

NORTH CAROLINA COURT OF APPEALS

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GERALD COSTANZO, BRYAN  
DAGGETT, JOHN DUMBLETON,  
PHILIP SCHNEIDER, CLARA  
SCHNEIDER, MARGARET BINNS,  
MOHAN ADKARNI, 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-Appellants,

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-Appellees.

**From Currituck County**

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**PLAINTIFFS-APPELLANTS' BRIEF**

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## INDEX

TABLE OF CASES AND AUTHORITIES .....	iv
INTRODUCTION .....	2
ISSUES PRESENTED .....	4
STATEMENT OF THE CASE .....	5
STATEMENT OF FACTS .....	5
STATEMENT OF GROUNDS FOR APPELLATE REVIEW .....	9
STANDARD OF REVIEW .....	9
ARGUMENT .....	10
I. The County Lacks Power to Spend Occupancy Tax Proceeds on General Public Services Because the General Assembly Has Deauthorized Such Spending .....	10
A. Counties have only the powers delegated to them by the General Assembly .....	10
B. The 2004 Act narrowed the purposes for which the County could spend occupancy tax proceeds .....	11
C. The statutory history shows that the General Assembly intended in 2004 to prohibit the County from using occupancy tax proceeds for general public services .....	15
II. Besides Flouting Statutory History, the County's Interpretation of the Act Is Unreasonable .....	20
A. The County cannot use its "judgment" to rewrite the 2004 amendment .....	21
1. General public services may relate to tourists, but not to tourism generally .....	21

2.	Offsetting the cost of tourism is not the same as attracting tourists.....	23
B.	The County misinterprets its act to match the enabling act of neighboring Dare County .....	25
C.	The County has revenue sources to offset the impact of tourists.....	27
III.	Alternatively, the County Has Abused Its Discretion Rather Than Exercise Its Judgment .....	29
IV.	The Trial Court Erred by Dismissing the Other, Related Claims.....	35
A.	The County cannot avoid public oversight by commingling occupancy-tax proceeds with other cash.....	35
B.	A loan for a water treatment facility is not a tourism-related expenditure .....	37
C.	The County cannot spend occupancy tax proceeds on fire hydrants and administrative costs.....	38
D.	The other claims are remedial claims that should be reinstated .....	39
	CONCLUSION.....	40
	CERTIFICATE OF COMPLIANCE.....	42
	CERTIFICATE OF SERVICE.....	43
	APPENDIX:	
	1985 N.C. Sess. Laws 449.....	App. 1-2
	1987 N.C. Sess. Laws 209.....	App. 3-4
	1991 N.C. Sess. Laws 177.....	App. 5-11

2004 N.C. Sess. Laws 95.....	App. 12-14
Legislative Summary for H.B. 1102.....	App. 15-16
H. 1102, 2007-2008 Sess. (N.C. 2007) .....	App. 17-18
Excerpts from Deposition Transcript of J. Owen Etheridge .....	App. 19-33
Excerpts from Deposition Transcript of Sandra Hill.....	App. 34-37
Excerpts from Deposition Transcript of Kevin Edward McCord .....	App. 38-40
Excerpts from Deposition Transcript of Robert “Bob” White.....	App. 41-54

## **TABLE OF CASES AND AUTHORITIES**

### **Cases:**

<i>Anderson Creek Partners, L.P. v. Cnty. of Harnett,</i> 275 N.C. App. 423, 854 S.E.2d 1 (2020).....	10
<i>Barbour v. Carteret Cnty.,</i> 255 N.C. 177, 120 S.E.2d 448 (1961).....	29, 30
<i>Burgess v. Your House of Raleigh, Inc.,</i> 326 N.C. 205, 388 S.E.2d 134 (1990).....	15, 16
<i>Burton v. City of Reidsville,</i> 243 N.C. 405, 90 S.E.2d 700 (1956).....	30, 31
<i>Corum v. UNC,</i> 330 N.C. 761, 413 S.E.2d 276 (1992).....	39
<i>Efird v. Bd. of Comm’rs for Forsyth Cnty.,</i> 219 N.C. 96, 12 S.E.2d 889 (1941).....	29, 31
<i>Forbis v. Neal,</i> 361 N.C. 519, 649 S.E.2d 382 (2007).....	10
<i>Gallardo ex rel. Vassallo v. Marstiller,</i> 142 S. Ct. 1751 (2022).....	26
<i>Horner v. Chamber of Com. of City of Burlington,</i> 235 N.C. 77, 68 S.E.2d 660 (1952).....	11, 31
<i>In re FLS Owner II, LLC,</i> 244 N.C. App. 611, 781 S.E.2d 300 (2016).....	19
<i>In re Hous. Auth. of City of Salisbury,</i> 235 N.C. 463, 70 S.E.2d 500 (1952).....	31
<i>In re Vogler Realty, Inc.,</i> 365 N.C. 389, 722 S.E.2d 459 (2012).....	10
<i>Midrex Techs., Inc. v. N.C. Dep’t of Revenue,</i> 369 N.C. 250, 794 S.E.2d 785 (2016).....	27

<i>Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment,</i> 169 N.C. App. 587, 610 S.E.2d 255 (2005).....	11, 21
<i>Painter v. Wake Cnty. Bd. of Ed.,</i> 288 N.C. 165, 217 S.E.2d 650 (1975).....	30
<i>Quality Built Homes Inc. v. Town of Carthage,</i> 369 N.C. 15, 789 S.E.2d 454 (2016).....	10
<i>Ray v. N.C. Dep't of Transp.,</i> 366 N.C. 1, 727 S.E.2d 675 (2012).....	19
<i>Smith Chapel Baptist Church v. City of Durham,</i> 350 N.C. 805, 517 S.E.2d 874 (1999).....	11
<i>State ex rel. Com'r of Ins. v. N.C. Rate Bureau,</i> 300 N.C. 381, 269 S.E.2d 547 (1980).....	30, 31
<i>Wells Fargo Bank, N.A. v. Am. Nat'l Bank &amp; Tr. Co.,</i> 250 N.C. App. 280, 791 S.E.2d 906 (2016).....	19, 22

**Statutes and Legislative Materials:**

N.C. Gen. Stat. § 7A-27 .....	9
N.C. Gen. Stat. § 105-113.80 .....	28
N.C. Gen. Stat. § 105-113.82 .....	6, 28
N.C. Gen. Stat. §§ 105-463 to -474.....	28
N.C. Gen. Stat. §§ 105-480 to -487.....	28
N.C. Gen. Stat. §§ 105-495 to -502.....	28
N.C. Gen. Stat. §§ 105-535 to -538.....	28
N.C. Gen. Stat. § 143B-324.2 .....	12
N.C. Gen. Stat. § 143B-434.2 .....	12
N.C. Gen. Stat. § 153A-146 .....	11
N.C. Gen. Stat. § 153A-149 .....	6, 27

N.C. Gen. Stat. § 153A-151 .....	6, 28
N.C. Gen. Stat. § 153A-301 .....	39
N.C. Gen. Stat. § 153A-307 .....	39
N.C. Gen. Stat. § 153A-309.2 .....	39
N.C. Gen. Stat. § 153A-309.3 .....	39
N.C. Gen. Stat. § 153A-310 .....	39
N.C. Gen. Stat. § 159-13.....	11
1985 N.C. Sess. Laws 449.....	25
1987 N.C. Sess. Laws 209.....	<i>passim</i>
1991 N.C. Sess. Laws 144.....	12
1991 N.C. Sess. Laws 155.....	13
1991 N.C. Sess. Laws 177.....	26
1999 N.C. Sess. Laws 155.....	13
2004 N.C. Sess. Laws 95.....	<i>passim</i>
2008 N.C. Sess. Laws 54.....	15
2013 N.C. Sess. Laws 414.....	15
H. 1102, 2007-2008 Sess. (N.C. 2007).....	18
Legislative Summary for H.B. 1102 .....	7, 18

**Other Authorities:**

Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012).....	16, 17, 19
N.C. Const. art. V, § 7(2) .....	11

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**PLAINTIFFS-APPELLANTS' BRIEF**

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## **INTRODUCTION**

For decades, North Carolina has been working to make this State an even better place to visit. Developing tourism, however, is not free. Attractions, amenities, and beautification cost money. Part of the State's strategy has been to permit local governments to fund improvements by levying an occupancy tax on the lodgings where tourists stay when they visit.

The State initially conceived of occupancy tax partly to promote tourism and partly to fund local governments. The last few decades, however, have seen a strategic shift. The General Assembly has increased the amount of occupancy tax that local governments can levy on lodgings while insisting that these tax dollars be reinvested to generate more tourism.

Currituck County, on the Outer Banks, is a case study in this policy shift. From 1987 to 2004, the General Assembly required the County to spend part of its tax on promoting tourism, while allowing the County to use the rest on general public services, such as police and fire protection.

But in 2004 that changed. The legislature eliminated the County's power to spend occupancy tax dollars on general public services. Consistent with its overall policy shift, the legislature now required the County to spend its occupancy tax dollars on generating more tourism by reinvesting this revenue into "attracting tourists" to the County.

The County commissioners were displeased because the County had been using its occupancy tax dollars to subsidize general public services provided throughout the County. The commissioners lobbied the legislature to restore its old authority. Yet the legislature refused to go back.

After this failure, the County tried something different—ignoring the law. The County acted as if the 2004 amendment never happened. It continued spending its occupancy tax dollars on general public services. The County has pursued this strategy for the last eighteen years.

The County now wants to justify its misconduct by arguing that it has the discretion to interpret the 2004 amendment to let it spend occupancy tax dollars on general public services. The County says no tourist wants to visit somewhere unsafe.

This rationale does not hold water. The County is undermining the legislature's intent and the plain language of the 2004 amendment. If the County were right, then the 2004 amendment was a dead letter from the moment of enactment. The amendment requires the County to reinvest its occupancy tax dollars on projects that “increase the use” of lodgings in the County by “attracting tourists.” General public services do not increase the use of lodgings or attract tourists. Tourists do not visit the County to admire its police departments, fire stations, and sewer plants. Tourists expect general public services

as a bare minimum, but no tourist visits an area *because of* these public services.

If the County does not want to encourage tourism, it does not have to. Under the law, it is the County's choice whether to levy an occupancy tax. But once it taxes, it must obey the law for spending those tax dollars. The General Assembly does not want the County to make tourism more expensive through taxation unless it is also making tourism more attractive. The trial court's contrary ruling, allowing the County to turn a blind eye to the law, should be reversed.

### **ISSUES PRESENTED**

1. The General Assembly initially granted the County the power to spend occupancy tax proceeds on general public services, but later explicitly revoked that power. Did the County break the law by continuing to spend occupancy tax dollars on general public services?

2. Assuming the County had some discretion to spend occupancy tax dollars on general public services, did the County abuse that discretion by (1) ignoring the statutory limits on its spending authority, and (2) conducting no due diligence in determining whether the expenditures met the statutory limitations?

3. Did the trial court also err by letting the County spend occupancy tax dollars on fire hydrants and special service districts, while commingling occupancy tax proceeds with the County's general fund?

### **STATEMENT OF THE CASE**

Plaintiffs filed their verified complaint on 7 May 2019. (R p 3.) Defendants moved for partial dismissal, which was allowed on 26 July 2021. (R p 172.) Plaintiffs moved for partial offensive summary judgment while Defendants moved for complete summary judgment. (R pp 133, 188-89.)

On 22 December 2021 the trial court denied Plaintiffs' motion for summary judgment and granted Defendants' motion. (R pp 211-12.) Plaintiffs gave timely notice of appeal on 25 January 2022. (R 213-14.) The record was settled by stipulation on 15 August 2022. (R p 230.)

### **STATEMENT OF FACTS**

Currituck County is North Carolina's northernmost coastal county. Ninety percent of the County's land is on the mainland. (White Dep. 32:21-33:5, 35:18-19.) Ten percent of the landmass is a thin strip of land, comprising part of the Outer Banks. (White Dep. 32:21-33:5.) The town of Corolla is the main city on the County's portion of the Outer Banks. Currituck's part of the Outer Banks is referred to as the Currituck Outer Banks or just Corolla.

Corolla is a tourist destination; the rest of the County is not. (White Dep. at 19:24-20:3.) Corolla has 20,000 beds available for rent in 4,000 private

homes, as well as hotels and inns. (R p 5 ¶ 14.) Corolla generates over 99% of the County's occupancy tax revenue, raised by taxes on lodging facilities. (R p 5 ¶ 14.)

Corolla disproportionately creates the County's wealth in other ways, too. Though only 10% of the County's landmass, Corolla is 52% of the County's property tax base. (White Dep. 35:18-19.) Corolla's property tax revenue goes into the County's general fund, to be spent for any public purpose, and in any part of the County. *See* N.C. Gen. Stat. § 153A-149. The same is true for sales tax and alcohol tax generated in Corolla. *See, e.g., id.* §§ 153A-151, 105-113.82. Plaintiffs do not challenge any of those taxes.

Corolla is also a bargain for the County because it requires disproportionately less general public services—police, fire, and EMS—than the mainland. For instance, during the peak summer season, there are twice as many tourists in Corolla as there are residents in the entire County. (R p 126.) Nonetheless, the County's EMS receives fewer calls from Corolla than the rest of the County, both during peak season and for the rest of the year. (R p 126.)

Similarly, there are far fewer calls to the police in Corolla than in the rest of the County. (R p 127.) The same is true for arrests. In 2018, for example, the number of arrests in Corolla were disproportionately much fewer than those on the mainland. (R p 128.)

Another benefit of Corolla is the occupancy tax it generates. An occupancy tax is a tax on receipts derived from the rentals of rooms and other lodgings, in addition to any sales tax. *See* 1987 N.C. Sess. Laws 209, § 1(a) [App. 3-4]. The General Assembly first authorized the County to levy an occupancy tax by local act in 1987. *Id.*

The General Assembly limits how the County can spend its occupancy tax dollars. From 1987 to 2004, the General Assembly let the County use *part* of its occupancy tax proceeds for general public services, such as “police protection” and “emergency services.” *Id.* § 1(e). But in 2004, the General Assembly amended the act and deleted language authorizing the County to spend occupancy tax proceeds on general public services. 2004 N.C. Sess. Laws 95, § 2(e) [App. 12-13]. Under the amendment, the County was limited to spending its occupancy tax dollars in ways that would “increase the use of lodgings” by “attracting tourists” to the County. *Id.* § 2(e)(4).

Disappointed with this change, the County commissioners lobbied the General Assembly to reinstate its “general public services” authorization. The County’s bill was introduced but went nowhere. (Owen Etheridge Dep. at 56-57 [App. 31-32]); Legislative Summary for H.B. 1102, <https://www.ncleg.gov/BillLookUp/2007/H1102> (last accessed Oct. 28, 2022) [App. 15].

The County's next strategy was to act as if the 2004 amendment never happened. So far, that strategy has worked. Through the filing of this lawsuit in 2019 and to date, the County has continued spending its occupancy tax dollars on general public services and other similar programs that attract no tourists but are instead just the cost of running local government. The County has also spent its occupancy tax dollars to build a water treatment plant, to install fire hydrants, and to pay other costs incurred because of new tax districts. (R pp 24-26 ¶¶ 97-106.) Corolla's occupancy tax dollars also fund general public services and general-purpose facilities on the mainland, where tourists are seldom seen. (R pp 147-48; Jarvis Dep. at 12:4-21, 16:7-17:4.) Moreover, the County commissioners simply lump the occupancy tax proceeds into the County's general funds, commingling dollars that should be earmarked for specific purposes. (R p 14 ¶¶ 53-54.)

The County's strategy is unique. There is no evidence that other local governments, with similarly limited local acts, spend their occupancy tax dollars on general public services. (R p 179 ¶ 16.) Yet the County's occupancy tax revenues rank fifth among the State's 100 counties. (R p 13 ¶ 49.)

Plaintiffs are property owners who collect and remit occupancy tax proceeds to the County. (R pp 6-7 ¶ 16.) In their verified complaint, they seek to have the County comply with the 2004 act, after nearly two decades of continuous violations. The complaint challenges numerous unlawful expenditures of

occupancy tax proceeds, with the primary challenge to the County's payment for general public services.<sup>1</sup> (R pp 14-15.) In fact, just after the lawsuit was filed, the County commissioners voted to withdraw \$100,000 of occupancy tax funds to pay for this litigation, illustrating their flexible view of how to attract tourists. (White Dep. at 50:3-15; R p 148.)

Plaintiffs moved for offensive summary judgment on just one claim—that the County broke the law by spending occupancy tax dollars on general public services. (R p 133.) The County responded by moving for summary judgment on all Plaintiffs' claims. (R p 188.) The trial court denied Plaintiffs' motion and granted the County's motion. (R p 211.) Plaintiffs appeal. (R p 213.)

### **STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

The trial court's order granting complete summary judgment to the County is appealable as a final judgment. N.C. Gen. Stat. § 7A-27(b)(1).

### **STANDARD OF REVIEW**

The trial court entered summary judgment, siding with the County's statutory interpretation. Disputes over statutory interpretation as well as orders for summary judgment are reviewed de novo. *See Forbis v. Neal*, 361 N.C.

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<sup>1</sup> Counts 3 and 4 were ultimately dismissed; Plaintiffs do not appeal those dismissals.



519, 524, 649 S.E.2d 382, 385 (2007) (summary judgment); *In re Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012) (statutory interpretation).

### **ARGUMENT**

#### **I. The County Lacks Power to Spend Occupancy Tax Proceeds on General Public Services Because the General Assembly Has Deauthorized Such Spending.**

Counties have only the powers that the General Assembly has given them. In 2004, the General Assembly stripped Currituck County of the power to spend its occupancy tax proceeds on general public services. The County acted ultra vires by ignoring this statutory change and spending the tax proceeds for illegal purposes.

##### **A. Counties have only the powers delegated to them by the General Assembly.**

Counties are a form of municipal government that are “born purely from legislative will and have no authority or powers apart from those given to them by the General Assembly.” *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 275 N.C. App. 423, 431, 854 S.E.2d 1, 7 (2020) (cleaned up), *rev’d in part on other grounds*, 2022-NCSC-93. Thus, any acts by a county “that extend beyond the scope of the powers and authorities statutorily granted to it are void.” *Id.*

For that reason, a county acts illegally, and ultra vires, when it charges fees without statutory authorization, *e.g.*, *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 22, 789 S.E.2d 454, 459 (2016), or spends funds without

statutory authorization, *e.g.*, *Horner v. Chamber of Com. of City of Burlington*, 235 N.C. 77, 81, 68 S.E.2d 660, 663 (1952). Indeed, the General Assembly has prohibited counties from imposing any taxes that it has not “specifically authorized,” N.C. Gen. Stat. § 153A-146(a), or making “expenditures of revenues for purposes not permitted by law,” *id.* § 159-13(b)(4). It could not be otherwise, for our Constitution provides that “[n]o money shall be drawn from the treasury of any county . . . except by authority of law.” N.C. Const. art. V, § 7(2).

Thus, when a litigant challenges a county’s spending as ultra vires, the legislature’s statutory language governs. *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999). And that language is “strictly construed.” *Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment*, 169 N.C. App. 587, 589, 610 S.E.2d 255, 258 (2005).

**B. The 2004 Act narrowed the purposes for which the County could spend occupancy tax proceeds.**

Ever since it first authorized Currituck County to levy an occupancy tax, the General Assembly has steadily increased the amount of tax that the County can levy, while also narrowing the purposes for which the County can spend this public revenue. These changes reflect the legislature’s statewide policy shift toward tourism.

From the 1990s to the early 2000s, the General Assembly was taking a leading role in promoting the state's tourism industry. In 1991, the legislature established its tourism policy in the Travel and Tourism Policy Act, which has since been amended six times. 1991 N.C. Sess. Laws 144 (codified as amended at N.C. Gen. Stat. § 143B-434.2). The Act recognizes that tourism “provides economic well-being by contributing to employment and economic development, generating State revenues and receipts for local businesses.” N.C. Gen. Stat. § 143B-324.2(b)(3).

During the 1990s, the General Assembly also shifted its policy on occupancy taxes. (R p 178 ¶ 12.) The legislature was presented with data showing that the imposition of occupancy tax, which is on top of sales tax, actually hurts the local tourism industry unless the proceeds are invested in making the area more attractive to tourists. (R p 178 ¶ 12.) The General Assembly listened and changed how Currituck County could spend its occupancy tax dollars. (R p 178 ¶ 12.)

In 1987, the General Assembly first authorized Currituck County to levy an occupancy tax. *See An Act to Authorize Currituck County to Levy a Room Occupancy and Tourism Development Tax*, 1987 N.C. Sess. Laws 209 [App. 3-4].<sup>2</sup> The act authorized a tax of up to 3% on the rentals of lodgings. *Id.* § 1(a).

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<sup>2</sup> The laws governing Currituck County's occupancy are local acts. As such, they are not codified in the General Statutes.

In the same act, the legislature limited how the County could use this new revenue source. Three-quarters of the occupancy tax had to be spent “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.” *Id.* § 1(e). The rest of the proceeds went into the County’s “General Fund” and could “be used for any lawful purpose.” *Id.*

Four years later, the General Assembly amended this enabling act, increasing the amount of tax that the County could levy by 1%. *See* 1991 N.C. Sess. Laws 155, § 1(a1). The legislature left in place the use limitations on the first 3% of the tax proceeds. *Id.* § 1(e). But it limited the use of the new 1% tax to the “capital costs, operation, and maintenance of the Currituck Wildlife Museum.” *Id.* Whatever portion of that 1% was “not needed” for the museum had to instead “be used for tourist-related purposes,” as defined in the original 1987 act. *Id.*

The next relevant amendment came in 2004—the amendment giving rise to this litigation.<sup>3</sup> *See* An Act to Allow an Increase in the Currituck County Occupancy Tax and to Change the Purposes for Which the Tax May Be Used, 2004 N.C. Sess. Laws 95 [App. 12-14]. The 2004 amendment authorized the

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<sup>3</sup> In 1999, the legislature amended the act, but did not modify the amount of tax or the uses for that tax. 1999 N.C. Sess. Laws 155.

County to levy up to an additional 2% occupancy tax, raising the total authorization to 6%. *Id.* § 1(a2).

At the same time, the General Assembly overhauled the statute and further restricted the County's use of the occupancy tax proceeds. *Id.* § 2(e). The amendment eliminated the County's authority to spend the proceeds on general public services, such as the "construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." *Id.*

These services had been called "tour~~ist~~ related purposes" in the original, 1987 act. In the 2004 amendment, however, the legislature deleted all reference to "tourist related purposes," instead limiting the spending of tax proceeds to "tour~~ism~~-related expenditures, including beach nourishment." *Id.* (emphasis added). When making this change the General Assembly also adopted a specific definition of 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.

*Id.* § 2(e)(4).

Under the 2004 amendment, when the County levies occupancy tax,<sup>4</sup> then two-thirds of the total occupancy tax received by the County must be used on tourism-related expenditures, and the other third spent “to promote travel and tourism.” *Id.*

The promotion of travel and tourism is specifically defined as marketing expenditures. *Id.* § 2(e)(4). Those expenditures are not at issue.<sup>5</sup>

**C. The statutory history shows that the General Assembly intended in 2004 to prohibit the County from using occupancy tax proceeds for general public services.**

By deleting the County’s prior authorization to spend occupancy tax proceeds on general public services, the General Assembly intentionally revoked the County’s prior authorization to spend occupancy tax proceeds on those services. That legislative intent means the County is prohibited from spending the tax proceeds on general public services. The legislature’s intent should be “carr[ied out] . . . to the fullest extent.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990).

Reasonable jurists differ on whether to consult legislative history. However, even jurists who reject legislative history agree that the history of statutory amendments provides critical evidence of legislative intent. This type of

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<sup>4</sup> Which is what happened. The County levies the full 6%. (R p 12 ¶ 46.)

<sup>5</sup> There were two later amendments as well, but neither is relevant to this case. See 2013 N.C. Sess. Laws 414, § 60(s); 2008 N.C. Sess. Laws 54.

historical evidence is referred to as statutory history, rather than legislative history. The late Justice Antonin Scalia explained,

But quite separate from legislative history is *statutory* history—the statutes repealed or amended by the statute under consideration. These form part of the context of the statute, and (unlike legislative history) can properly be presumed to have been before all the members of the legislature when they voted. So a change in the language of a prior statute presumably connotes a change in meaning.

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012). Our courts recognize the same principle.<sup>6</sup> *Burgess*, 326 N.C. at 216, 388 S.E.2d at 141 (“Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve.”).

Statutory history matters when the legislature amends a statute to delete language that authorizes a particular action. In that scenario, no reasonable argument can be made that the deleted action continues to be authorized: “For example, if a statute providing for an award to the prevailing party of ‘attorney’s fees and expert-witness fees’ has been amended to award only

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<sup>6</sup> Our courts collectively refer to both “legislative history” (in Justice Scalia’s usage) and “statutory history” as just legislative history. See, e.g., *State v. Jones*, 358 N.C. 473, 479, 598 S.E.2d 125, 129 (2004) (analyzing prior versions of a statute to determine meaning, and referring to this history of amendments as “legislative history”).

‘attorney’s fees,’ there would be no basis for the argument (sometimes made) that attorney’s fees include reimbursement of the attorney’s expenditures for expert witnesses.” Scalia & Garner, *supra*, at 256.

That’s what happened here. From 1987 to 2004, the County’s local act authorized the County to use occupancy tax proceeds for “construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services.” 1987 N.C. Sess. Laws 209, § 1(e) [App. 4]. In 2004, the General Assembly amended the act and deleted that authorization. The legislature replaced it with expenditures more narrowly focused: expenses “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.” 2004 N.C. Sess. Laws 95, § 2(e)(4) [App. 13]. The amendment and its emphasis on “facilities” shows that, in 2004, the General Assembly intended to deauthorize the County from spending its occupancy tax proceeds on general public services designed to offset costs of tourism.

The County knows what the legislature intended in 2004 because it lobbied to undo the amendments. The commissioners believed it was forced to spend too much of its occupancy tax proceeds on tourism. (Owen Etheridge Dep. at 53-54 [App. 28-29].) So they lobbied the legislature in 2006 to amend



the act. (Owen Etheridge Dep. at 54 [App. 29].) They found a legislator to introduce their bill. (Owen Etheridge Dep. at 57 [App. 32].)

In the County's own words, that bill would have "changed everything" by "reinstating" the County's ability to spend occupancy tax dollars on general public services. (Hill Dep. 35:1-21 [App. 34].) The proposed bill would have let the County spend 75% of its occupancy tax for "tourist-related services," defined as general public services using the 1987 act's language: "construction and maintenance of public facilities and buildings; garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." H. 1102, 2007-2008 Sess. (N.C. 2007), *available at* <https://www.ncleg.gov/Sessions/2007/Bills/House/PDF/H1102v1.pdf> [App. 16-17]. The other 25% could have been spent "for any lawful purpose." *Id.* As the County now concedes, the proposed bill would have "reinstated" County's authority to spend its occupancy tax proceeds on general public services. (Hill Dep. at 35; *accord* Owen Etheridge Dep. at 55 [App. 30, 34].)

But the County's authority was not reinstated. The bill went nowhere. (Owen Etheridge Dep. at 56-57 [App. 31-32].) It never made it out of any committee. (Owen Etheridge Dep. at 56-57 [App. 31-32]); Legislative Summary for H.B. 1102, *supra*.

Despite the County's failed lobbying efforts, the County has continued to act as if the 2004 amendment never happened, or as if its 2007 lobbying had

worked. The legislature amended the County's act in 2004, but the County's current litigation position is that the 2004 amendment changed nothing. The County told the Plaintiffs that the 2004 amendment "carried over" the County's authority to spend occupancy tax dollars on general public services. (R pp 150-51.)

The County's argument flunks the canons of statutory construction. The title of the 2004 act states that it is a change: "An Act to Allow an Increase in the Currituck County Occupancy Tax and to ***Change the Purposes*** for Which the Tax May Be Used." 2004 N.C. Sess. Laws 95 (emphasis added) [App. 12-14]. The County says the title of the act does not bear on its meaning. (White Dep. at 47:16-48:3 [App. 50-51].) The County is wrong: An act's title is a valid indication of legislative intent. *See, e.g., Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012); *In re FLS Owner II, LLC*, 244 N.C. App. 611, 616, 781 S.E.2d 300, 303 (2016).

The legislature's intent to narrow the County's use of proceeds is also indicated by the major change in language in the 2004 amendment. When the legislature changes the language of a clear statute, the change in language "indicates the intent to change the law." *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 285, 791 S.E.2d 906, 910 (2016). In other words, "a significant change in language is presumed to entail a change in meaning." Scalia & Garner, *supra*, at 256.

The legislature's deletion of the "tourist related purposes" and general public services language, and its replacement with "tourism-related expenditures" and a special definition of that phrase, is a major change in language. The former phrase deals with people ("tourists") while the latter deals with an industry ("tourism"). This change in language shows an intent to change the law and prohibit the future use of occupancy tax dollars on general public services.

Unfortunately, the County defies the General Assembly. Since 2004, the County has continued spending its occupancy tax proceeds on general public services, as if the 2004 act changed nothing. The County's "nothing to see here" position is oblivious to the act's text and is belied by the County's own failed lobbying efforts. If the County wants to spend occupancy tax proceeds on general public services, then it needs to resume lobbying.<sup>7</sup>

## **II. Besides Flouting Statutory History, the County's Interpretation of the Act Is Unreasonable.**

The General Assembly's deletion of the "general public services" language is sufficient to show that the County no longer has authority to spend its occupancy tax proceeds on general public services. But even if that were

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<sup>7</sup> The County's general public services are not starved for funds and enjoy more than adequate sources of funding. *See infra* Argument § II.C.

not enough, other textual evidence proves that the legislature intended to strip the County of this authority.

**A. The County cannot use its “judgment” to rewrite the 2004 amendment.**

Below, the County clung to the “judgment” language in the definition of “tourism-related expenditure,” found in the 2004 act, arguing that it could use its “judgment” to ignore the definition of “tourism-related expenditures” and retain its prior practice under the prior law. But the General Assembly did not delegate to the County the authority to define its own powers. *See Nash-Rocky Mount Bd. of Educ.*, 169 N.C. App. at 590, 610 S.E.2d at 258 (“A local entity cannot define the scope of the authority granted to it by the General Assembly.”). In other words, although the County is allowed to exercise judgment on how it spends its occupancy tax proceeds to attract tourists, the County lacks discretion to spend the tax to offset the impact of the tourists it attracts. Those expenses must be paid from other sources.

**1. General public services may relate to tourists, but not to tourism generally.**

In 2004, the General Assembly changed the limit on the County’s use of occupancy tax proceeds from “tourist related” to “tourism-related” purposes. The County says the change from “tourist” to “tourism” is irrelevant. But the County is mistaken. The prior focus on tour~~ists~~ allowed the County to offset the impact of tourists, but the 2004 focus on tour~~ists~~*ism* was intended to focus the

County on developing the tourism sector of its economy. That is the difference the County misses.

For starters, the County's argument is presumptively wrong. When the legislature changes the words in a law, courts presume a change in meaning. *Wells Fargo*, 250 N.C. App. at 285, 791 S.E.2d at 910 ("We must presume that by changing the law . . . the General Assembly intended for the new law to have a different meaning."). Under the County's reading, the legislature's change from "tourist" to "tourism" was arbitrary. But there is no reason to ascribe caprice to the General Assembly when a reasonable distinction between these terms is available.

Before the 2004 act, the General Assembly earmarked some occupancy tax proceeds for things broadly related to the actual tourists visiting the County, such as providing them with trash collection, police protection, and emergency services. 1987 N.C. Sess. Laws 209, § 1(e) [App. 4]. But the 2004 act sought to entice the County to develop its local tourism industry, which in turn benefits the entire state. That is why the 2004 amendment talks about "attracting tourists . . . to the county," 2004 N.C. Sess. Laws 95, § 2(e)(4) [App. 13], whereas the prior law made no mention of developing the tourism sector of the County's economy.

It is this change in focus—which is captured by the change from "tourist" to "tourism"—that the County has ignored. The 2004 act shows the

legislature's change in policy, pivoting toward development of the tourism industry. The focus shifted away from ensuring that the County could meet the general public services demand of tourists, and toward generating tourism and the economic benefits that flow therefrom.

**2. Offsetting the cost of tourism is not the same as attracting tourists.**

Under the 2004 amendment, the County was required to spend two-thirds of its occupancy tax proceeds on things that would “attract tourists.” Instead, the County has chosen to spend this money to offset the impact of tourists on general public services. (See Owen Etheridge Dep. at 20:14-19 [App. 20] (explaining that the County uses occupancy tax to pay for any “burden” created by “increased tourism”).) But offsetting the impact of tourists is not what “attracts” tourists and “increase[s] the use of lodging” and other tourist facilities in the County. 2004 N.C. Sess. Laws 95, § 2(e)(4) [App. 13].

Under the 2004 amendment, a tourism-related expenditure is one that increases the use of lodgings (and similar facilities) by attracting tourists. *Id.* Thus, the County would make a tourism-related expenditure if it:

- coordinated a weekend-long “pirate invasion,” as in Beaufort, <https://www.beaufortpirateinvasion.com/>
- hosted a race at Kill Devil Hills, [https://www.theobxrunningcompany.com/5k-run-july-4th-outer-banks.html?utm\\_source=icwnet](https://www.theobxrunningcompany.com/5k-run-july-4th-outer-banks.html?utm_source=icwnet);
- funded a museum celebrating North Carolina's aviation history, like in Kitty Hawk, <https://www.nps.gov/wrbr/index.htm>;

- organized a fishing tournament, such as Big Rock in Morehead City, <https://www.thebigrock.com/>;
- put on a beach music festival, as done in Carolina Beach <https://www.wilmingtonandbeaches.com/event/carolina-beach-music-festival/4084/>; or
- built a visitor center, like in Corolla, <https://www.visitcurrituck.com/places/corolla-county-visitors-center/>.

Each of those is a tourism-related expenditure. Offsetting the impact of tourists is not. According to the County, spending on general public services qualifies as a tourism-related expenditure because tourists will not want to come to the County if there is poor police, fire, trash, or emergency services. While the failure to pay for basic public services likely would harm the tourism industry, that does not transform the funding of these services into tourism-related expenditures.

Consider a hypothetical town in rural North Carolina. It spends five times more per capita on police services than the state's average, and there's a fire station on every block. The town has no crime. The town, however, has no museums, festivals, or other cultural attractions. If the town were to argue that its spending on police and fire services were tourism-related expenditures, the argument would not be taken seriously. No doubt, the town is a great place to live, but that does not mean tourists will flock there.

Consider another example: Raleigh. The city is generally considered safe, and it attracts tourists, but not because of the city's spending on general

public services. Tourists come to Raleigh because of the convention center, the museums, and the Carolina Hurricanes. There may be fewer visitors if the city cut the police force in half, but it would be silly to say that people visit Raleigh *because of* the police.

There is an easy way to distinguish between baseline services and tourism-related expenditures. If *residents* would reasonably expect the service to be provided, whether tourists come or not, then the service is a general public service. Just as residents expect the government to provide such a bare minimum, so too do tourists arriving in Raleigh or Currituck County reasonably assume that general public services are provided.

**B. The County misinterprets its act to match the enabling act of neighboring Dare County.**

The County also makes a “fairness” argument, unmoored from the statutory history: that it should be able to use occupancy tax dollars to offset the costs of visiting tourists. Yet the General Assembly knows how to write that kind of law and chose not to do so for Currituck County.

The General Assembly has authorized neighboring Dare County to spend its occupancy tax proceeds on “tourist-related purposes,” defined in a similar fashion as Currituck County’s pre-2004 authorization. *See An Act to Authorize Dare County to Levy an Occupancy Tax*, 1985 N.C. Sess. Laws 449, § 1(e) [App. 2] (authorizing spending of occupancy tax proceeds on “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”). And Dare County actually spends its tax proceeds on these services. See Occupancy Tax, Dare County, <https://www.darenc.com/departments/tax-department/occupancy-tax> (last accessed Oct. 28, 2022).

Perhaps even more frustrating for Currituck County is a later amendment for Dare County. In 1991, the General Assembly authorized Dare County to levy an additional occupancy tax, and earmarked part of the proceeds to “be used for services or programs needed *due to the impact of tourism* on the county.” 1991 N.C. Sess. Laws 177, § 7(2) (emphasis added) [App. 10].

The statutes speak plainly. Had the legislature intended for Currituck County to have the same “tourism offset” spending power as Dare County, it would have used that same language in Currituck’s statute. See, e.g., *Gallardo ex rel. Vassallo v. Marstiller*, 142 S. Ct. 1751, 1758 (2022) (holding that, when the legislature uses language in one statute, but not in another, it reveals an intent to draw a distinction).

The General Assembly chose to give that power to Dare County, while withholding it from Currituck County. Yet Currituck County has consistently spent its occupancy tax proceeds as if it had the same legislation as Dare County. But courts interpret statutes to “give effect to the words actually

used”; they “should neither delete words used nor insert words not used in the relevant statutory language.” *Midrex Techs., Inc. v. N.C. Dep’t of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016). The County, however, wants a judicial rewrite.

**C. The County has revenue sources to offset the impact of tourists.**

The General Assembly stripped the County of the power to spend occupancy tax proceeds on general public services because the General Assembly has already authorized sufficient revenue streams to offset the costs of tourists. Counties have many sources of income that increase as tourism increases.

**Property tax.** Counties can levy property taxes to pay for, among many things, emergency medical services, fire protection, waste collection, and law enforcement. N.C. Gen. Stat. § 153A-149(c)(5), (11), (18), (29), (31).

Tourist-attracting properties have a higher assessed value due to their commercial value, leading to greater tax proceeds. The evidence confirms that commonsense proposition. The Outer Banks portion of the County is the County’s tourism epicenter. Although Corolla makes up only 10% of the County’s land mass, it constitutes half of the County’s property tax base. (White Dep. 32:21-33:5 [App. 47-48].) Put differently, tourist-centric properties are disproportionally more valuable than other properties in the County.

***Sales and use taxes.*** Counties are authorized to levy local sales and use taxes. N.C. Gen. Stat. § 153A-151. In fact, the General Assembly has enacted numerous statutes authorizing counties to levy a variety of sales and use taxes, much of which can be spent to offset the impact of tourists. *See, e.g.*, N.C. Gen. Stat. §§ 105-463 to -474 (First One-Cent (1¢) Local Government Sales and Use Tax); *id.* §§ 105-480 to -487 (First One-Half Cent (1/2¢) Local Government Sales and Use Tax); *id.* §§ 105-495 to -502 (Second One-Half Cent (1/2¢) Local Government Sales and Use Tax); *id.* §§ 105-535 to -538 (One-Quarter Cent (1/4¢) County Sales and Use Tax).

When tourists visit, they leave tax dollars behind as they buy food, clothing, and other goods. That money is then spent to offset costs imposed by the tourists.

***Beer and wine tax.*** The State levies excise taxes on the sale of wine and beer. *See* N.C. Gen. Stat. § 105-113.80(a)-(b). Portions of those taxes are remitted to the counties in which the beverages are sold. *Id.* § 105-113.82(a). Counties can spend those taxes “for any public purpose.” *Id.* § 105-113.82(g). Increased tourism in Currituck County means increased revenue from the taxes on beer and wine. The County can use those funds to offset the impact of tourism.

As these points show, tourism pays its own way. If the County cannot make efficient use of these revenue streams, then it should either change its

governance or petition the General Assembly for “offsetting” authority as in Dare County.

Below, the County’s response was that it would have to raise property taxes if it must comply with the 2004 amendments. Not only is that an insufficient reason to excuse a violation of law, it is also a problem the County created. The County has spent almost two decades ignoring the 2004 amendment. It is hardly surprising that, if the County brings itself into compliance, it will have to change the way it does business.

### **III. Alternatively, the County Has Abused Its Discretion Rather Than Exercise Its Judgment.**

Thus, the analysis never reaches the County’s discretionary spending power because the governing law forbids the expenditure of occupancy tax dollars on general public services. Alternatively, the County abused its limited discretion in spending these tax dollars on general public services.

Even when local governments are given discretion, that discretion is still limited. *Efird v. Bd. of Comm’rs for Forsyth Cnty.*, 219 N.C. 96, 12 S.E.2d 889, 896 (1941) (“It is not consonant with our conception of municipal government that there should be no limitation upon the discretion granted municipalities . . . .”). That discretion is particularly limited when municipalities spend taxpayer money. Courts enjoin local governments from misusing public money. *See, e.g., Barbour v. Carteret Cnty.*, 255 N.C. 177, 181-82, 120 S.E.2d 448, 451-

52 (1961) (holding that County abused discretion by overpaying for property for a hospital); *Painter v. Wake Cnty. Bd. of Ed.*, 288 N.C. 165, 178, 217 S.E.2d 650, 658-59 (1975) (holding that County board's exchange of property could be enjoined as an abuse of discretion, depending on the values of the properties).

Courts ask whether public officials have abused their discretion in making such expenditures when they do not consider relevant evidence or do not follow the law. These inquiries are factual in nature and not normally suited to summary adjudication. See *Burton v. City of Reidsville*, 243 N.C. 405, 408, 90 S.E.2d 700, 703 (1956).

Here, the evidence was that the County, through its commissioners, has acted capriciously in spending occupancy tax revenue. The decisions of public officials are arbitrary and capricious when "they indicate a lack of fair and careful consideration." *State ex rel. Com'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980), *abrogated in part on other grounds*, *In re Redmond*, 369 N.C. 490, 797 S.E.2d 275 (2017). For instance, when a county sells property "without appraisal or other investigation as to value," and there is evidence that the sale price is less than fair market value, courts will enjoin the sale as an abuse of discretion. *Barbour*, 255 N.C. at 182, 120 S.E.2d at 452 ("Such conduct does not comport with the duty which public officials owe those they represent."). Likewise, when municipalities seek to destroy public buildings producing profitable rent, the action can be enjoined if the municipality

has failed “to consider” alternative courses of action. *Burton*, 243 N.C. at 408, 90 S.E.2d at 703. And if the government action is undertaken for an “ulterior motive,” rather than in furtherance of the common good, then it will be enjoined. *Efird*, 219 N.C. at 12 S.E.2d at 896.

Proving an abuse of discretion is no insurmountable burden. A showing of bad faith will do the trick but is not required. *See Horner*, 235 N.C. at 82, 68 S.E.2d at 663 (holding that good faith will not absolve an improper expenditure); *In re Hous. Auth. of City of Salisbury*, 235 N.C. 463, 467, 70 S.E.2d 500, 502 (1952) (holding that a plaintiff need not prove “malice, fraud, or bad faith,” because proving “abuse of discretion” is enough). Nor must a plaintiff show that the governmental body violated a procedural requirement. *N.C. Rate Bureau*, 300 N.C. at 420, 269 S.E.2d at 573 (explaining that an abuse of discretion occurs when public officials “impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements”).

The evidence here required the trial court to enter summary judgment for the Plaintiffs, or at least deny summary judgment to the County. The evidence showed the following points.

**The County commissioners did not apply the 2004 amendment’s definition of “tourism-related expenditures.”** During their depositions,

the commissioners showed little understanding of the limited purposes for which occupancy tax dollars may be spent:

- The commissioners do not discuss or deliberate whether general public services are tourism-related expenditures; they simply approve the expenditures every year. (White Dep. 27:23-28:1 [App. 45-46].)
- Commissioner White said that the 2004 amendment's definition of "tourism-related expenditure" does not "limit[] us much at all." (White Dep. at 14:1-4 [App. 41].)
- Commissioner Etheridge testified that a "tourism-related expenditure" is anything that "is needed to support tourism." (Owen Etheridge Dep. at 11:23-24 [App. 19].) By contrast, the statutory definition requires expenditures that "increase" the use of lodgings "by attracting tourists."
- Commissioner McCord testified that the County could spend money to attract tourists to visit something, with an attraction being "something that somebody wants to come to," like a golf course. (McCord Dep. at 24:6-7 [App. 38].) But he admitted that police and EMS services are not such attractions. (McCord Dep. at 25:3-21 [App. 39].)

Perhaps one of the best examples of the way the County treats its occupancy tax dollars is this lawsuit. The County has authorized the use of \$100,000 of occupancy tax dollars to pay for this litigation. (White Dep. at 50:3-15 [App. 52].) The commissioners' reasoning is typical of the mental gymnastics they use to justify their occupancy tax expenditures: it is important for the County to defend its authority so that it can avoid raising property taxes, and defending this authority lets the County "keep the money that we use to attract tourists." (White Dep. at 50:20-51:12 [App. 52-53].)

If the County is able and willing to exercise its "judgment" to justify spending occupancy tax dollars on litigation, then the Commissioners see no real cap on their discretion.

**The County conducts no due diligence to see whether general public services attract tourists.** The County surveys tourists to determine the reasons they visit the Currituck County. (White Dep. at 17 [App. 42].) The County does not list EMS or police services as a potential response. (White Dep. at 17-18 [App. 42-43].) That omission is no surprise since general public services are expected by residents and visitors alike; they are not tourist attractions. The County admits it has no evidence that general public services attract tourists. (White Dep. at 18:20-24; Owen Etheridge Dep. at 25:8-26:21 [App. 21-22, 43].) The County does not advertise its EMS, police, and fire services, nor does it think doing so would be wise. (White Dep. at 19:2-11, 32:16-



20 [App. 44, 47].) When the police request more spending from occupancy tax proceeds, the commissioners approve it without looking at any data to see if the cost is justified. (White Dep. 32:1-15 [App. 47].)

**The County commissioners dip into the occupancy-tax account to avoid raising property taxes.** Occupancy tax poses a problem of political accountability because the tax is paid by people—tourists—who do not get a vote. For that reason, the General Assembly requires local governments to use the occupancy tax proceeds to generate more tourism, not to pay for general public services that benefit residents and tourists alike.

The County commissioners use the occupancy tax to artificially depress property tax rates. If the County were to comply with the 2004 amendment and pay for general public services out of the general fund without input from occupancy tax proceeds, the commissioners may have to raise the property rates.<sup>8</sup> (White Dep. at 33:6-13 [App. 48].) Raising taxes, of course, is politically unpalatable. (Owen Etheridge Dep. at 29:16-31:23 [App. 23-25].) So it is far simpler for the commissioners to fund their government through tourists—people who do not have a vote. (Owen Etheridge Dep. at 31:7-16 [App. 25].)

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<sup>8</sup> Some commissioners claimed that the tourist-heavy parts of the County are also disproportionately heavy users of general public services. (White Dep. at 33:15-21 [App. 48].) But they concede they have no data to support their supposition. (White Dep. 34:6-23 [App. 49].) In fact, the data shows the opposite. *See supra*, Statement of Facts.

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As this evidence shows, the County commissioners abused their discretion in spending occupancy tax dollars on general public services, when those services should have been paid for out of the general fund.

#### **IV. The Trial Court Erred by Dismissing the Other, Related Claims.**

At the summary judgment hearing, the parties and the trial judge focused on the general public services issue. That issue, however, was central to just one of several claims in the complaint. After the hearing, the trial court dismissed not only the general public services claim, but all remaining claims. That was error because the dismissed claims were meritorious.

##### **A. The County cannot avoid public oversight by commingling occupancy-tax proceeds with other cash.**

Not only does the County misuse its occupancy tax proceeds, it compounds the problem by commingling this tax revenue with its own general revenue. That makes it difficult or impossible for the public to understand how the occupancy tax revenue is being spent. The trial court erred by dismissing the Plaintiffs' claim that seeks to restore government transparency.

The General Assembly did not intend for the County itself to spend occupancy tax revenue. In the 2004 amendments, the legislature created a separate governmental entity, the Currituck County Tourism Development Authority (TDA). 2004 N.C. Sess. Laws 95, § 3. It is the TDA—not the County—

that is supposed to spend occupancy tax revenue for purposes permitted by law:

(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.

*Id.* (emphasis added) [App. 13].

This is another law the County has ignored. The TDA, which is controlled by the County’s commissioners, does not spend the occupancy tax revenue. Instead, it transfers the cash to the County’s “general fund,” and other special funds, to be spent by the County. (R p 14 ¶ 53; *see* Doc. Ex. 25-31.) In fact, from 2005 to 2019, the commissioners forced the TDA to transfer over \$72 million to the County’s general and special funds. (R p 14 ¶ 53.) From there, the money becomes untraceable.

The County did not even create a TDA fund separate from the general fund until 2009, five years after the TDA was created as the only entity allowed to spend occupancy tax dollars. (Hill Dep. at 38:9-39:4 [App. 35-36].) And even then, the County only created a separate account at the request of the Local Government Commission.<sup>9</sup> (Hill Dep. at 39:2-7 [App. 36].)

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<sup>9</sup> The Local Government Commission is an entity created by the General Assembly to control borrowing and spending by units of local government. *See* About the Local Government Commission,

The General Assembly mandated transparency in the spending of occupancy tax proceeds. The trial court erred by letting the County hide its spending of the tax.

**B. A loan for a water treatment facility is not a tourism-related expenditure.**

Plaintiffs also challenged a loan from the TDA to the County for the creation of a new water treatment plant. (R p 24-25 ¶¶ 97-101.) This loan violated the occupancy-tax statute because it was neither an expenditure by the TDA nor for a tourism-related purpose.

As explained above, *supra* Argument § IV.B, the TDA is the only entity allowed to spend occupancy tax dollars. The TDA is authorized to “expend” the money, not loan it. 2004 N.C. Sess. Laws 95, § 3. Otherwise, the TDA loses control of the money and the purpose for which it is spent. So this loan by the TDA was illegal, no matter its purpose.

But even aside from that defect, the ultimate purpose for this money violated the occupancy tax law. The construction of public infrastructure, like a water treatment facility, is not rationally designed to attract tourists. Again, this is simply the County acting as if the pre-2004 law were still in place. That law specifically authorized the County to construct public facilities related to

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<https://www.nctreasurer.com/divisions/state-and-local-government-finance-division/lgc/local-government-commission/about-local-government-commission> (last accessed Oct. 28, 2022).

“garbage, refuse, and solid waste collection and disposal.” 1987 N.C. Sess. Laws 209, § 1(e). In fact, the lack of any mention of public infrastructure or public utilities suggests that the water treatment facility would not have passed muster under the old law. But it certainly cannot be said, under existing law, that water treatment plants attract tourists. No one is coming to watch the County clean sewage.

**C. The County cannot spend occupancy tax proceeds on fire hydrants and administrative costs.**

In count six of their complaint, the Plaintiffs challenge the County’s use of occupancy tax dollars on a fire hydrant, employee salaries, and the other costs of starting up and maintaining special tax service districts. (R pp 25-26, ¶¶ 102-06; Owen Etheridge Dep. 43:21-44:6 [App. 26-27].) These expenditures have nothing to do with attracting tourists.

For instance, the County spent \$40,000 on a fire hydrant, but tourists do not visit the County to see fire hydrants. The County used to be able to spend occupancy tax dollars on fire services, but not since 2004.

The County also has no justification for its expenditures on special road and water service districts. Counties have the power to create special service districts for a wide variety of purposes. *See* N.C. Gen. Stat. § 153A-301. These general purposes are unrelated to developing tourism. *See id.* § 153A-301(a) (listing permissible purposes). The General Assembly has directed counties to

fund these special-purpose districts through an additional levy of property tax. *See id.* § 153A-307. There are many limits on how much tax can be levied in the districts. *See, e.g., id.* §§ 153A-307, -309.2, -309.3, -310. But nowhere has the General Assembly authorized counties to fund service districts with occupancy tax dollars, or to use those tax dollars to circumvent the property tax caps in those districts. No tourist comes to the County to delight in standing in a road or fire service district.

**D. The other claims are remedial claims that should be reinstated.**

The remaining claims in the complaint raise allegations that should be reinstated if *any* merits claim is reinstated. Counts 7, 8, 10, 11, and 12 were, respectively, for a declaratory judgment, a claim under *Corum v. UNC*, 330 N.C. 761, 413 S.E.2d 276 (1992), a claim for a permanent prohibitory injunction, a claim for supplemental relief, and a claim for a permanent mandatory injunction. (R pp 26-33, 39-41.)

These counts define the remedies requested by Plaintiffs should the Court determine that the County has misspent its occupancy-tax revenue. The trial court dismissed these claims with no discussion of their merits. If this Court were to find that the trial court wrongly dismissed any other claim, then the right course of action would be to reinstate Counts 7, 8, 10, 11, and 12.

That course would allow the trial court, on remand, to fashion an appropriate remedy.

### **CONCLUSION**

For these reasons, the trial court erred by entering summary judgment for the County instead of for the Plaintiffs. The County is violating the statutory restriction on its use of occupancy tax proceeds. The judgment below should be reversed, with instructions that the County's motion for summary judgment be denied, that summary judgment be entered instead for the Plaintiffs, and that the trial court proceed to determine appropriate remedies for the County's violations of the law.

Respectfully submitted this the 31st day of October, 2022.

FOX ROTHSCHILD LLP

Electronically submitted

Troy D. Shelton

N.C. Bar No. 48070

tshelton@foxrothschild.com

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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*Counsel for Plaintiffs-Appellants*



**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Plaintiffs-Appellants certifies that this brief contains less than 8,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 31st day of October, 2022.

/s/ Troy D. Shelton  
Troy D. Shelton

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this brief was electronically filed and served this 31st day of October, 2022, by email and by depositing a copy with the United States Postal Service, first-class mail, postage prepaid, and addressed as follows:

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/s/ Troy D. Shelton  
Troy D. Shelton

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*

GERALD COSTANZO, BRYAN  
DAGGETT, JOHN DUMBLETON,  
PHILIP SCHNEIDER, CLARA  
SCHNEIDER, MARGARET BINNS,  
MOHAN ADKARNI, 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-Appellants,

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-Appellees.

**From Currituck County**

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CONTENTS OF APPENDIX

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## Appendix Pages

1985 N.C. Sess. Laws 449.....	App. 1-2
1987 N.C. Sess. Laws 209.....	App. 3-4
1991 N.C. Sess. Laws 177.....	App. 5-11
2004 N.C. Sess. Laws 95.....	App. 12-14
Legislative Summary for H.B. 1102 .....	App. 15
H. 1102, 2007-2008 Sess. (N.C. 2007).....	App. 16-17
Excerpts from Deposition Transcript of J. Owen Etheridge .....	App. 18-32
Excerpts from Deposition Transcript of Sandra Hill.....	App. 33-36
Excerpts from Deposition Transcript of Kevin Edward McCord .....	App. 37-39
Excerpts from Deposition Transcript of Robert “Bob” White .....	App. 40-53

GENERAL ASSEMBLY OF NORTH CAROLINA  
1985 SESSION

CHAPTER 449  
HOUSE BILL 532

AN ACT TO AUTHORIZE DARE COUNTY TO LEVY AN OCCUPANCY TAX.

The General Assembly of North Carolina enacts:

Section 1. Occupancy Tax. (a) Authorization and Scope. The Dare 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 the following in Dare County:

- (1) Any room, lodging, or similar accommodation subject to sales tax under G.S. 105-164.3(4); and
- (2) A campsite.

This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose. This tax is in addition to any State or local sales tax.

(b) Collection. Every operator of a business subject to the tax levied under this act 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 Dare 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 Dare 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 act may deduct from the amount remitted by him to the county a discount of three percent (3%) of the amount collected.

(c) Administration. The county shall administer a tax levied under this act. A tax levied under this act 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 and sales upon which the tax is levied. A return filed with the Dare County Tax Collector under this act 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 act 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 act 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) and imprisonment not to exceed six months.

(e) Use and Distribution of Tax Revenue. Dare County shall distribute two-thirds of the net proceeds of the tax, on a monthly basis, to the Towns of Kill Devil Hills, Kitty Hawk, Manteo, Nags Head, and Southern Shores in proportion to the amount of ad valorem taxes levied by each town for the preceding fiscal year. The county shall retain the remaining one-third of the net proceeds. Revenue distributed to a town or retained by the county under this subsection may 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.

As used in this subsection, "net proceeds" means gross proceeds less the cost to the county of administering and collecting the tax.

(f) Repeal. A tax levied under this act may be repealed by a resolution adopted by the Dare County Board of Commissioners. Repeal of a tax levied under this act 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 act does not affect a liability for a tax that 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 24th day of June, 1985.

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.

(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  
1991 SESSION

CHAPTER 177  
HOUSE BILL 225

AN ACT TO AUTHORIZE DARE COUNTY TO INCREASE ITS OCCUPANCY TAX, LEVY A RESTAURANT TAX, AND CREATE A TOURISM BOARD TO PROMOTE TOURISM IN DARE COUNTY.

The General Assembly of North Carolina enacts:

Section 1. Chapter 449 of the 1985 Session Laws, as amended by Chapter 826 of the 1985 Session Laws, reads as rewritten:

"AN ACT TO AUTHORIZE DARE COUNTY TO LEVY AN OCCUPANCY TAX, ~~TAX AND A PREPARED FOOD AND BEVERAGE TAX.~~

The General Assembly of North Carolina enacts:

Section 1. Occupancy Tax.

(a) Authorization and Scope. The Dare 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 the following in Dare County:

- (1) Any room, lodging, or similar accommodation subject to sales tax under ~~G.S. 105-164.4(3);~~ G.S. 105-164.4(a)(3); and
- (2) A campsite.

This tax does not apply to accommodations furnished by nonprofit charitable, educational, or religious organizations when furnished in furtherance of their nonprofit purpose. This tax is in addition to any State or local sales tax.

(b) Collection. Every operator of a business subject to the tax levied under this act 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 Dare 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 Dare 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 act may deduct from the amount remitted by him to the county a discount of three percent (3%) of the amount collected.~~

(c) Administration. The county shall administer a tax levied under this act. A tax levied under this act 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 and sales upon which the tax is levied. A return filed with the Dare County Tax Collector under this act 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 act 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 act 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) and imprisonment not to exceed six months.~~

(e) Use and Distribution of Tax Revenue. Dare County shall distribute two-thirds of the net proceeds of the tax, on a monthly basis, to the Towns of Kill Devil Hills, Kitty Hawk, Manteo, Nags Head, and Southern Shores in proportion to the amount of ad valorem taxes levied by each town for the preceding fiscal year. The county shall retain the remaining one-third of the net proceeds. Revenue distributed to a town or retained by the county under this subsection may 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.

~~As used in this subsection, 'net proceeds' means gross proceeds less the cost to the county of administering and collecting the tax.~~

(f) Repeal. A tax levied under this act may be repealed by a resolution adopted by the Dare County Board of Commissioners. Repeal of a tax levied under this act 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 act does not affect a liability for a tax that 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. Definitions. The definitions in G.S. 105-164.3 apply in this act. In addition, the following definitions apply in this act.

- (1) Net proceeds. Gross proceeds less the cost to the county of administering and collecting the tax.
- (2) Prepared food and beverages. Meals, food, and beverages which a retailer has added value to or whose state has been altered (other than solely by cooling) by preparing, combining, dividing, heating, or serving, in order to make them available for immediate consumption.

Sec. 3. Additional Occupancy Tax. In addition to the tax authorized by Section 1 of this act, the Dare County Board of Commissioners may levy a room occupancy and tourism development tax of one percent (1%) of the gross receipts derived from the rental of accommodations taxable under that section. The county may not levy a tax under this section unless it also levies the tax under Section 1 of this act. The county may levy a tax under this section only if it also levies a tax under Section 4 of this act to become effective on the same date. A tax levied under this section may not become effective before the later of (i) the first day of the second month after the resolution levying the tax is adopted or (ii) January 1, 1992. The levy, collection, administration, and repeal of the tax authorized by this section shall be in accordance with Section 1 of this act, except that the county may repeal a tax levied under this section only if it also repeals the tax levied under Section 4 of this act effective on the same date. The county shall distribute the net proceeds of the tax as provided in Section 7 of this act.

Sec. 4. Prepared Food and Beverage Tax.

(a) Authorization. The Dare County Board of Commissioners may, by resolution, after not less than 10 days' public notice and a public hearing held pursuant thereto, levy a prepared food and beverage tax of up to one percent (1%) of the sales price of prepared food and beverages sold within the county at retail for consumption on or off the premises by a retailer subject to sales tax under G.S. 105-164.4(a)(1). The county may levy a tax under this section only if it also levies a tax under Section 3 of this act to become effective on the same date. This tax is in addition to State and local sales tax.

(b) Exemptions. The prepared food and beverage tax does not apply to the following sales of prepared food and beverages:

- (1) Prepared food and beverages served to residents in boarding houses and sold together on a periodic basis with rental of a sleeping room or lodging.
- (2) Retail sales exempt from taxation under G.S. 105-164.13.
- (3) Retail sales through or by means of vending machines.
- (4) Prepared food and beverages served by a business subject to the occupancy tax levied pursuant to this act if the charge for the meals or prepared food or beverages is included in a single, nonitemized sales price together with the charge for rental of a room, lodging, or accommodation furnished by the business.
- (5) Prepared food and beverages furnished without charge by an employer to an employee.
- (6) Retail sales by grocers or by grocery sections of supermarkets or other diversified retail establishments other than sales of prepared food and beverages in the delicatessen or similar departments of the grocer or grocery section.

(c) Collection. Every retailer 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 prepared food and beverages. The tax shall

be added and charged separately from the sales records, and shall be paid by the purchaser to the retailer 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 retailer. The county 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.

For the convenience of retailers the county shall determine the amount to be added to the sales price of sales subject to the prepared food and beverage tax. The amounts shall be set forth in a bracket system and distributed to each retailer responsible for collecting the prepared food and beverage tax. The use of the bracket system does not relieve the retailer from the duty of collecting and remitting an amount equal to the prepared food and beverage tax.

(d) Administration. The county shall administer a tax levied under this section. A tax levied under this section is due and payable to the county finance officer in monthly installments on or before the fifteenth 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 fifteenth 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 sales upon which the tax is levied.

A return filed with the county finance officer 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.

(e) Refunds. The county shall refund to a nonprofit or governmental entity the prepared food and beverage tax paid by the entity on eligible purchases of prepared food and beverages. A nonprofit or governmental entity's purchase of prepared food and beverages is eligible for a refund under this subsection if the entity is entitled to a refund under G.S. 105-164.14 of the sales and use tax paid on the purchase. The time limitations, application requirements, penalties, and restrictions provided in G.S. 105-164.14(b) and (d) shall apply to refunds to nonprofit entities; the time, limitations, application requirements, penalties, and restrictions provided in G.S. 105-164.14(c) and (d) shall apply to refunds to governmental entities. When an entity applies for a refund of the prepared food and beverages tax paid by it on purchases, it shall attach to its application a copy of the application submitted to the Department of Revenue under G.S. 105-164.14 for a refund of the sales and use tax on the same purchases. An applicant for a refund under this subsection shall provide any information required by the county to substantiate the claim.

(f) Use of Proceeds. The county shall distribute the net proceeds of the tax as provided in Section 7 of this act.

(g) 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 before the later of (i) the first day of the second month after the date the resolution is adopted or (ii) January 1, 1992.

(h) Repeal. A tax levied under this section may be repealed by a resolution adopted by the Dare County Board of Commissioners. The county may repeal the tax, however, only if it also repeals the tax levied under Section 3 of this act, effective on the

same date. 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. 5. Penalties. A person, firm, corporation, or association who fails or refuses to file a return required by this act 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. The board of commissioners may, for good cause shown, compromise or forgive the additional tax penalties imposed by this section.

A person who willfully attempts in any manner to evade a tax imposed under this act 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) and imprisonment not to exceed six months.

Sec. 6. Dare County Tourism Board.

(a) Appointment and Membership. When the Dare County Board of Commissioners adopts a resolution levying a tax under Section 3 and Section 4 of this act, it shall also adopt a resolution creating a tourism board to be known as the Dare County Tourism Board, which shall be a public authority under the Local Government Budget and Fiscal Control Act. The tourism board shall consist of 13 members appointed by the board of commissioners as provided below. Members of the tourism board must be residents of Dare County. Members shall serve two-year terms except as provided below. No member may serve more than two successive two-year terms.

- (1) One member shall be a member of the board of directors of the Outer Banks Chamber of Commerce selected from nominees submitted by the board of directors of the Chamber of Commerce. This member shall serve an initial term of one year.
- (2) One member shall be a member of the board of directors of the Dare County Restaurant Association selected from nominees submitted by the board of directors of the Dare County Restaurant Association. This member shall serve an initial term of two years.
- (3) One member shall be a member of the board of directors of the Dare County Hotel/Motel Association selected from nominees submitted by the board of directors of the Dare County Hotel/Motel Association. This member shall serve an initial term of one year.
- (4) One member shall be a member of the board of directors of the Dare County Board of Realtors selected from nominees submitted by the

board of directors of the Dare County Board of Realtors. This member shall serve an initial term of two years.

- (5) Five members shall be one member from each of the town boards of Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo, who shall serve initial terms respectively of one year, two years, one year, two years, and one year, and who shall be selected from nominees submitted by each of the respective town boards.
- (6) One member shall be a Dare County Commissioner. This member shall serve an initial term of two years.
- (7) Three members 'at large' shall be from anywhere within Dare County. One of these members must be a resident of Hatteras Island. Two of these members shall serve initial terms of one year, and one shall serve an initial term of two years.

The board of commissioners may remove a member of the tourism board only for good cause. Members shall serve the full term for which appointed regardless whether the member is no longer a member of the appropriate board designated above. The Dare County Board of Commissioners shall determine the compensation to be paid to members of the tourism board.

(b) Duties. The tourism board shall elect a Chair and other officers from among its members to serve one-year terms. The tourism board shall meet at least quarterly at the call of the Chair and shall adopt rules of procedure to govern its meetings.

The tourism board shall promote year-round travel and tourism in Dare County as provided in Section 7 of this act and perform other duties required by law.

Sec. 7. Use of Proceeds of Additional Occupancy Tax and Prepared Food and Beverage Tax. Dare County shall remit the net proceeds of the taxes levied under Sections 3 and 4 of this act on a monthly basis to the Dare County Tourism Board. The tourism board may deduct the cost of its annual audit from the proceeds remitted to it. The tourism board shall use the remainder of the proceeds as follows:

- (1) Seventy-five percent (75%) shall be used for the cost of administration and to promote tourism. The tourism board's expenditures may include (i) advertising to promote less-than-peak-season events and programs, (ii) marketing research, (iii) a mail and telephone inquiry response program, and (iv) welcoming and hospitality functions.
- (2) Twenty-five percent (25%) shall be used for services or programs needed due to the impact of tourism on the county.

The tourism board may expend funds only for public purposes. The tourism board 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. The tourism board may not use the proceeds distributed to it to purchase real property or for the purposes set out in subdivision (2) above without prior approval by the Dare County Board of Commissioners.

Sec. 2- Sec. 8. This act is effective upon ratification."

Sec. 2. Effective on the date the Dare County Board of Commissioners creates the Dare County Tourism Board as provided in this act, Chapter 201 of the 1965

Session Laws, as amended, is further amended by deleting the phrase "Dare County Tourist Bureau" and substituting the phrase "Dare County Tourism Board".

Sec. 3. This act is effective upon ratification.

In the General Assembly read three times and ratified this the 30th day of May, 1991.

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James C. Gardner  
President of the Senate

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Daniel Blue, Jr.  
Speaker of the House of Representatives

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 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 13<sup>th</sup> day of July, 2004.

s/ Beverly E. Perdue  
President of the Senate

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

# - App. 15 -

10/30/22, 6:14 AM

House Bill 1102 (2007-2008 Session) - North Carolina General Assembly

H1101

## House Bill 1102

H1103

Modify Currituck County Occupancy Tax.  
2007-2008 Session

VIEW BILL DIGEST	
EDITION	FISCAL NOTE
Filed	
Edition 1	

<b>Last Action:</b>	Ref To Com On Finance on 3/28/2007
<b>Sponsors:</b>	Owens (Primary)
<b>Attributes:</b>	Local
<b>Counties:</b>	CURRITUCK
<b>Statutes:</b>	No affected General Statutes
<b>Keywords:</b>	COUNTIES, COUNTY COMMISSIONERS, HOTELS & MOTELS, LOCAL, LOCAL GOVERNMENT, SESSION LAWS, TAXATION, TAXES, OCCUPANCY, TRAVEL & TOURISM, REP. OWENS, CURRITUCK COUNTY

HISTORY			
DATE	CHAMBER	ACTION	DOCUMENTS
3/28/2007	House	Ref To Com On Finance	
3/28/2007	House	Passed 1st Reading	
3/27/2007	House	Filed	

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                   c.     ~~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.~~  
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.

No. COA22-699

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO: 19-CVS-171

GERALD COSTANZO, COROLLA  
CIVIC ASSOCIATION, ET AL.,

PLAINTIFFS,

VS.

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

DEFENDANTS.

D-E-P-O-S-I-T-I-O-N

OF

J. OWEN ETHERIDGE

\* \* \* \* \*

12:05 P.M., DECEMBER 7, 2020, AT THE HISTORIC CURRITUCK  
COUNTY COURTHOUSE, 153 COURTHOUSE ROAD, CURRITUCK, NORTH  
CAROLINA.

APPEARANCES OF COUNSEL:

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J. OWEN ETHERIDGE: PAGE 11

1 Sheriff Department, Total County Cost. And then the  
2 same thing for EMS, EMS Department Total County Cost.  
3 So occupancy tax did not fund that entire cost.  
4 There's no doubt about that. What would you say -- how  
5 was the balance fulfilled for those services? So  
6 anything outside of what occupancy tax paid for. How  
7 was that -- how were those funds generated?

8 A. Property tax.

9 Q. And are you familiar with the statutory  
10 regulation that govern the expenditure of occupancy  
11 tax?

12 A. Yes, sir.

13 Q. For Currituck County? And you guys are a  
14 little bit particular. You've got your own local bill.  
15 It's not the exact same as the uniform statute that's  
16 out there now, but it's pretty close. And that statute  
17 actually, that bill is Plaintiff's Exhibit Number [2],  
18 just for reference. So if I refer back to it, I'm  
19 referring to Plaintiff's Exhibit [2] there. In your  
20 own words, if you would, please, tell me your  
21 understanding of Currituck County's ability to make use  
22 of occupancy tax funds.

23 A. To me it's simple. It says in the judgment  
24 of the commissioners what is needed to support tourism.

J. OWEN ETHERIDGE: PAGE 20

1 expenditures, your vote was based on full year staffing  
2 costs.

3 A. Yes, sir. Because we still had to have their  
4 presence on the beach in the wintertime, even though  
5 the tourists were not there because of the possibility  
6 of crime and whatnot, take your break-ins.

7 Q. So were there any staffing costs, to your  
8 knowledge at least -- is it in general that all  
9 staffing costs for the full year for the annual fiscal  
10 year, is it general that these OT funds go to pay all  
11 those staffing costs, or are there supplements that  
12 come from the general fund as well? For this --  
13 particularly for Currituck Outer Banks?

14 A. I'm not really sure if there's any blending  
15 of general fund money in there or not. But we just  
16 felt like when the decision was made to do it that it  
17 should come from the occupancy tax because the purpose  
18 or the reason, the burden of providing that additional  
19 law enforcement was because of the increased tourism.

20 Q. And, again, though, it was your thoughts or  
21 thinking, though, that the amount that you were  
22 approving was supposed to cover the full year of  
23 staffing costs?

24 A. Yes, sir.



J. OWEN ETHERIDGE: PAGE 25

1 competent people and equipment that can, especially in  
2 an isolated area like Corolla, that they can get the  
3 best medical care possible until they can get somewhere  
4 else. And to me, that means a lot to people coming  
5 down here. It's just like would we have as many people  
6 coming to Corolla if we didn't have the good lifeguard  
7 service we've got.

8 Q. Right. And was there any -- do you recall  
9 there being any type of specific evidence, though, that  
10 was presented to you that showed that keeping these  
11 services did indeed -- or funding these services out of  
12 OT, having new services, did indeed attract these  
13 tourist and business travelers?

14 A. I can only utilize my personal experience.  
15 I'm not going to go somewhere personally that I don't  
16 feel safe or feel like that if I was in a bad situation  
17 that help would not be there to access me.

18 Q. Understood.

19 A. So, I'm just saying human nature, we  
20 gravitate to go where the places we feel safe.

21 Q. And particular position is, I think you're  
22 saying is your personal position.

23 A. That's right.

24 Q. It didn't -- did that, did it come from,

J. OWEN ETHERIDGE: PAGE 26

1       though, the county manager or the county attorney or  
2       county staff, your determination or I'll say it another  
3       way. Did they ever, the manager or the county  
4       attorney, ever give you an opinion or render any form  
5       of evidence to you that that would show that there is  
6       an attraction, that these public services are actually  
7       attractions by tourists or attraction of tourists or,  
8       again, was it your, always been your personal opinion  
9       that that's the right thing to do?

10       A. Well, it's personal opinion that it's the  
11       right thing to do. But professional staff had also  
12       told us that these are the things that are important to  
13       maintain, support among the tourist.

14       Q. And, again, the reason I'm asking this the  
15       way I am, I just want to make sure that I'm not missing  
16       anything in my discovery documents. That's why. So  
17       would there have been any particular documentation that  
18       would have highlighted for me, for example, surveys of  
19       tourists or something about the public safety services.  
20       Was any information like that ever presented?

21       A. Not to my knowledge. I do know that when I  
22       talk to people, I ask them and I've said -- I've asked  
23       people over the years because I served on the Tourism  
24       Advisory Board. I was the first commissioner to sit on

J. OWEN ETHERIDGE: PAGE 29

1           A.    I don't know if you can quantify.

2           Q.    So, what's your perspective on why the real,  
3           for example, the balance of these services, so the  
4           portion not funded by occupancy tax proceeds for  
5           sheriff and EMS. They're funded out of the general  
6           fund, which property taxes as you've said and as we all  
7           know are the catalyst and one of the main catalyst  
8           there. Why, in your opinion, were real property taxes  
9           -- which, of course, are permanent and non-resident  
10          property owners alike. They are assessed against both  
11          these folks. Why were the property taxes not  
12          sufficient to cover the cost of sheriff and EMS during  
13          the year, during any point in time during the fiscal  
14          year?

15          A.    Say that again.

16          Q.    So, why, just in your opinion, why was it --  
17          why were the property taxes, okay, so what's charged  
18          currently, once assessed against each property owner at  
19          the given rate, the value of, assessed against the  
20          value of the property, why were those costs or those  
21          funds collected in a given year not sufficient to --  
22          why could they not have been used to fund the, all  
23          costs of sheriff and EMS during the fiscal year in  
24          Currituck County?

J. OWEN ETHERIDGE: PAGE 30

1           A.   Well, this is my opinion.

2           Q.   Understood.

3           A.   You know, you always want to keep your tax  
4   burden as fair as you can. And on the mainland in  
5   Currituck we have a lot of people that, you know, they  
6   struggle. They've always struggled. And if we're  
7   putting more of a burden on them than what they would  
8   ordinarily carry because of the cost of tourism  
9   services that we provide, is it fair to tax them for  
10   that on the beach in terms of law enforcement and EMS?  
11   You know, I think that was some of the original  
12   thinking when we began to fund the sheriff's  
13   department, and we first funded the EMS over there was  
14   to put the cost of the burden where it was coming from.  
15   And that was why we used the occupancy tax.

16          Q.   And I think, again, one of the main reasons I  
17   was asking that is because just about, according to my  
18   research, about half of the total tax value in the  
19   county exists on the Currituck Outer Banks portion, but  
20   it only makes up about ten percent of the total land  
21   area.

22          A.   Uh-huh.

23          Q.   So, that's, again, that's a lot of general  
24   tax funds that are being raised based on the values of

J. OWEN ETHERIDGE: PAGE 31

1 those non-resident or permanent property owners over on  
2 Corolla Outer Banks, a very small area of land. So  
3 that was the basis; that was why I was asking.

4 A. Well, if I can add another reason maybe.  
5 Possibly is when we looked at it originally, we felt  
6 like or at least I did. I felt like it was equalizing  
7 the burden on the people at the beach. Because I  
8 believe if we pulled the money and raised the taxes to  
9 fund the sheriff and EMS would been a greater burden or  
10 hit on the people on the beach, that owned the homes on  
11 the beach than it would be from an occupancy tax.  
12 Because I looked at the occupancy tax as a pass  
13 through. The homeowner's don't pay that tax. It's  
14 charged in their rental fees. Whereas the property  
15 tax, you know, they're paying the property tax out of  
16 their rental fees. But I think it's more of a burden  
17 on them, especially on the ones that don't rent their  
18 homes. And you try -- we tried to be as fair about how  
19 we placed this burden on people for taxes. Because we  
20 did have a large number of people on the beach that  
21 didn't rent their homes. And if we raised the taxes to  
22 fund additional law enforcement and EMS, we were  
23 hitting them also.

24 Q. And, I suppose we can, this shifting of

J. OWEN ETHERIDGE: PAGE 43

1 There's no disputing that either. But let me ask you,  
2 do you believe that the attraction of tourists and  
3 business travelers and this increase in use of these  
4 facilities, do you think that that's limited  
5 specifically by that statute to tourists and business  
6 travelers, or another way to say that is your  
7 definition, anyone outside of the county. Or do you  
8 think that applies or can apply also to folks that live  
9 permanently within the county?

10 A. Say that again.

11 Q. And I'll tell you what; I'm going to ask it  
12 like this: Do you believe that occupancy tax  
13 expenditures can be made in a manner that are  
14 specifically designed to benefit permanent residents or  
15 mainland citizens even of Currituck County?

16 A. Can be made just for that purpose?

17 Q. Uh-huh.

18 A. No. And I say that from this perspective.  
19 I've gone to the beach and stayed and paid the  
20 occupancy tax. So, I have contributed to it. I know  
21 there's other people in the county that go stay a week  
22 at the beach. I think it goes hand in hand. If we  
23 make improvements to help support tourism, mainland  
24 people will benefit from it.

1           Q.    But you see it as more of an incidental  
2 benefit as opposed to something that was generated or  
3 specifically designed.

4           A.    Right. I mean how do you separate?

5           Q.    And in terms of looking at what constitutes  
6 this, because that's what this lawsuit, as you well  
7 know, is all about, what constitutes this legitimate  
8 tourism-related expenditure. And in your time or  
9 during your tenure of service, how have you been  
10 educated on what constitutes a legal expenditure of OT  
11 funds? How have you been advised? Have there been any  
12 documents or evidence that's been presented to you?  
13 I'm talking more in general now, not just sheriff and  
14 EMS.

15          A.    Official documents or standards are you  
16 saying, or guidelines?

17          Q.    Guidelines, document form, verbal, words, any  
18 form of information.

19          A.    I just go back to that definition in Section  
20 4 in the judgment of the commissioners what is  
21 tourism-related. Because -- going back to the previous  
22 question, the ball fields, yes, the county residents  
23 play. We have our youth leagues up there, but this  
24 past summer we didn't have youth leagues. But that

J. OWEN ETHERIDGE: PAGE 53

1 handed you the other stack yet. I believe you are the  
2 only deponent today that had service on the board  
3 during this time period.

4 Mr. Etheridge, please correct me if I'm  
5 wrong, but I do -- does this look familiar to you?  
6 Were you serving as a board member during this time  
7 frame, 2007 to 2008?

8 A. Yes, sir.

9 Q. And do you recall a push for this particular  
10 legislative change? You can take some time to  
11 familiarize yourself with the document.

12 A. I'm familiar with it.

13 Q. Okay.

14 A. The board had changed in terms of the make up  
15 in the two, as a result of the 2006 election. And  
16 there was a commissioner that came back on the board in  
17 the 2006 election who always felt like we should have  
18 75 percent of the occupancy tax for expenditure in  
19 every, in any situation in the county, and 25 percent  
20 for tourism. And when he got elected --

21 Q. So 75 percent on anything?

22 A. Yeah.

23 Q. And then 25 percent dedicated to tourism?

24 A. Yeah.



1 Q. Okay.

2 A. When he got elected, he came back on the  
3 board, change -- it was a five-member board then.

4 Q. Who is that commissioner you said that got  
5 elected in '06? Do you recall his name?

6 A. Gene Gregory.

7 Q. Okay.

8 A. And Mr. Gregory always felt like there was  
9 too much money going to tourism. And he came back on  
10 the board in the 2006 election. And there was a  
11 majority that supported putting this bill forward. I  
12 did not support putting this bill forward.

13 Q. Okay.

14 A. Because we were always told, leave it alone.  
15 Don't make amendments to change the appropriations per  
16 se. Leave it alone. If you make any amendments to it,  
17 things to fine tune it, make it better.

18 Q. Do you recall where that advice was coming  
19 from that you're talking about, those folks saying,  
20 don't make any changes to the --

21 A. The first one was Vernon James who was the  
22 house rep from Pasquotank, who introduced the occupancy  
23 tax or helped introduce it. And he said, you don't --  
24 once you get it put in place, don't mess with it a

J. OWEN ETHERIDGE: PAGE 55

1 whole lot because it opens it up for people to go and  
2 take and change things in ways that maybe you don't  
3 want it changed. So we kind of had an unwritten rule  
4 among the commissioners we really wouldn't make any  
5 amendments to change it. But then the board changed  
6 with the election, and they put this bill forward.

7 Q. Because at that point had the majority  
8 approval to move forward.

9 A. Yeah.

10 Q. And what -- I won't put words in your mouth.  
11 So what would this bill -- had it been passed, I mean I  
12 think we obviously can agree that there was no action  
13 at least taken. It didn't get passed. There wasn't  
14 any action taken is what occurred. But how would it,  
15 if it had actually been taken and it had been passed  
16 into law, how would that have changed the way Currituck  
17 County can currently spend the occupancy tax?

18 A. It would have changed it a whole lot.

19 Q. Does that go back to that 75 percent for  
20 anything and everything?

21 A. Uh-huh. Yeah.

22 Q. And then 25 percent for tourism?

23 A. Yeah.

24 Q. And just out of curiosity, did you get ever

1 any feedback or any understanding of why the general  
2 assembly elected not to act on this particular  
3 amendment?

4 A. Because if this bill would have passed, it  
5 could have had the domino effect with other counties  
6 that had similar occupancy tax bills. And the tourism  
7 industry did not want to see that happen across the  
8 state.

9 Q. So, in other words, there's surrounding  
10 counties or other counties in North Carolina that have  
11 something equivalent to this 2004 bill, if Currituck  
12 was allowed to make a change, then it could create a  
13 domino effect across the state?

14 A. Uh-huh. Because my understanding at that  
15 time was there was several counties that a hundred  
16 percent of their occupancy tax went to nothing but  
17 tourism, did not give any latitude. I don't -- if my  
18 memory serves me correctly, I looked at it again  
19 yesterday, 1105. I went back and researched it. It  
20 never even got out of committee.

21 Q. It didn't. You're absolutely right about  
22 that. That's right. And, further, I believe my  
23 understanding is they just did not act at all, and it  
24 just -- it died. There was no discussion that I can

1 find, so that -- that matches up with what I found.

2 A. I think Representative Owens introduced it  
3 out of the courtesy of a local bill, but he did not  
4 push it.

5 Q. Uh-huh.

6 A. But I was not in favor of the bill going  
7 forward.

8 Q. And one final question, and you might have  
9 touched on this before, but I don't think I've asked it  
10 this way.

11 In public meetings, open meetings, again, we  
12 are talking about the exercise of your judgment here.  
13 There wasn't, from what I can see, there was not a lot  
14 of communication amongst the board, amongst the board  
15 of commissioners, so once the final budget or a budget  
16 amendment got back to the actual board of  
17 commissioners, there wasn't a lot of what I'm calling  
18 deliberation. The reason I'm saying deliberation is  
19 that's what was referred to in discovery responses.  
20 That's how you guys came to decipher whether it was  
21 legitimate or not, the transfer or the expenditure.  
22 Why might there have been little to no discussion  
23 amongst the board members in public meeting on a budget  
24 approval item?

No. COA22-699

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO: 19-CVS-171

GERALD COSTANZO, COROLLA  
CIVIC ASSOCIATION, ET AL.,

PLAINTIFFS,

VS.

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

DEFENDANTS.

D-E-P-O-S-I-T-I-O-N

OF

SANDRA HILL

\* \* \* \* \*

1:35 P.M., DECEMBER 2, 2020, AT THE HISTORIC CURRITUCK  
COUNTY COURTHOUSE, 153 COURTHOUSE ROAD, CURRITUCK, NORTH  
CAROLINA.

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

CASEY C. VARNELL, ESQUIRE  
SHARP, GRAHAM, BAKER & VARNELL  
P.O. DRAWER 1027  
KITTY HAWK, NC 27949

FOR THE DEFENDANTS:

CHRISTOPHER J. GEIS, ESQUIRE  
WOMBLIE BOND DICKINSON (US) LLP  
ONE WEST FOURTH STREET  
WINSTON-SALEM, NC 27101

ALSO PRESENT:

IKE McREE, ESQUIRE  
MS. SELINA JARVIS  
MS. MARY KITTY ETHERIDGE

COURT REPORTER:

SANDRA A. GRAHAM, CVR-M

SANDRA HILL: PAGE 35

1 Q. And just in your own words, again, I'm not  
2 asking for legalese here. What exactly does that  
3 document constitute? What is it?

4 A. A Bill to be entitled An Act to Modify the  
5 Occupancy Tax for Currituck County.

6 Q. And do you recall the merits of the bill, in  
7 other words, what it would have changed in terms of  
8 how the county can utilize the occupancy tax?

9 A. It basically wipes out everything.

10 Q. And by that, in other words --

11 A. It changed everything so that basically it  
12 says that at least 75 percent of the net proceeds of  
13 the tax levied under this section could only be used  
14 for tourism related purposes, including construction  
15 and maintenance of public facilities and buildings:  
16 garbage, refuse, and solid waste collection and  
17 disposal, police protection, and emergency services.

18 Q. Okay. All right. So it would have, had it  
19 been passed, reinstituted the ability without a doubt  
20 to explicitly use OT for sheriff and EMS, for example?

21 A. Right.

22 Q. Do you recall the foundation for the county's  
23 request, why they wanted this -- proposed this  
24 legislation back in 2007 and '08?

1 A. I do not specifically.

2 Q. Okay.

3 A. I wasn't in this conversation.

4 Q. Understood. And I'll ask just to ask, do you  
5 have an understanding or do you have any knowledge as  
6 to why the General Assembly elected not to take action  
7 on that 2007 Amendment?

8 A. I do not.

9 Q. Understood. In looking through all the  
10 discovery and the audit reports specifically that we  
11 received, it appears the Tourism Development Authority  
12 fund, the TDA fund, was not created until fiscal year  
13 2009. Do you have any knowledge as to why that was the  
14 case?

15 A. It just was a department in the general fund,  
16 which is how it had originally been set up. Back  
17 historically it was -- if you looked down the list of  
18 all the departments, the sheriff's department and the  
19 EMS and the finance and everybody else, there was an  
20 occupancy tax department, so it was just --

21 Q. So it was a line item, if you will, in the  
22 general fund?

23 A. It basically was a department in the general  
24 fund and then it was -- it was always reported as a

SANDRA HILL: PAGE 39

1 blended component unit of the county and then it just -  
2 - then we separated it out I believe at the request of  
3 the local government commission that we separate it  
4 out.

5 Q. Okay.

6 A. Because they were looking at TDA's for  
7 reporting at that time.

8 Q. Okay. I believe I'm on [13] now; is that  
9 correct? So Plaintiff's Exhibit [13]. If you would,  
10 does that document look familiar to you? I'm sorry, I  
11 didn't know if you were still reading?

12 A. No. I mean I have read it before.

13 Q. If you haven't read it yet, if you would take  
14 one second, if you could just tell me what exactly this  
15 budget amendment is, or what it's for?

16 A. It is a budget amendment to increase the  
17 professional services in the occupancy tax tourism  
18 related portion to defend the recent lawsuit.

19 Q. And do you know what lawsuit in particular  
20 that's referring to? Is it the one that you're  
21 testifying in today?

22 A. I believe so, but I'm not a hundred percent  
23 certain of that.

24 Q. Just a few more questions. Are you aware of



No. COA22-699

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO: 19-CVS-171

GERALD COSTANZO, COROLLA  
CIVIC ASSOCIATION, ET AL.,

PLAINTIFFS,

VS.

D-E-P-O-S-I-T-I-O-N

OF

KEVIN EDWARD MCCORD

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

DEFENDANTS.

\* \* \* \* \*

1:53 P.M., DECEMBER 7, 2020, AT THE HISTORIC CURRITUCK  
COUNTY COURTHOUSE, 153 COURTHOUSE ROAD, CURRITUCK, NORTH  
CAROLINA.

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

CASEY C. VARNELL, ESQUIRE  
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P.O. DRAWER 1027  
KITTY HAWK, NC 27949

FOR THE DEFENDANTS:

CHRISTOPHER J. GEIS, ESQUIRE  
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WINSTON-SALEM, NC 27101

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S. Graham & Associates  
Court Reporting Services  
P.O. Box 385  
Elizabeth City, NC 27907-0385  
(252) 264-4646 [sgrahamassoc@gmail.com](mailto:sgrahamassoc@gmail.com)

KEVIN McCORD: PAGE 24

1 you're increasing the use of lodging facilities,  
2 meeting facilities, convention facilities. In that  
3 context what do you think the -- what does the word  
4 attract mean to you when assessing an expenditure from  
5 OT?

6 A. As far as attract, something that somebody  
7 wants to come to. I mean like a perfect example we  
8 can't advertise -- our tourism we can't advertise a  
9 business. I don't know if you play golf. We're number  
10 2 to Myrtle Beach in golf packages. Believe it or not,  
11 in the '90s I was one of the ones that helped set that  
12 up, the initial golf packages down here, which not only  
13 benefits Currituck County, it benefits Dare County as  
14 well as restaurants and the other stuff. But they're  
15 attracted to -- you know, golfers come down here in the  
16 off season and play golf because there's Kilmarlic, you  
17 know, nice golf courses.

18 Q. Right, right.

19 A. The Currituck Club.

20 Q. So those are destinations or places that you  
21 can go and you can attend and play golf, if you will,  
22 pay for this package. So do you view sheriff and EMS  
23 expenditures from OT in the same fashion that you do a  
24 golf package?

1           A.    Can you ask that question again? I see what  
2           you're saying, but I want to make sure.

3           Q.    So do you think sheriff and EMS services are  
4           an actual attraction in the same way, for a tourist or  
5           a business traveler, in the same way that a golf  
6           package is an attraction?

7           A.    I mean they're needed. I went to a couple  
8           fights at the waterpark. And I've went to a couple  
9           fights in Corolla, and I've went to a couple of fights  
10          at golf courses, believe it or not, too.

11          Q.    Oh, I know.

12          A.    As well as EMS has had to go for some  
13          injuries at all the above as well too, so it's  
14          something that comes with the -- they're needed and  
15          required I guess would be the idea.

16          Q.    All right. Okay. And do you think that  
17          Sheriff and EMS meets the requisite requirement that it  
18          be an expenditure that attracts tourists and increases  
19          the lodging facilities, use of those lodging and  
20          meeting facilities?

21          A.    I think the safety. I mean they stress  
22          especially in Corolla as well as other stuff. They  
23          like the clean, safe beaches. I mean when you googled  
24          -- we had a presentation one night here, and the guy

No. COA22-699

STATE OF NORTH CAROLINA  
COUNTY OF CURRITUCK

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SCANLON II, CURRITUCK COUNTY  
MANAGER and BUDGET OFFICER,  
both in his official capacity and  
in his individual capacity, ET AL)

DEFENDANTS.

D-E-P-O-S-I-T-I-O-N

OF

ROBERT "BOB" WHITE

\* \* \* \* \*

3:17 P.M., DECEMBER 7, 2020, AT THE HISTORIC CURRITUCK  
COUNTY COURTHOUSE, 153 COURTHOUSE ROAD, CURRITUCK, NORTH  
CAROLINA.

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFFS:

CASEY C. VARNELL, ESQUIRE  
SHARP, GRAHAM, BAKER & VARNELL  
P.O. DRAWER 1027  
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WINSTON-SALEM, NC 27101

COURT REPORTER:

STEPHANIE C. GRAHAM, CVR-M

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Elizabeth City, NC 27907-0385  
(252) 264-4646 [sgrahamassoc@gmail.com](mailto:sgrahamassoc@gmail.com)

1 very broad reaching. I don't think it limits us much  
2 at all except that we need to draw some correlation  
3 between that expenditure and the tourism-related  
4 portion of that.

5 Q. Okay. And drawing a correlation to the  
6 tourist-related expenditure, so when you're making that  
7 comparison, what do you use as criteria for determining  
8 what exactly is a tourist-related expenditure?

9 A. Me personally or as a body politic?

10 Q. Either. Body politic.

11 A. Body politic? Well, generally, that gets  
12 discussed in our work sessions, like I said. That's  
13 where, you know, the meat and potatoes happens of these  
14 things. By the time it gets to the commissioner  
15 meeting, it's we've already decided what's going to  
16 happen.

17 Q. Right.

18 A. So just discussion with the county manager.  
19 And generally the county attorney is present as well.  
20 If I ever have a question related to that, I'll seek  
21 advice of our attorney to make sure that we're not over  
22 reaching our bounds, in his opinion.

23 Q. And has the county manager been instrumental  
24 also --

1       them even knowing it, provides that level, measure of  
2       comfort. And when they pick up that phone, and someone  
3       is going to answer and respond to that call.

4             Q.    So, how would it -- how would it attract a  
5       tourist, though, if they didn't know the service  
6       existed?

7             A.    Well, that's -- you can't prove a negative.  
8       But to prove a negative -- I can't -- I can ask them, I  
9       guess, on our survey, did you think about fire and EMS  
10      when you came here?

11            Q.    And has that occurred?

12            A.    It may have. I don't know.

13            Q.    Surveys of that nature?

14            A.    I doubt it. We mostly ask them about the  
15      condition of our beaches. How did you enjoy your  
16      vacation? Have you found that we have adequate  
17      facilities here? So, whatever those are, bath houses,  
18      things of those natures. We have activities all over  
19      the county during the summertime and various -- and  
20      seasonally, seasons for tourists. So I view them as an  
21      integral part of the tourist satisfaction and coming  
22      here and wanting to be safe. No different than a  
23      lifeguard, for instance. They don't -- you know, they  
24      do ask about lifeguards.

1           Q.   Well, and you might remember, I think you  
2           were present at the preliminary injunction hearing  
3           where we excluded lifeguard services from our lawsuit.  
4           We're not -- we tend to agree that lifeguard services  
5           are something that somebody coming to the beach would  
6           look at. They would look to see because there are some  
7           beaches that are not lifeguarded. We know that. And  
8           it's a great service.

9           A.   Right.

10          Q.   Absolutely. Was there ever any specific  
11          evidence that you can remember, whether it be  
12          quantitative or qualitative, that showed you that --  
13          and I guess this kind of goes to a survey question.  
14          That's an example of the type of evidence I'm talking  
15          about.

16          A.   Uh-huh.

17          Q.   That would show you that, yes, indeed, these  
18          services are what keep people coming to Corolla, I mean  
19          to Currituck Outer Banks.

20          A.   Evidentiary, no, I wouldn't say that. That's  
21          probably too strong a word. As I said, I don't think  
22          you can prove a negative. So if they haven't thought  
23          about it, then, you know -- and I don't know that you  
24          want to put that in advertising, for instance.

1 Q. Right.

2 A. That, you know -- it may make people question  
3 whether or not it's safe come here. Why would you  
4 advertise that you have a good medical and police  
5 department here?

6 Q. So does that mean that Currituck County does  
7 not advertise their police and fire department?

8 A. I don't believe we do. I haven't seen any  
9 ads with anything in there like that. No, it's more  
10 geared toward, obviously, families and creating a scene  
11 in someone's mind that this is where you want to be.

12 Q. Okay. And I've gotten varied responses on  
13 this particular question, so I'll try to -- I don't  
14 know if it's -- people have different opinions I'll  
15 say. So, but historically, and you've voted on, what  
16 the last, in '17 you voted on the budgets moving  
17 forward. So, what is your historical perspective on  
18 how -- better said, what the figure shown in Column 2,  
19 which would be OT Transfers to General Fund for  
20 Sheriff, OT Transfers to General Fund for EMS. What  
21 were those precise transfers intended to cover? What  
22 were they paying for exactly?

23 A. The expense of having those services at the  
24 beach. So -- and largely at the beach. That is



BOB WHITE: PAGE 27

1 with in the last three or four years that could really,  
2 I guess, be questionable. Most of it has been --  
3 probably our biggest spend has been doing our maritime  
4 museum.

5 Q. Right; right.

6 A. So that probably was the biggest discussed  
7 thing. So, you know, in our annual retreat, we'll go  
8 through things we'll want to do. We'll discuss,  
9 deliberate those items. And then we go into budget  
10 time. As we go through the budget, if we want to call  
11 out stuff and dig in a little bit deeper, we can and  
12 have discussion about it. And tourism is just one  
13 small part of that, obviously.

14 Q. And in general with Sheriff and EMS over the  
15 last few years, let's say, have, do you recall there  
16 being any substantial discussions or deliberations  
17 amongst the board concerning the validity of those  
18 transfers from OT for Sheriff and EMS, Sheriff and EMS  
19 specifically.

20 A. You're going to have to clarify validity for  
21 me because I believe that the --

22 Q. Legality.

23 A. Well, no, because we've approved it again and  
24 again. So I think we all believe in our judgment that

1 that is a perfectly acceptable expense.

2 Q. All right. And with the current board or  
3 with any board members that you've ever served with, do  
4 you recall during your tenure as a board of  
5 commissioner, do you recall a time where there was a  
6 specific work session or any time outside of a public  
7 meeting even where you and the entire board has been  
8 vetted on what constitutes a valid tourist-related  
9 expenditure? Has there been like a crash course in --

10 A. Yes, there has been.

11 Q. -- in tourist-related. Can you tell me about  
12 that and when it occurred?

13 A. Well, for myself, personally when I was in  
14 the office of elect to become a commissioner, I sat  
15 down with Kitty Etheridge and Bobby Hanig. We came in  
16 for a meeting with Dan Scanlon, the previous county  
17 manager, and went through really what it means to be a  
18 commissioner. There's running for commissioner and  
19 there's actually doing the job, so. Part of that  
20 process was to talk about the tourism governing  
21 authority, and how that money got spent and where it  
22 got spent. And then we also go over that with our  
23 board members for our Tourism Advisory Board. When  
24 they come in, we talk about, again, this act and how it

1           Q.    But what data, if any, was given to you guys  
2 to show that there was also more services needed?

3           A.    No, we didn't see any data, but we did hear  
4 from our professionals. So the sheriff is a  
5 professional; right?

6           Q.    Okay. Right; right.

7           A.    And so when they say, we need this, we're not  
8 going to dispute the professional's opinion. I do know  
9 as --

10          Q.    So department heads.

11          A.    Department heads, yes.

12          Q.    When they would speak.

13          A.    Right. What they do and the sheriff,  
14 obviously, is elected. So these individuals tell us,  
15 they need this, then we're not going to dispute that.

16          Q.    Okay. I believe you've already hit on this,  
17 but to your knowledge, there's no actual advertisement  
18 or promotion of sheriff and EMS services, as what I'm  
19 calling a tourist attraction?

20          A.    No, sir.

21          Q.    Now, why, in your opinion -- so, we've got  
22 the Currituck Outer Banks. Currituck Outer Banks makes  
23 up about half of the total tax value in the county, and  
24 I'm talking about ad valorem taxes here.

1 A. Yep.

2 Q. All right. So, but also, though, it only  
3 makes up about ten percent of the county's total land  
4 area.

5 A. Uh-huh. Right.

6 Q. Why, though, or why then would the general  
7 taxes, the property taxes, the general fund, why would  
8 the cost collected there not have been sufficient to  
9 cover the, what's coming from OT, the 1.6 and 1.2  
10 million per year for Sheriff and EMS?

11 A. I don't think that's a, probably an adequate  
12 question. It is sufficient. We could cover that  
13 money. We'd have to raise taxes to do so.

14 Q. Okay. Well -- okay.

15 A. So -- but the need is greater than -- that is  
16 different -- for regular citizen's safety, what we --  
17 what we see throughout the county is the status quo.  
18 The need is greater, it's ramped up because of the  
19 tourist impact on the Outer Banks area. And this  
20 simply pays for that extra service level that is needed  
21 over there because of the tourist involvement.

22 Q. Okay. And when we're talking about an  
23 increase in a service level, from a service level  
24 standpoint, is it your opinion that, let's say during

BOB WHITE: PAGE 34

1 peak season, that the calls on Currituck Outer Banks  
2 for sheriff and EMS, the actual service calls, do you  
3 think that they're more than -- are they more rampant  
4 in number than the calls you receive from the mainland?

5 A. Yes.

6 Q. Okay. Do you have any information or data  
7 that would support that, or is that just your opinion?

8 A. No, I -- no, like I've said we've gotten some  
9 reports over the years from various department heads.  
10 And in our annual retreat, I believe, that they usually  
11 cover -- they, being either the sheriff or our Fire  
12 Chief Melton, the call volume that they're getting and  
13 where it's coming from, what they respond to, types of  
14 calls.

15 Q. And the call volume -- so you've seen the  
16 data from them. And the call volumes --

17 A. Well, they -- I don't know that -- well, some  
18 of it they presented. But in their presentation, some  
19 of it has just been verbal. But we know that that  
20 occurs. And having lived there for the last -- since  
21 1996, you know, I see it. I see them moving -- I live  
22 right by the fire department, so, I know how many times  
23 they roll out.

24 Q. Right. So, again, it's fair to say that the

1           A.    So, yeah.  It seems to me that the language  
2           is fairly broad.  And in introspection, I would say  
3           that you can't define everything that is a  
4           tourist-related expenditure, so it leaves latitude for  
5           us to decide what works for tourist-related expenditure  
6           for our county and our needs.

7           Q.    But you do agree, though, that the  
8           limitations are at least such that whatever expenditure  
9           it is must be designed to attract tourists and business  
10          travelers and thereby increase the use of these  
11          facilities within the county.

12          A.    Uh-huh.

13          Q.    You do agree that that at least is a  
14          limitation?

15          A.    Yeah.  Absolutely.

16          Q.    And speaking of, I guess, headings, since you  
17          brought up the tourist-related heading, this act is  
18          actually entitled, An Act To Allow An Increase In The  
19          Currituck Occupancy Tax And To Change The Purposes For  
20          Which The Tax May Be Used.

21          A.    Uh-huh.

22          Q.    Do you see that as having any bearing on how  
23          money is now spent?

24          A.    Didn't say positive or negative changes did

1       it?

2           Q.    Just do you think it has any bearing?

3           A.    No.  No.  It doesn't.

4           Q.    Fair enough.  Wrapping up now.  Do you  
5 believe that occupancy tax expenditures, not, and not  
6 in incidental form, but in specific form, do you think  
7 that expenditures can be made from OT funds that are  
8 designed to specifically benefit mainland or -- yeah,  
9 mainland citizens in Currituck County?

10          A.    I'm not quite sure I follow that.

11          Q.    So permanent residents within Currituck  
12 County.

13          A.    Okay.

14          Q.    Do you believe that occupancy tax  
15 expenditures can be made, and those expenditures be  
16 specifically designed to benefit permanent residents,  
17 specifically designed, not incidentally benefit them?

18          A.    No.  No, the language is pretty clear.  It's  
19 not designed for residents.

20          Q.    And, again, just for the record, you know.  
21 In terms of advice and education on tourism, what  
22 constitutes tourism-related expenditure under the 2004  
23 act, how have you educated yourself or how have you  
24 been educated on what constitutes a valid expenditure?

1           A.    I'm going to take a stab at a hundred  
2           thousand dollars.

3           Q.    That's the one. All right. So, can you  
4           confirm that the county did approve that expenditure or  
5           -- I'm sorry, transfer of a hundred thousand dollars  
6           from occupancy tax for, I think -- what is it,  
7           professional services, I think it states?

8           A.    Uh-huh.

9           Q.    The minutes go on to say, defending the  
10          lawsuit. That's how it was described at the meeting.  
11          Was the transfer approved from OT?

12          A.    Yes. Yes.

13          Q.    And is this particular lawsuit the lawsuit  
14          that that expenditure was in reference to?

15          A.    Yes.

16          Q.    And just, I've got to know, what was your  
17          rationale or justification for -- I'm assuming you  
18          voted to approve that.

19          A.    I did.

20          Q.    What was your justification for approving  
21          that particular expenditure?

22          A.    I think it's absolutely imperative that we  
23          keep, that we defend ourselves and keep our, the  
24          authority that we have the way that it is. And so this



1 goes towards that. If we have that money taken away  
2 from us, we're going -- you're going to end up with a  
3 tax increase for the citizens of this county and the  
4 property owners of this county.

5 Q. Okay.

6 A. And I don't believe ad valorem taxes should  
7 pay for something ?? 11.10

8 Q. Okay. So, it would be your testimony that  
9 defending a lawsuit is designed to attract tourists and  
10 increase the use of lodging?

11 A. It's going to allow us to keep the money that  
12 we use to attract tourists.

13 Q. Fair enough. When the county auditor issues  
14 their report at the end of any fiscal year, if that  
15 report comes back and they haven't made comments about  
16 a particular transfer from OT being improper or red  
17 flagging it, for example, is it your opinion that that  
18 makes the expenditure lawful?

19 A. I'm not sure how our auditor actually looks  
20 at that.

21 Q. Okay.

22 A. So I can't really speak to that.

23 Q. Understood. I think to -- so, final question  
24 then. And I think you've even basically said at your