

**SHARP, GRAHAM, BAKER AND VARNELL, L.L.P.
ATTORNEYS AT LAW**

KITTY HAWK, NORTH CAROLINA
TELEPHONE: (252) 261-2126
FACSIMILE: (252) 261-1188

STARKEY SHARP
JOHN C. GRAHAM, III
RONALD G. BAKER
CASEY C. VARNELL
JAMIE G. VARNELL
KATHERINE S. HARRELL*

Website Address:
www.ncobxlaw.com

SENDER'S EXTENSION:
245

SENDER'S DIRECT LINE:
(252)573-7033

MAILING ADDRESS:
POST OFFICE DRAWER 1027
KITTY HAWK, NC 27949-1027

STREET/SHIPPING ADDRESS:
4417 N. CROATAN HIGHWAY
KITTY HAWK, NC 27949-1027

*Also Licensed in Virginia

Sender's E-mail Address:
nicole@ncobxlaw.com

September 20, 2021

Christopher J. Geis
Womble Bond Dickinson
One West Fourth St.
Winston Salem, NC 27101

Re: Costanzo v. Currituck County
File No. 19 CVS 171

Dear Mr. Geis:

Please find enclosed a copy of the Brief in Support of Motion for Partial Summary Judgment in the above referenced matter.

Sincerely,



Nicole E. Wilkinson
Paralegal

Enc.

STATE OF NORTH CAROLINA
COUNTY OF CURRITUCK

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

GERALD COSTANZO, COROLLA CIVIC)
ASSOCIATION, ET AL.)
)
Plaintiffs,)
v.)
)
CURRITUCK COUNTY, NORTH)
CAROLINA and THE CURRITUCK COUNTY)
TOURISM DEVELOPMENT AUTHORITY)
)
Defendants.)

BRIEF IN SUPPORT OF
MOTION FOR
PARTIAL SUMMARY
JUDGMENT

INTRODUCTION

Plaintiffs, by and through undersigned counsel, have simultaneously herewith filed a motion with the Court pursuant to Rule 56 of the North Carolina Rules of Civil Procedure for Partial Summary Judgment in favor of Plaintiffs as to the Second Claim For Relief under the Complaint in this action. That Second Claim For Relief seeks a declaratory judgment that rules that Currituck County's, as well as its Tourism Development Authority's ("TDA"), expenditures of occupancy tax ("OT") proceeds for the purposes of funding police protection and emergency services (sheriff, emergency medical and fire services and equipment) (referred to herein as "General Services") are improper and unlawful, and cannot reasonably be considered as "tourism-related expenditures" under the Act (as defined below) that governs the County's and the TDA's expenditures of such proceeds. (For purposes herein, the term "General Services" shall not be deemed to refer to lifeguard services and related equipment since the ocean beaches and its thousands of summer vacation homes are unique to the tourist area (the

“Beach”.)

Plaintiffs assert that, pursuant to Rule 56(c), they are entitled to the judgment sought because the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting affidavits, show that there is no genuine issue as to any material fact and that the Plaintiffs are entitled to such judgment as a matter of law.

JURISDICTION AND DISCRETION OF THE COURT

The Complaint in this matter was filed in Currituck County Superior Court on May 7th, 2019, wherein the Plaintiffs requested a permanent injunction be issued against the Defendants regarding the use of OT proceeds for the purposes named in this motion, among other items. This Court has original jurisdiction to rule on Plaintiffs’ Motion for Partial Summary Judgment.

PARTIES

The individual Plaintiffs all own (or have owned during periods relevant to the allegations in the Complaint) properties in the County’s Outer Banks area that generate OT revenues. Plaintiff Corolla Civic Association (“CCA”) is a nonprofit corporation duly organized and existing under the laws of the State of North Carolina with its principal place of business in Currituck County. Its members include individuals who rent (or have rented during relevant periods) accommodations located in the County’s Outer Banks area (referred to herein as the “Beach”). CCA has joined in the filing of this action to protect the interests of its members who are payers of occupancy taxes.

Defendant Currituck County (hereinafter “County”) is a body politic and body corporate organized and existing under the laws of the State of North Carolina. Defendant Currituck County Board of Commissioners (hereinafter “Commissioners” or the “BOC”) is the board of commissioners exercising the powers and functions of the County under the Constitution and the laws of the State. The Board consists of seven Commissioners. Defendant Tourism Development Authority (“TDA”) is a public authority organized and existing under the laws of the State which is tasked with approving expenditures of any and all OT proceeds for the statutorily allowed uses. The voting members of the TDA are the seven County Commissioners.

BACKGROUND/FACTS

Since 2005 the County has unlawfully expended more than \$30 Million of OT proceeds to fund General Services through the fiscal year ended June 30, 2020. Its approved budget for the current fiscal year 2021 included more than \$3 Million for such purposes. The County is authorized to impose a 6% occupancy tax on qualified lodging rentals, under N.C. Sess. Law 2004-95, as amended (herein referred to as the “Act”), § 2. Attached hereto as **Exhibit A** is a copy of the cited Session Law.

The portion of the County that is located on the Beach is a 23-mile-long narrow strip of barrier island beach separated from the mainland portion of the County (herein referred to as the “Mainland”) by the miles-wide Currituck Sound. It is responsible for generating over 98% of the County’s OT revenues. The Beach has over 20,000 rental bedrooms in 4,000 private homes that are rented to tourists, primarily in the summer season, in addition to several hotels and inns, with a total of about 200 rooms. The

Mainland has approximately 40 rental rooms in several motels and inns and a few hundred rental campsites and RV hookups.

In 1987, the North Carolina General Assembly authorized the County to levy a 3% occupancy tax. The initial authorizing legislation required that at least 75% of the net proceeds of the tax be used “only for *tourist* related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, *police protection and emergency services*.” See N.C. Sess. Law 1987-209, § 1(e) (emphasis added). The remainder was to be deposited in the County’s General Fund and could be used “for any lawful purpose.” *Ibid*.

After several amendments not relevant to this action, in 2004 the General Assembly enacted legislation with the title “TO ALLOW AN INCREASE IN THE CURRITUCK COUNTY OCCUPANCY TAX AND TO CHANGE THE PURPOSES FOR WHICH THE TAX MAY BE USED.” (emphasis added) (See Exhibit A attached hereto.) The legislation became effective on July 13, 2004. *Id.*, § 4. In adopting the 2004 amendment, the legislature authorized the County to levy an additional 2% occupancy tax, raising the total rate to 6%. *Id.*, § 1.

More important to the merits of the Plaintiffs’ motion, the 2004 amendment specifically changed the purposes for which OT proceeds could be used. (The former statute allowed the use of such proceeds for, *inter alia*, “police protection and emergency services” and other general municipal services.) Under the current Act, there are only two allowed uses of net OT proceeds: one-third (1/3) of the net proceeds of the 6% tax must be used “to promote travel and *tourism*.” The remaining two-thirds (2/3) must be

used for “*tourism*-related expenditures, including beach nourishment.” (*Emphasis added*). See N.C. Sess. Law 2004-95, § 2. The 2004 amendment also deleted from the prior statute a provision that expressly permitted the County to deposit a portion of its OT proceeds into its General Fund.

The term “*tourism*-related expenditures” (herein referred to as “TRE”) is defined in § 1(e)(4) as follows:

“Expenditures that, in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county. The term includes *tourism*-related capital expenditures and beach nourishment.”

Thus, for expenditures to be considered to meet the TRE *tourism* requirement, a two-prong analysis **must** be satisfied by the BOC in exercising their discretion, as the expenditures must: 1) be designed to increase the use of lodging and other facilities; 2) by attracting tourists or business travelers to the County.

In 2007, the County proposed to the General Assembly a bill that would have restored the ability of the County to use at least 75% of the net proceeds of the tax for “*tourist*related purposes, including construction and maintenance of public facilities and buildings; garbage, refuse, and solid waste collection and disposal, police protection, and emergency services.” The proposed legislation also would have restored the ability of the County to deposit the remainder of the net proceeds in the County’s General Fund to be used for “any lawful purpose.” See House Bill 1102, § 1, as sent to the House Finance Committee, attached hereto as Exhibit B. However, this bill was not passed by the legislature and failed to become law.

ARGUMENT

Pursuant to Rule 56(c), a judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” Such judgment is appropriate in this case regarding the issue of the County’s and the TDA’s lack of authority to appropriate OT proceeds for the purposes of General Services.

Plaintiffs are entitled to summary judgment on several grounds:

I. As a matter of statutory interpretation, the 2004 amendment of the Act clearly and explicitly changed the purposes of the prior statute to eliminate the County’s authority to use OT proceeds to pay for General Services.

II. The Act cannot be reasonably interpreted as permitting the BOC to make a rational “judgment” that OT funding of General Services could legally qualify as an expenditure which attracts tourists and/or business travelers to the County, under the definition of the term “TRE.”

III. BOC “judgments” that OT expenditures for General Services qualify as “TRE” would be arbitrary and capricious and/or in disregard of the Act, and therefore constitute an abuse of discretion. This is particularly the case where the documents and discovery produced by the County, the depositions of County officials, as well as records of BOC meetings, all demonstrate that the BOC failed to consider relevant facts of how these General Services attracted tourists and/or business travelers to County, or of the budget amounts proposed before exercising its “judgment” in approving the budgets at public meetings.

All of the above arguments constitute grounds that call for the requested summary judgment to be granted. However, *any one* of those grounds would itself be sufficient to sustain the requested judgment. The North Carolina courts have stated: “[I]f a grant of summary judgment can be sustained *on any grounds*, it should be affirmed on appeal.” *RME Management, LLC v. Chapel HOM Assoc.*, 251 N.C App. 562, 795 S.E.2d 641, at 644 (2017) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (emphasis added)).

I. The 2004 Amendment of the Act Clearly and Explicitly Changed the Purposes of the Prior Statute to Eliminate the County’s Authority to Use OT Proceeds to Pay for General Services

This first issue involves purely a matter of interpretation of the Act, without reference to either party’s discovery or any other evidence. Thus, pursuant to Rule 56(a) there is clearly “no genuine issue as to any material fact” concerning this issue, and the Plaintiffs “are entitled to a judgment as a matter of law.” Plaintiffs contend that the 2004 amendment clearly changed the purposes of the prior statute and explicitly prohibited the funding with OT proceeds of expenditures for General Services.

The plain and explicit purpose of the 2004 amendment was stated in its title itself. It was: “TO . . . CHANGE THE PURPOSES FOR WHICH THE TAX MAY BE USED.” Consequently, the amended Act explicitly prohibited the use of OT proceeds to pay for “police protection and emergency services,” which was one of the purposes permitted in the prior statute, but had now been directly removed by the amendment. The North Carolina Supreme Court has held “that even when the language of a statute is plain, the title of an act should be considered in ascertaining the intent of the legislature.” *Ray v. NC Dep’t of Transp.*, 366 N.C. 218, 727 S.E.2d 675 (2012).

The starting point for any statutory interpretation must be its language. The text of the 2004 amendment could not be clearer. In fact, as published by the legislature, the deleted text and the new text (as set forth in Exhibit A attached hereto) are presented next to each other in a “Track Changes” format, with the *new* text shown by underlining and the *deleted* text shown by strike-through. The old and the “changed” purposes of the Act are directly juxtaposed in this format. Section 2 of the amendment stated that § 1(e) of the former statute “reads as rewritten”

“Currituck County shall use the net proceeds of the tax levied under subsection (a) of this section ~~only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services~~ **tourism-related expenditures, including beach nourishment.**” (Emphasis in bold face added.)

The amended Act thus authorizes OT proceeds to be used only for (1) TRE or (2) advertising and promotional expenses. However, General Services (as defined herein) qualify as neither under the Act. “TRE” is defined in § 1(e)(4) of the Act as:

“Expenditures that, in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county.”

Significantly, the 2004 amendment also deleted from the prior statute a provision that expressly permitted the County to deposit a portion of its OT proceeds into its General Fund and to be “used for any lawful purpose.”

It is abundantly clear that the 2004 amendment *explicitly* changed the “purposes for which the tax may be used” under the prior statute. But what were those prior purposes? They were the “*tourist* related purposes” that were specified in the prior

statute's "including" clause. It is also clear that those "*tourist* related purposes" that were changed included garbage, solid waste, "police protection, and emergency services," etc.).

The itemized "**tourist**" related purposes in the former statute were all general municipal services that are provided county-wide and normally funded by property taxes. However, the amendment *explicitly removed* those services as authorized OT expenditures under the Act. And the permitted purposes of the former statute were (in the language of the amendment) "rewritten" to include only "**tourism**" related expenditures as legitimate TRE. (The amendment's elimination of the prior statute's language that permitted the County to deposit OT proceeds in the County's General Fund "for use for any lawful purpose" also had the effect of preventing a simple work-around that would have permitted the County to use OT funds for the purposes that the amendment was eliminating.)

It also seems obvious that the legislature intended in the amendment to shift the focus of the use of proceeds under the Act to *tourist* attractions that help grow the *tourism* business in the County, and away from the general municipal services that had been listed in the prior statute. The language in the new "TRE" definition clearly changed that focus, in order to further the typical tourism industry objectives of increasing the use of lodging, recreational and other facilities by attracting tourists and business travelers.

Nevertheless, in total disregard of the amended Act, the County has for the last 15 years deposited more than \$30 Million of OT proceeds into its General Fund to fund General Services. These expenditures were clearly unlawful and in violation of the Act and of Article V, § 5 of the State Constitution.

The County's public statements, and the records that it has produced for Plaintiffs, including minutes and videos of BOC and TDA meetings, have never articulated the BOC's rationale for "using its discretion" in exercising its "judgment" as to why, despite the 2004 amendment, expenditures for General Services continued to qualify as "TRE" under the Act.

Prior to this lawsuit, the only attempt by the County to explain its disregard of the 2004 amendment was an interpretation presented orally by the County Attorney in an April 13, 2017 meeting with CCA representatives. (See para. 14 of the Plaintiffs' Affidavit attached hereto as Exhibit C ("Plaintiffs' Affidavit").) The County Attorney argued that General Services expenditures constitute "very legal" TRE under the Act because those services were recognized under the prior statute as "**tourist** related" and that this term is equivalent to the new term "**tourism**-related" expenditures in the amended Act. He claimed that the expenditures authorized as "**tourist** related" under the prior statute were consequently carried forward into the new Act as an authorized use of OT proceeds.

The Plaintiffs opine that the amended Act cannot be construed to have been intended to "carry forward" *into* the new definition of "TRE" the services described as "**tourist**" related in the former statute ("garbage, refuse, and solid waste collection and disposal," etc.). The newly defined term is clearly designed to require that OT proceeds be spent on tourist attractions, and none of the tourist related purposes listed in the prior statute (including General Services) could reasonably be construed as tourist attractions. (See Part B below.)

Two other points are also noteworthy concerning this issue of why General Services are not a “tourist attraction.” *First*, the “carry forward” theory was not mentioned in the County’s Interrogatory response on this question, which instead relied on a newly found rationale that the “safe and secure” environment provided by police, emergency medical and fire service is the attractant. However, that new rationale seems contrived, and discovery data affirms that it certainly was not the rationale used to approve previous budgets. The three members of the CCA Legal Committee who attended that 2017 meeting have attested that they had *never* heard any mention by any County personnel of the “safe and secure” rationale until it was first mentioned in the County’s Interrogatory response. *Second*, the fact that this rationale is newly contrived is also reinforced by the fact that the three Legal Committee members who attended the 2017 meeting with CCA have attested that none of the County representatives at the meeting mentioned the “safe and secure” rationale during that meeting. (See Plaintiffs’ Affidavit, para. 14.)

This argument is also rejected by the chain of legislation denoted herein, as it incorrectly assumes that all services in the deleted “tourist” related clause have been carried forward into the amendment as permitted uses of OT proceeds. This argument would mean that the 2004 amendment, despite its title and text, *did not change any of the purposes of the former statute relating to use of OT proceeds.*

The plain and unambiguous language of the 2004 amendment also belies the “carry forward” argument. The Supreme Court stated the following rule of statutory construction in *Burgess v. Your House of Raleigh*, 326 N.C. 205, 388 S.E.2d 134, at 136-37 (1990):

“Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will. The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent. [Citations omitted.]”

The North Carolina rules of statutory construction would not permit the County’s aforesaid effort to expand the definition of “TRE.” In *Appalachian Materials v. Watauga County*, ___ N.C. ___ 618, 822 S.E.2d 57 (2018), the Supreme Court stated: “[C]ourts should ‘give effect to the words actually used in a statute and should neither delete words used *nor insert words not used in the relevant statutory language* during the statutory construction process.’ *Midrex Techs., Inc., v. N.C. Dep’t of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citation and quotation marks omitted).” (Emphasis added.)

In light of the foregoing, the definition of “TRE” does not allow for any implication that the prior language of the Act was somehow “carried forward” into the amended Act as authorized TRE. The amendment is not ambiguous in any respect, and its language should not be distorted by the County’s “carry-forward” interpretation. Consequently, the Act cannot be rationally construed to authorize the use of OT proceeds to fund “police protection and emergency services.”

The State legislature’s intent in enacting Currituck’s OT statute is also reinforced by a comparison of the Act to the OT statutes enacted for other counties and cities in the State. The CCA Legal Committee has examined a compendium of such statutes, 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. For example,

several jurisdictions specifically allow “fire protection” as permitted expenditures (e.g., Robeson County); and Dare County is allowed such use for “police protection and emergency services.” (See Plaintiffs’ Affidavit, para 15.)

In light of the foregoing, Plaintiffs submit that the foregoing argument conclusively establishes that “no genuine issue of any material fact” is relevant to the interpretation of the Act concerning the issue at hand. In 2004 the Act was amended to delete and thereby explicitly prohibit “police protection and emergency services” as authorized uses of OT proceeds. However, they continued funding what they reasonably should have known was not permitted by the law. This case is as simple as that.

Plaintiffs respectfully urge the Court to rule that they are entitled to a judgment as a matter of law, on the ground that the 2004 amendment of the Act explicitly eliminated the County’s authority to use OT proceeds to pay for General Services. Such ruling would resolve this Motion in favor of Plaintiffs and would render moot the remainder of the arguments presented below in this Brief.

II. The Act Cannot be Reasonably Interpreted as Permitting the BOC to Make a Rational “Judgment” that OT Funding of General Services at the Beach Could Legally Qualify as an Expenditure Which Attracts Tourists and/or Business Travelers to the County Under the Definition of the Term “TRE”

Even if the Court were to determine that the 2004 amendment did not conclusively eliminate the County’s authority to use OT proceeds to fund General Services, the Act cannot be reasonably interpreted as permitting the BOC to make a *rational* “judgment” that such OT funding could qualify as “TRE.” This is because it would be irrational, arbitrary or capricious, and/or in disregard of the law, for the BOC to “judge” that such expenditures are “designed to increase the use of lodging” and other facilities in the County by “attracting” tourists and/or business travelers. Attracting

tourists is to be the cause with the effect of increasing the use of facilities that generate tourism revenues and associated taxes. (The BOC's interpretation of the Act in this context also constitutes an abuse of discretion, as discussed in Part III below.)

The concept of tourists being "attracted" to the Beach by the presence of General Services defies the language and intent of the Act. The 2004 amendment of the Act was designed to require the County to limit its investments of OT proceeds only to items which are designed to attract tourists and/or business travelers that would directly or indirectly generate revenues in the area they will be visiting, for the benefit not only of local vendors providing products or services but also of the County itself, in the form of occupancy and sales taxes. In addition, General Services are provided to all areas of the County, residents and visitors alike; and, as is the case in the rest of the County, are normally funded by ad valorem property taxes.

As noted in Part I above, the County has recently offered a new theory to explain how providing General Services may be reasonably judged to attract tourists. Its interrogatory responses indicated that tourists are attracted by the "safe and lawful" environment provided at the Beach by General Services, as well as the theory that the County provides these services "to encourage tourists to return." Plaintiffs deposed five Commissioners on this issue, who constitute more than a majority of the current BOC. Although only two of them referred to the novel theory of "returning tourists" (i.e., if they are injured or die while vacationing, they will not return), all deponents emphasized that General Services was essential to attracting tourists. Their testimony is summarized in Appendix I hereto (paras. (A) and (B)) to Plaintiffs' Affidavit (referred to herein as the "Affidavit Appendix").

However, the County has never used its vast promotional budget to advertise the presence of General Services at the Beach (despite the County's assertions in its responses to Interrogatories that it does "promote" such services). Thus, it would be unreasonable for the Commissioners to presume that tourists and business travelers would base their decision to rent vacation homes or hotel rooms in the County upon the availability of such services. In fact, it is reasonable to presume that all visitors to the County would expect such services to be available throughout the County, just as they would expect to have other adequate municipal services, such as garbage collection, sewers or septic systems, and potable drinking water. This reveals the flaw in the Commissioners' rationale that tourists would not be "attracted" to the Beach if the County did not provide its normal level of General Services at the Beach during the summer "season." The County's rationale is also flawed because it does not account for how *first-time* visitors would be attracted to the County if they are not aware of its General Services.

In fact, to reduce the County's "tourist attraction" interpretation beyond the absurd, the explanation that the former statute's stated purposes were "carried forward" into the amended Act's definition of "TRE" would enable the BOC to "judge" that expenditures for garbage and waste collection and disposal on the Beach are also "tourist attractions," on the theory that tourists would not want to vacation there in the absence of such services. The flawed logic of this argument is based on the premise that typical public facilities that tourists would assume are necessary in a community they visit – such as garbage disposal, a potable drinking water, or fire service – would actually "attract"

them to that vacation site. This distorts the concept of a “tourist attraction” and is clearly not the intent of the Act’s definition of “TRE.”

The County has recently put forth an additional theory to explain why General Services “attract” tourists to the County. In its response to Plaintiffs’ Interrogatories, it asserted that making an area safe “is necessary for tourists to *want to return*” (emphasis added), and that the BOC believes that if the County is perceived to be unsafe, then visitors and guests “could choose to vacation elsewhere.” This theory has never been expressed by any Commissioner in any BOC meeting, or in any public statement or public documentation since the adoption of the 2004 amendment of the Act. The “returning tourists” theory has no foundation on which to stand.

One of the most egregious instances of the County’s abuse of its authority under the Act is its use of OT proceeds to fund expenditures for emergency medical services on the Currituck Mainland, admittedly based on the theory that “tourists” traveled through Route 168/158 to their vacation destinations. (This funding was confirmed by the Commissioners’ deposition testimony, and also by their discussion at a BOC work session on May 30, 2017. (See the Plaintiffs’ Affidavit , para. 11(4th bullet point), and the Affidavit Appendix, paras. (A) & (B).) This interpretation of “TRE” ignores the fact that most of the travelers driving through the Mainland are destined for Dare County or other southern beach resort areas. Such transient visitors could not rationally be deemed to be “tourists” who have been “attracted” to the County (within the meaning of the term “tourist” in the “TRE” definition) because of the presence of Sheriff or emergency medical services on Route 168/158, merely due to the fact that they happen to be traveling through the Mainland to reach their ultimate destinations.

The Plaintiffs are not disputing that EMS should be available to the entirety of the County, but the issue here is whether those services may *legally* be funded by OT funds or should be funded by some other County tax revenues. The Act could have allowed such OT funding of EMS (as it did prior to the 2004 amendment), but now it does not, due to the amendment's adoption of the new "TRE" definition and its explicit deletion of "police protection and emergency services" from the purposes for which the use of OT proceeds is authorized.

In the Court's hearing in this action on Plaintiffs' Motion for a Preliminary Injunction, the County argued that it would make no sense if a lifeguard rescued a swimmer from the surf, only to find that no EMS personnel were available on the Beach to resuscitate the swimmer. No one would dispute that EMS should be available in these circumstances, but the issue here is whether those services may *legally* be funded by OT funds or should be funded by some other County tax revenues.

Plaintiffs contend that the County's OT-funding of lifeguard services at the Beach can legally be considered to qualify as "TRE", and should be contrasted with the County's OT funding of EMS. The County is not legally obligated to provide lifeguard services, and in fact does not provide such services in other areas of the County. However, the County *is* legally obligated to provide for Sheriff, EMS and Fire services to all homes, businesses and persons in the County, wherever they are located. The ocean Beach is a unique attraction that is the County's primary tourist destination. (In fact, the County does advertise this attraction in its literature.) For the family vacationers that are the bulk of the County's tourist population, a life-guarded beach is a significantly increased attraction. Therefore, the use of OT proceeds to fund those services at the

Beach could rationally be judged by the BOC to qualify as “TRE”. This illustrates the distinction that Plaintiffs are making between legitimate “TRE” and the County’s abusive use of OT proceeds for General Services.

In conclusion, Plaintiffs respectfully urge the Court to rule that they are entitled to a judgment as a matter of law, on the ground that the BOC’s interpretation of “TRE” is irrational, arbitrary and capricious in its “judgment” that the presence of General Services at the Beach is designed to “attract tourists” and/or business travelers to the County.

III. BOC “Judgments” That Expenditures For General Services Qualify as “TRE” Would be Arbitrary and Capricious and/or in Disregard of the Act, and Therefore Constitute an Abuse of Discretion.

County officials have repeatedly stated that the discretionary power, or “judgment” standard as referred to herein, in the “TRE” definition grants the BOC absolute authority to spend OT proceeds any way they want. However, the Supreme Court has stated:

“While it is a well recognized principle of law with us that the courts will not ordinarily interfere with the discretionary powers conferred on municipal corporations for the public welfare, still when the actions of such corporations become *so unreasonable as to manifest an abuse of such discretion, the courts will furnish relief to one aggrieved thereby. The discretion vested in municipal corporations is not entirely without limitation.* It must be exercised at least in good faith and be free from ulterior motives. It is not consonant with our conception of municipal government that there should be no limitation upon the discretion granted municipalities, and that no remedy is left to him who may be injured by an abuse thereof.”

Efird v. Com’rs of Forsyth Co., 219 N.C. 96, 106, 129 S.E.2d 889, 896 (1941).

(Emphasis added.)

This argument focuses on the BOC’s failures to exercise its TRE “judgments” in

a good faith manner that is consistent with its duties as a deliberative body. It will first analyze the North Carolina case law applicable to public officials' abuse of discretion. Under that case law, the standards to determine such abuse are based on whether the officials failed to exercise due care and diligence in taking official actions, or acted arbitrarily or capriciously and/or in disregard of the law.

Secondly, it will demonstrate, based on the documents produced by the County in discovery and in response to CCA's 2018 Public Records request, and based on its officials' depositions and on the minutes and videos of BOC meetings, that the BOC failed to exercise due care and diligence in its appropriations of OT proceeds for General Services by failing to request and/or consider data or other information necessary to formulate a rational "judgment," as well as failing to properly discuss and articulate at public meetings its collective "judgment" in making "TRE" determinations.

A. The Case Law Standards On Public Officials' Abuses of Discretion

The leading and often-cited Supreme Court case on this subject is *Burton v. City of Reidsville*, 243 N.C. 405, 90 S.E.2d 700 (1956). The Court, while paying deference to public officials' discretion, laid down the following test for determining an abuse of discretion: "[a] court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law. *Pue v. Hood*, Comr. of Banks [222 N.C. 310, 22 S.E.2d 896 (1942)]." 243 N.C. at ---, 90 S.E.2d at 702 . (Emphasis in the original.)

The *Burton* case involved a decision by a City Council to tear down apartment houses owned by the City that were situated on land owned by third parties who were demanding one-half of the rents. The Court stated: "The disposition of the apartment

houses described in the complaint . . . rests within the sound discretion of the defendant members of the Council” *Ibid.* It cited as authority *In re Housing Authority*, 235 N.C. 463, 70 S.E.2d 500, at 503 (1952), which will be discussed below.

Despite its deferential language respecting the discretion of public officials, the Court in *Burton* reversed the lower court’s dismissal of the complaint and remanded the case for a factual finding on the merits. This was because the Court had found that facts had been alleged that could be found at trial to constitute an abuse of discretion, due to the City officials’ failure to consider material factors in reaching their decision. The Court stated :

“Here there is evidence the individual defendants [the City Council members] declined to consider the purchase of the land on which the apartments are located, or a public sale of the land and buildings with an equitable division of the proceeds of sale, or to make any offer of any type to the landowners. The resolution ordering that the buildings be torn down makes no provision for salvaging the lumber and other material. While the buildings are temporary structures, there is evidence that the interiors of the apartments are quite presentable, and the exterior can be made so.” *Id.* at 703.

Before examining the post-*Burton* progeny, we note two significant cases cited in that decision. The first, *Pue v. Hood*, *supra*, was cited for the statement that “a court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily *or* in bad faith *or* in disregard of the law.” (Emphasis added.) The case involved the denial by the Commissioner of Banks of an application for a charter to establish a bank, and the Court upheld the denial, based on the failure of the complaint to state a valid claim.

In re Housing Authority, supra, the second decision cited in *Burton*, described in detail the standards applicable to an abuse of discretion. The case involved a decision by housing authority commissioners to select a portion of a college campus as the site for a housing project. The Court noted that “[I]n determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of eminent domain is delegated.” 70 S.E.2d 500, at 502. It continued:

“Indeed, so extensive is this discretionary power of housing commissioners that ordinarily the selection of a project site may become an issuable question, determinable by the court, on nothing short of allegations charging arbitrary or capricious conduct amounting to abuse of discretion. [Citations omitted.] *However, allegations charging malice, fraud, or bad faith in the selection of a housing project site are not essential to confer the right of judicial review. It suffices to allege and show abuse of discretion.*

* * *

“The allegations set out in the amendment to the answer filed by the respondent . . . are sufficient to put to test, for determination by the court, the *question whether the action of the Housing Commissioners in selecting the campus site was arbitrary or capricious amounting to a manifest abuse of discretion.*” *Ibid.* (Emphasis added.)

The Court defined the terms “arbitrary” and “capricious” as essentially synonymous, stating:

“‘Arbitrary’ means fixed or done capriciously or at pleasure. *An act is arbitrary when it is done without adequate determining principle; not done according to reason or judgment, but depending upon the will alone,—absolute in power, tyrannical, despotic, non-rational,—implying either a lack of understanding of or a disregard for the fundamental nature of things.* [Citation omitted.]

“‘Capricious’ means freakish, fickle, or arbitrary. *An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.* [Citation omitted.] ‘Arbitrary’ and ‘capricious’ in many respects are

synonymous terms. When applied to discretionary acts, they ordinarily denote abuse of discretion, though they do not signify nor necessarily imply bad faith.” Id. at 503. (Emphasis added.)

The Court then proceeded to scrutinize the steps taken by the commissioners to exercise their judgment. It concluded:

“It thus appears that substantial evidence was offered tending to show that the Housing Commissioners *either failed to understand or disregarded the ill effects and harm likely to come* to Livingstone College as a result of locating on its campus a public housing project. The testimony tends to support the inference that they *failed to consider the contributions this college is making* toward curing the very social and economic ills which public housing is designed to minimize.

“The evidence offered in the trial below, when considered in its light most favorable to the respondent, as is the rule on motion for a directed verdict, was sufficient to overcome the motion and sustain the jury in finding that the Commissioners of the Housing Authority *acted arbitrarily and capriciously* in selecting the campus site for the location of the housing project.” *Id.* at 504. (Emphasis added.)

The Court also held that the abuse of discretion issue should be determined by the jury by “the preponderance of the evidence,” and not by the “clear and convincing” standard that had been asserted by the commissioners. *Id.* at 504-05.

The Supreme Court has consistently applied the abuse of discretion standards established in *Burton, Pue v. Hood* and *In re Housing Authority* in subsequent decisions. In *State ex rel. Comm’r of Ins. v. NC Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, at 572 (1980), it stated: “Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are ‘whimsical’ because they indicate a lack of fair and careful consideration; [or] when they fail to indicate ‘any course of reasoning and the exercise of judgment . . . [citation omitted].”

Thus, according to the Supreme Court, the principal basis for finding officials' action to be arbitrary or capricious is that it is "not done according to reason or judgment," or is done either with a lack of understanding or careful consideration of, or a disregard for, the surrounding facts or circumstances or the applicable legal principles.

Painter v. Wake County Bd. of Ed., 288 N.C. 165, 217 S.E.2d 650 (1975), a significant post-*Burton* case, represents another example where, despite paying deferential language to governing bodies' actions, the Court reversed the lower court and remanded the case for trial of a complaint that alleged arbitrary and capricious action by a board of education.

The issue in *Painter* involved a school board's decision to swap County-owned property for a privately owned tract as a site for a new school. The plaintiffs alleged that the value of the property owned by the County was two and a half times larger than the property being acquired. The Court stated: "The Board's discretion with reference . . . [to selection of a school site] cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law." 217 S.E.2d at 657. However, in direct reliance on *Burton* (the facts of which were closely analogous to *Painter*'s), it remanded the case for trial, stating: "The trial court should find the facts and render its judgment on the facts found as to whether the Board abused its discretion in proposing the exchange." 217 S.E.2d at 660.

The *Painter* decision is also significant because it clarified the meaning of "manifest abuse of discretion," a term frequently used in abuse of discretion decisions (including *Burton*). As noted above, the Court began its analysis by noting that official

action “cannot be restrained by the courts *absent a manifest abuse of discretion* or a disregard of law.” However, it then remanded the case, citing *Burton*, for a determination whether the public officials “*acted capriciously or arbitrarily* or in bad faith or in disregard of the law.” In effect, this equated “capricious or arbitrary action” and “manifest abuse of discretion.”

The *Burton* standards for determining public officials’ abuse of discretion – “whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law” -- have continued into modern times. See, e.g., *Mann Media v. Randolph Co.*, ___ N.C. ___, 565 S.E.2d 9 (2002); *Act-Up Triangle v. Comm’n For Health Servs.*, 345 N.C. ___, 707, 483 S.E.2d 388, at 393 (1997); *Granville Co. v. NC Hazardous Waste Comm’n*, 329 N.C. 615, 407 S.E.2d 785, at 790 (1991); *State ex rel. Comm’r of Ins. v. NC Rate Bureau*, *supra*, at 572 (1980); *Alamance County v. N.C. Dep’t of Hum. Res.*, ___ N.C. App. ___, 294 S.E.2d 377, at 378 (1982); and *Reese v. Mecklenburg Co.*, 58 N.C. App. ___, 694 S.E.2d 453, at 462 (2010). See, Markham—*A Powerless Judiciary? The North Carolina Courts’ Perceptions of Review of Administrative Action*, 12 N.C. Central L.R. 21, at 29-30 (1980).

Reese v. Mecklenburg Co., *supra*, is the most recent reported decision concerning public officials’ abuse of discretion, and it clearly followed the *Burton* standards. *Reese* involved multiple abuse of discretion allegations against public officials, in a case brought by a real estate developer relating to a county development project. The claims all essentially took issue with the plaintiff’s grievances about business decisions made by the county in approving the project. The Court upheld the lower court’s dismissal of the

claims, based on *Alamance County v. N.C. Dep't of Hum. Res.*, 294 S.E.2d 377 (1982).

The Court stated:

“[T]he trial court applied the correct legal standard in ruling on Defendants’ motion for judgment on the pleadings. *Alamance Cty.*, 58 N.C.App. at 749, 294 S.E.2d at 378 (stating that the courts have no authority to intervene in discretionary actions by governmental bodies “*in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority*”). 694 S.E.2d at 462. (Emphasis added.)

The Court in *Reese* also dismissed one claim due to the fact that it “simply fails to allege a manifest abuse of discretion on the part of the County.” 694 S.E.2d at 462. Thus, the *Reese* decision adopted the *Burton* abuse of discretion standards. Moreover, it also cited *Painter v. Wake County Bd. of Ed.*, *supra*, in which, citing and quoting the *Burton* standards, the court remanded the case for trial for a determination whether the public officials “*acted capriciously or arbitrarily or in bad faith or in disregard of the law.*” 217 S.E.2d at 660 (emphasis added). Accordingly, the *Reese* decision clearly reaffirms that the *Burton* standards continue to apply to abuse of discretion determinations.

The cases discussed above all share a common theme – public officials who have acted arbitrarily or capriciously or in disregard of the law (although “they do not necessarily imply bad faith” – see *In re Housing Authority*, *supra*), have abused their discretion by their failure either to understand or to diligently consider the relevant factors in deliberating on their actions.

B. The BOC Abused its Discretion by Arbitrarily Failing to Exercise Due Care in its OT Expenditures For General Services and Failing to Exercise Its

“Judgments” in Public Meetings Without Openly Discussing Their Rationale For Such Expenditures or Without Consideration of Pertinent Factual Information

This section of Part III will demonstrate the BOC’s abuse of its discretion in its appropriations of OT proceeds for General Services. The decisions cited above under “*Case Law*” all support that conclusion.

(1) Failure of the BOC to Consider the Elements of the Definition of “TRE.” The County’s document production and deposition testimony of County officials in this case, as well as the minutes and videos of BOC and TDA meetings, also demonstrate that the BOC abused its discretion by failing to consider carefully in its public meetings the elements of the definition of “TRE” that were necessary to exercise their “judgment” that General Services were eligible for OT funding under the Act. These key TRE elements include increasing the use of lodging and other tourism facilities by attracting tourists and/or business travelers to the County.

On January 25, 2018, CCA’s counsel submitted to the County a detailed records request under the Public Records Act, N.C.G.S., ch. 135. Paragraph 2 of that request sought, with respect to the period from July 1, 2010, through December 31, 2017, all documents and communications that, among other things, “related to any proposed or actual use or expenditure of the occupancy tax” (other than for promotions). It also stated:

“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, *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 *standard or factors under which any proposed or actual use or expenditure was evaluated . . .*” *Ibid.* (Emphasis added.)

The County provided over 5,000 documents in response to CCA’s request. It also produced over a hundred documents in response to Plaintiffs’ 2020 discovery request for documents (similar to those requested in CCA’s 2018 request) covering the period from January 1, 2018 to the date of that request.

Plaintiffs’ Affidavit (para. 9) evidences that the County’s responses to these requests were as follows:

“*[N]one* of the documents . . . contained any of the information that was requested pertaining to whether the County’s use of OT proceeds for public safety services and equipment met the OT statute’s prescribed limitations upon such use under the 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 such services or equipment were to be considered, (a) relating to any rationale or justification of how the proposed public safety services and equipment 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 services or equipment in the . . . COBX, or (c) indicating how the tourist ‘season’ should be determined for purposes of the BOC’s annual appropriations of OT proceeds to fund allegedly ‘seasonal’ appropriations for such services and equipment, or (d) 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 tourist ‘season,’ or (e) specifying the degree to which the demand for public safety services in the COBX area exceeded the normal demand in non-tourist areas with equivalent numbers of homes, or (f) indicating that BOC members understood that using OT for public safety purposes would avoid an unpopular increase in the County’s property tax rate.”

The Affidavit (see para. 9) describes the inadequacy of the County’s responses to these requests, including that none “contained any of the information that was requested

pertaining to whether the County's use of OT proceeds for General Services met the OT statute's prescribed limitations upon such use under the definition of 'TRE.'"

In addition, CCA's 2018 Public Records request asked the County to confirm that the minutes of the BOC and the TDA on the County's web site were accurate and complete, and the County confirmed that in its response. The Affidavit (see para. 11) indicates that CCA's Legal Committee members reviewed the minutes and agenda packets of all of the meetings of the County's BOC and TDA since January 1, 2006 through June 2020, and viewed the videos of all of their meetings since they were first posted beginning in January 2015.

However, the reviewers state in Plaintiffs' Affidavit (*ibid.*) that they "*never found any mention*" over more than a decade regarding (a) the 2004 amendment of the Act or its effects, or (b) how any OT-funding of General Services met the definition of "TRE," or (c) any factual basis on which the BOC could reasonably have exercised its collective "judgment" as to whether a proposed expenditure met the statutory test for OT funding. Five Commissioners (a majority of the current BOC) and the Finance Director were deposed by Plaintiffs, and their testimony is summarized in the Affidavit Appendix. Although the summaries are lengthy, the Plaintiffs strongly urge the Court to review that testimony, which shows in the Commissioners' own words their unfamiliarity of the elements of a "TRE" determination and illustrates how they have abused their discretion in their appropriations of OT proceeds for General Services.

The Commissioners' lack of comprehension of the legal standards for appropriating "TRE" is amply illustrated by their inability to provide a merit-based

understanding of the definition of that term. The following examples reflect their responses after Plaintiffs' counsel showed them a copy of the Act's definition and asked them to explain their understanding of the term (see the Affidavit Appendix, para. (A)):

- “anything that supports, attracts and ultimately benefits tourism” (Ms. Jarvis)
- “anything that we – I – see in my judgment as being tourism, tourism-related and tourist-supported” (Mr. O. Etheridge)
- “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” (Ms. K. Etheridge)
- “anything that supports or promotes tourism is a TRE” (Mr. White, the BOC Chairman)
- “anything to promote travel and tourism for Currituck County” or “anything to promote what Currituck . . . has to offer” (Mr. McCord)

The Commissioners' total disregard of the “TRE” definition is even more striking in their responses as to why, at a meeting on May 20, 2019, they appropriated \$100,000 as a legal defense fund for this lawsuit, which clearly could not conceivably constitute “TRE.” The Commissioners were asked to justify this expense as “TRE” and four replied (Mr. McCord had no recollection of this appropriation, even though the meeting minutes noted his vote in the affirmative) as follows (*ibid.*):

- “I believe our defense of how we can use OT has a direct bearing on the future of any tourist industry in Currituck County.” (Ms. Jarvis)
- I “do not recall” what this appropriation was for, but “if hypothetically” it 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.” (Mr. O. Etheridge)
- “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.” (Ms. K. Etheridge)
- It is “imperative that we keep and defend our authority the way it is . . . and “if you take that money away, you’re going to have a tax increase for citizens of the County.” (Mr. White)

The Commissioners' explanations in their depositions of how tourists are “attracted” to the County by its General Services are equally divorced from any rational analysis of the “TRE” definition. (See the Affidavit Appendix, para. 2.) They contain

such comments as: “the spirit of the law is it’s not enough to get them [referring to tourists] here one time. We want them to return” (Ms. Jarvis); “nobody wants to go to a dangerous beach in terms of crime, . . . such as thefts, muggings, things of that nature” (Mr. O. Etheridge); “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” (Ms. K. Etheridge); “tourists are attracted by safety” (Mr. White); and “I think the safety” is what attracts them (Mr. McCord).

The Commissioners’ misunderstanding of “TRE” is also evident from the numerous references in their depositions to other activities that they believe may legally be funded by OT proceeds, such as: EMS services on the Mainland (all of the Commissioners supported this); General Services personnel on the Beach “in the wintertime,” because “it was our duty to protect” the property owners’ investments in the Beach (Mr. O. Etheridge); and the need for “increased presence [of Sheriff deputies] . . . in the off-road area to protect the property” (Mr. White). (See the Affidavit Appendix, para. 1.)

Section (4) below casts substantial doubt as to whether the BOC regularly (or ever) “discussed and deliberated” its “TRE” appropriations. However, the level of the discussion of the above issues in the Commissioners’ depositions demonstrates that they did not have a sufficient understanding of “TRE” to conduct a coherent and intelligent discussion of the relevant issues to make a rational determination of TRE under the Act.

Although the Commissioners are laymen, their ignorance of the law can be no excuse in their performance of their sacred duties under the law. The State Constitution provides: “Every act of the General Assembly levying a tax shall state the special object

to which it is to be applied, and *it shall be applied to no other purpose.*” N.C. CONST, art. V, § 5 (emphasis added). The Local Government Finance Act provides that county commissioners are held to the following standard in adopting a budget ordinance: “No appropriation may be made that would require . . . expenditures of revenues for purposes not permitted by law.” N.C.G.S. § 159-13(b)(4). The Commissioners should have consulted with counsel on these matters, but it appears that either they did not, or they did not understand any competent advice they were given concerning the meaning of the Act’s definition of the term “TRE.” The Commissioners’ appropriation of OT funds deserves full transparency and special scrutiny, given their inherent conflict of interest in their dual roles as the body that determines the County’s budget and their acting as the only members of the TDA who are authorized under the Act to appropriate OT funds as TRE.

(2) Lack of Diligence in Appropriating OT for Summer Season at the Beach.

One of the most glaring examples of the BOC’s lack of diligence in appropriating OT funds for General Services is that for at least the last ten years it has relied on grossly overstated projections by the County Managers of the costs of “seasonal” Sheriff and EMS personnel at the Beach during the summer. In addition the BOC showed a lack of due diligence by never asking for or being shown the Sheriff and EMS readily available call data that would have indicated that even when the Beach vacation homes were full of owners and guests during the summer there was less Sheriff and EMS call demand per house than in the rest of the County. Taking this evidence in a light most favorable to the Defendants, it cannot be denied that history serves to show the need for General Services on Currituck OBX does not greatly outweigh the need for these services in other parts of

the County at any point during a fiscal year. These facts, however, are entirely contradictory of the rationale presented to and used by the BOC in exercising its judgment to expend OT funds on these General Services.

In the video records of BOC budget approval meetings since 2015, the County Managers repeatedly assured the BOC that the purpose of OT-funding of General Services at the Beach was solely to pay for the *incremental* costs of extra Sheriff and EMS personnel during the summer. A typical statement said the funding was for “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). (Emphasis added.) (See Plaintiff’s Affidavit, para. 9), which quotes the relevant language used by the County Managers for the last six fiscal years’ video recorded budget presentations.)

However, the Plaintiffs’ Affidavit (see *ibid.*) provides documentary evidence that all of those assurances were false and reveals that the annual OT appropriations for these purportedly “seasonal” services were actually almost equal to the *total* personnel costs (including salary and benefits) of *all Sheriff and EMS personnel assigned to the Beach area for the entire year*. This evidence is in the form of internal County email messages, as reported in documents produced by the County in response to either the Public Records Request or the Plaintiffs’ discovery requests. (See **Exhibit A** that is attached to Plaintiffs’ Affidavit.)

Plaintiffs’ Affidavit (see para. 9) explains in detail a table (the “PS Costs Table”) that presented data (taken solely from County documents) showing (a) the County’s audit

reports of the total annual Sheriff and EMS costs actually expended *for the entire County* (Col. 1), (b) the OT amounts transferred to the General Fund annually since FY 2010 for General Services (Col. 2), (c) the full *annual* personnel costs for *all* General Services personnel assigned to the Beach area, based on the projections in the County email messages referred to above (in the case of Sheriff costs for FY's 2012 and 2013) and based on the County's response to an Interrogatory (in the case of EMS costs for FY's 2015-20) (Col. 3), and (d) data from a spreadsheet prepared by the County Finance Director (2012 version) that showed past costs since FY2008 and projected the full annual costs from FYs 2010 through 2021 for all General Services personnel assigned to the Beach area (Col. 4).

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" that were funded by OT proceeds actually reflected the *total annual costs of all General Services personnel assigned to the Beach area* (with an additional non-projected funding in a few years for Sheriff vehicles), and (2) the amounts appropriated each year by the County (see Column 4) for the entire period from FY2010 through FY 2021. (This is proved by the strong correlation of the amounts in Columns 2, 3 and 4 for both Sheriff and EMS costs, as illustrated in the Table.)

In the case of EMS, there are two notable deviations from the County's earlier projections. One is the almost \$400k increase in FY 2018, due to the BOC's decision in June 2018 to fund the startup costs of the newly-created Corolla Fire Service District. The other deviation is reflected in the *decreases* shown in Column 3 for EMS personnel costs in FY 2019 and projected in the budgets for FYs 2020 and 2021. These resulted

from the new Fire Service District, which shifted the funding of the cost of EMS services from OT funds to a special tax on Corolla property owners. Surprisingly, 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 \$1.6 million in FY 2020 and \$1.65 million in FY 2021, respectively.

In their deposition testimony, the five Commissioners all denied that OT-funding of General Services at the Beach was designed to pay *only* for the increased tourist presence in the *summers*, and all said they did not “recall” the County Manager’s budget presentations for at least the last six fiscal years that OT was appropriated only for the incremental costs of General Services for the summer. (Some may infer whether these memory lapses were due to the fact that the County’s internal 2012 cost projections for Beach General Services costs had been disclosed to the Plaintiffs during discovery. That revealed that the BOC had been appropriating OT, purportedly for each “season,” that was substantially equal to the *annual* costs of *all* of the Sheriff and EMS personnel that were assigned to the Beach area.)

The Commissioners’ testimony regarding the “seasonal” OT funding of General Services at the Beach is summarized in the Affidavit Appendix, para. 10(C). That testimony shows that they denied that General Services is subject only to a “summer season,” and claimed variously that OT funding of General Services is “to cover the costs per year that it takes to keep our visitors safe”; “we’re looking now at almost year-round season”; or “you have to have them [referring to General Services personnel] year round.”

The Commissioners' testimony (summarized in the Affidavit Appendix, para. 10(D)) revealed even greater confusion in attempting to explain why the amounts of OT appropriations for EMS in FYs 2018-21 were *greater than* the amounts that their discovery documents disclosed had actually been spent (or budgeted to be spent) on EMS personnel costs during that period. (The OT appropriation for each year was about \$1.6 million, but col. 3 of the PS Costs Table showed that only \$1.1k, \$535k and \$529k, respectively, was spent (or budgeted to be spent) on EMS personnel during the period.) The Finance Director testified that the deviation was due to the fact that "some funds were transferred directly to EMS and some into the Fire District funds." This may be a plausible explanation, although it highlights the County's lack of transparency in violating the Act by transferring OT proceeds into the General Fund and then diverting the funds to other accounts without further BOC action.

The Commissioners' testimony was very confused on this issue. When asked about the discrepancies in the 2018-21 EMS figures, one said that the unexplained OT appropriated funds "may have been for equipment costs"; another said, simply: "I can't answer that"; another did "not know"; another said simply that "it was split, I believe, between EMS and fire personnel" (although he could not explain why OT went to fire personnel after the new Corolla Fire Service Special Tax District had been formed and provided for the District's services to be funded by taxpayers in the District); and the fifth said: "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." (*Ibid.*)

The relevant issue here is not *how* these OT proceeds were funneled through the County's General Fund and became expenditures for EMS personnel. That issue is irrelevant to the legal issues in this Motion, in which Plaintiffs contend that (a) the Act prohibited not only the deposit of TDA funds into the County's General Fund but also the appropriation of such funds for General Services, and (b) the BOC abused its discretion by its failure to understand how its appropriated funds were administered and spent. It is important to note that these sizeable EMS deviations *occurred over a period of three fiscal years*, and yet five Commissioners have testified that they did not know how those funds were spent. This evidences their abuse of discretion in failing to understand and explain what was happening to those funds, and their failure to inquire into the details of the application of OT proceeds during that period.

This key element of abuse of discretion is evidenced by the fact that no Commissioner questioned the million dollar-plus amounts proposed as seasonal increased costs, nor did they ask for or were provided with the readily available Sheriff or EMS personnel data that would have shown that the proposed rationale was false.

Plaintiffs' Affidavit (para. 11) provides numerous other examples of the BOC's careless attitude in appropriating OT for General Services. These include its appropriations (a) at a February 5, 2018 meeting of \$111,000 for the purchase of Sheriff vehicles, simply because they were said to be for "the Beach," without further discussion or analysis, and (b) at May 20, 2019 BOC and TDA meetings of \$100,000 for a "legal defense reserve" for the County's defense of the present lawsuit, without any discussion of how that might constitute "TRE" under the OT statute. The above examples and

others cited in the Plaintiffs' Affidavit evidence that, under the *Burton* case law standards, the BOC failed to "understand" or "carefully consider" the material factors relevant to their OT appropriations for General Services at the Beach and on the Mainland.

(3) BOC Failure to Meet Publicly to Appropriate OT Proceeds. A review of the County's meeting minutes and videos, as well as the materials it furnished in document production, and the Commissioners' deposition testimony, reveals that the BOC acted arbitrarily and capriciously and/or in disregard of the law, under the legal standards of the *Burton v. Reidsville* line of case law. This is because of the BOC's failure to conduct appropriate diligence in considering how the factors underlying the exercise of its "judgment" under the Act that OT-funding of General Services met the "TRE" criteria. By the standards of the definition of "arbitrary or capricious" under the *In re Housing Authority (supra)* and *Burton* decisions, the BOC's OT appropriations were enacted "either with a lack of understanding of or a disregard for the surrounding facts or circumstances."

Based on the absence of discussion of relevant TRE factors in the BOC meeting minutes and videos, it appears that the Commissioners *never met as a body* to consider the factors that would lead to their *collective* "judgment," as contemplated by the definition of "TRE," that their appropriations met the statutory test for the expenditure of OT proceeds. The issue arose on several occasions when members of the public challenged OT expenditures at BOC meetings, and the Commissioners turned to the County Manager for advice concerning whether in his opinion an OT funding qualified as

“TRE.” In at least one instance, a Commissioner and the County Manager invoked the County’s Independent Auditor as authority for the legality of all OT fundings. (See para. (5) below, and see Plaintiffs’ Affidavit, para. 11 (third bullet point).) This raises the question – How could the BOC have ever reached a collective “judgment” on “TRE” without ever publicly discussing the subject among themselves as a group?

Plaintiffs maintain that it is reasonable to interpret the Act as imposing a requirement that the Commissioners *discuss or deliberate* together and reach a *collective judgment* that each OT-funding meets the TRE test. (The definition of “TRE” calls for a “judgment” by the *BOC itself*, not by the individual Commissioners.) However, based on the County’s discovery documents and the minutes and videos of BOC and TDA meetings and on the deposition testimony, there is *absolutely no evidence* that they complied with this requirement. (Plaintiffs do not claim that the NC Open Meetings Law, § G.S. 143-318, necessarily requires the Commissioners to “deliberate” on all their rulings. However, they do claim that public deliberation of the rationale for the BOC’s “judgment” *is inherently required* by the language of the definition of “TRE,” which calls for the exercise of the BOC’s *collective* “judgment” under the Act.)

The County’s responses to Plaintiffs’ discovery requests admit that the BOC failed to disclose publicly its rationale for General Services OT appropriations. An Interrogatory requested it to admit that the BOC and the TDA “never documented in writing its rationale or basis” for such appropriations. The County responded: the Defendants “expressly deny” that the Act “requires the . . . [BOC] to document in writing its rationale for approving the use of occupancy tax proceeds.” In another Interrogatory,

the County was requested to “describe with specificity” “any measures” taken by the BOC or the TDA to “ensure that approval” of OT expenditures for General Services “was in accordance with” the OT statute. It responded that “all budgets and amendments are voted in open BOC meetings, and that, “[i]n so doing, the Board of Commissioners has expressed its judgment that approved expenditures” of OT proceeds “comply with the requirements of” the OT statute. (Emphasis added.) Therefore, the County claims that the BOC does not have to publicly reveal its rationale or basis for such “judgments,” and that the *vote itself* constitutes the “expression of its judgment.”

The word “designed” is another key term in the definition of “TRE” (“expenditures that *in the judgment of the Board of Commissioners are designed* to increase the use of lodging” and other facilities “by attracting tourists or business travelers”). That term reinforces the conclusion that the Commissioners must act *collectively* in exercising their judgment in appropriating OT for TRE. The term “design,” when used as a verb, is defined in the Merriam-Webster dictionary as “to create, fashion, execute, or construct according to plan.” (See <https://www.merriamwebster.com/dictionary/itemize> (last visited 11/28/20).)

Plaintiffs contend that the “TRE” definition necessitates that the Commissioners assemble together *as a group* in a public meeting to “judge” whether a particular expenditure is “designed” to increase the use of certain facilities by attracting tourists to the County. The Act does not contemplate that the Commissioners may, within the meaning of the “TRE” definition, *individually* examine a proposed expenditure and determine its “design” and its legitimacy, without discussion or deliberation of the question among the Commissioners at a public meeting. How could the *BOC itself* have

a “design” or a “plan” or a “judgment” if the Commissioners do not meet publicly to discuss the issues on which they are going to vote? An accumulation of the Commissioners’ *individual* judgments (without any stated rationale or basis) would not satisfy the definition’s requirement of a *collective* “judgment” by the “Board” itself, based on a “design” determined by the Board.

(4) Implausibility of the County’s Claims that All “TRE” was “deliberated” at Work Sessions. The County has claimed, in response to an Interrogatory requesting specifics about the “voting process” for approving TRE, that the BOC “discuss and deliberate on the utilization of occupancy tax proceeds during budget work sessions” prior to the BOC’s “public hearing on the proposed budget.” There are no video or audio recordings or minutes of such meetings. Nor were any documents / briefing materials used in these sessions provided as part of Plaintiffs’ Public Records and discovery requests.

First, it should be noted that this Interrogatory response is incomplete, because the BOC does not appropriate OT proceeds only at annual budget meetings. It adopts budget amendments throughout each fiscal year, including on “TRE” budget items. All of the Commissioners (other than Ms. Jarvis) testified in their depositions that deliberations took place at public “work sessions” preceding all TRE determinations. However, Chairman White, when asked if there were “in the last few years” any “substantial discussions or deliberation amongst the board concerning the validity of those transfers of OT from Sheriff and EMS,” 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.”

Commissioner White's statement is startling, because one Commissioner (Mr. McCord) took office in November 2018 (he had also served as Commissioner from 2012 to July 2014), and another (Ms. Jarvis) took office in January 2019. The Chairman's comment suggests that these two more-recently elected Commissioners never participated in a public deliberation of the BOC's OT appropriations for General Services during their current service. Significant TRE appropriations took place during that period, including the ongoing transition of fire and EMS services to the Corolla Fire Service District in the 2020 and 2021 Fiscal Years. (In fact, Ms. Jarvis testified that she did not "recall specific conversations that the Board had about" TRE, and Mr. McCord, when asked whether "actual deliberation" occurred at BOC meetings or work sessions, replied "I would say there was [*sic*] questions," but he declined to say whether there were "discussions.") (See the Affidavit Appendix, para. (E), for a summary of the five Commissioners' testimony on this subject.)

The County's and some Commissioners' assertions that OT appropriations were routinely discussed and deliberated in public "work sessions" is highly implausible, for several reasons. First, members of the CCA Legal Committee state in Plaintiffs' Affidavit that they attended a number of work sessions concerning the annual budget, and they did not witness any "deliberations" of General Services TRE matters. (See Plaintiffs' Affidavit, para. 13.) Second, Mr. White's comments noted above concerning the BOC's failure to deliberate any TRE appropriations for General Services during the tenure of its two newest Commissioners indicates that there were no TRE deliberations on the amounts of OT appropriations for General Services during the "last few" fiscal years.

Third, any claims that the Commissioners regularly deliberated on “TRE” in work sessions that preceded BOC/BOC appropriations seems also to be belied by the absence of any emails or other communications by or to the Commissioners prior to any such work sessions. This is because no such communications or relevant documents used in these meetings were produced in the County’s responses to the Public Records and discovery requests, which had specifically requested such documents. (See Plaintiffs’ Affidavit, paras. 9 and 13). It seems highly implausible that there would have been no written communications evidencing such work sessions and no sharing of any documents before they occurred.

Finally, the Commissioners’ competence to deliberate “TRE” issues in work sessions is highly questionable, in view of their unfamiliarity with the standards of the definition of the term “TRE” (as evidenced by their deposition testimony).

(5) BOC Failure to Obtain Independent Legal Advice; and Mistaken BOC Reliance on County Auditor to Approve Legality of TRE Appropriations. It is also noteworthy that none of the documents produced by the County pursuant to the Public Records request or Plaintiffs’ discovery requests indicated that the Commissioners or County staff had ever sought or obtained independent legal advice as to (a) the effects of the 2004 amendment of the previous OT statute that had deleted from the Act 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. (See Plaintiffs’ Affidavit, para. 9.)

As noted above, at a June 18, 2018 BOC meeting, the Commissioners invoked the authority of its Independent Auditor as a basis for its belief that its TRE appropriations have complied with the Act. (See Plaintiffs Affidavit, para. 11 (2nd bullet point).) In their depositions, two of the five Commissioners, as well as the Finance Director, testified that the Report of the County's Independent Auditor on its Annual Financial Statements *confirms* the legality of the BOC's OT expenditures. This reliance is an egregious example of the Commissioners' lack of diligence in performing their duties, including a lack of understanding of what a County audit verifies. The guidelines of the American Institute of Certified Public Accountants are clear that "the auditor is not responsible for preventing noncompliance and cannot be expected to detect noncompliance with all laws and regulations." AICPA Statement of Auditing Standards No. 122, para. .04. The Commissioners' failure to seek professional advice on this question is further evidence of their abuse of discretion in appropriating TRE.

Conclusion

The core of this action is that the Plaintiffs allege that the County Commissioners diverted restricted tax revenues for an illegal purpose.

It does not seem to be too much to require public officials who are disbursing restricted tax funds to carefully review pertinent and readily available data on service demand and cost and then discuss or deliberate in a public forum their rationale as to why such disbursements are statutorily authorized. In *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006), the Supreme Court held that two individual taxpayers had standing in a suit claiming that the Governor violated statutory and constitutional provisions by diverting tax levies

appropriated for one purpose but disbursed for another. The Court stated:

“We recognized as early as the nineteenth century that taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by officials. In *Stratford v. City of Greensboro*, a taxpayer sought to enjoin Greensboro city authorities from street construction that the taxpayer alleged was undertaken for the benefit of a private citizen rather than for the benefit of the public. * * * [Citations omitted.] We found ‘no serious question’ that a taxpayer had an equitable right to sue ‘to prevent an illegal disposition of the moneys of the county.’ * * * [Citations omitted.] We observed that ‘[i]f such rights were denied to exist against municipal corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities’ [citation omitted].” *Id.* at 880-81.

Plaintiffs’ case is based on the *Goldston* principles, and Plaintiffs contend that the County’s actions involving the unlawful diversion of restricted tax funds deserve special scrutiny of a process that should have been open and transparent. It is a sad state of affairs that aggrieved taxpayers have to bring a lawsuit against public officials merely to obtain a publicly disclosed rationale that justifies, within the terms of the Act, their expenditure over the last 15 years of more than of \$30 million of restricted tax funds for General Services. This amount is the single largest expenditure of occupancy tax proceeds by the County for any purpose.

Consequently, Plaintiffs respectfully urge the Court to rule that they are entitled to a judgment as a matter of law, on the ground that the BOC’s “judgments” that OT expenditures for General Services qualified as “TRE” constituted an abuse of discretion because (a) they were arbitrary or capricious and/or in disregard of the Act and the NC Constitution, due to their failure to understand or diligently consider the relevant factors

in deliberating on their actions, and (b) the BOC failed to exercise its “judgments” at public meetings, without openly discussing their rationale for such expenditures.

Plaintiffs, as the moving party for summary judgment, have the initial burden under Rule 56(c) of showing “that there is no genuine issue as to any material fact.” However, they are entitled to the requested judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,” show the absence of any genuine issue as to any material fact. *Ibid.*

Plaintiffs respectfully submit that they have met their initial burden. Consequently, “the burden shifts to the [non-moving] party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [they] . . . can at least establish a *prima facie* case at trial.” *Badin Shores Resort Owners Ass’n v. Handy Sanitary Dist.*, 257 N.C. App. 542, at 550, 811 S.E.2d 198, at 204 (2018) (citation omitted); see Rule 56(e). That decision continued: “When a motion for summary judgment is made and supported as provided in this rule [56(e)], an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, *must set forth specific facts showing that there is a genuine issue for trial.* If he does not so respond, summary judgment, if appropriate, shall be entered against him.” *Ibid.* (Emphasis added.)

Plaintiffs contend that the Defendants cannot sustain their burden of setting forth “specific facts” showing that a triable issue exists. This is because, first, there are no material factual issues involved in the argument under Part I of this Brief, and no County documents, depositions or arguments can possibly overcome the language of the Act that prohibits OT-funding of General Services. Plaintiffs have shown that the only reasonable

interpretation of the 2004 amendment of the Act is that it explicitly changed the purposes of the prior statute and prohibited the funding of General Services with OT proceeds.

Secondly, Plaintiffs' arguments in Parts II and III of this Brief have not been rebutted by any "specific facts" that the Defendants have been able to assert in response to Plaintiffs' case. Based on the Defendants' document production, discovery responses, deposition testimony and meeting minutes and videos, they cannot establish either that the BOC exercised due care and diligence in appropriating OT proceeds for General Services or that it exercised at public meetings its collective "judgments" that the funding with OT proceeds of General Services met the criteria set forth in the Act's definition of "Tourism-related expenditures." Nor is there any evidence that the Commissioners carefully considered or deliberated as a group regarding such criteria. Consequently, in authorizing such OT appropriations they abused their discretion by acting in an arbitrary or capricious manner and/or in disregard of the Act.

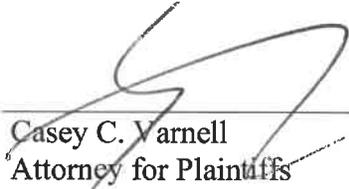
SUMMATION

WHEREFORE, Plaintiffs pray the Court to grant the Plaintiffs a summary judgment upon the Second Claim For Relief under the Complaint in this action, on the grounds that that there is no genuine issue of material fact and the Plaintiffs are entitled to judgment as a matter of law as shown by the pleadings, discovery, depositions, answers to interrogatories, admissions, and affidavits. Plaintiffs also pray that the Court issue a declaratory judgment that rules that Currituck County's expenditures of occupancy tax ("OT") proceeds for the purposes of funding General Services, as defined herein, are improper and unlawful under, and do not constitute "tourism-related expenditures" under the Act. In making the foregoing declarations the Plaintiffs respectfully request that

Defendants be required to replace *all* OT funds utilized by the Defendants for General Services during the statutory timeframe applicable to this lawsuit, which funds shall be deposited into the TDA Fund within sixty (60) days of the date of the Court's order.

RESPECTFULLY SUBMITTED, this the 20th day of September 2021.

SHARP, GRAHAM, BAKER and VARNELL, LLP



Casey C. Varnell
Attorney for Plaintiffs

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

SESSION LAW 2004-95
HOUSE BILL 1721

AN ACT TO ALLOW AN INCREASE IN THE CURRITUCK COUNTY OCCUPANCY TAX AND TO CHANGE THE PURPOSES FOR WHICH THE TAX MAY BE USED.

The General Assembly of North Carolina enacts:

SECTION 1. Section 1 of Chapter 209 of the 1987 Session Laws, as amended by Chapter 155 of the 1991 Session Laws and Chapter 155 of the 1999 Session Laws, is amended by adding a new subsection to read:

"(a2) Second Additional Occupancy Tax. – In addition to the tax authorized by subsections (a) and (a1) of this section, the Currituck County Board of Commissioners may levy a room occupancy tax of up to two percent (2%) of the gross receipts derived from the rental of accommodations taxable under subsection (a). The levy, collection, administration, and repeal of the tax authorized by this subsection shall be in accordance with the provisions of this act. Currituck County may not levy a tax under this subsection unless it also levies the tax under subsections (a) and (a1)."

SECTION 2. Section 1(e) of Chapter 209 of the 1987 Session Laws, as amended by Chapter 155 of the 1991 Session Laws, reads as rewritten:

"(e) Use of tax revenue. Currituck County shall use at least seventy five percent (75%) of the net proceeds of the tax levied under subsection (a) of this section only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services. tourism-related expenditures, including beach nourishment. The remainder of the net proceeds of the tax levied under subsection (a) shall be deposited in the Currituck County General Fund and may be used for any lawful purpose. Currituck County may shall use at least two-thirds of the net proceeds of the tax levied under subsection subsections (a1) and (a2) of this section, to the extent that they are needed, for capital costs, operation, and maintenance of the Currituck Wildlife Museum. Whatever is not needed for the capital costs, operation, and maintenance of the Currituck Wildlife Museum shall be used for tourist related purposes. As used in this subsection, 'net proceeds' means gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer. section to promote travel and tourism and shall use the remainder of those funds for tourism-related expenditures.

The following definitions apply in this subsection:

- (1) Beach nourishment. – The placement of sand, from other sand sources, on a beach or dune by mechanical means and other associated activities that are in conformity with the North Carolina Coastal Management Program along the shorelines of the Atlantic Ocean of North Carolina and connecting inlets for the purpose of widening the beach to benefit public recreational use and mitigating damage and erosion from storms to inland property. The term includes expenditures for any of the following:
 - a. Costs directly associated with qualifying for projects either contracted through the U.S. Army Corps of Engineers or

- otherwise permitted by all appropriate federal and State agencies.
 - b. The nonfederal share of the cost required to construct these projects.
 - c. The costs associated with providing enhanced public beach access.
 - d. The costs of associated nonhardening activities such as the planting of vegetation, the building of dunes, and the placement of sand fences.
- (2) Net proceeds. – Gross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer, not to exceed three percent (3%) of the first five hundred thousand dollars (\$500,000) of gross proceeds collected each year and one percent (1%) of the remaining gross receipts collected each year.
- (3) Promote travel and tourism. – To advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred in engaging in these activities.
- (4) Tourism-related expenditures. – Expenditures that, in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county. The term includes tourism-related capital expenditures and beach nourishment."

SECTION 3. Chapter 209 of the 1987 Session Laws, as amended by Chapter 155 of the 1991 Session Laws and Chapter 155 of the 1999 Session Laws, is amended by adding a new section to read:

"Section 1.1. Currituck County Tourism Development Authority. – (a) Appointment and Membership. – When the board of commissioners adopts a resolution levying a room occupancy tax under this act, it shall also adopt a resolution creating a county Tourism Development Authority, which shall be a public authority under the Local Government Budget and Fiscal Control Act. The Authority shall be composed of six members: five voting members and one ex officio nonvoting member. The ex officio nonvoting member shall be the county's designated travel and tourism representative. The voting members shall be as follows:

- (1) The county commissioner representing the Moyock Township.
- (2) The county commissioner representing the Crawford Township.
- (3) The county commissioner representing the Poplar Branch Township.
- (4) The county commissioner representing the Fruitville Township.
- (5) The at-large county commissioner.

(b) Administration. – The resolution creating the Authority shall designate one member of the Authority to serve as the initial chair and provide for the members' terms of office and for the filling of vacancies on the Authority. After the initial term, the Authority must elect a chair from among its members. The members of the Authority shall serve without pay. The Authority shall meet at the call of the chair and shall adopt rules of procedure to govern its meetings. The Finance Officer for Currituck County shall be the ex officio finance officer of the Authority.

(c) Duties. – The Authority shall expend the net proceeds of the tax levied under this act for the purposes provided in Section I of this act. The Authority shall promote travel, tourism, and conventions in the county, sponsor tourist-related events and activities in the county, and finance tourist-related capital projects in the county.

(d) Reports. – The Authority shall report quarterly and at the close of the fiscal year to the board of commissioners on its receipts and expenditures for the preceding quarter and for the year in such detail as the board may require."

SECTION 4. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 13th day of July, 2004.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

H

1

HOUSE BILL 1102

Short Title: Modify Currituck County Occupancy Tax. (Local)

Sponsors: Representative Owens.

Referred to: Finance.

March 28, 2007

A BILL TO BE ENTITLED

AN ACT TO MODIFY THE OCCUPANCY TAX FOR CURRITUCK COUNTY.

The General Assembly of North Carolina enacts:

SECTION 1. Section 1(e) of Chapter 209 of the 1987 Session Laws, as amended by Section 1 of Chapter 155 of the 1991 Session Laws, and as amended by Section 2 of S.L. 2004-95, reads as rewritten:

"(e) Use of tax revenue. Currituck County shall use at least seventy-five percent (75%) of the net proceeds of the tax levied under subsection (a) of this section only for tourism-related expenditures, including beach nourishment. Currituck County shall use at least two-thirds of the net proceeds of the tax levied under subsections (a1) and (a2) of this section to promote travel and tourism and shall use the remainder of those funds for tourism-related expenditures, tourist-related purposes, including construction and maintenance of public facilities and buildings; garbage, refuse, and solid waste collection and disposal, police protection, and emergency services. The remainder of the net proceeds shall be deposited in the Currituck County General Fund and may be used for any lawful purpose. As used in this subsection, "net proceeds" means gross

The following definitions apply in this subsection:

(1) ~~Beach nourishment.~~— ~~The placement of sand, from other sand sources, on a beach or dune by mechanical means and other associated activities that are in conformity with the North Carolina Coastal Management Program along the shorelines of the Atlantic Ocean of North Carolina and connecting inlets for the purpose of widening the beach to benefit public recreational use and mitigating damage and erosion from storms to inland property. The term includes expenditures for any of the following:~~

a. ~~Costs directly associated with qualifying for projects either contracted through the U.S. Army Corps of Engineers or otherwise permitted by all appropriate federal and State agencies.~~

- 1 b. ~~The nonfederal share of the cost required to construct these~~
2 ~~projects.~~
3 e. ~~The costs associated with providing enhanced public beach~~
4 ~~access.~~
5 d. ~~The costs of associated nonhardening activities such as the~~
6 ~~planting of vegetation, the building of dunes, and the placement~~
7 ~~of sand fences.~~

8 (2) ~~Net proceeds. Gross proceeds less the cost to the county of~~
9 ~~administering and collecting the tax, as determined by the finance~~
10 ~~officer, not to exceed three percent (3%) of the first five hundred~~
11 ~~thousand dollars (\$500,000) of gross proceeds collected each year and~~
12 ~~one percent (1%) of the remaining gross receipts collected each~~
13 ~~year.officer.~~

14 (3) ~~Promote travel and tourism. To advertise or market an area or~~
15 ~~activity, publish and distribute pamphlets and other materials, conduct~~
16 ~~market research, or engage in similar promotional activities that attract~~
17 ~~tourists or business travelers to the area; the term includes~~
18 ~~administrative expenses incurred in engaging in these activities.~~

19 (4) ~~Tourism related expenditures. Expenditures that, in the judgment of~~
20 ~~the Currituck County Board of Commissioners, are designed to~~
21 ~~increase the use of lodging facilities, meeting facilities, recreational~~
22 ~~facilities, and convention facilities in a county by attracting tourists or~~
23 ~~business travelers to the county. The term includes tourism related~~
24 ~~capital expenditures and beach nourishment."~~

25 **SECTION 2.** This act is effective when it becomes law.

STATE OF NORTH CAROLINA
COUNTY OF CURRITUCK

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

GERALD COSTANZO, COROLLA CIVIC ASSOCIATION, ET AL.)
)
)
Plaintiffs,)
v.)
)
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 Depart- ment 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).

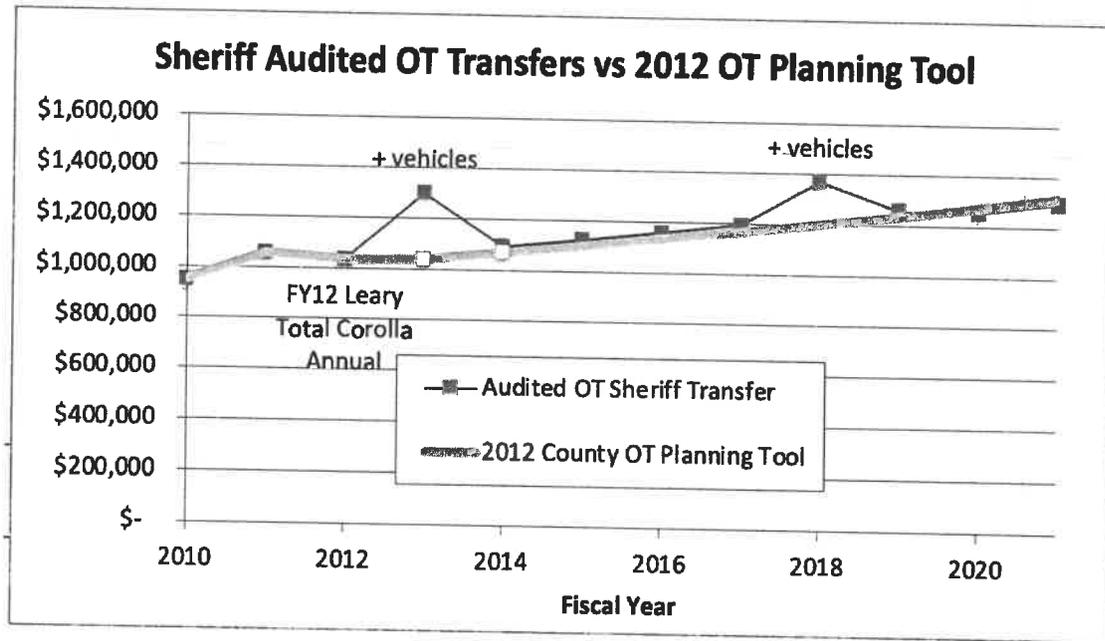
Column 2 shows the OT amounts reported in the County's audit reports that were transferred annually since FY 2010 from the TDA Fund to the General Fund for General Services costs. (These are the appropriations that the County Managers had consistently described to the BOC as merely for additional costs *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

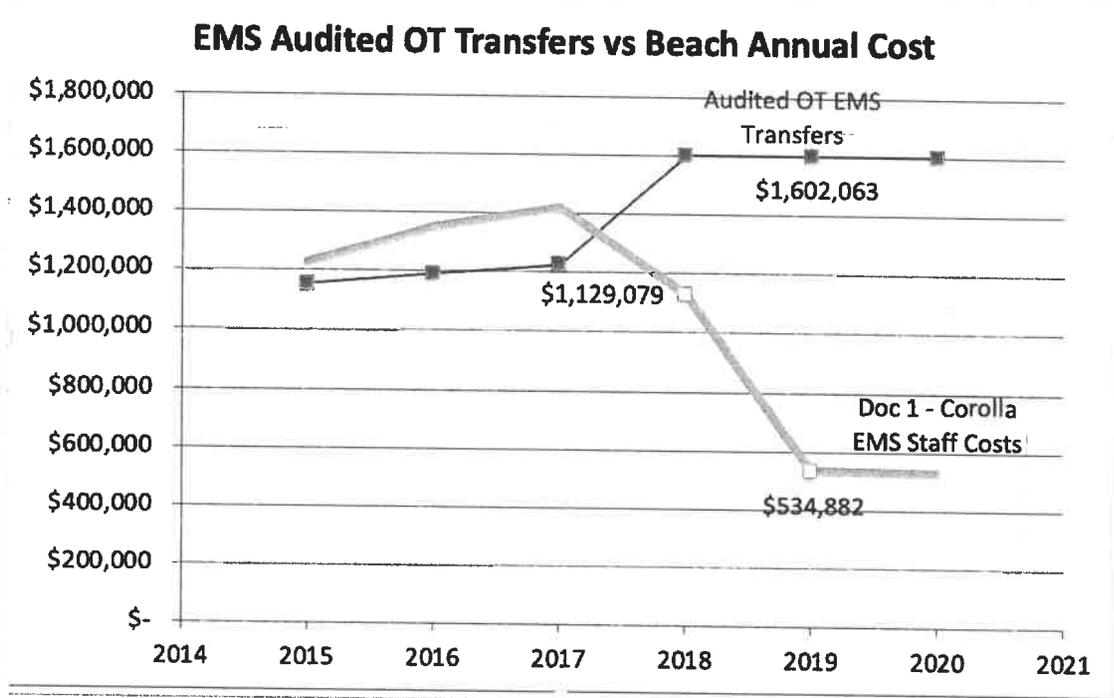
Manager in his 2012 spreadsheet (see Column 4) for the entire period from FY 2010 through FY 2021 (adjusted only for the annual 3% annual cost of living increase). This is proved by the strong correlation of the amounts in Columns 2, 3 and 4 for both Sheriff and EMS costs. This is illustrated in the 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 2015.¹ 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%20Tax%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

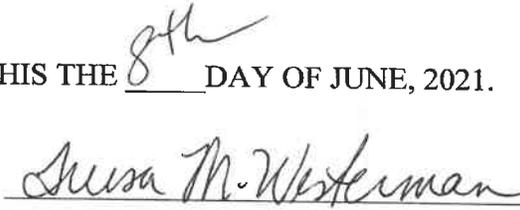
VERIFICATION

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

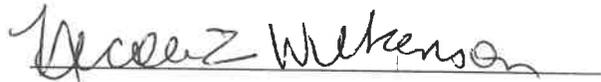
VERIFICATION

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.



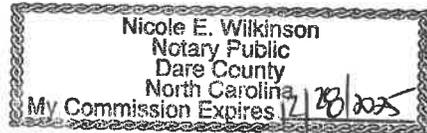
Edward P. Cornet

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

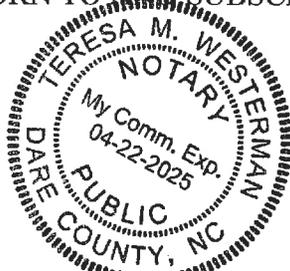
COUNTY OF CURRITUCK

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

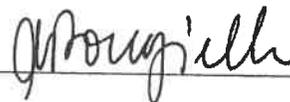
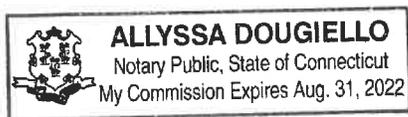
VERIFICATION

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.	-	-	9,269	4,798	-	-	-	-	-	-
Coop Advertising	-	-	15,325	22,000	26,000	26,000	26,000	26,000	26,000	26,000
Interest Income	421,574	311,464	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	9,588,126	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	277,088	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	68,125	76,037	83,641
Retirement Expense	12,616	22,078	25,152	31,678	34,912	35,034	29,265	29,850	30,447	31,056
	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	52,694	85,000	85,000	87,550	90,177	92,882	95,868
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	99,185	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	1,854	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	2,338,750	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 Promoloin	-	-	-	-	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	58,199	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	1,206	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	21,862	22,538
Contingency	-	-	-	1,405	3,342	-	-	-	-	-
	1,206,152	1,967,208	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	18,576	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	3,322,268	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	8,251	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	46,720	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	626,111	706,933	660,321	680,131	700,535	721,551	743,197	765,493
Historic Preservation	79,162	9,852	6,008	17,970	331,635	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	165,000	462,065	475,927	490,205	504,911
50% PJO 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	1,069,379	1,101,460	1,134,504	1,168,538
Sheriff Deputies Mainland	250,000	250,000	300,000	-	-	-	-	-	-	-
Recreation Projects	80,121	37,750	-	3,335	-	-	-	-	-	-
Administrative Fee	85,000	-	86,772	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 Gov1 Facilities	-	-	-	-	-	-	-	-	-	-
Carova Beach Park	510,000	-	-	-	-	-	-	-	-	-
Bike 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	54,086	-	-	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	643,402	897,681	800,000	800,000	800,000	800,000	800,001
	<u>6,848,204</u>	<u>4,769,203</u>	<u>7,049,196</u>	<u>5,504,131</u>	<u>6,269,634</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	9,857,723	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)	(903,619)
BEGINNING FUND BALANCE	<u>3,987,196</u>	<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>
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	1,531,083	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.**

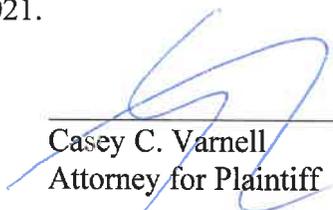
Two of the five deposed Commissioners (Mr. Etheridge, at p 53, lines 3-11; and Ms. Etheridge, at p 39, lines 13-21), as well as the Finance Director (p 41, lines 10-16), testified that the Report of the County’s Independent Auditor on its Annual Financial Statements confirms the legality of the BOC’s 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.”)

CERTIFICATE OF SERVICE

This is to certify that a copy of this Brief in Support of Motion for Partial Summary Judgment filed in the above matter was served upon all parties in accordance with Rule 5 of the Rules of Civil Procedure by email and by depositing a copy in the United States Mail, postage prepaid, addressed to:

Christopher J. Geis
WOMBLE BOND DICKINSON (US) LLP
One West Fourth Street
Winston-Salem, NC 27101
Chris.Geis@wbd-us.com
Attorney for Defendants

This the 20th day of September 2021.



Casey C. Varnell
Attorney for Plaintiff