

STATE OF NORTH CAROLINA
COUNTY OF CURRITUCK

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19-CVS-171

2021 JUL 24 P 3:00

GERALD COSTANZO, COROLLA CIVIC ASSOCIATION, ET AL. CURRITUCK CO., C.S.C.

BY 
Plaintiffs,

v.

MOTION FOR
PARTIAL SUMMARY JUDGMENT

CURRITUCK COUNTY, NORTH
CAROLINA; THE CURRITUCK COUNTY
TOURISM DEVELOPMENT AUTHORITY;
DANIEL F. SCANLON II, CURRITUCK
COUNTY MANAGER and BUDGET OFFICER,
both in his official capacity and in his individual
capacity, ET AL.

Defendants.

NOW COMES the Plaintiff in this matter, through Counsel, and pursuant to the provisions of Rule 56 of the North Carolina Rules of Civil Procedure, the Plaintiff respectfully prays the Court for Partial Summary Judgment as to Plaintiff's Second cause of action named within the Complaint filed in this matter.

In support thereof, the Plaintiff shows unto the Court that there is no genuine issue of material fact and the Plaintiff is entitled to Judgment as a matter of law as shown by the pleadings, admissions, answers to interrogatories and affidavits.

WHEREFORE, the Plaintiff respectfully prays the Court for an Order granting Partial Summary Judgment in favor of the Plaintiff; and for such other relief as the Court may deem appropriate.

This the 18th day of June, 2021.

SHARP, GRAHAM, BAKER and VARNELL, LLP

By: _____


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CURRITUCK COUNTY, NORTH
CAROLINA; THE CURRITUCK COUNTY
TOURISM DEVELOPMENT AUTHORITY;
DANIEL F. SCANLON II, Former CURRITUCK
COUNTY MANAGER and BUDGET OFFICER,
in his official capacity, ET AL.

Defendants.

**AFFIDAVIT IN SUPPORT OF PLAINTIFFS'
MOTION FOR
SUMMARY JUDGMENT**

Each of the undersigned, Barbara H. Marzetti, Edward P. Cornet, Gerri Adams, and William T. Collins, does hereby swear and affirm as follows:

1. Affiants. Ms. Marzetti and Ms. Adams have each been Directors since prior to January 2018 of Corolla Civic Association (“CCA”), a Plaintiff in this case, and have served in that capacity at all times since then to the present. (Ms. Marzetti has at all relevant times served as President of CCA.) Mr. Cornet has served as a Director since September 2018 to the present, and has served since August 2017 to the present, along with Ms. Marzetti and Mr. Collins, as members of a Special Committee of the CCA Board (the “CCA Legal Committee”). Mr. Collins, who is also a Plaintiff in this case, served as a CCA Director since prior to January 2018 and until September 2018, when he sold his home in Corolla and was no longer eligible to serve as a

Director. The CCA Legal Committee was formed in August 2017 to oversee and coordinate (a) the preparation of CCA's Public Records Request dated January 25, 2018 (the "Public Records Request") to Currituck County (the "County") under the NC Public Records Act, (b) the review of the County's responses thereto and to the Plaintiffs' discovery requests in this suit, and (c) to review the transcripts of the depositions in this case, and in connection with other matters pertaining to this suit.

2. In our capacities as Directors of CCA and/or as members of the CCA Legal Committee, each of us is authorized to execute this Affidavit. The CCA President assigned to each reviewer (including herself) a designated portion of the totality of County document production, the minutes/videos of the County Board of Commissioners ("BOC"), and the deposition transcripts, for that person to be the lead reviewer. Each of the undersigned reviewers hereby confirms that he or she completed *at least* his or her assigned review. Each lead reviewer initially read through his or her assigned portion of the documents and identified those of potential relevance to the case. These were then read by at least one other reviewer before reporting our findings to the group.

Following those reviews, the reviewers consulted together in teleconference, and each confirmed that the matters set forth in this Affidavit are true and accurate with respect to his or her assigned content, as well as with respect to any matters of which such reviewer has personal knowledge. In addition, each of us has read the documents specifically referenced in this Affidavit, and agrees with the descriptions and interpretations thereof that are contained herein.

3. We are familiar with the facts set forth in the Complaint in this suit and in Plaintiffs' Motion for Summary Judgment, including the Brief of Plaintiffs' counsel in support thereof, and the exhibits to each of said documents.

4. CCA Review of County Document Productions. The County produced about 5,000 documents in response to the CCA Public Records Request, and over 100 documents in response to Plaintiffs' 2020 discovery requests. The undersigned have coordinated the review of all of the produced documents. We initially divided up among ourselves the responsibility for such review, starting with a chronological read of all the documents to understand their inter-connectivity. We then did a search by author and recipient to understand the communications between senior County staff, the County Commissioners and the County Attorney. Lastly, we did key word searches for any email or attachment containing topic words such as General Services, Public Safety, Sheriff, Emergency, Fire or EMS.

5. Scope of CCA Review of BOC Meeting Records. The Public Records Request asked the County to confirm that the minutes of the BOC and its Tourism Development Authority ("TDA") that were posted on the County's website were "true, accurate and complete." The County confirmed the same in its transmittal letter to CCA's counsel in response to that Request. Designated members of the Legal Committee reviewed the published agenda packets and minutes of all meetings of the BOC and the TDA for the past decade, including the annual budget presentations and adoptions, as well as all the TDA budget amendments approved during each year. Finally, we reviewed the full meeting video records of each BOC and TDA meeting from January 2015 to the present as archived on the County website. We have also made video copies of the meeting segments where occupancy tax ("OT") expenditures were discussed and approved for police, emergency medical or fire services and equipment (referred to herein as "General Services," which term excludes, for purposes hereof, lifeguard services). (It should be noted that the County appears to be unique among North Carolina counties in that its Commissioners are the only voting members of its TDA. In all other counties, TDA voting members include a super-

majority of representatives of the community's tourism industry and, in many cases, other nonpolitical community members, according to NC Legislature records.)

6. Scope of CCA Public Records Request. Paragraph 1 of the Public Records Request, which related to the period from July 1, 2010, through January 25, 2018, called for all documents and communications that, among other things, "related to any proposed or actual use or expenditure of the [County's] occupancy tax" (other than expenditures for promotions). Said paragraph 1 stated, *inter alia*:

"For purposes of this request, records, documents, notes and communications shall include but not be limited to records, documents, notes and communications regarding or *relating to the rationale* for any proposed or actual use or expenditure [of OT proceeds], *the purpose* for any proposed or actual use or expenditure, *the justification* for any proposed or actual use or expenditure, *the merits* of any proposed or actual use or expenditure, the expected or anticipated impact of any proposed or actual use or expenditures, [and] the *standards or factors under which any proposed or actual use or expenditure was evaluated*" (Emphasis added.)

7. Focus of Review of County Document Production and Meeting Records. In reviewing the County's document production and the BOC and TDA minutes and recorded meeting videos, we particularly focused on whether the Commissioners, in appropriating OT proceeds for General Services, appeared to consider the applicable requirements set forth in the County's OT statute (the "Act") for the disbursement of OT proceeds. Section 1(e) of the Act authorizes OT proceeds to be used by the County *only* for (a) *tourism-related expenditures* ("TRE") or (b) advertising and promotional expenses.

8. Deficiencies of County Document Production. Each of the undersigned affirms that *none* of the documents that he or she personally reviewed and that were produced by the County (either pursuant to the Public Records Request or in response to CCA's discovery of the

County in this suit) contained any of the information that was requested pertaining to whether the County's use of OT proceeds for General Services met the Act's prescribed limitations upon such use under its definition of "TRE." In addition, we found no written or email communications to or among the Commissioners or County staff, prior to scheduled meetings when appropriations of TRE for General Services were to be considered, (a) relating to any rationale or justification of how the proposed General Services met the definition of "TRE," or (b) relating to how tourists could be "judged" to be "attracted" to the County by the presence of General Services in the Currituck Outer Banks area (the "COBX"), or (c) providing any details pertaining to the proposed expenditures, such as how many extra Sheriff or EMS personnel were to be assigned to the COBX area during the summer "season." Our reviewers had expected that the County would produce documents that contained such types of communications pertaining to such matters that were expected to be voted upon at such meetings. (This was particularly the case, in view of the absence from the BOC and TDA meeting minutes and videos of any discussion of such matters.) In addition, none of the documents produced by the County indicated that the Commissioners or County staff had ever sought or obtained independent legal advice as to (a) the effects of the 2004 amendment that had deleted from the previous OT statute the authority to appropriate OT proceeds for "police protection and emergency services," or (b) the meaning of the term "TRE" under the Act, or (c) the legality of any of the Commissioners' TRE appropriations for General Services.

9. BOC Failure to Question or Investigate Data Provided by County Manager in Adopting Budget Regarding OT Funding of General Services. (B) Our reviewers discovered a consistent pattern in the BOC minutes and videos, as well as the other County documents we reviewed, showing that the BOC failed to raise questions in those records and documents concerning the factual basis for their appropriations of OT proceeds for General Services. The

most egregious examples of this are from the video records of the County Managers' annual presentations of the separate million-dollar plus TRE budget items for Sheriff and EMS services. Beginning with the first video records in 2015, the Managers justified these budget items as covering only increased costs for the *summer*, even though email records show that the Managers knew, or should have known, that the proposed amounts covered the *full annual costs of all Sheriff and EMS personnel who were assigned to the Beach area*. The six years of video records show that the BOC approved these budgets without ever questioning either the actual General Services demand or their proposed costs, or whether the appropriations qualified as "TRE."

Video clips of the County Managers' remarks at annual BOC budget presentation meetings show that they typically characterized the proposed amounts for Sheriff and EMS costs as "seasonal," or "for the summer." For example, the reasons given for transferring OT funds to the General Fund for the last six annual budgets were described as follows:

- (1) "to support additional law enforcement as hired for the summer season" and "for additional ambulance units that are needed for the influx of population" (BOC Meeting, June 1, 2015);
- (2) "we augment some of the services, bring on additional EMS crews, additional law enforcement that comes in for the summer" (BOC Meeting, May 16, 2016);
- (3) "... additional EMS coverage ... for the increase in summer traffic, ... also increase enough Sheriff staff for season" (BOC Meeting May 15, 2017);
- (4) "additional cost associated with additional EMS unit in OBX to account for influx during summer" and "same additional law enforcement required" (BOC meeting, June 4, 2018);
- (5) "these are not EMS year-round, these are specific times of increased demand, same as Sheriff" (BOC meeting, May 20, 2019); and
- (6) "extra EMS staff to facilitate the up-tick of population, ... same for the Sheriff's office" (BOC Meeting June 1, 2020).

County records show that the amounts of OT appropriated for each annual "summer season" for the last decade were approximately the same as the *full annual costs* for these services at the Beach. This demonstrates that the notion of simply funding "additional" costs for General

Services only for the “summer season” at the Beach were gross misstatements that the Commissioners never questioned or investigated.

Set forth below is a table (referred to herein as the “PS Costs Table”) that confirms those misstatements.

Data Source - > FY Budget or Audit	1. Audit Report: Sheriff Department Total County Cost	2. Audit Schedule C: OT Transfers to General Fund for Sheriff	3. Corolla Sheriff: Full Annual Personnel Cost-Source Noted	4. Occ Tax Planning.xls April 2012 line 83 Sheriff Deputies Outer Banks
fy10 audit	\$ 5,250,203	\$ 950,000	-	\$ 950,000
fy11 audit	\$ 5,256,331	\$ 1,056,452	<i>Leary 3/16/11</i>	\$ 1,056,452
fy12 audit	\$ 5,370,851	\$ 1,034,338	\$ 1,034,338	\$ 1,034,338
fy13 audit	\$ 5,668,963	\$ 1,093,103 +\$206,000 Vehicles	\$ 1,038,232	\$ 1,038,232
fy14 audit	\$ 5,906,337	\$ 1,093,103	<i>County Document 2</i>	\$ 1,069,379
fy15 audit	\$ 5,971,650	\$ 1,125,896	\$ 1,118,772	\$ 1,101,460
fy16 audit	\$ 5,928,635	\$ 1,159,673	\$ 1,328,339	\$ 1,134,504
fy17 audit	\$ 6,231,041	\$ 1,194,463	\$ 1,305,450	\$ 1,168,539
fy18 audit	\$ 6,917,586	\$ 1,260,294 +\$108,907 Vehicles	\$ 1,368,231	\$ 1,203,595
fy19 audit	\$ 7,225,161	\$ 1,260,294	\$ 1,335,196	\$ 1,239,703
fy20 budget	\$ 7,621,214	\$ 1,260,294	\$ 1,469,534	\$ 1,276,894
fy21 budget	\$ 7,349,158	\$ 1,298,103	-	\$ 1,315,201

Data Source - > FY Budget or Audit	1. Audit Report: EMS Department Total County Cost	2. Audit Schedule C: OT Transfers to General Fund for EMS	3. Corolla EMS: Full Annual Personnel Costs - Source Noted	4. Occ Tax Planning.xls April 2012 line 88 EMS Corolla
fy10 audit	\$ 5,132,664	\$ 950,000	-	\$ 950,000
fy11 audit	\$ 5,135,964	\$ 987,375	-	\$ 987,376
fy 12 audit	\$ 5,330,679	\$ 1,121,086		\$ 1,121,085
fy13 audit	\$ 5,649,821	\$ 1,121,085		\$ 1,121,085
fy14 audit	\$ 6,167,587	\$ 1,121,084	<i>County Document 2</i>	\$ 1,154,718
fy15 audit	\$ 6,195,180	\$ 1,154,718	\$ 1,225,906	\$ 1,189,359
fy16 audit	\$ 6,350,069	\$ 1,189,359	\$ 1,348,678	\$ 1,225,040
fy17 audit	\$ 6,712,710	\$ 1,225,040	\$ 1,417,061	\$ 1,261,791
fy18 audit	\$ 7,116,235	\$ 1,602,063	\$ 1,129,079	\$ 1,299,645
fy19 audit	\$ 5,500,908	\$ 1,602,063	\$ 534,882	\$ 1,338,634
fy20 budget	\$ 5,604,377	\$ 1,602,063	\$ 529,125	\$ 1,378,793
fy21 budget	\$ 5,467,858	\$1,650,125	-	\$ 1,420,157

The amounts set forth in the above Table were derived from various County documents, consisting of:

Column 1 shows the amounts reported in the County's audit reports as the total annual Sheriff and EMS costs actually expended *for the entire County* (except that amounts for the FY's 2020 and 2021 reflect the *budgeted* amounts).

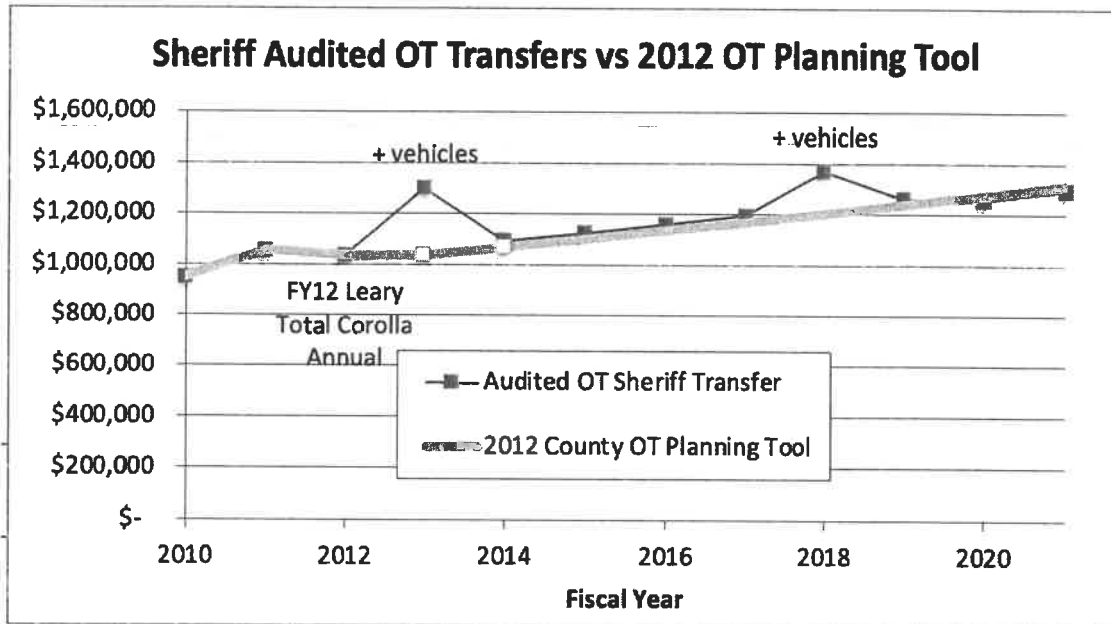
Column 2 shows the OT amounts reported in the County's audit reports that were transferred annually since FY 2010 from the TDA Fund to the General Fund for General Services costs. (These are the appropriations that the County Managers had consistently described to the BOC as merely for additional costs *for the summer season in the Beach area*.) This reveals that the amounts of OT that were purportedly transferred to the General Fund only for *incremental* General Services costs at the Beach actually represented about 20% of the *total* annual County expenditures for all Sheriff and EMS services, operating costs and capital equipment.

Column 3 shows the total personnel costs (including salary and benefits) of all General Services personnel assigned to the Beach area for that *entire year*, as reported in documents produced by the County in response to the Public Records Request and/or the Plaintiffs' discovery requests. The figures for Sheriff costs for FY's 2012 and 2013 were set forth in a spreadsheet attached to an email dated March 16, 2011 from Human Resources Director Leary to the County Manager. The figures for both Sheriff and EMS costs for FY's 2014-2018 were contained in documents (referred to in Column 3 of the Table as "Documents 1 and 2") that were provided by the County to Plaintiffs in response to a discovery request.

Column 4 contains data from a planning spreadsheet that was prepared by the County Finance Director and was attached to an email dated April 23, 2012 from the County Manager to a Commissioner who had asked for an explanation of "allowable" OT expenditures. The Finance Director's spreadsheet shows the 2012 Human Resources Department's full annual costs plus overtime, and projects them forward (with a 3% annual growth rate) through FY 2021. (That email and its attached spreadsheet were provided by the County in response to CCA's Public Records request; they are attached to this Affidavit as Exhibit A.)

The startling revelations of the figures in the PS Costs Table are that (1) in each year, the so-called "additional" General Services costs for the "summer season" at the Beach, that were funded by OT proceeds, actually reflected the *total annual costs of all General Services personnel assigned to the Beach area* (with a non-projected additional funding in a few years for Sheriff vehicles), and (2) the amounts appropriated each year had already been projected by the County

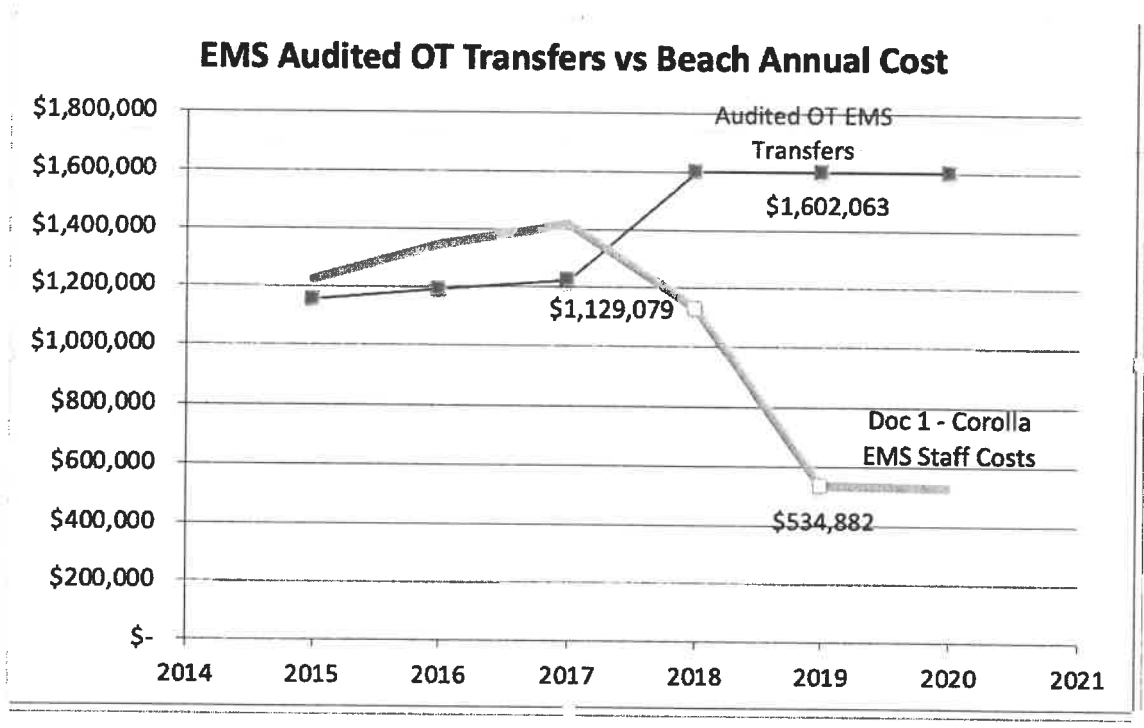
Manager in his 2012 spreadsheet (see Column 4) for the entire period from FY 2010 through FY 2021 (adjusted only for the annual 3% annual cost of living increase). This is proved by the strong correlation of the amounts in Columns 2, 3 and 4 for both Sheriff and EMS costs. This is illustrated in the following graphic regarding Sheriff costs.



There are two notable deviations from this pattern. On Saturday, June 2, 2012, the FY2013 TRE budget request was increased by \$206,000 to fund Sheriff vehicles by the Finance Director and was approved by the BOC on June 4, 2012, without substantive discussion. Also added to the FY13 TRE budget on June 2, 2012, was \$40,000 for a fire hydrant in Grandy and also approved without discussion by the Board members of how it attracts tourists.

The second deviation was a budget amendment for \$111,000 for Sheriff vehicles for the off-road area. The video record of the discussion indicates that this had not been previously discussed as an OT charge and two BOC members expressed concerns. However, after being told that these were “for the beach” the amendment was approved.

The OT budget approvals for EMS services also closely tracked the full annual costs for EMS at the Beach as shown in the graphic below. The thin red line with square markers shows the audit report values for the transfers while the thick solid green line shows the numbers reported by the County for the full annual personnel costs for EMS services at the Beach.



There are two notable deviations from this pattern. One is the almost \$400k increase in FY 2013 shown in Column 2 for the OT transfers to the General Fund for EMS costs in Corolla, as compared to the lower amount in FY 2017. This was apparently due to the BOC's decision in June 2018 to fund from OT proceeds the startup costs of the newly-created Corolla Fire Special Tax Service District.

Another deviation is reflected in the *decreases* shown in Column 3 for actual EMS personnel costs in FY 2019, as compared to the amounts as projected in the budgets for FY 2020 and 2021. These deviations were apparently due to the fact that the new Corolla Fire Service

District shifted the funding of a portion of the cost of EMS services from OT funds to a special tax on Corolla property owners. However, notwithstanding that tax shift, Column 2 reveals that \$1.6 million was transferred from the TDA Fund to the General Fund for EMS in FY 2019, and was budgeted for OT funds of \$1.6 million in FY 2020 and \$1.65 million in FY 2021, respectively. Finally, the other deviation is that Column 3 of the Schedule pertaining to EMS costs in FY's 2019 and 2020 shows that, despite the opening of the new Fire Service District, the County spent \$535k and \$529k for EMS at the Beach.

(B) The Commissioners demonstrated their lack of understanding and diligence in their deposition testimony by their inability to explain the significant million-dollar anomalies between their large approved budgets and the much smaller actual costs reported in their Discovery documents about the OT-funding of General Services at the Beach that are discussed in detail in the Affidavit noted above.. See Appendix I hereto, paras. (C) and (D).

On the issue whether OT appropriations for General Services at the Beach actually covered the cost of all personnel for the *entire year*, two of the five Commissioners said they did not “recall” the County Manager’s presentations at annual BOC budget meetings that OT funding was only for the summer. The others evaded the question, but all five Commissioners seemed to support year-round OT funding for these services, and ignored the issue of how they may constitute “TRE.” (See *id.*, para. (C).)

As for the issue concerning how amounts appropriated for General Services were actually spent, the Commissioners’ testimony was even more confused. No Commissioner was able to explain the discrepancies illustrated in the Public Safety Cost Tables that are discussed above. All tried to speculate on how the appropriated funds that exceeded personnel costs shown in the Table,

such as suggesting they were to cover equipment costs and other operating expenses; one even suggested that the excess amounts funded General Services on the Mainland. Three said flatly that they did not know how the \$1.6 million appropriations for EMS for FY's 2019-21 could have been spent. (See *id.*, para. (D).)

As noted in Plaintiffs' Brief, the relevant issue here is not to determine how these OT proceeds were run through the County's General Fund and became expenditures for EMS personnel. Rather, the relevant legal issue here is that the BOC abused its discretion by its failure to understand, before approving the budgets, how its appropriated funds were to be administered and spent..

10. CCA Review of Defendants' Deposition Testimony. CCA directed members of its Legal Committee to review the transcripts of the deposition testimony by five of the current Commissioners and the County Finance Director. Appendix I hereto summarizes portions of that testimony.

11. Other Examples of BOC Laxity in OT-Funding for General Services. As noted above, our reviewers also examined the minutes and agenda packets of all of the meetings of the County's BOC and TDA since January 1, 2010 to date, and also viewed the videos of all of their respective meetings since they were first posted beginning in January 2015. At each video recorded budget presentation, a slide with the TRE definition was shown, but there was no discussion of the definition's requirement to attract tourists and thus increase use of lodging and other facilities. The reviewers never found any mention over that entire decade regarding the 2004 amendment of the Act or the effect of its changed purposes, or how any specific OT-funded project met the definition of "TRE," or of any factors on which the BOC could reasonably exercise their

collective “judgment” as to whether a proposed expenditure met the statutory test. On the rare handful of occasions when a Commissioner asked whether a proposed expenditure was eligible for funding with OT proceeds, the Commissioners turned to the County Manager for his advice. His standard reply was that he believed the expenditure was eligible, but (without mentioning any elements of the “TRE” definition) that the ultimate decision depended on the judgment of the Commissioners. The following examples demonstrate the BOC’s lax attitude regarding the approval of OT appropriations for General Services without serious consideration of the definition of the term “TRE”:

- The agenda for the April 2, 2018 BOC/TDA meeting proposed the OT-funding of the \$486,000 startup costs of a new Corolla Fire Service District. During the meeting’s public comment period, a County taxpayer challenged the legality of the proposed expenditure, asserting that under the Act’s definition of “TRE” tourists could not reasonably be deemed “attracted” to the County due to the presence of a fire department in Corolla. During the meeting, the Chairman referred to those comments, and asked the County Manager if the proposed funding was a permissible use of OT proceeds. The Manager replied: “That’s a BOC decision but in my opinion it is permissible” and there is a “valid and viable argument that it’s allowed under the NC General Statutes.” Without further discussion of the issue, or any mention of “TRE” or how a Fire Department could “attract tourists,” the BOC approved the proposed appropriation.
- At a June 18, 2018 BOC meeting at which the FY 2018-19 Budget was adopted, a County taxpayer suggested in the public comment period that the Commissioners consult with their personal attorneys concerning the legality of their OT appropriations for General Services. Later in the meeting, the Chairman noted that suggestion and asked the County Manager whether the County’s financial records are audited every year regarding the use of OT proceeds. The Manager replied “Yes.” The Chairman then asked him whether the auditor ever mentioned “any violation” or that the County “was doing anything illegally.” The Manager replied “To my knowledge, no.” The implication of that exchange was clear to all who were present that the auditor’s report gives legal blessing to all TRE expenditures. None of the Commissioners at that meeting questioned this false implication.
- At a February 5, 2018 BOC/TDA meeting, the BOC considered a TDA budget amendment that the meeting agenda packet referred to as \$111,000 for “beach patrol vehicles.” Two Commissioners asked the County Manager some questions about the use of the vehicles and whether they would be used exclusively on the Beach. When they were told that they were, there was no further discussion as to whether the expenditure qualified as “TRE,” and the amendment was approved.
- At a May 30, 2017 BOC public “work session” that was attended by two of the undersigned CCA Legal Committee members, the County Manager raised the question whether the

Commissioners would approve OT-funding of EMS services performed on the County's Mainland during the tourist "season." He said that the EMTs frequently service travelers on Route 168/158 when they had vehicle breakdowns or were involved in traffic accidents, and many of those travelers were "tourists." Without any discussion of how this funding could qualify as "TRE," the Commissioners concurred (without any further discussion or vote) that such funding was appropriate. Since OT funds for Sheriff and EMS are transferred into the County's General Funds, there is no public accountability for how they are actually used.

- At its May 20, 2019 BOC/TDA meetings, the Commissioners appropriated \$100,000 of OT proceeds as a "legal defense reserve" for the County's defense of "the litigation we discussed tonight." The referenced "litigation" is the instant proceeding relating to the County's unlawful diversion of OT proceeds for unauthorized purposes. Although this expenditure could obviously not be judged to "attract tourists," there was no discussion of how it might constitute "TRE" under the OT statute.
- At its September 18, 2017 BOC/TDA meetings, the Commissioners appropriated \$200,000 of OT proceeds for "the Audubon capital assistance," according to the TDA minutes. Although the County provided to Plaintiffs in discovery a copy of a notice of this proposed project dated September 7, 2017 from the County Manager to the Commissioners, we found no evidence of any preceding public meeting of the BOC at which this project was discussed. (The Manager's notice indicated that Audubon was proposing to construct a "pavilion" that could accommodate tourists.)

12. BOC Failure to Meet Publicly as a Body to Appropriate OT for General Services.

The undersigned affiants affirm that they coordinated the review on the County's web site of the agenda packets and minutes and recorded videos (which commenced recording in 2015) of all meetings of the BOC and the TDA since at least 2010. Our reviews included the annual County and TDA budget presentations and adoptions and amendments adopted during each year, with a particular focus on all actions relating to the authorization of OT funds for General Services. Our reviews found *no discussion* among the Commissioners at such meetings (a) relating to any rationale or justification of how the proposed General Services met the definition of "TRE," or (b) relating to how tourists could be "judged" to be "attracted" to the County by the presence of such General Services at the Beach, or (c) providing any details pertaining to the proposed expenditures, such as how many extra Sheriff or EMS personnel were to be assigned to the Beach area during

the summer season, or (d) questions relating to the amounts proposed for seasonal coverage that were actually full-year costs.

The silence of those documents and videos regarding “TRE” determinations is deafening, and can lead to only one conclusion – that the BOC *never met publicly as a body* to deliberate on and consider the factors that would lead to their “judgment,” as required by the definition of “TRE,” that the OT appropriations for General Services met the statutory test for the expenditure of OT proceeds. This raises the question – How could they have ever reached a collective “judgment” on “TRE” without ever publicly discussing the subject among themselves as a group?

13. Absence of Any Records Showing that OT was Appropriated at BOC Work Sessions. The Plaintiffs’ Interrogatories (Item 4) asked the County to describe the “voting process” for OT-funding of General Services matters, including a “synopsis of any and all deliberations or discussions” among the BOC members in order to justify such funding. The County responded that “the allocation and appropriation of OT proceeds is part of the annual budgeting process,” and that the members “discuss and deliberate” on the use of OT proceeds “during budget work sessions.” However, this assertion is implausible. First, the Public Records and discovery requests asked for all materials, emails and documents relevant to the BOC judgments on TRE expenditures, which should have included materials presented to the BOC at their work sessions. Since there were no minutes or video records of these work sessions (prior to May 2020), and since we must assume that the County was compliant with Plaintiffs’ requests, the absence of such information in the more than 5,000 documents reviewed gives credence to the lack of rational discussion of these issues at work sessions. Secondly, as stated in paragraph 11 hereof (3d bullet point), members of the CCA Legal Committee attended several work sessions at which the BOC

discussed matters relating to OT appropriations in the proposed FY 2017-18 budget. They contained no “deliberation” regarding the details or amounts of the General Services expenditures then under discussion, or of any rationale or justification as to how such expenditures could qualify as “TRE” or be “judged” to “attract tourists,” despite the fact that these were two of the largest expenditures of OT funds each year.

We also note that the County’s response to Item 7 of the Plaintiffs’ Interrogatories appears to be contradictory of its response to Interrogatory 4. Interrogatory 7 asked the County to “describe with specificity any measures taken” by the BOC, “whether during an open meeting or otherwise, to ensure that approval” of OT expenditures for various purposes, including General Services, were “in accordance with” the OT statute. The County responded that all such approvals were “voted on and approved in open sessions at meetings” of the BOC. It then states: “*In so doing, the Board of Commissioners has expressed its judgment* that approved expenditures of occupancy tax proceeds comply with the requirements of” the OT statute. (Emphasis added.) In other words, the response claims that the BOC does not have to reveal its rationale for such “judgments,” and that the *vote itself* constitutes the “expression of its judgment.” This response is, *ipso facto*, an admission by the County that there was never any public discussion by the BOC of the basis for exercising its judgments of TRE determinations.

14. County Attorney’s Theory Concerning Why the 2004 Amendment Allowed the County to Continue Using OT Proceeds to Fund General Services. On April 13, 2017, three of the undersigned Affiants met with three Commissioners (including two of the current Commissioners who were deposed by Plaintiffs) and the County Attorney to discuss a letter that CCA had sent to the County that challenged the County’s interpretation of “TRE,” including funding for General Services. The County Attorney responded that OT-funding of General Services was “very legal,”

and was based on the rationale that the pre-2004 statute had authorized OT-funding for “tourist related purposes, including . . . police protection and emergency services.” He argued that the word “including” effectively carried over this authorization into the amended statute, even though the changed purposes used a new term “tourism related expenditures” as a permitted use of OT proceeds, requiring attracting tourists in order to increase use of lodging and other tourism industry facilities.

The fallacy of the County Attorney’s “carry forward” theory is shown by the fact that this rationale was not even mentioned in the County’s Interrogatory response on this question, but instead relied on a newly-found rationale that the “safe and secure” environment provided by police, EMS and Fire service is the attractant. However, that new rationale seems contrived, as evidenced by the fact that the three Legal Committee members who attended the 2017 meeting with CCA swear that none of the County personnel at the meeting mentioned the “safe and secure” rationale during that meeting.

15. Examples of NC Occupancy Tax Statutes that Authorize the Use of OT Proceeds to Fund General Services. As noted at the end of Part I of the Brief, the CCA Legal Committee has examined a compendium of the OT statutes of other NC local jurisdictions, and found that the legislation was clear and explicit in authorizing the use of OT proceeds when the legislature intended to authorize such use for General Services. That compendium is contained in a State legislative website, see <https://www.ncleg.gov/documentsites/legislativepublications/Legislative%20Analysis%20Division/Occupancy%2CTax%20Overview/Occupancy%20Tax%20Overview.pdf>.

In addition to the statutes cited in the Brief, other notable examples are included in the following table (in which emphasis is added with respect to references to use of OT proceeds to fund

General Services):

NC Legislature Session laws	County	Occupancy Tax Allocation per Statute
SL 1985-449, SL 1985-826. Sec. 13, SL 1991-177, SL 1991-906, SL 2001-394, SL 2001-439. Part VII., SL 2010-78. Sec. 7, SL 2013-414	Dare County	Of the first 3% - Used only for tourist-related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, solid waste collection and disposal, <i>police protection and emergency services</i> : --- 2/3 to the six towns (Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags-Head, Manteo)- distributed in proportion to the amount of ad valorem tax levied by each town for the preceding fiscal year. --- 1/3 to Dare County - in FY 2016, Dare County has earmarked their share of this 3% occupancy tax as follows- 25% for garbage, refuse, and solid waste collection and disposal; 25% for <i>police protection</i> ; and 50% for <i>emergency services</i> . --- Additional 1% to the Dare County Tourism Board -3/4 must be used for the cost of administration and to promote tourism, and 1/4 used for services and programs needed due to the impact of tourism on the county. --- Remaining 2% to Dare County - Used for beach nourishment.
SL 1991-154	Robeson County - Town of Rowland	City officials - Used for sponsoring tourist-oriented events, encouraging tourism through advertising and promotion, establishing a visitors' center, and other expenditures that directly enhance tourism; also includes the following type of expenditures- <i>criminal justice system, fire protection</i> , public facilities and utilities, health facilities, and solid waste & sewage treatment.

16. The above statements are true and correct, to the best of our knowledge, information and belief.

Dated: June __, 2021

/s/ Barbara H. Marzetti

/s/ Edward P. Cornet

/s/ Gerri Adams

/s/ William T. Collins

[Verifications of the above-named affiants are attached hereto.]

STATE OF NORTH CAROLINA

COUNTY OF CURRITUCK

VERIFICATION

Barbara H. Marzetti, being first duly sworn, depose and say: That he is an Affiant in the above-entitled action, that he has read the foregoing Affidavit re Plaintiffs' Motion for Summary Judgment and that the same is true to his own knowledge and belief, except as to those matters and things stated on information and belief, and as to those, he believes them to be true.


Barbara H. Marzetti

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 8th DAY OF JUNE, 2021.




Teresa M. Westerman

NOTARY PUBLIC

MY COMMISSION EXPIRES: 4-22-2025

STATE OF NORTH CAROLINA

COUNTY OF CURRITUCK

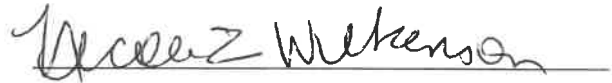
VERIFICATION

Edward P. Cornet, being first duly sworn, depose and say: That he is an Affiant in the above-entitled action, that he has read the foregoing Affidavit re Plaintiffs' Motion for Summary Judgment and that the same is true to his own knowledge and belief, except as to those matters and things stated on information and belief, and as to those, he believes them to be true.



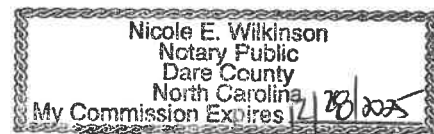
Edward P. Cornet

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 18 DAY OF JUNE, 2021.



NOTARY PUBLIC

MY COMMISSION EXPIRES: 12/28/2025



STATE OF NORTH CAROLINA

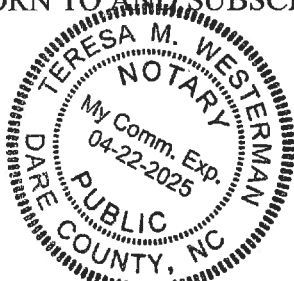
COUNTY OF CURRITUCK


VERIFICATION

Gerri Adams, being first duly sworn, depose and say: That she is an Affiant in the above-entitled action, that she has read the foregoing Affidavit re Plaintiffs' Motion for Summary Judgment and that the same is true to her own knowledge and belief, except as to those matters and things stated on information and belief, and as to those, he believes them to be true.


Gerrilea Adams

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 9 DAY OF JUNE, 2021.




NOTARY PUBLIC

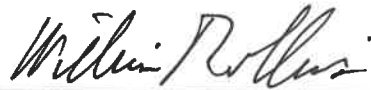
MY COMMISSION EXPIRES: 4-22-2025

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD

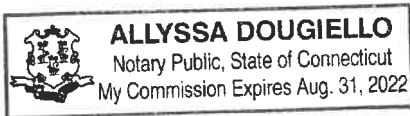
VERIFICATION

William T. Collins, being first duly sworn, depose and say: That he is an Affiant in the above-entitled action, that he has read the foregoing Affidavit re Plaintiffs' Motion for Summary Judgment and that the same is true to his own knowledge and belief, except as to those matters and things stated on information and belief, and as to those, he believes them to be true.



William T. Collins

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 9th DAY OF JUNE, 2021.



NOTARY PUBLIC

MY COMMISSION EXPIRES: 08.31.2022

Casey Varnell

To: Casey Varnell
Subject: FW: Occupancy Tax Use
Attachments: Occ Tax planning.xlsx

From: "Dan Scanlon" <Dan.Scanlon@CurrituckCountyNC.gov>
Subject: RE: Occupancy Tax Use
Date: April 23, 2012 at 8:20:41 AM EDT
To: "Paul Beaumont" <beaumontp@live.com>

The attached is an internal planning spreadsheet that tracks the historical spending of the Occupancy Tax as well as projects a ten year future spending plan. I use this as part of our long term planning efforts to track and budget projects. Please note that it is a working draft.

From: Paul Beaumont [<mailto:beaumontp@live.com>]
Sent: Sunday, April 22, 2012 10:35 PM
To: Dan Scanlon
Subject: Occupancy Tax Use

Well,

As probably the normal questions during elections, the topic of Occupancy Tax use continues to raise its ugly head as well as some other tax related questions.

I know some of these questions may require data mining, I need as many answers as soon as possible. The remainder would be beneficial to me when you have them.

Can you tell me:

1. What the currently acceptable uses are of Occupancy Taxes?
2. What were last year's Occupancy Taxes spent on?
3. What portion of the Y was paid for from the Occupancy Taxes?
4. If the Y was purchased by Occupancy Taxes, what was the justification if required used for the purchase?
5. When was the land for the Y and the extension center purchased?
6. Why was the Y located where it was? (other than it is in the center of the county).
7. What proportion of the County's revenue (property taxes) are generated by the Outer Banks?
8. Property taxes are broken down into Commercial, Residential, and Agricultural. What is the approximate breakdown of revenue?
9. Do you know the percentage of taxes generated in the Outer Banks by resident vice nonresident owners.

Thanks Dan!

CURRITUCK COUNTY
OCCUPANCY TAX FUND PROJECTIONS

	PROJECTED YEAR 2007-08	PROJECTED YEAR 2008-09	PROJECTED YEAR 2009-10	PROJECTED YEAR 2010-11	PROJECTED YEAR 2011-12	PROJECTED YEAR 2012-13	PROJECTED YEAR 2013-14	PROJECTED YEAR 2014-15	PROJECTED YEAR 2015-16	PROJECTED YEAR 2016-17
OCCUPANCY TAX FUND (15) -										
REVENUES:										
Occupancy Tax	8,944,369	9,276,524	8,672,218	9,442,002	9,500,029	9,000,000	9,090,000	9,180,900	9,272,709	9,365,436
Occupancy Tax - Restricted	-	-	-	-	-	-	-	-	-	-
Penalties and int.	-	-	9,289	4,798	-	-	-	-	-	-
Coop Advertising	-	-	15,325	22,000	26,000	26,000	26,000	26,000	26,000	26,000
Interest Income	421,574	311,484	127,116	129,326	90,000	90,000	90,000	90,000	90,000	90,000
Other	35,232	43,038	-	-	122,156	-	-	-	-	-
TOTAL REVENUES	9,401,175	9,631,026	8,823,928	9,598,126	9,738,185	9,116,000	9,206,000	9,296,900	9,388,709	9,481,436
EXPENDITURES:										
TOURISM - PROMOTION										
Salaries	128,028	243,952	256,014	277,086	289,725	290,981	296,801	302,737	308,791	314,967
Salaries - Part Time	48,372	101,315	36,544	-	-	-	-	-	-	-
Temporary Services	1,281	675	78,402	129,860	117,000	117,000	117,000	117,000	117,000	117,000
FICA	13,013	24,858	27,350	29,504	31,114	31,211	31,656	32,110	32,573	33,045
Insurance	18,339	28,176	36,271	49,231	51,936	57,128	62,841	69,125	76,037	83,641
Retirement Expense	12,616	22,076	25,152	31,678	34,912	35,034	29,265	29,850	30,447	31,058
	221,649	421,048	459,732	517,159	524,687	531,354	537,562	550,821	564,849	579,710
Telephone & Postage	64,463	62,143	60,158	52,594	85,000	85,000	87,500	90,177	92,882	95,668
Data Transmission	1,607	2,341	2,832	3,271	4,000	4,000	4,120	4,244	4,371	4,502
Utilities	10,374	25,549	32,118	32,770	99,165	99,800	102,794	105,878	109,054	112,326
Travel	6,771	10,719	13,852	18,419	20,300	20,300	20,909	21,536	22,182	22,848
Training & Education	3,425	2,743	6,575	10,280	15,300	15,300	15,759	16,232	16,719	17,220
Fees Paid to Officials	2,050	1,850	1,950	1,850	1,800	1,800	1,654	1,910	1,967	2,026
Repairs & Maintenance	2,474	4,644	1,638	1,402	3,000	3,000	3,090	3,183	3,278	3,377
Vehicle Maintenance	-	-	789	403	4,500	4,500	4,635	4,774	4,917	5,065
Rent	-	-	-	-	-	-	-	-	-	-
Equipment Lease	634	5,861	10,062	18,727	19,800	19,800	20,394	21,006	21,636	22,285
Advertising	421	(2,613)	2,729	1,183	2,000	2,000	2,060	2,122	2,185	2,251
Promotional Efforts	1,024,740	1,712,862	2,025,980	2,084,168	2,381,750	2,336,750	2,406,853	2,479,058	2,553,430	2,630,033
Econ Dev Promotion	-	48,614	22,459	33,444	50,000	50,000	51,500	53,045	54,636	56,275
Airport Promotoin	-	-	-	-	20,000	20,000	20,600	21,218	21,855	22,510
Gas, Oil, Etc	1,630	1,955	1,753	3,840	5,000	5,000	5,150	5,305	5,464	5,628
Supplies	56,199	25,676	34,121	35,584	38,500	40,000	41,200	42,436	43,709	45,020
Tourism Adv Bd Expenses	38	-	193	1,472	2,000	2,000	2,060	2,122	2,185	2,251
Uniforms	-	75	1,363	651	2,100	1,200	1,236	1,273	1,311	1,351
Workers Compensation	6,344	15,007	10,572	7,739	7,739	7,739	7,971	8,210	8,457	8,710
Contracted Services	22,107	42,574	42,145	28,012	46,100	46,100	47,483	48,907	50,375	51,886
Dues & Subscriptions	2,875	7,208	9,587	11,705	20,025	20,025	20,626	21,245	21,882	22,538
Contingency	-	-	-	1,405	3,342	-	-	-	-	-
	1,206,152	1,867,208	2,280,875	2,349,019	2,831,421	2,784,314	2,867,843	2,953,879	3,042,495	3,133,770
Capital Outlay	174,877	29,924	30,302	107,811	88,475	-	-	-	-	-
Tech over \$1,000	55,133	22,505	53,210	16,576	9,835	6,600	6,798	7,002	7,212	7,428
	230,010	52,429	83,511	124,387	98,310	6,600	6,798	7,002	7,212	7,428
TOTAL TOURISM PROMOTION	1,657,812	2,440,685	2,824,119	2,990,565	3,454,418	3,322,288	3,412,203	3,511,702	3,614,556	3,720,908
TOURISM RELATED EXPENDITURES										
Utilities	2,653	2,734	1,940	21,294	3,500	3,200	3,500	3,500	3,500	3,500
Repairs & Maintenance	11,614	6,251	15,197	13,021	6,000	15,000	15,450	15,914	16,391	16,883
Signs	6,059	11,713	6,846	6,558	7,750	7,750	7,983	8,222	8,469	8,723
Outer Banks Access Ramps	35,034	33,140	48,720	27,525	50,000	50,000	51,500	53,045	54,636	56,275
Maintenance Supplies	-	-	-	-	9,000	-	-	-	-	-
Advertising	-	-	-	-	-	-	-	-	-	-
Promotional Efforts	-	-	100,000	-	-	-	-	-	-	-
Playground Incentive	-	-	-	-	-	-	-	-	-	-
Contract Services	52,901	72,938	122,575	55,823	50,340	50,340	51,850	53,406	55,008	56,658
Beach Services	361,373	500,000	628,111	706,933	660,321	680,131	700,535	721,551	743,197	765,493
Historic Preservation	79,162	9,852	6,008	17,970	331,835	100,000	100,000	100,000	100,000	100,001
Public Transportation	-	-	-	-	-	-	-	-	-	-
Corolla Wild Horse Fund	75,000	54,912	74,998	99,994	75,000	75,000	75,000	75,000	75,000	75,001
Rent - Corolla School House	11,900	11,900	11,900	11,900	11,904	-	-	-	-	-
Insurance	3,324	4,018	4,314	4,447	5,000	5,000	5,150	5,305	5,464	5,628
Professional Services	-	-	25,000	169,895	28,635	25,000	25,000	25,000	25,000	25,000
Transfers to Operating Fund	-	-	-	-	-	-	-	-	-	-
Rural Center	-	-	373,380	749,210	729,481	185,000	462,065	475,927	490,205	504,911
50% PIO Budget	160,746	28,190	-	-	-	-	-	-	-	-
Economic Development	44,409	39,493	110,773	121,245	117,127	118,923	122,491	126,165	129,950	133,849
PEG Grant	-	-	-	-	-	-	-	-	-	-
Sheriff Deputies Outer Banks	650,000	650,000	650,000	1,056,452	1,034,338	1,038,232	1,069,378	1,101,460	1,134,504	1,168,539
Sheriff Deputies Mainland	250,000	250,000	300,000	-	-	-	-	-	-	-
Recreation Projects	80,121	37,750	-	3,335	-	-	-	-	-	-
Administrative Fee	85,000	-	96,772	104,420	105,000	100,000	100,900	101,809	102,727	103,654
Airport 10% Match	-	-	-	-	-	-	-	-	-	-
EMS 2nd Corolla Unit	473,299	900,000	950,000	987,376	1,121,085	1,121,085	1,154,718	1,189,359	1,225,040	1,261,791
Carova Beach Service District	-	-	300,000	-	-	-	-	-	-	-
Transfers to Fire Services Fund	-	-	-	-	-	-	-	-	-	-
Corolla VFD contract 3rd crew	121,459	-	-	-	-	-	-	-	-	-
Transfers to Co Gov't Facilities	-	-	-	-	-	-	-	-	-	-
Carova Beach Park	510,000	-	-	-	-	-	-	-	-	-
Blake Patch matching funds	-	-	860,549	-	-	-	-	-	824,575	824,575
Airport 10% Match	-	73,360	-	-	-	-	-	-	-	-
Corolla Village Bathroom	-	-	-	200,000	-	400,000	-	-	-	-
Maple Commerce	-	-	368,170	490,974	1,025,837	1,233,370	1,500,000	1,500,000	753,665	753,665
Reserve for Recreation Bldg	1,300,000	1,000,000	586,980	-	-	-	-	-	-	-
Transfer to So Outer Banks Water	-	-	-	-	-	-	-	-	-	-
100HP Pump to provide add'l H2O	30,000	-	-	-	-	-	-	-	-	-
Capital Outlay	54,066	-	-	12,358	-	-	-	-	-	-
Purchase of Welcome Center	1,550,056	255,952	510,459	-	-	-	-	-	-	-
4H Cultural Life Center	-	-	-	-	-	-	-	-	-	-

	PROJECTED YEAR 2007-08	PROJECTED YEAR 2008-09	PROJECTED YEAR 2009-10	PROJECTED YEAR 2010-11	PROJECTED YEAR 2011-12	PROJECTED YEAR 2012-13	PROJECTED YEAR 2013-14	PROJECTED YEAR 2014-15	PROJECTED YEAR 2015-16	PROJECTED YEAR 2016-17
Whalehead Projects	900,000	825,000	900,508	843,402	897,881	800,000	800,000	800,000	800,000	800,001
	<u>6,848,204</u>	<u>4,789,203</u>	<u>7,049,198</u>	<u>5,504,131</u>	<u>6,289,634</u>	<u>6,008,031</u>	<u>6,245,519</u>	<u>6,355,662</u>	<u>6,547,331</u>	<u>6,664,147</u>
TOTAL EXPENDITURES	8,506,015	7,209,888	9,873,317	8,494,696	9,724,053	9,330,299	9,657,723	9,867,364	10,161,886	10,385,055
REVENUES OVER (UNDER) EXPEND	895,160	2,421,137	(1,049,389)	1,103,430	14,132	(214,299)	(451,723)	(570,464)	(773,177)	(803,619)
BEGINNING FUND BALANCE	<u>3,987,196</u>	<u>4,882,355</u>	<u>7,303,493</u>	<u>8,254,104</u>	<u>7,357,533</u>	<u>7,371,666</u>	<u>7,157,367</u>	<u>6,705,645</u>	<u>6,135,181</u>	<u>5,362,003</u>
ENDING FUND BALANCE	<u>4,882,355</u>	<u>7,303,493</u>	<u>6,254,104</u>	<u>7,357,533</u>	<u>7,371,666</u>	<u>7,157,367</u>	<u>6,705,645</u>	<u>6,135,181</u>	<u>5,362,003</u>	<u>4,458,385</u>
<hr/>										
New Formula:										
Tourism Promotion	3,983,118	4,781,467	4,949,723	5,232,444	5,156,863	4,923,555	4,628,263	4,265,993	3,830,920	3,322,125
Tourist Related Expenditures	899,238	2,522,026	1,304,381	2,125,089	2,214,803	2,233,812	2,076,382	1,869,188	1,531,063	1,136,259
	<u>4,882,355</u>	<u>7,303,493</u>	<u>6,254,104</u>	<u>7,357,533</u>	<u>7,371,666</u>	<u>7,157,367</u>	<u>6,705,645</u>	<u>6,135,181</u>	<u>5,362,003</u>	<u>4,458,385</u>

APPENDIX I TO PLAINTIFFS' AFIDAVIT

The following summarizes portions of the testimony of the persons deposed by Plaintiffs' counsel. They consist of five of the current Currituck County Commissioners (a majority of the BOC) and of the County Finance Director. The summary relates to certain specific topics about which they were interrogated. Page references are to the transcripts of their testimony.

A. **The "TRE" definition generally.** The Commissioners' transcripts displayed a basic ignorance of the meaning of "TRE" under the OT statute. They all shared a very expansive interpretation of the term, and a disregard of its statutory definition.

Commissioner Jarvis

She defines "TRE" as "anything that supports, attracts and ultimately benefits tourism" in Currituck County. (p 34, lines 13-14)

Asked why, in her opinion, OT expenditures on the mainland for Sheriff and EMS are permissible as "TRE," she said: "Because our visitors have to travel through the County." (p 164, lines 8-13)

She was asked for her opinion as to whether expenditures for Sheriff and EMS can be made under the Act "which are specifically designed to benefit someone other than a tourist or business traveler." She replied: "Well, permanent residents can be tourists." (p 37, lines 19-23)

Asked about the rationale for OT funding of the \$100k defense costs for this suit, she said: "I believe our defense of how we use OT has a direct bearing on the future of any tourist industry in Currituck County." (p 40, lines 23-24, and p 41, line 1)

Commissioner Owen Etheridge

Asked for his interpretation of "TRE," he said: "That's simple. It says in the judgment of the Commissioners what is needed to support tourism. That's my definition of it." (p 11, lines 19-24, and p 12, line 1)

Referring to the use of OT to fund Public Safety in the winter, he said: "We still had to have their [referring to Sheriff and EMS] presence on the beach in the wintertime, even though the tourists were not there because of the possibility of crime and whatnot" (p 20, lines 3-6)

He said we also needed to fund Public Safety with OT at the beach in the winter, because "You know, we asked people to make an investment in Currituck County by building a home over there. It's our duty to do everything we can to protect it." (p 21, lines 2-5)

Asked if OT was used to fund Public Safety on the *mainland*, he said he did not know (p 39, lines 8-11), but when asked if that would be permissible, he replied: "I would have to say so." (p 39, line 19) Asked why that would qualify as "TRE," he said: "That burden wouldn't be there if it wasn't for the tourists." (p 40, lines 11-12)

Asked what “restrictions” apply to the BOC regarding the use of OT, he replied: “anything that we – I – I see in my judgment as being tourism, tourism-related and tourism-supported.” (p 41, lines 9-14)

Asked about what was the “general process” of the BOC “in coming up with the rationale or justification for the [OT] expenditures” (p 46, lines 6-11), he says that they relied on the County’s Tourism Advisory Board for advice on “tourism expenses.” (p. 47, lines 11-24). [However, note that Commissioner White testified that the TAB only deals with the promotional side of the budget.” (p 7, lines 16-19)]

Asked about the \$100k OT funding of defense of the lawsuit, he said he did not “recall what this was for” (p 51, line 11), but then said that if “hypothetically” this was for this lawsuit, “that would be OK,” because if the BOC is challenged “the [OT] statute does give authority to spend for tourism-related.” (p 51, lines 22-24) (Note: The CCA Legal Committee confirms that the minutes of that meeting indicate that Mr. McCord was present at the meeting and voted in favor of the funding.)

Commissioner Kitty Etheridge

Asked about the justification for the use of OT for Public Safety in the County, she says it is “because of tourism in the County” and that it is needed “in OBX and also on the mainland due to increased traffic and accidents.” (p 13, lines 4-11)

Asked whether there are any limitations on spending OT for TRE, she replied: “We have to spend a third of them on promotion. And then the other two-thirds, anything that promotes tourism. To me whatever we as a Board of Commissioners feel that it would help with the tourism in our county.” (p 31, lines 21-24 and p 32, lines 1-5)

Asked about the \$100k OT funding of defense of the lawsuit, she replied: “Because we need to protect the county. If we had had [sic] the tourists and the money is going to be used to protect what we see as, and we feel in our judgment, is legitimate tourist-related activities.” (p 38, lines 1-11)

Commissioner White

Asked whether he believes that “anything that supports or promotes tourism is a TRE,” he replied “I think so. I think the heading [of the Act] is important, related or associated with [sic]. That’s a pretty broad word in itself. And it allows you to relate things to tourism.” (p 46, lines 16-23)

Asked about the rationale for OT funding of Public Safety at the Beach, he said: “It’s providing a safe environment with ample resources for them [referring to tourists].” (p 15, lines 22-23) He said it is also needed for “increased presence” . . . in the off-road area to protect the property, . . . in the winter and the shoulder season, . . . so . . . we need deputies there to protect those assets of those individuals who have invested in Currituck County.” (p 22, lines 3-11)

He said he “can’t answer” whether any Public Safety on the mainland was funded by OT or discussed by the BOC (p 23, lines 11-14; p 24, lines 3-5), but agrees that OT can pay for EMS for tourists on the mainland “to some degree.” (p 43, lines 1-15)

Asked about the \$100k OT funding of defending this lawsuit, he justified it as “imperative that we keep and defend our authority the way it is” (p 50, line 22-24),

continuing that “if you take that money away, you’re going to have a tax increase for citizens of the County” (p 51, lines 1-4), and the lawsuit defense “is going to allow us to keep the money that we use to attract tourists.” (p 51, lines 11-12)

Commissioner McCord

“Q ... What is your interpretation of what a tourist-related expenditure actually is? A. Anything to promote travel and tourism for Currituck County, anything to promote what Currituck -- I mean, what Currituck County has to offer.” (p 22, lines 11-19)

“Q What limitations, or better said, what criteria do you use when assessing whether or not something attracts a tourist and thereby increases lodging facilities? A If it’s something that’s promoting the county that’s bringing business to the county, bringing people to the county, whatever it’s for as far as, you know, can we use, as you refer OT, not overtime, OT for that, is it something as far as somebody is coming here.” (p 48, lines 7-17)

B. **Rationale for OT funding of Public Safety and “Attraction” of Tourists.** All the Commissioners’ responses adhered to the County’s Interrogatory responses that tourists are deemed under the Act to be “attracted” by the “safe and lawful” environment provided at the Beach by Public Safety personnel. All conceded that the County does not advertise those services. Only two of the Commissioners mentioned the theory, set forth in the Interrogatory response, that first-time tourists would be attracted to *return* to the Beach area after having experienced that safety and security during their initial visit.

Commissioner Jarvis

Asked why she views OT-funding of Public Safety as qualifying as “TRE,” she says: It’s “to make the County a great place to visit and make them want to come back again.” (p 12, lines 1-3) “We have to make sure people get here safely as efficiently as possible.” (p 12, lines 12-18) It’s also to make sure that “the people who live here know that they’re going to be safe with this many people around. . . . So to me that’s the rationale.” (p 13, lines 10-16)

She explained that “attracting” tourists is satisfied because “the part of the spirit of the law is “it’s not enough to get them here one time. We want them to return.” (p 36, lines 3-10) [The implication of her remarks is that she has not considered how *first-time* visitors can be deemed to have been attracted by COBX by its Public Safety services.]

Commissioner Owen Etheridge

Regarding “attraction” of tourists by OT funding of Public Safety, he stated: “Nobody wants to go to a dangerous beach in terms of crime,” such as “theft, muggings, things of that nature.” (p 17, lines 17-24) He added: “People like to go where they feel safe” (p 24, lines 22-24), and added: “They also need good medical care.” (p 25, lines 2-7)

Commissioner Kitty Etheridge

Asked about the “attracting” standard in the “TRE” definition, she said: “I don’t remember anything being given to us . . . but it just makes common sense that if you don’t have fire protection, if we don’t have police protection, people are not coming to an area that they don’t feel is safe.” (p 19, lines 5-9)

Commissioner White

Asked his opinion as to “what qualifies Sheriff and EMS as a ‘TRE,’” he says: “I’m not taking my family to Baltimore right now. It’s not safe.” (p 16, lines 16-18)

Asked “would it attract tourists, though, if they didn’t know the service existed,” he said: “Well, that’s -- you can’t prove a negative.” (p 17, lines 4-8)

Commissioner McCord

“Q. And do you think that Sheriff and EMS meets the requisite requirement that it be an expenditure that attracts tourists and increases the lodging facilities, use of those lodging and meeting facilities? A. I think the safety. I mean they stress especially in Corolla as well as other stuff. They like the clean, safe beaches.” p 25, lines 16-23

“Q. How does it qualify under that definition in that statute of tourist-related expenditure, how is it designed to attract tourists and increase the use of lodging facilities? A. I mean you’ve got to ask the attorney that’s it’s coming to. That’s a joke, obviously. I don’t know. Q. Understood. A. I don’t really know how to answer that, I guess.” p 57, lines 8-18

C. Failure of the BOC to question or investigate data provided by the County Manager regarding the OT-Funding of “seasonal” Public Safety expenses in the summer. One of the most striking examples of the BOC’s incompetence and deception (or amnesia) is the witnesses’ unanimous denial that, at each budget approval BOC meeting for the last six fiscal years, the County Manager stated that OT-funding of Public Safety at the Beach was designed to pay for the increased tourist presence in the *summers*. Two of the five Commissioners flatly said they did not “recall” the County Manager’s presentations that typically characterized the proposed amounts for Public Safety costs as “seasonal” or “for the summer.” But the others evaded the question. Some of the Commissioners supported the use of OT proceeds to fund year-round Public Safety services, and the others rambled on but implied that such funding is justified. None could explain any knowledge of how the coverage of Sheriff deputies and EMS costs was calculated. It raises the question whether their approach may have been motivated by the fact that the Plaintiffs’ discovery had uncovered an internal County document indicating that the BOC had been appropriating OT, purportedly for each summer, that was substantially equal to the *annual* costs of all of the Sheriff and EMS personnel that were assigned to the COBX area.

Commissioner Jarvis

Asked if the annual TRE appropriations for public safety were only for the summer season, she replied that they were “not just for the summer season. I would say just a tourist season.” (p 13, lines 19-24)

She said she was “not aware” that the only reference at budget meetings “used the word ‘summer.’” (p 14, lines 5-8)

Asked about the duration of the summer season for Public Safety OT funding, she said the “season” “begins at Easter and goes through Thanksgiving” (p 17, lines 21-24; p18, lines 1-2), and that OT funds are used for Public Safety because it’s intended “to cover the costs per year that it takes to keep our visitors safe.” (p 19, lines 7-9)

Commissioner Owen Etheridge

He initially testified that the OT for Sheriff and EMS were for “salaries primarily,” and that the Sheriff told the BOC “how many additional were needed to handle the tourists in the summertime.” (p 18, lines 22-24). He went on to say that “we couldn’t have part-time people per se” (p 19, lines 9-10), and that “you need them to stay full time” and “we were voting on the entire year’s gross salary for OBX.” (p 19, line 20)

The Plaintiffs’ counsel then pointed out that this testimony was contradicted by the County Manager’s presentation for the 2020 budget that “these are specific times of increased demand.” (p 21, lines 20-21) The witness then reversed his testimony, saying that he had been referring to how the Commissioners interpreted the OT statute “originally.” (p 21, line 24, and p 22, line 1) He said “we’re looking now at almost year-round season.” (p 21, line 9) The Plaintiffs’ counsel pointed out that “from 2018 forward” the County Manager’s reference was that “this is not year-round, it’s for a particular time of year that sees increased demand.” (p 22, lines 23-24, and p 23, lines 1-8) The witness did not respond further on this issue.

Commissioner Kitty Etheridge

She testified: “You have to have them [i.e., Public Safety personnel] year round.” You “can’t have part-time service.” . . . “It would have to be for the whole year, but it wouldn’t cover the entire portion of their pay.” (p 14, lines 18-20, and p 15, lines 7-11)

The Plaintiffs’ counsel pointed out that Mr. Scanlon stated at the BOC meeting for the FY 2019 budget that the OT request was “for influx [of tourists] in the summer.” (p 17, lines 22-24) She replied that she didn’t “recall it being seasonal,” and that she thinks “the season in Currituck County is all season long.” He asked: “So all year?” And she replied: “Yes, sir.” (p 18, lines 10-13)

The Plaintiffs’ counsel then showed her the PS Costs Table, and pointed out that cols. 2 and 3 show that the annual OT appropriations for FY’s 2018 through 2020 “were equal to the annual OBX personnel costs,” and asked her why those numbers were so “near.” She replied: “In my opinion some of the money for the Sheriff was also being used here on the mainland.” (p 25, lines 11-19)

When she was then asked if “it would be a justified use of occupancy tax to pay for a Sheriff deputy who works on the mainland, she replied: “In my opinion, yes.” Asked to

explain why, she said: "Because to get competent people to work for you, they've got to be year round employees." (p 24, lines 4-12)

Commissioner White

Asked about the County Managers' presentations that said OT funding for the Beach was only "for the summer," he replied that "the amount for Sheriff and EMS is derived in large part for overtime." (p 21, lines 16-17) He also said OT funds were needed in OBX "to protect the property." (p 22, lines 4-11)

Asked to explain the \$1.2 million OT appropriation for the Sheriff in FY 2019, he said that the BOC "doesn't get into line items in the budget." (p. 23, lines 8-9)

He was asked beginning at p.37 why the amounts in cols. 2 and 3 of the PS Costs Table that show the annual OT appropriation for Public Safety at the beach and the actual annual personnel costs, "were so close." The witness said he doesn't know exactly what the appropriated amount was spent on. In a rambling explanation that went on for pages, he finally said that that "was just" the Sheriff's budget, and he "can't say" that "\$1.26 million went to all personnel costs." (p 37, lines 19-22) He concluded: "But some of those things may have gone into it. I don't know. As I said, they're bringing their budget to us. The county manager vets their budget. He goes -- he pulls out a red pen and starts marking it down as soon as he gets it. . . . But it is presented to us in a form that, this is basically what they need to function for the year." (p 39, lines 5-13)

Commissioner McCord

"Q ... Do you believe that when you voted on the OT expenditure for Sheriff, for example, for EMS, but was it intended to cover the staffing cost year round in Currituck OBX? A: A portion of that as far as, because there is travel and tourism year round in OBX." (p 32, lines 12-17)

"Q ... So, yes, you do believe the occupancy tax transfers were intended to cover the full year's worth of services or not intended to cover the full year's worth of sheriff services on Corolla Outer Banks? A: I mean it's for, and I don't know the percentage. I would say this goes for EMS too. Heavy percentages of it is for the bulk of the season as far as - - you know, I mean the maintenance." (p 33, lines 4 to 11)

D. **BOC members' confusion concerning discrepancies in the EMS budgets relating to expenditure of the amounts of OT appropriated.** The PS Costs Table reveals that, in each of the FY '18, '19 and '20 budgets, \$1.6 million of OT funds were appropriated for EMS. However, col. 3 of the PS Costs Table shows that only \$1.1k, \$535k and \$529k, respectively, were spent on EMS personnel. Ms. Hill may have been accurate as to how those amounts were spent. However, none of the other witnesses were able to explain these discrepancies. This demonstrates the Commissioners' failure to understand the basics of their administration of County budgets and expenditures.

Finance Director Hill

Asked about the 2018 discrepancy, she said that the “difference” between the 2 figures was transferred directly from the General Fund to the Corolla Fire Service District to pay for EMS salaries and benefits. (p 25, lines 4-12) Her explanation of the 2019 discrepancy was that some funds were transferred from the General Fund directly to EMS and some into the Fire District funds. (pp 29-31)

She was asked: “Do you recall any information or any documents that were provided to the Board of Commissioners to enable them to evaluate or substantiate the validity of occupancy tax transfers for sheriff and EMS?” She replied: “Basically a number.” (p 33, lines 22-24, and p 34, lines 1-6)

Commissioner Jarvis

Asked whether the amounts of TE appropriated in the FY 2020 budget “exceed the full annual cost of EMS services on” COBX, she replied: “Well, they exceeded the cost of the personnel but not the full cost, but of personnel, which is what you’re pointing to. It’s not the full cost. It’s the full cost of personnel.

Asked to “explain what you mean by it’s not the full cost,” she replied: “Well, EMS, there’s other costs. There’s equipment. There’s other infrastructure that you have to maintain besides just people. People can’t just respond to fires and emergencies. They have to have equipment.” (p 30, lines 4-24) She added: “Knowing what I do now about the cost of EMS equipment, yes, I think that’s what would explain the difference.” (p 31, lines 7-9) [In light of Ms. Hill’s testimony, Ms. Jarvis’ testimony was pure speculation and totally inaccurate.]

Commissioner Owen Etheridge

Asked regarding the FY 2019 and 2020 budgets, “Why would there be a 1.1 million dollar difference in what was transferred for EMS and what the actual cost of EMS were for those two fiscal years?,” the witness replied: “I can’t answer that. I don’t know.” (p 38, lines 12-16)

Commissioner Kitty Etheridge

Asked about the FY 2019 and 2020 EMS discrepancies, she said: “I assume it’s because of putting more, the EMS, and we made it full time and brought in more EMS down on the Outer Banks and the fire department because they weren’t able to -- they were having problems with the volunteer fire department.” (p 26, lines 23-24 and p 27, lines 1-4)

Asked “Do you know where that 1.1 million dollars went? Do you know how it was expended?,” she replied: “No, sir.” (p 27, lines 10-17)

She was asked for her “explanation or reasoning for why you think that the OT funds, which were promoted as these increased seasonal cost of the particular service, why these OT expenditures or transfers to the general fund were legitimate and actually were going for the purposes they were promoted as.” She replied: “Because with tourism brings the need for more services. And that, to me, if we need the services it’s not right for the

citizens to have to pay the extra cost. And if it wasn't for the tourist coming in we wouldn't need the extra services." (p 28, lines 2-13)

Commissioner White

The Plaintiffs' counsel pointed out the EMS appropriations of \$1.6 million OT for FYs 2019 and 2020, and asked why the personnel costs "dropped tremendously, by about \$600,000, and that continued in fiscal year '20, . . . do you know the reason for the drop, for the decrease in those annual costs?" He replied: "It was split, I believe, between EMS and fire personnel. It was that much to pay the fire department and it changed how they were broke out." (p 40, lines 1-9)

He was asked: "Do you believe or do you know whether any of this 1.6 million for EMS, do you know if it went to fund expenses on the mainland? He replied: I do not. Asked: "You're not a hundred percent sure?" He replied: "That's correct." (p 42, lines 19-24)

Commissioner McCord

Q "Do you know what caused that substantial decrease in personnel costs [for EMS] in FYs 2019 and 2020?" A. "Paid fire. I want to say it has something to do with paid fire. Off the top of my head, I believe paid fire went into play in '18." (p 41, lines 4 to 10)

Q "Are you aware of where the additional 1.1 million dollars in both '19 and '20, where that money went?" A. "I do know there's additional -- I don't want to say this wrong. I do know there's -- I want to say there is an additional two medics in the summertime, you know, where that number where, you know if you're buying an EMT vehicle compared to a patrol vehicle. I'm not saying like a new one was purchased, but I'm just saying as far as the staffing and as far as the gear and stuff on the EMS side." He continued: "Now, see, and the other thing is too, like I said, I don't know the specifics of it. I do know in the summertime I want to say there's two more trucks. (p 42, lines 18-24 and p 43, lines 11-13)

E. **Lack of BOC Diligence in Deliberating and Discussing OT Appropriations for Public Safety.** Minutes of the BOC's meetings are devoid of any deliberation or serious discussion of the elements or criteria of "TRE." However, the County's Interrogatory responses stated that "the allocation and appropriation of OT proceeds is part of the annual budgeting process," and that the members "discuss and deliberate" on the use of OT proceeds "during budget work sessions." All the Commissioner witnesses (except Jarvis) followed this script. However, Mr. White testified that during "the last few years," there were no "substantial discussions or deliberations" regarding Sheriff and EMS appropriations, "because we've approved it again and again."

Commissioner Jarvis

Asked to describe "in general terms" her "functions as a Currituck County Commissioner," she replied: "I believe my functions are to *deliberate* and make

decisions concerning the UDO, decisions for budgeting, decisions about personnel and tax rates.” (p 6, lines 12-18). [Emphasis added.]

Asked whether she ever discussed “with other members of the Board or County staff” her “rationale or understanding of what could be expended from OT,” she replied “No.” She said this is because she has lived in the County for 30 years and has “a full understanding” of what tourism is and how tourism benefits the County and what we need to do and what we should do to promote tourism. So I don’t feel like I had to clarify that, no, sir.” (p 34, line 24, and p 35, lines 1-8)

She was asked: “What form of deliberation occurred in a public meeting, in an open meeting regarding tourist related expenditures from OT?” She replied: “I don’t remember having deliberations about it. I remember once again the presentations, specifically where we were given the numbers to help form that judgment, but I don’t recall specific conversations. I don’t recall specific conversations that the Board had about that.” (p 42, lines 9-17)

Commissioner Owen Etheridge

As noted above, when asked about what was the “general process” of the BOC’s TRE determinations, he said that they relied on the County’s Tourism Advisory Board for advice on “tourism expenses.” (p. 47, lines 14-24).

Asked whether he recalled any conversations with other Board members about TRE, he said: “Just during budget sessions and when it came up in amendment.” (p 15, lines 12-18)

Asked why there was “little to no discussion amongst the board members in a public meeting on a budget approval item” (p 57, lines 22-24), he said “it was handled in budget workshops.” (p 58, lines 1-3) He said: “As much as a week we’ll have budget workshops.” (p 59, lines 4-5)

Asked whether deliberations took place at the workshops for the FY 2018 through 2021 budgets, he replied: “Its always been the practice and continues to be the practice.” (p 59, lines 22-23)

Commissioner Kitty Etheridge

Asked whether there was “open discussion and deliberation at these open [BOC] meetings concerning the validity of OT expenditures,” she replied: “Yes, sir.” (p 40, line 17-23) She said this occurred in “work sessions.” (p 41, line 22)

Commissioner White

Asked when the Board discussed the criteria for determining what is permissible as TRE, he said “generally, that gets discussed in our work sessions. . . . By the time it gets to the commissioner meeting, it’s we’ve already decided what’s going to happen.” (p 10, lines 11-16)

Asked whether there were “in the last few years” any “substantial discussions or deliberations amongst the board concerning the validity of those transfers of OT from Sheriff and EMS,” he replied “no, because we’ve approved it again and again. So I think

we all believe in our judgment that this is a perfectly acceptable expense.” (p 27, lines 14-19, and p 28, line 1)

Commissioner McCord

“Q. Do you feel like you guys deliberated amongst yourselves at these meetings or work sessions? Was there actual deliberation that occurred? A. I would say there was questions. Q. Discussions. A. There was -- I mean if we took a break and went to the bathroom, I'm hungry, when are we going to eat lunch. That was the discussion. Q. Right, right. A. But as far as, you know, discussion was in the room.”

F. **Erroneous Reliance of the Commissioners and County Staff on the County's Independent Auditor to Determine the Legality of "TRE" Determinations.**

Two of the five deposed Commissioners (Mr. Etheridge, at p 53, lines 3-11; and Ms. Etheridge, at p 39, lines 13-21), as well as the Finance Director (p 41, lines 10-16), testified that the Report of the County's Independent Auditor on its Annual Financial Statements confirms the legality of the BOC's OT expenditures. The other Commissioners said they did not know if the auditor makes that determination. (As noted in para. 11 (third bullet point) of Plaintiffs Affidavit, the same issue arose at the June 18, 2018 BOC meeting. A member of the public had questioned whether the approval of the startup costs of the Corolla Fire District qualified as TRE. The Chairman asked the County Manager whether the County Auditor had ever questioned the legality of any OT expenditures, and the Manager replied "To my knowledge, no.")