STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF CURRITUCK	19 CVS 171
GERALD CONSTANZO, BRYAN DAGGOT, JOHN DUMBLETON, PHILIP SCHNEIDER, CLARA SCHNEIDER, MARGARET BINNS, MOHAN NADKARNI, GREGORY A. WANDER, RONALD BUCHANAN, STACEY MCCONNELL, GARY S. MILLER, JEFFREY P. FUSSNER, WILLIAM T. COLLINS, REX LUZADER, ELIZABETH SCHWEPPE, GERRILEA ADAMS, RICHARD J. CHOWN, PATRICIA C. CHOWN, GARY GOSNELL, MARY MAGNER, MICHAEL C. BRIGATI, ROBERT RICHARDSON, MARYANN DUMBLETON, and COROLLA CIVIC ASSOCIATION, Plaintiffs, v. CURRITUCK COUNTY, NORTH CAROLINA; THE CURRITUCK COUNTY TOURISM DEVELOPMENT AUTHORITY; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; and DANIEL F. SCANLON II, CURRITUCK COUNTY MANAGER and BUDGET OFFICER, both in his official capacity and in his individual capacity, Defendants.	**BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

STATEMENT OF THE CASE

The plaintiffs filed this lawsuit on May 7, 2019, seeking declaratory and injunctive relief from Currituck County over how the county spends occupancy-tax

revenue collected pursuant to local statutes enacted by the Legislature. The plaintiffs asserted 13 claims, but none for damages.

The defendants timely answered and filed a partial motion to dismiss on July 12, 2019, seeking dismissal of all claims against the Currituck County Board of Commissioners; all claims against County Manager and Budget Officer Daniel F. Scanlon, and the Eighth Claim for Relief, a direct claim under the North Carolina Constitution.

On August 1, 2019, the plaintiffs filed a motion for a preliminary injunction seeking "to enjoin the use of any occupancy tax ("OT") proceeds by the Defendants for the purposes of funding police, emergency medical and fire services and equipment (referred to herein as 'public safety services and equipment')," except for "lifeguard services and related equipment or any services . . . related to beach clean-up." (Pl.'s Mot. for Prelim. Injun.) This Court conducted a hearing on the motion on September 18, 2019, and, after hearing witness testimony and arguments of counsel, denied the motion. See Order of October 3, 2019.

On December 9, 2019, the plaintiffs voluntarily dismissed all claims against defendant Scanlon in his individual capacity, and on July 19, 2021, the Court granted the remainder of the defendants' partial motion to dismiss.

Thus, the remaining defendants are Currituck County and the Currituck County Tourism Development Authority, and the remaining claims are all those alleged in the Complaint except for the Eighth Claim for Relief. Claims 1 through 7 seek a declaratory judgment that the county has spent occupancy-tax revenues

improperly, and Claims 9 through 12 seek injunctions to prevent the county from spending such funds improperly.

Following extensive discovery, the plaintiffs filed a partial motion for summary judgment on June 18, 2021, and served a supporting brief on September 20, 2021. The defendants filed a motion for summary judgment on November 19, 2021, and serve this brief in support thereof and in response to the plaintiffs' motion and brief.

FACTS

The relevant facts of this case are not in dispute.

Plaintiff's Allegations and Statutory Authority

The plaintiffs are the Corolla Civic Association and 23 individuals who own and rent property in Currituck County. (Compl. ¶¶ 16-17.) The Corolla Civic Association is a nonprofit corporation whose "members include individuals who rent accommodations" in the county and who "collect and remit the County occupancy taxes levied on them by the County." (Compl. ¶ 17.) Thus, the plaintiffs do not actually pay the taxes but only collect them and pass them along to the county.

The occupancy taxes are collected pursuant to a local statute enacted specifically for Currituck County during the 1987 session of the North Carolina Legislature and amended in 1991, 1999, and 2004. (Compl., ¶¶ 4-5, 36-38, and Ex. A.) Section I(a2) of the statute, which is attached as Exhibit A to the Complaint and also hereto, allows the county to levy an occupancy tax on rental properties in the county. See N.C. Sess. Law 2004-95, H.B. 1721, Sec.1(a2). Section 2(e) of the statute allows the county to use one-third of the occupancy-tax proceeds "to promote travel

and tourism," and two-thirds "only for tourism-related expenditures, including beach nourishment." (Compl. ¶ 38.) "Tourism-related expenditures" is defined by the statute thusly:

> 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.

Id., Sec. 2(e)(4) (emphasis added).

Thus, for every $100 in occupancy-tax taxes from a rental property that the county collects, it must use one-third of that amount to promote travel and tourism, and must use the remaining two-thirds for projects that the county commissioners believe will help increase tourism and attract visitors to the county. (Sandra Hill Dep. p. 36.) The statue allows, but does not require, that the county pay for beach nourishment from the two-thirds of revenue not used for promotions.

The statute also created the Currituck County Tourism Development Authority (TDA), a separate governmental entity whose members have the authority to spend occupancy-tax funds allocated to "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." See N.C. Sess. Law 2004-95, H.B. 1721, Secs. 3(1.1) and 3(c). The TDA is comprised of the seven county commissioners and the county finance director, who is a non-voting, ex-officio member. See N.C. Sess.

Law 2008-54, H.B. 2763, Sec. 1 (amending 2004 local law to include two members of expanded board of commissioners on TDA).

The plaintiffs allege that the county has spent occupancy-tax revenue in violation of this statute and seek a declaration from this Court to that effect. (Compl. ¶ 9.) They also seek other declaratory and injunctive relief related to the spending of this tax revenue. (Compl. ¶¶ 10-12.)

The plaintiffs do not assert that revenue spent on promotion of travel and tourism has been spent improperly. Rather, they focus on the revenue that may be spent pursuant to the discretion of the Board of Commissioners as "tourism-related." Of these expenditures that the plaintiffs find objectionable, the plaintiffs have focused on the county's use of occupancy-tax funds to pay for increased public safety services that are required in response to the influx of tourists to the county during tourist season – except for beach life guards, to which the plaintiffs have no objection.

Overview of Currituck County and how it spends tourism revenue

Currituck County is physically divided by the Currituck Sound. (Bob White Aff. ¶ 3.) Most of the county's land mass is on the mainland, and a small portion is on the Corolla Outer Banks, a thin peninsula that is separated from the rest of the county by the sound and runs along the Atlantic Ocean. (White Aff. ¶ 3.) Corolla also contains a small portion of the county's population: only 1,159 year-round residents out of 28,100 total residents in the county. (White Aff. ¶ 5.) However, it contains 52 percent of the county's tax value. (White Dep. p. 35.)

The Currituck County Board of Commissioners has seven members, and, though all are elected at-large, five are required to live in distinct geographic districts of roughly equal population, one of which covers Corolla. (White Aff. ¶ 4.) Robert (Bob) White, who has been on the board since 2016 and was its chairman for two years, lives in Corolla and operates a tourism business there. (White Aff. ¶ 2.)

Corolla, though having a small number of permanent residents, attracts most of the tourists who visit the county in the summer season, when the local population doubles to about 60,000 people a week. (White Aff. ¶ 5.) Thus, the county's occupancy-tax revenue is mostly generated from Corolla. (White Aff. ¶ 5.)

The county generates between $10 and $12 million a year in occupancy-tax revenue, but it spends about 80 percent of those funds on Corolla. (White Aff. ¶ 6.) That includes funding for public safety, which includes law enforcement, emergency medical services, fire protection, and beach life guards and ocean rescue teams. (White Aff. ¶ 6.) All but the life guards and ocean rescue teams, the need for which is seasonal and which cost about $1 million a year, are year-round expenses. (White Aff. ¶¶ 6, 12..)

The public safety spending comes from that portion of occupancy-tax funds that the Board of Commissioners can spend pursuant to its judgment that the costs are related to tourism. (White Aff. ¶ 12.) The county uses occupancy-tax funds to pay for some, but not all, year-round costs, including salaries of employees; because it cannot hire employees to work for only part of the year, it hires them for full-time work and moves them to the Outer Banks during tourist season. (Hill Dep. pp. 19, 22.)

All of the occupancy-tax receipts the county takes in each year go to the Tourism Development Authority, which then sends the money not used to promote travel and tourism to the county's general fund for spending pursuant to the Board of Commissioners' discretion. (White Aff. ¶ 12.) The county spends $3.5 million a year to promote tourism, and the rest goes to other costs. (Hill Dep. p. 36.)

The county has used occupancy-tax revenue on projects outside Corolla. It allocated $177,000 to refurbish the old Currituck County Jail, a tourist attraction on the mainland. (White Aff. ¶ 8.) It upgraded the county's airport, which attracts tourists, including hunters and fishermen, from around the world. (White Aff. ¶ 9.) It built baseball and softball fields, which have attracted visitors for 39 of 52 weeks each year for tournaments. (White Aff. ¶ 9.) It converted an old Coast Guard station into a military veterans' park along the Intracostal Waterway near a marina used by boaters traveling up and down the East Coast. (White Aff. ¶ 9.) It helped restore the Historic Jarvisburg Colored School Museum, which dates to 1868, is on the National Register of Historic Places, and is a popular tourist attraction. (White Aff. ¶ 9.) The county made these investments at the recommendation of a tourism consultant, who said the county should diversify how it promotes the county and attracts visitors and that it should not just focus on the Corolla Outer Banks. (White Aff. ¶ 10.)

The county has been transparent in how it allocates tax money. All budget decisions of the board are made in meetings open to the public and after public budget workshops in which residents have the opportunity to provide input; and residents can vote in elections for the commissioners they want to see elected. (White Aff. ¶ 13;

K. Etheridge Dep. p. 37.) County budgets are open to public inspection and placed on the county website. (White Aff. ¶ 13; White Dep. p. 49.)

Budget decisions by the Board of Commissioners are made following input from county officials, including the tourism director, according to the county finance director, Sandra Hill. (Hill Dep. pp. 5, 8-10.)

Generally, a 1-cent tax on property brings in about $600,000 in revenue. In 2014, the county manager determined that, if the county could not spend occupancy-tax revenues on the services it was using them for, it would have to raise the property tax rate for all residents by as much as 12.5 cents per $100 of assessed value, unless only "core" services were funded, in which case the increase would be 6 cents. (Hill Dep. pp. 32-34 and Ex. 9.)

Despite the plaintiffs' objections, the seven-member board has been unanimous about how to spend occupancy-tax funds. Currituck County has seen an increase in the number of tourists every year since 2006, except for 2009, when there was a recession, and commissioners believe this has validated their spending decisions. (White Aff. ¶ 11.)

Testimony of county commissioners

County commissioners testified that they believe their spending on public safety is logically related to tourism, is appropriate, and is within the broad discretion that the statute provides to the board. Their testimony demonstrates a rational, reasonable basis for their decision-making process and is evidence that they have

used their best judgment in determining how to spend occupancy-tax funds in accordance with the statutory authority given them.

Commissioner Bob White, who was chairman of the board from 2018 to 2020 and represents Corolla, has been in the tourism business on Corolla since 1996 and speaks with tourists daily. (White Dep. pp. 5-6, 15.) The board recognizes that that occupancy-tax revenue may only be used "for tourism-related expenditures," but that the board must determine what such expenditures are by using its collective "judgment." (White Dep. p. 13.) However, the statute is "very broad reaching" and allows spending on anything as long as there is "some correlation between that expenditure and the tourism-related portion of that." (White Dep. p. 14.) The commissioners discuss this connection in work sessions. (White Dep. p. 14.)

Commissioner White believes the occupancy-tax funds used for public safety (police, fire, EMS, and life guards) provide a safe environment for tourists and are "an integral part of the tourist satisfaction." (White Dep. pp. 15-17.) Occupancy-tax funds have been used to pay for deputies on a year-round basis, and that allows them to protect homes that are empty in the off-season, when break-ins on Corolla increase. (White Dep. pp. 21-22.) Such funds also pay for deputies' overtime. (White Dep. p. 20.)

The increased costs for public safety at the beach is driven by tourists. The sheriff and other county officials report the need for services to the board and the board does not dispute this need. Tourists thank county officials for the public safety

services. "We all believe in our judgment that this is a perfectly acceptable expense." (White Dep. pp. 19, 27-31, 35.)

The county would have to raise property taxes if it did not use occupancy-tax funds to pay for some public safety costs. (White Dep. p. 33.) That could mean a 12-cent tax increase if the county set up a tax district on Corolla or a six-cent increase if the county used increased property-taxes county-wide. (White Dep. p. 35.) But "the need is greater . . . because of the tourist impact on the Outer Banks area. And this simply pays for that extra service level that is needed over there because of the tourist involvement." (White Dep. pp. 33-34.)

The county receives many compliments from visitors about the professional level of public safety services it provides, and this "absolutely is crucial to the tourist experience here in attracting them through a positive tourist experience. And – and re-attracting them." (White Dep. pp. 31, 44.)

Occupancy-tax funds have also been used for other things, such as improving the Whalehead Club and maritime museum, which provide a place for tourists to visit on Corolla, for ball fields on the mainland that attract visitors from outside the county, and for other events on the mainland. (White Dep. pp. 23, 27, 43.)

Commissioners Selina Jarvis represents the southern part of the county and has lived in the county for 30 years. She testified that the use of occupancy-tax funds to pay for some sheriff and EMS services is proper because it is related to tourism. (Jarvis Dep. pp. 5-6, 8.)

Commissioners use their best judgment in deciding how to spend the funds. The matter must be "what's related to tourism and . . . to try to attract tourists." Public safety spending assures that tourists have a safe environment to visit. (Jarvis Dep. pp. 11-13.)

In addition, the use of occupancy-tax funds to pay for public safety throughout the county is proper because tourists travel throughout the county even when they are just going to and from Corolla. "The whole county is affected by the tourist season." (Jarvis Dep. pp. 14-17.)

The commissioners rely on recommendations of the county's professional staff in determining how to allocate funds, including from the sheriff, EMS director, and tourism director. It is clear that the county receives a greater call volume for public safety services as a result of tourism. This information informs the commissioners' judgment about how to spend the funds. (Jarvis Dep. p. 19, 23-27.)

The bottom line is that the commissioners can spend occupancy-tax funds on "[a]nything that supports, attracts, and ultimately benefits tourism in Currituck County." Jarvis believes that living in the county for 30 years has allowed her to understand "what tourism is and how tourism benefits the county and what we need to do and what we should do to promote tourism." (Jarvis Dep. pp. 34-35.)

Mary "Kitty" Etheridge, an at-large commissioner, testified that, in her opinion, the county has "to have more [deputy] [s]heriffs or EMS because of the influx of the tourists on our county," and it has to hire them year-round. The occupancy-tax

funds pay for increased costs to cover the tourist-driven needs on the Outer Banks, but they do not pay the entire cost. (K. Etheridge Dep. pp. 12-16.)

Commissioners rely on the recommendations of public safety officials about the staffing needs of the county and review relevant data. "[I]t just makes common sense that if we 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." (K. Etheridge Dep. pp. 17-22.)

The county does not generate enough revenue just from property taxes to cover services for the large influx of tourists it receives each year. "Because of having an influx of people making us need more police protection, more fire protection, more everything, property tax won't cover that." (K. Etheridge Dep. p. 23.)

She summarized her thought process this way: Tourism "brings the need for more services. And . . . 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 down we wouldn't need the extra services." If the county did not pay for increased public safety, "people wouldn't come to the Outer Banks anymore. . .. [S]o you have to spend money to make sure that your tourists feel like that if they come down here they've got protection. [¶] To me it's common sense." (K. Etheridge Dep. pp. 28-29.)

The increased public safety spending also covers tourists who are on the mainland. If no one responded to an accident on the mainland involving tourists traveling to Corolla, that could impact future tourism. (K. Etheridge Dep. p. 31.)

The commissioners determine their spending needs based on their belief as to what "would help with the tourism in [the] county." If something "will bring the

tourists to our county, make the tourist feel safe, secure and know that it is someplace that they can bring their family and feel those same things, that safety and security," that is a tourist-related expense. For example, the county increased patrols on the beach and last year had no deaths in the water. (K. Etheridge Dep. pp. 32-33, 39.)

Commissioner Owen Etheridge, who represents the northern part of the county, was first elected to the board in 1994 and has served several terms over 19 years since. (O. Etheridge Dep. pp. 6-7.) He testified that the board's authority is simple and it is what in their judgment helps tourism. (O. Etheridge Dep. pp. 11-12.)

In his view the language in the amended bill from 2004 broadened the board's flexibility in determining how occupancy-tax funds should be spent. (O. Etheridge Dep. p. 15.)

With regard to sheriff and EMS funds, he echoed the testimony of the other commissioners. The population on Corolla in the tourist season swells to three times that of the population on the mainland, and because this burden is created by tourism, the board uses tourism tax revenue to address it. "That burden wouldn't be there if it wasn't for the tourists." (O. Etheridge Dep. pp. 16-20, 24-28, 40.)

It would not be fair to tax those on the mainland to provide extra services that are caused by visitors to Corolla. Rather, the county should "put the cost of the burden where it was coming from. And that was why we used the occupancy tax." Using the occupancy taxes also helps those who own property on Corolla, because the taxes are charged to visitors, not permanent residents. Charging permanent

residents for increased public safety services when they are not causing those increases would not be fair either. (O. Etheridge Dep. pp. 29-31.)

Asked why the county used $2.8 million in occupancy-tax proceeds for increase sheriff and EMS costs, Etheridge said that doing so saves property owners a five-cent tax increase. Such a tax increase would also hurt the agricultural community. (O. Etheridge Dep. pp. 32-33.)

The county also uses occupancy-tax funds for tourism-related projects on the mainland. His test is: "Does this really qualify as tourism-related?" Not all projects do, but he uses his personal experience as well as the advice of professionals to help form his judgment. (O. Etheridge Dep. pp. 41-45, 49.)

Kevin McCord, the other at-large commissioner, serves as a Currituck County sheriff's deputy and owns a business. He believes that the public safety expenditures keep tourists safe. (McCord Dep. pp. 5-6.)

McCord said the increased public safety spending on Corolla helps tourism and is therefore tourism-related. The county's ocean rescue teams conducted 194 rescues in 2020, for example, and occupancy-tax revenue pays for increased medical units on Corolla and Jeeps for sheriff's patrols. (McCord Dep. pp. 29-31, 42.)

Visitors have told county officials that they are impressed with the "clean and safe" beaches, and "if the services weren't there the people wouldn't be there, and you wouldn't have your clean, safe beaches. . . ." (McCord Dep. pp. 17-18, 26, 45.)

ARGUMENT

1. The Currituck County Board of Commissioners has not abused its discretion in spending occupancy-tax revenue because the relevant statute requires the board to use its judgment as to what expenditures are related to tourism, and the board has not acted arbitrarily, capriciously, or in bad faith.

Public official abuse-of-discretion case law

The parties agree that the applicable standard of review in this case is whether public officials abused their discretion in making official decisions. Under this standard, it is clear that the plaintiffs' claims fail because the defendants have not abused their discretion.

The North Carolina Supreme Court has said that, "[w]hen an officer acts capriciously, or in bad faith, or in disregard of the law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief." Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896, 900 (1942).

The Court applied this standard in In re Housing Authority of City of Salisbury, 235 N.C. 463, 70 S.E.2d 500 (1952). In that case a city housing authority attempted to "condemn a portion of the campus of Livingstone College as a site for the erection of a low-rent public housing project." Id. at 465, 70 S.E.2d at 501. The college was private and operated by the African Methodist Episcopal Church. Id. at 468-69, 70 S.E.2d at 503-504. The college objected to the taking, and it argued that the proposed area of condemnation "was vitally needed for the use and expansion of the College" and that "there were other suitable sites available where the project could be built." Id. at 466, 70 S.E.2d at 502. This included adjacent property owned

by the college; however, the housing authority disregarded this offer, proceeded with its initial condemnation plan, and filed an action for eminent domain. Id. at 469, 235 N.C. at 504. At trial, a jury found that the housing authority had been "arbitrary or capricious" in condemning the land, and it found for the college. Id.

On appeal, the Supreme Court acknowledged that the authority had "broad discretion" under the eminent domain statutes and that the issue was whether authority commissioners were "arbitrary or capricious amounting to a manifest abuse of discretion." Id. at 467, 70 S.E.2d at 502. It defined arbitrary this way: "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." Id. It defined capricious this way: "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." Id. The Court said the terms were similar and "[w]hen applied to discretionary acts, they ordinarily denote abuse of discretion, though they do not signify nor necessarily imply bad faith." Id.

The Court found "substantial evidence" that the authority "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." Id. at 469, 70 S.E.2d at 504. The authority "failed to consider the contributions this college [was]

making toward curing the very social and economic ills which public housing is designed to minimize." Id. at 470, 70 S.E.2d at 504. The evidence supported a finding that the authority' acted arbitrarily and capriciously. Id. at 469, 70 S.E.2d at 504.

This was a clear example of a government body abusing its discretion, but four years later the Supreme Court said there was not enough evidence to determine whether a city council had abused its discretion. In Burton v. City of Reidsville, 243 N.C. 405, 406, 90 S.E.2d 700, 701 (1956), the Court was asked whether the Reidsville City Council acted arbitrarily or capriciously in ordering that low-cost apartment buildings be torn down. The decision about what to do with the apartments "rest[ed] within the sound discretion of the defendant members" of the city council, but the Court returned the case to the trial court to determine whether the council "acted in good faith after full consideration and in the best interest of the defendant municipality." Id. at 407-08, 90 S.E.2d at 702-03.

Though it could not say whether the council had acted improperly, the Court set down ground rules for answering the question. It started with this basic principle:

> The acts of administrative or executive officers are not to be set at nought by recourse to the courts. Nor are courts charged with the duty or vested with the authority to supervise administrative and executive agencies of our government. However, a court . . . may determine whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law.

Id. at 407, 90 S.E.2d at 702.

The Court cautioned that, even if a public official abuses his discretion, a court "may not direct any particular course of action. It only decides whether the action of

the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice." Id. at 407, 90 S.E.2d at 703.

This judicial restraint flows from the general principles of our form of government. If an "officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action." Id. at 407-08, 90 S.E.2d at 703. It concluded:

> The right to err is one of the rights – and perhaps one of the weaknesses – of our democratic form of government. . . . [W]e operate under the philosophy of the separation of powers, and the courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials. So long as officers act in good faith and in accord with the law, the courts are powerless to act – and rightly so.

Id. (emphasis added).

Our appellate courts have followed this line of reasoning in many other cases. A plaintiff has the burden of proving that a governmental body or public officials have abused their discretion.

In Painter v. Wake County Board of Education, 288 N.C. 165, 217 S.E.2d 650 (1975), the plaintiffs challenged a school board's decision to exchange lands for the construction of a high school, but the Court said: "Such decisions are vested in the sound discretion of the Board. The Board's discretion with reference thereto cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of the law." Id. at 176, 217 S.E.2d at 657.

Though the Court remanded the case to the trial court for an evidentiary hearing on whether the facts supported a finding that the board abused its discretion, id. at 182, 217 S.E.2d at 66, it again set out the high standard that a plaintiff must meet. "Absent evidence to the contrary, it will always be presumed . . . '[t]hat public officials will discharge their duties in good faith and exercise their powers in accord with the spirt and purpose of the law,' and '[e]very reasonable intendment will be made in support of the presumption.'" Id. at 178, 217 S.E.2d at 658 (quoting Huntley v. Potter, 255 N.C. 619, 628, 122 S.E.2d 681, 686 (1961)) (internal citations and quotations omitted)). It again said that "[t]he burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence." Id. (citation and quotations omitted). Id.

The Court relied on Barbour v. Carteret County, 255 N.C. 177, 120 S.E.2d 448 (1961), which involved a challenge to the decision of a county board of commissioners to buy land. In Barbour the Supreme Court said the commissioners were merely "performing duties inherent to their office(s), expressly conferred by the Legislature." Id. at 182, 120 S.E.2d at 402. The Barbour Court stressed:

> Courts have no right to pass on the wisdom with which they [local boards] act. Courts cannot substitute their judgment for that of the county officials honestly and fairly exercised. For a court to enjoin the proposed expenditure, there must be allegation and proof that the county officials acted in wanton disregard of public good.

Id.

This principle was reaffirmed in Alamance County v. N.C. Dep't of Human Resources, 58 N.C. App. 748, 294 S.E.2d 377 (1982), where a county sued a state

agency over how it distributed funds, and the trial court's dismissal of the complaint was affirmed by the Court of Appeals. Id. at 749, 294 S.E.2d at 377. The Court of Appeals said: " 'When discretionary authority is vested in [a] commission, the court has no power to substitute its discretion for that of the commission; and, in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene.' " Id. at 749, 294 S.E.2d at 378 (citation omitted). A plaintiff cannot prevail by making a "mere assertion of a grievance" against a governmental body. Id. at 750, 294 S.E.2d at 378.

This line of reasoning is solidly woven into our case law.

"' 'Courts will not undertake to control the exercise of discretion and judgment on the part of the members of a commission in performing the functions of State agency.' " Granville County Board of Commissioners v. N.C. Hazardous Waste Mgmt. Comm., 329 N.C. 615, 407 S.E.2d 785 (1991) (quoting Pharr v. Garibaldi, 252 N.C. 803, 811-12, 115 S.E.2d 18, 24-25(1960)). When a governmental body such as a state commission is given discretion by the legislature, "the court has no power to substitute its discretion for that of the commission; and, in the absence of fraud, manifest abuse of discretion or conduct in excess of lawful authority, the court has no power to intervene." Id.

A state commission is equivalent to a county board of commissioners, because a county is merely a political subdivision of the state and its board, like a state commission, is the executive authority responsible for carrying out the duties of the county. See Silver v. Halifax County Board of Commissioners, 256 N.C. App. 559,

589, 805 S.E.2d 320, 340 (2017) ("Counties are also creatures of and instrumentalities of the State, with specific statutorily-assigned roles, but ultimately created by and controlled by the State[.]"); Piland v. Hertford County Board of Commissioners, 141 N.C. App. 293, 300, 539 S.E.2d 669, 673 (2000) ("the Board of Commissioners is statutorily vested with the power to exercise powers and rights on behalf of the county . . . much like a board of directors acting on behalf of a corporation.").

The Supreme Court has said that, in determining whether a state agency's decision meets the standard of arbitrary or capricious, "the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." Act-Up Triangle v. Comm. for Health Services, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997). In addition, "[t]he 'arbitrary or capricious' standard is a difficult one to meet," and requires evidence that the decisions were " 'patently in bad faith,' " or " 'whimsical' in the sense that 'they indicate a lack of fair and careful consideration' or " 'fail to indicate any course of reasoning and the exercise of judgment.' " Id. (quoting Comm'r of Ins. v. Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 473 (1980) (internal quotations omitted)). In Act-Up the Court affirmed the lower court's decision not to interfere with the decision of a state agency that eliminated anonymous HIV testing by local health departments. Id. at 702, 483 S.E.2d at 389.

The high standard of review applies because "North Carolina law recognizes a strong presumption that governmental bodies act in good faith" and there is a "strong presumption of lawfulness that attaches to the actions of public bodies." Reese v.

Mecklenburg County, 204 N.C. App. 410, 422, 424, 694 S.E.2d 453, 462-63 (2010). Courts must defer to boards and agencies absent extraordinary circumstances. " 'The courts may not interfere with the exercise of the discretionary powers of local administrative boards for the public welfare 'unless their action is so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion.' " Id. (quoting Mullen v. Town of Louisburg, 225 N.C. 53, 60, 33 S.E.2d 484, 489 (1945)). The court in Reese rejected the plaintiff's challenge to land transactions by the city, county, and city-county school board that were part of an economic-development plan. Id. at 412, 694 S.E.2d at 455-56.

In the case at bar, it is clear that, when the above principles are applied, the plaintiffs have not shown that the Currituck County commissioners abused their discretion in determining how to spend occupancy-tax funds.

The plaintiffs' chief complaint is that the commissioners should not use such funds to pay for public safety services that the plaintiffs contend should be paid for with general property-tax revenues. See, e.g., Plaintiff's Motion for Preliminary Injunction (filed Aug. 1, 2019). However, as the deposition testimony shows, the commissioners have a reasonable and rational basis to conclude that public safety services promote tourism and are related to tourism, and, because the statute gives them the discretion to make that determination, this Court should not interfere with that judgment. Their decision is neither arbitrary nor capricious, nor in bad faith.

Statutory interpretation and analysis

In addition, basic rules of statutory construction support the defendants' position. The 1987 and 2005 statutes should be read together. " '[S]tatutes which are in pari materia, i.e., which relate to or are applicable to the same matter or subject, although enacted at different times must be construed together in order to ascertain legislative intent.' " Friends of Hatteras Island Nat. Hist. Forest Land Trust Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 566, 452 S.E.2d 337, 344 (1995) (quoting Carver v. Carver, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984)).

The 1987 statute provided specific examples of what "tourist-related" expenditures were and included "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. Laws, 1987, Chapter 209, H.B. 555, Sec. 1(e). The 2004 statute is general and defines "tourism-related expenditures" as those 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." N.C. Sess. Laws 2004-95, H.B. 1721, Sec. 2(4). The 2004 statute provides only two examples, "capital expenditures and beach nourishment," and does not specifically exclude any expenditures but instead leaves it up to the commissioners to determine what increases visitors to the county.

If in 1987 the Legislature determined that "tourist-related" expenditures included "police protection, and emergency services," it follows that in 2004 the

Legislature, in giving authority to the Board of Commissioners to use its own judgment, would know that the Board of Commissioners could consider "tourism-related expenditures" as including "police protection, and emergency services." There is no difference between the words "tourist," which was used in the 1987 statute, and "tourism," which was used in the 2004 statute. If police protection was a tourist-related expenditure in 1987, it is reasonable to conclude that it was a tourism-related expenditure in 2004.

The 2004 Amendment actually expanded the county's tourism-related allowances while eliminating other provisions not relevant to this lawsuit. The plaintiffs' argument that Currituck County was not authorized to spend occupancy-tax proceeds for police protection and emergency services is a strained and incorrect interpretation of the 2004 Amendment. A plain reading of the 2004 Amendment, and a focused view of the use-categories which were the subject of the amendment, show that it in no way curtailed or affected the county's authority to attract tourists and tourism by ensuring that adequate police protection and emergency services were in place. Instead, through the 2004 Amendment, the Legislature reemphasized the county's ability to use its judgment to spend occupancy-tax proceeds to promote and attract tourism.

The tourism-related textual changes that were adopted in 2004 did not restrict the county's discretion to determine which subjects — such as police protection and emergency services — would attract tourists or tourism. In the original statute, in

1987, the county's use of occupancy-tax revenue was limited to two separate categories under the statute:

> (e) Use of tax revenue. Currituck County shall **use at least seventy-five percent (75%) of the net proceeds of the tax levied under 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. The **remainder** of the net proceeds shall be deposited in the Currituck County **General Fund and may be used for any lawful purpose**.

See N.C. Sess. Law 1987-209 Sec. 1(e) (Exhibit B) (emphasis added). The plain language of the 1987 statute gave the county authority to use such revenue for two specific and separate categories: (1) a Tourist Related category, which expressly included "construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services," and (2) a residual General Purpose category, which allowed funds to be placed in the "General Fund" to be "used for ***any lawful purpose***." Id. (emphasis added).

In 1991, the Legislature amended the statute to add a third use-category, which was for "capital costs, operation, and maintenance of the Currituck Wildlife Museum." See N.C. Sess. Law, H.B. 665, Sec. 1(e) (attached as Exhibit C). That act read as follows (emphasis added):

> (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. 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 use the net proceeds of the tax levied under subsection (a1) 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 historic restoration and cultural programs** shall be used for tourist-related purposes.

The part about the Wildlife Museum was dropped by the 2004 Amendment. See N.C. Sess. Law 2004-95, H.B. 1721 (containing strike-through language). Thus, the two aforementioned Tourist Related and General Purpose categories remained prior to the 2004 Amendment, but a third category, Currituck Wildlife Museum, which is not relevant to this action, was also part of the Act.

As is clear on the face of Session Law 2004-95, the 2004 Amendment only affected the latter categories that are not specific to tourism. The Tourist-Related allowances remained in the Act, but the General Purpose category and the Currituck Wildlife Museum categories were removed. See N.C. Sess. Law 2004-95, H.B. 1721 (retaining tourism-related category by replacing term "tourist related" with "tourism-related," defining "tourism-related expenditures," and removing and deleting General Purpose and Currituck Wildlife Museum categories).[1]

[1] Plaintiffs admit that a significant use-related change in the 2004 Amendment was that the Legislature "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.' " (Pl.' Brief, p. 8.)

As to the Tourist Related category which has been present in the Act since 1987, the Legislature originally included key examples of subjects which are widely-considered to be related to tourism:

> (1) Construction and maintenance of public facilities and buildings;
> (2) Garbage, refuse, and solid waste collection and disposal;
> (3) Police protection; and
> (4) Emergency services.

See N.C. Sess. Law 1987-209 Sec. 1(e). Importantly, these four subjects, including "police protection" and "emergency services," were exclusively part of the Tourist Related category, and they were separate and distinct from the General Purpose and CWM categories. Id. As the plaintiffs admit, the significant deletion in 2004 was in regard to the General Purpose category, which did not include "police protection" or "emergency services." See Pl. Brf., p. 4 (stating that the 2004 Amendment "deleted from the prior statute a provision that expressly permitted the county to deposit a portion of its OT proceeds into its General Fund.").

By asking the Court to classify "police protection" and "emergency services" as purported "General Services," the plaintiffs have ignored the clear difference between the tourist-related category, which was retained in 2004, and the General Purpose category, which was removed. In accordance with the rule against surplusage, a semantic canon commonly used by our courts and the United States Supreme Court, a "statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." State v. Williams, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975); see also Appalachian Materials, LLC v. Watauga County, 262 N.C. App. 156, 163-64, 822 S.E.2d 57, 63

(2018) (declining to adopt "a method of interpretation guaranteed to render the plain language of the second sentence of the definition at issue meaningless"); see also Neil v. Kuester Real Estate Servs., 237 N.C. App. 132, 146, 764 S.E.2d 498, 508–09 (2014) ("Under our long-standing principles of statutory construction, we presume that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein.") (cleaned up); accord, Yates v. United States, 574 U.S. 528, 543 (2015). Accordingly, the plaintiffs' request that the Court ignore the express inclusion of "police protection" and "emergency services" as a tourist-related category, rather than in the separate General Purpose category, must be rejected.

In 2004, the four areas noted above were deleted from the examples listed as being "tourist related," and the singular example "beach nourishment" was included instead. See N.C. Sess. Law 2004-95, Sec. 1(e). However, the mere deletion of the four subjects from the list of "tourist related" examples did not amount to a prohibition of such expenditures. As has long been recognized by our Supreme Court, the term "including" and the use of examples is not intended to be exhaustive or exclusive. "The term 'includes' is ordinarily a word of enlargement and not of limitation. The statutory definition of a thing as 'including' certain things does not necessarily place thereon a meaning limited to the inclusions." N.C. Turnpike Auth. v. Pine Island, Inc., 265 N.C. 109, 120, 143 S.E.2d 319, 327 (1965) (citations omitted). See also Jeffries v. County of Harnett, 259 N.C. App. 473, 492-93, 817 S.E.2d 36, 49 (2018) ("[The statute's] use of 'including' to introduce examples of acceptable 'rural' agritourism activities indicates the list is meant to be illustrative and not

exhaustive."); accord, Jackson v. Charlotte Mecklenburg Hosp. Auth., 238 N.C. App. 351, 357, 768 S.E.2d 23, 27 (2014); State ex rel. Utils. Comm'n v. EDF, 214 N.C. App. 364, 367, 716 S.E.2d 370, 372 (2011) ("[O]ur Supreme Court has indicated that use of the word 'including' expresses legislative intent to list examples."). Thus, it would contradict common rules of statutory interpretation to argue that the county can only use occupancy tax proceeds for "beach nourishment" and not for police protection or emergency services simply because they are not included as examples.

Notably, the 2004 Amendment did not delete the Tourist Related category altogether — it expanded it and broadly defined it, stating that "[t]ourism-related expenditures" are "[e]xpenditures that, ***in the judgment of the Currituck County Board of Commissioners***, are designed to increase the use of lodging facilities, meeting facilities, and convention facilities in a county by attracting tourists or business travelers to the county." N.C. Sess. Law 2004-95, Sec. 2 (emphasis added). This broad definition cannot be ignored. If the Court were to accept Plaintiffs' argument that the 2004 Amendment effectively banned the four examples included before 2004, it would have to conclude, illogically, that the following subjects are not "designed to increase the use of" facilities "by attracting tourists or business travelers to the county": (1) construction and maintenance of public facilities and buildings; (2) garbage, refuse, and solid waste collection and disposal; (3) police protection; and (4) emergency services. Id.; compare with N.C. Sess. Law 1987-209 Sec. 1(e). Such an interpretation would not conform with the plain language of the 2004 Amendment, nor would it lead to a logical conclusion, for the Court would have to find that the

construction and maintenance of public facilities and buildings would not "increase the use of lodging facilities, meeting facilities, and convention facilities" or attract tourists and travelers to use such facilities. N.C. Sess. Law 2004-95 Sec. 2; N.C. Sess. Law 1987-209 Sec. 1(e). The same holds true for the categories at issue — police protection and emergency services — categories which are of direct concern to tourists in the county and everywhere tourists visit. In light of the above, the defendants need not rely on any "carry-forward" arguments or creative interpretations of the Act because the plain language of the Act and norms of statutory construction affirm that their expenditures were at all times authorized and appropriate.

However, the Currituck County commissioners could reasonably believe that this definition carried forward and that they may act accordingly. In analyzing any law, a court has a core duty: " '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.' " Kidd Construction Group LLC v. Greenville Utilities Comm'n, 271 N.C. App. 392, 397, 845 S.E.2d 797, 800 (2020) (citation omitted). " 'The best indicia of that intent are the language of the statute . . ., the spirit of the act[,] and what the act seeks to accomplish.' " Id. (citation omitted). If the statute is clear and unambiguous, the court must " 'give effect to the plain meaning of the statute.' " Id. (citation omitted).

The 2004 statute is clear and unambiguous. Its plain language does not exclude public safety services as a permissible expenditure. If such expenditures are not excluded from the statute, if the previous statute allowed them, and if the

amended statute gives authority to the board to use its judgment in determining what is a proper use of occupancy-tax funds, then there is a reasonable basis to conclude that public safety expenditures are proper under the statute. If, as their deposition testimony shows, the Board of Commissioners could reasonably make such a conclusion – that such expenditures are allowed – and could reasonably believe that such services help promote tourism and business travel to the county, then the commissioners have not abused their discretion in making this determination.

Notably, the plaintiffs do not seek to bar spending on life guards and ocean-rescue teams from public safety expenditures. The plaintiffs must believe that these things promote tourism. And, in fact, it is reasonable to think that they do, because they provide a sense of safety and security to tourists who go to Corolla beaches, as the commissioners testified. But, if that is the case, it also follows that police, fire, and EMS services do the same, and the commissioners have so concluded.

The commissioners are not abusing their discretion in making this determination. The county is not using occupancy-tax revenue to pay the county manager's salary, to build offices for its staff, to lower the general property-tax rate, or to pay for any day-to-day expenses of the county. It is using the revenues to pay for costs incurred because of the increase in tourism and to provide services that the commissioners reasonably believe keep tourists coming back.

The board is merely using the judgment it was asked to use by the Legislature. "Judgment" is defined as "[t]he mental faculty that causes one to do or say certain things at certain times, such as exercising one's own discretion or advising others;

the mental faculty of decision-making." Judgment, BLACK'S LAW DICTIONARY (11th ed.). It is also defined as "the formation of an opinion after consideration or deliberation," as "discernment," or as "the capacity to form an opinion by distinguishing and evaluating." Judgement, AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1997).

If the Legislature had specifically set out what the commissioners could spend occupancy-tax revenues on, the Court could look at a specific expenditure and determine whether it fell under the list of authorized expenditures. But the Legislature chose not to be specific, and instead broadened the law and to put the decision-making authority of what is best for the county in the hands of the elected leaders of Currituck County.

The statute is not ambiguous just because it does not spell out an itemized list of expenditures. Rather, it is unambiguous in giving the board the discretion to make its own judgment about which expenditures qualify as tourism-related. The purpose of the Legislature in doing this could not be more clear.

2. This Court should defer to the Legislature, which gave the commissioners the authority to use their judgment about to spend occupancy-tax revenues, and to the Board of Commissioners, and respect the authority of these co-equal branches of government.

Even if the commissioners are wrong in their judgment, however, their decisions are due deference from this Court.

If this Court disagreed with the county's position that the board has the authority to spend money on public safety, it would be taking away the board's discretion and that would "frustrate the purpose of the statute." Friends of Hatteras

Island Nat. Hist. Forest Land Trust Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 573, 452 S.E.2d 337, 348 (1995). The statute gives the board discretion to use its judgment, and holding for the plaintiffs would mean that the board would no longer have that discretion and the Court would be substituting its own judgment.

Judicial restraint and deference to the other branches of government is part of our jurisprudence. See, e.g., Corum v. Univ. of North Carolina, 330 N.C. 761, 784, 413 S.E.2d 276, 291 (1992) (noting that, in using judicial power to create remedies for violations of constitutional rights, "the judiciary must minimize the encroachment upon other branches of government[.]"); White v. Payne, 58 N.C. App. 402, 403, 293 S.E.2d 601, 602 (1982) ("As a general rule, our courts give deference to the legislature and indulge every proposition in favor of the constitutionality of statutes."); State v. Fowler, 197 N.C. App. 1, 13, 676 S.E.2d 523, 536 (2009) (" '[S]o long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision.' " (citation omitted)).

This Court should must bear these principles in mind and defer to the Board of Commissioners' judgment about how it spends its tax revenues, as long as such determinations are reasonable. Otherwise, the Court is substituting its own judgment for that of the duly elected board, usurping its role as a co-equal branch of government, and making itself superior to the other branches; it is becoming the legislative or executive branch instead of just the judicial one.

Except for the plaintiffs, who represent a tiny amount of the population, the residents of Currituck County do not appear to be displeased with how the board has

made its determinations, because the seven-member board has been unanimous on this question. Residents supporting the plaintiffs' position are free to run in elections for county commissioner or to lobby the commissioners if they want things done differently. These are hallmarks of our democratic form of government.

Residents can also ask the Legislature to change the statute – and the Legislature has not done so, which is further evidence that the county is doing what the Legislature intended when it gave the board the authority to make its own determination about what best helps tourism in the county. Just as if the Legislature had wanted to be specific about how the county could spend the money, it could be more specific now if it believed the county was not spending the money properly.

The plaintiffs may point to other local statutes, but those statutes involve counties where there are many municipalities as well as the county government. For example, Dare County not only has the county government but six incorporated towns (Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo). See Dare County website at https://www.darenc.com/about/towns-villages-areas (last visited Nov. 28, 2021). Each town has the power to tax and spend. Currituck County, by contrast, has no incorporated towns and thus the county board makes all the spending and taxing decisions in the county. Thus, any analogy to other local statutes is not applicable. Moreover, the very purpose of a local statute is to address the specific needs of that locality, or otherwise the Legislature could simply enact a statewide law. Thus, there were good reasons for this specific legislation and the

Court should defer to the Legislature's decision to make that decision specific to Currituck County.

3. The plaintiffs' brief makes several arguments not supported by case law, facts in the record, or logic.

The plaintiffs claim that "the 2004 amendment 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.' " (Pl. Brf., p. 8.) However, this assertion ignores a very key fact, which is that, under the 1987 bill, police protection and emergency services were not considered spending for "any lawful purpose" but were considered "tourist-related purposes." Section 1(e) of the 1987 statute, H.B. Bill 555, states: "Currituck County shall use at least seventy-five percent (75%) of the net proceeds of the tax levied under this section only for tours related purposes, including . . . police protection and emergency services." Thus, these public safety services were considered tourism-related expenses, not general expenses, in the 1987 bill.

The plaintiffs also claim that the Board of Commissioners has never articulated in "public statements its rationale for 'using its discretion' in exercising its 'judgment' as to why" it believes certain expenditures qualify as tourism-related. (Pl. Brf., p. 10.) However, nothing in the 2004 statute or any other statute requires the board to do so, and in any case the commissioners testified that they do discuss spending decisions with county staff and use their judgment in deciding how to spend funds. See, e.g., White Dep. p. 14 ("[T]hat gets discussed in our work sessions. . . . "); Jarvis Dep. pp. 19, 24, and 27 ("[W]e have lots of departments that testify before us

and provide us information before we approve a budget"; "we get data routinely"; and "that data is what I use to make my best judgment as to how we fund the budget"); K. Etheridge Dep. pp. 17 and 22 ("[T]he fire chief came in and spoke to us. His assistant spoke. The county manager gave a presentation."; "Usually in the presentations the county manger explained to us how he got to the numbers"); Hill Dep. pp. 8-9 ("[T]ypically we have public hearings or public meetings to discuss the budget before it's approved with the county commissioners. And then once they have gone through the highlights of everything, then it's brought to a county meeting, to a commissioners' meeting.").

The plaintiffs also concede that paying for life guards and beach clean-up are tourism-related even though neither is specifically named as such in the statute. This is a matter of opinion on which the commissioners happen to agree. But it also shows that the plaintiffs are picking and choosing which items they believe are related to tourism – even though that is the job of the county commissioners, who are elected county-wide, including from Corolla, where the plaintiffs live, and who are given the statutory discretion by the Legislature to make such determinations. This is the very purpose of elected, representative government. The plaintiffs and the commissioners have a difference of opinion on whether police protection and emergency medical services are tourism-related, even if they agree on life guards. But if the choice is between the plaintiffs' opinions and the commissioners' opinions, the Court must defer to the commissioners. The plaintiffs are entitled to their opinions, but so are

the commissioners, and the commissioners, not the plaintiffs, are the officials elected and empowered to make such decisions.

The illogic of the plaintiffs' assertion about life guards is self-evident on page 17 of their brief, where they say that "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 simmer. No one would dispute that EMS should be available in these circumstances, but the issue here is whether these services may legally be funded by OT funds or should be funded by some other County tax revenues." See Pl. Brf., p. 17 (emphasis in original). But, again, the plaintiffs do not explain why, under their theory, life guards could be legally funded by occupancy-tax funds, yet they do not challenge such expenditures.

The plaintiffs also claim that the county is not legally required to fund life guard services, but neither is it required to have EMS or fire services; it just chooses to do so because it is safer for residents and tourists if it does. The plaintiffs claim that a beach with life guards is safer for tourists and thus increase tourism, but this logic also supports the funding of other public safety services.

Underlying the plaintiffs' argument about law enforcement and EMS services is that the county uses occupancy-tax funds for these items not just in Corolla but throughout the county. But, as the commissioners testified, it cannot be credibly asserted that there is tourism only on Corolla, and, even if there was, the statute does not say the funds should be spent only on Corolla. Rather, the statute covers the

whole county. And yet the county still spends 80 percent of occupancy-tax revenues on Corolla. (White Aff. ¶ 6.) Thus, this position is without any merit whatsoever.

Finally, the plaintiffs claim that the commissioners "have abused their discretion by their failure to either understand or to diligently consider the relevant factors in deliberating on their actions." (Pl. Brf., p. 25.) This assertion is baseless, as the record testimony shows. The plaintiffs assert that their judgment about what is tourism-related is superior to the commissioners' judgment. But the commissioners represent the entire county, not just Corolla. Collectively, they have lived there for hundreds of years and have experience in tourism, law enforcement, the schools, farming, business, and agriculture. Collectively, their judgment is superior to that of the plaintiffs. And even if that were not the case, they have been elected and empowered by law to exercise that judgment, and the plaintiffs have not.

CONCLUSION

For the reasons and authorities cited herein, the defendants respectfully request that their motion for summary judgment be granted and that the plaintiffs' motion be denied.

Respectfully submitted, this 2nd day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an attorney at law licensed to practice in the State of North Carolina, is attorney for defendants in this matter, and is a person of such age and discretion as to be competent to serve process.

That on December 2, 2021, he served a copy of the attached **BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** by electronic email to the attorney listed below with consent of said attorney:

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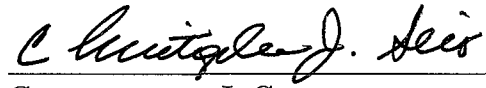

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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

Ex. A

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 1 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
1987 SESSION

CHAPTER 209
HOUSE BILL 555

AN ACT TO AUTHORIZE CURRITUCK COUNTY TO LEVY A ROOM OCCUPANCY AND TOURISM DEVELOPMENT TAX.

The General Assembly of North Carolina enacts:

Section 1. Occupancy tax. (a) Authorization and scope. The Currituck County Board of Commissioners may by resolution, after not less than 10 days' public notice and after a public hearing held pursuant thereto, levy a room occupancy tax of three percent (3%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by a hotel, motel, inn, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(3), or from the rental of a campsite within the county. This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose.

(b) Collection. Every operator of a business subject to the tax levied under this section shall, on and after the effective date of the levy of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the county. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The Currituck County Tax Collector shall design, print, and furnish to all appropriate businesses and persons in the county the necessary forms for filing returns and instructions to ensure the full collection of the tax. An operator of a business who collects the occupancy tax levied under this section may deduct from the amount remitted to the county a discount of three percent (3%) of the amount collected.

(c) Administration. The county shall administer a tax levied under this section. A tax levied under this section is due and payable to the county tax collector in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the county. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied. A return filed with the county tax collector under this section is not a public record as defined by G.S. 132-1 and may not be disclosed except as required by law.

EX. B

(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this section shall pay a penalty of ten dollars ($10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional tax of five percent (5%) for each additional month or fraction thereof until the tax is paid.

Any person who willfully attempts in any manner to evade a tax imposed under this section or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars ($1,000), imprisonment not to exceed six months, or both. The Board of Commissioners may, for good cause shown, compromise or forgive the penalties imposed by this subsection.

(e) Use of tax revenue. Currituck County shall use at least seventy-five percent (75%) of the net proceeds of the tax levied under 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. 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 proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer.

(f) Effective date of levy. A tax levied under this section shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.

(g) Repeal. A tax levied under this section may be repealed by a resolution adopted by the Currituck County Board of Commissioners. Repeal of a tax levied under this section shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this section does not affect a liability for a tax that was attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal.

Sec. 2. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 18th day of May, 1987.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1999

SESSION LAW 1999-155
HOUSE BILL 665

AN ACT TO MODIFY THE CURRITUCK COUNTY ROOM OCCUPANCY AND TOURISM DEVELOPMENT TAX.

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, reads as rewritten:

"Section 1. Occupancy tax. (a) Authorization and scope. The Currituck County Board of Commissioners may ~~by resolution, after not less than 10 days' public notice and after a public hearing held pursuant thereto,~~ levy a room occupancy tax of three percent (3%) of the gross receipts derived from the rental of any room, lodging, or similar accommodation furnished by a hotel, motel, inn, or similar place within the county that is subject to sales tax imposed by the State under G.S. 105-164.4(a)(3), or from the rental of a campsite within the county. This tax is in addition to any State or local sales tax. This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose.

(a1) Additional occupancy tax. In addition to the tax authorized by subsection (a) of this section, the Currituck County Board of Commissioners may levy a room occupancy tax of one percent (1%) 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 subsection (a).

(b) A tax levied under this act shall be levied, administered, collected, and repealed as provided in G.S. 153A-155. The penalties provided in G.S. 153A-155 apply to a tax levied under this section. ~~Collection. Every operator of a business subject to the tax levied under this section shall, on and after the effective date of the levy of the tax, collect the tax. This tax shall be collected as part of the charge for furnishing a taxable accommodation. The tax shall be stated and charged separately from the sales records, and shall be paid by the purchaser to the operator of the business as trustee for and on account of the county. The tax shall be added to the sales price and shall be passed on to the purchaser instead of being borne by the operator of the business. The Currituck County Tax Collector shall design, print, and furnish to all appropriate businesses and persons in the county the necessary forms for filing returns and instructions to ensure the full collection of the tax.~~

EX. C

~~(c) Administration. The county shall administer a tax levied under this section. A tax levied under this section is due and payable to the county tax collector in monthly installments on or before the 15th day of the month following the month in which the tax accrues. Every person, firm, corporation, or association liable for the tax shall, on or before the 15th day of each month, prepare and render a return on a form prescribed by the county. The return shall state the total gross receipts derived in the preceding month from rentals upon which the tax is levied. A return filed with the county tax collector under this section is not a public record as defined by G.S. 132-1 and may not be disclosed except as required by law.~~

~~(d) Penalties. A person, firm, corporation, or association who fails or refuses to file the return required by this section shall pay a penalty of ten dollars ($10.00) for each day's omission. In case of failure or refusal to file the return or pay the tax for a period of 30 days after the time required for filing the return or for paying the tax, there shall be an additional tax, as a penalty, of five percent (5%) of the tax due in addition to any other penalty, with an additional tax of five percent (5%) for each additional month or fraction thereof until the tax is paid. Any person who willfully attempts in any manner to evade a tax imposed under this section or who willfully fails to pay the tax or make and file a return shall, in addition to all other penalties provided by law, be guilty of a misdemeanor and shall be punishable by a fine not to exceed one thousand dollars ($1,000), imprisonment not to exceed six months, or both. The Board of Commissioners may, for good cause shown, compromise or forgive the tax penalties imposed by this subsection.~~

(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. 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 use the net proceeds of the tax levied under subsection (a1) 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.

~~(f) Effective date of levy. A tax levied under this section shall become effective on the date specified in the resolution levying the tax. That date must be the first day of a calendar month, however, and may not be earlier than the first day of the second month after the date the resolution is adopted.~~

~~(g) Repeal. A tax levied under this section may be repealed by a resolution adopted by the Currituck County Board of Commissioners. Repeal of a tax levied under this section shall become effective on the first day of a month and may not become effective until the end of the fiscal year in which the repeal resolution was adopted. Repeal of a tax levied under this section does not affect a liability for a tax that was~~

~~attached before the effective date of the repeal, nor does it affect a right to a refund of a tax that accrued before the effective date of the repeal.~~"

Section 2. County Administrative Provisions. Section 3(b) of S.L. 1997-102, as amended by Section 2 of S.L. 1997-255, Section 2 of S.L. 1997-342, Section 3 of S.L. 1997-364, Section 6 of S.L. 1997-410, and Section 2 of S.L. 1998-14, reads as rewritten:

"(b) This section applies only to Avery, Brunswick, Currituck, Davie, Madison, Nash, Person, Randolph, and Scotland Counties."

Section 3. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 7th day of June, 1999.

s/ Marc Basnight
President Pro Tempore of the Senate

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