

NORTH CAROLINA COURT OF APPEALS

GERALD CONSTANZO, BRYAN DAGGOT,)
JOHN DUMBLETON, PHILIP SCHNEIDER,)
CLARA SCHNEIDER, MARGARET BINNS,)
MOHAN NADKARNI, GREGORY A. WANDER,)
RONALD BUCHANAN, STACEY)
MCCONNELL, GARY S. MILLER,)
JEFFREY P. FUSSNER, WILLIAM T. COLLINS,)
REX LUZADER, ELIZABETH SCHWEPPE,)
GERRILEA ADAMS, RICHARD J. CHOWN,)
PATRICIA C. CHOWN, GARY GOSNELL,)
MARY MAGNER, MICHAEL C. BRIGATI,)
ROBERT RICHARDSON, MARYANN)
DUMBLETON, and COROLLA CIVIC)
ASSOCIATION,)

Plaintiffs,)

v.)

From Currituck County

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.)

No. 19 CVS 171

BRIEF OF DEFENDANT-APPELLEES

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BRIEF OF DEFENDANT-APPELLEES

ISSUES PRESENTED

1. Did the trial court correctly hold that the Currituck County Board of Commissioners has properly used its “judgment” to determine what expenditures of occupancy-tax revenues attract tourists and business travelers to the county when the local statute at issue explicitly gives the board the authority and duty to do so?

2. Did the trial court correctly conclude that, in exercising its “judgment” to determine what expenditures attract tourists to their county, the Currituck County commissioners have not abused their discretion as public officials?

STATEMENT OF FACTS

I. Background.

Currituck County collects occupancy taxes under a local statute enacted in 1987 and amended in 2004. N.C. Sess. Law 2004-95, H.B. 1721, § 1(a2). (R. p. 198.) This statute allows the county to levy an occupancy tax on visitors who rent properties in the county and requires it to use revenue from this tax “only for tourism-related expenditures, including beach nourishment.” Id., § 2(e). It requires the county to spend a specific portion of revenue from its occupancy tax “to promote travel and tourism” and to “use the remainder of those funds for tourism-related expenditures.” (R. pp. 198-200.)

The issue in this case is what qualifies as “tourism-related expenditures.” The statute defines them as follows:

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

Id., § 2(e)(4) (emphasis added). (R. p. 199.)

Out of every \$100 in occupancy-tax revenue collected, the county uses one-third for promotions and the remaining two-thirds for expenditures that the commissioners judge will help attract tourists. (Appellees’ Brf., p. 15; Sandra Hill Dep. p. 37.) The county receives about \$10 to \$12 million in occupancy-tax revenue a year, and spends about \$3.5 million of that on promotions. (R. p. 192; Hill Dep. p. 37.)

When it was enacted in 1987, the statute required the county to use 75 percent of occupancy-tax revenue “only for tourist-related purposes,” which included, among other things, “construction and maintenance of public facilities and buildings, . . . police protection, and emergency services.” N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). (R. p. 201.) The remaining 25 percent of revenue could be used “for any lawful purpose,” *id.* – with no requirement that expenditures be related to tourists.

The 2004 amended statute also created the Currituck County Tourism Development Authority (TDA), which consists of all seven county commissioners and a travel-and-tourism representative as a non-voting member.¹ The statute allows the TDA to spend occupancy-tax revenue to “promote travel, tourism, and conventions in the county, sponsor tourist-related events and activities in the county, and finance tourist-related capital projects in the county.” N.C. Sess. Law 2004-95, H.B. 1721, §§ 3(1.1) and 3(c). All occupancy-tax revenue goes to the TDA, which sends money not used for promotions to the county’s general fund for spending pursuant to the commissioners’ discretionary authority. (R. p. 195.)

Appellants, who collect and remit the taxes but do not pay them, claim that Currituck County spends occupancy-tax revenue in violation of the statute and that many expenditures, especially those for law enforcement, emergency medical services, and fire protection, should not be paid for with this revenue because they are not related to tourism. (R. pp. 4-7.)

¹ The law was amended in 2008 to add two commissioners to the TDA board. See N.C. Sess. Law 2008-54, H.B. 2763, § 1.

The commissioners, using the discretion given them by the statute, disagree. They have unanimously judged that certain expenditures, including those on public-safety services required in response to the influx of visitors to the county during tourist season, are related to tourism. (R. 192, 195.)

All seven members of the Board of Commissioners are elected at-large in the county, but five are required to live in distinct geographic districts, one of which covers Corolla. (R. p. 192.) The commissioner from Corolla, Bob White, has run a tourism business there for over 25 years. (R. p. 192; Robert (Bob) White Dep. p. 15.)

About 80 percent of the county's annual occupancy-tax revenue is spent on Corolla. (R. p. 192.) Corolla, a peninsula on the Outer Banks, is set off from the mainland part of the county by the Currituck Sound. Corolla is bracketed by the sound on one side and the Atlantic Ocean on the other. (R. p. 192.)

Most of the county's land and population are on the mainland. Of the county's 28,100 year-round residents, only 1,159 live on Corolla, but the county's population doubles to about 60,000 during tourist season. (R. p. 192; White Dep. p. 35.)

Most of the county's tourists visit Corolla, so most occupancy-tax revenue is generated from there. (White Dep. pp. 19-20; R. p. 192.) However, following a consultant's recommendation, the county has tried to diversify its tourism economy to attract more visitors to the mainland and has used occupancy-tax revenue for several projects there. (R. pp. 193-94.) It spent \$177,000 to refurbish the old Currituck County Jail. (R. p. 193.) It upgraded the county's airport, which is used by hunters and fishermen from around the world. (R. p. 194.) It built baseball and

softball fields, which have attracted visitors for tournaments most weeks each year. (R. p. 194.) It converted an old Coast Guard station into a military veterans' park along the Intracoastal Waterway near a marina used by boaters traveling up and down the East Coast. (R. p. 194.) It helped restore the Historic Jarvisburg Colored School Museum, which dates to 1868, is on the National Register of Historic Places, and is a popular with tourists. (R. p. 194.)

The county also has used occupancy-tax revenue to pay for public safety services on the mainland during tourist season. Corolla is accessible only through the mainland, so tourists headed there bring increased traffic to the mainland too. (Selena Jarvis Dep. pp. 12, 15-17.)

The county has seen an increase in the number of tourists every year since 2006, except for 2009, when there was a recession. (R. pp. 194-95.)

Appellants focus on the use of occupancy-tax revenues to pay for public safety services, including law enforcement, emergency medical services, fire protection, and beach lifeguards and ocean rescue teams. (R. p. 192.) The need for lifeguards and ocean rescue teams is seasonal, but the other costs are year-round because the county cannot hire employees to work for only part of the year, so it hires them for full-time work and moves them to Corolla during tourist season. (R. p. 192, 195; Hill Dep. pp. 19, 22.) The commissioners have judged these expenditures as tourism-related because they are caused by the influx of tourists. (R. p. 195.)

II. Commissioners' judgment about tourism-related expenditures.

The commissioners make budget decisions after receiving input from county officials, including the tourism director. (Hill Dep. pp. 5, 8-10.) The county is transparent in making spending decisions. Budget decisions are made in open public meetings and after open budget workshops in which residents can provide input. County budgets are placed on the county's website. (R. p. 195; White Dep. p. 49.)

The commissioners believe that their spending occupancy-tax revenues has been logically related to tourism and is within the discretion the statute provides them. Their testimony provides a rational, reasonable basis for their decisions and shows they have used their best judgment in exercising their statutory authority.

Commissioner White, who was chairman of the board from 2018 to 2020 and represents Corolla, has been in the tourism business on Corolla since 1996 and speaks with tourists daily. The board recognizes that occupancy-tax revenue may be used only "for tourism-related expenditures," but that it may determine what such expenditures are by using its "judgment." The board must find "some correlation between that expenditure and the tourism-related portion of that," and commissioners discuss this connection. (White Dep. pp. 5-6, 13-15.)

Items such as school textbooks would not meet this definition. (Kevin McCord Dep. p. 15.) But occupancy-tax funds used for public safety services (e.g., sheriff, fire, EMS, and lifeguards) provide a safe environment for tourists and are "an integral part of the tourist satisfaction." (White Dep. pp. 14-17.) Occupancy-tax funds have been used to pay for sheriff's deputies on a year-round basis, including for their

overtime, and that allows them to protect homes that are empty in the off-season, when break-ins on Corolla increase. (White Dep. pp. 20-22.)

Tourists drive the increased costs for public safety on Corolla. The sheriff and other county officials have reported the need for services to the board. Tourists thank county officials for these services. These factors have led the commissioners to conclude that law enforcement spending “is a perfectly acceptable expense.” Visitors have complimented the county about its public safety services, which are “absolutely is crucial to the tourist experience here in attracting them through a positive tourist experience. . . . [A]nd re-attracting them.” (White Dep. pp. 19, 27-31, 35, 44.)

“The need [for services] is greater . . . because of the tourist impact on the Outer Banks area. And this simply pays for that extra service level that is needed over there because of the tourist involvement.” (White Dep. p. 33.)

The county is aware of other needs in attracting tourism. Occupancy-tax funds have been used to improve the Whalehead Club and its maritime museum, which is a tourist destination on Corolla; for baseball and softball fields on the mainland; and for events on the mainland. (White Dep. pp. 16, 23, 27, 43.)

Using occupancy-tax funds to pay for some public safety services is related to tourism because it ensures that tourists have a safe place to visit. Tourists travel throughout the county even when they are just going to and from Corolla, so “[t]he whole county is affected by the tourist season.” (Jarvis Dep. pp. 8, 11-17.)

The commissioners rely on recommendations of the county’s professional staff, including the tourism director, and knows that there is a greater call volume for

public safety services because of tourism. This information informs the commissioners' judgment about how to spend the funds. (Jarvis Dep. pp. 19, 23-27.)

The county has "to have more [deputy] [s]heriffs or EMS because of the influx of the tourists on our county." Occupancy-tax revenue pays for some, but not all, of the increased costs to cover tourist-driven needs on the Outer Banks. (Mary "Kitty" Etheridge Dep. pp. 12-16.)

Commissioners rely on information from public safety officials and review relevant data, but "it just makes common sense that if we don't have fire protection, if we don't have police protection, people are not coming to an area that they don't feel is safe." Tourists bring the need for "more police protection, more fire protection, more everything[.]" Not only does tourism "brings the need for more services," but tourists want those services and there are benefits to the services. When the county increased beach patrols in 2020, for example, it did not suffer any deaths in the water. (K. Etheridge Dep. pp. 17-23, 28, 37, 39.)

Increased public safety spending also covers tourists on the mainland. If no one responded to an accident on the mainland involving tourists who were traveling to Corolla, that could affect future tourism. (K. Etheridge Dep. pp. 28-29, 31.)

Kevin McCord, an at-large commissioner, who serves as a Currituck County sheriff's deputy and owns a business, testified that the public safety expenditures keep tourists safe. Because increased public safety spending on Corolla helps tourism, it is tourism-related. The county's ocean rescue teams conducted 194 rescues in one recent year, for example, and occupancy-tax revenue pays for increased

medical units on Corolla and sheriff's patrol vehicles. Visitors have told county officials that they are impressed with the "clean and safe" beaches, and "if the services weren't there the people wouldn't be there, and you wouldn't have your clean, safe beaches. . . ." (McCord Dep. pp. 5-6, 16-18, 25-26, 29-31, 42, 45.)

ARGUMENT

I. Introduction

The Legislature gave the Currituck County Board of Commissioners the authority to exercise its "judgment" to determine what expenditures attract tourists to the county and it has done so. It does not use occupancy-tax proceeds on "general public services," only for services that, in its judgment, help attract tourists.

The 2004 Act changed the purposes for which Currituck County could spend occupancy-tax revenue, but it broadened the board's discretion to determine what attracts tourists. The statute's language and history show that the Legislature believed the commissioners were best suited to determine what expenditures attract tourists, so it gave them the authority and responsibility to make this determination by using their "judgment."

II. The language of the statute is clear and requires the Currituck County Board of Commissioners to use its "judgment" to determine what expenditures of occupancy-tax revenue increase tourism.

The statute at issue is clear. Section 2(e)(4) of the statute defines "tourism-related expenditures" and, inserting that definition into Section 2(e) of the statute, that portion of the statute reads as follows (with emphasis added):

Currituck County shall use the net proceeds of the tax levied under subsection (a) of this section only for 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 and such expenditures include capital expenditures and beach nourishment.

Thus, the statute plainly gives the commissioners the authority and responsibility to determine what expenditures attract tourists.

The key language is “in the judgment of the Currituck County Board of Commissioners,” and the Court must apply its plain meaning. “Judgment” is defined as “the formation of an opinion after consideration or deliberation,” as “discernment,” or as “the capacity to form an opinion by distinguishing and evaluating.” Judgment, AMERICAN HERITAGE COLLEGE DICTIONARY (3d ed. 1997). It is “[t]he mental faculty that causes one to do or say certain things at certain times, such as exercising one’s own discretion or advising others; the mental faculty of decision-making.” Judgment, BLACK’S LAW DICTIONARY (11th ed. 2019).

“Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” Burgess v. Your House of Raleigh, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). “When a statute is unambiguous, the court will give effect to the plain meaning of the words without resorting to judicial construction. Courts must give an unambiguous statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” State v. Jamison, 234 N.C. App. 231, 238, 758 S.E.2d 666, 671 (2014).

The Legislature could have listed specific items for which it wanted occupancy-tax revenue used. Instead, it said the county could spend on “tourism-related expenditures” and defined that phrase as those that the commissioners, using their judgment, believe will attract tourists. The Legislature did not want to exclude beach nourishment and capital expenditures and so they were “included” as permissible expenditures, but this was permissive, not limiting. N.C. Turnpike Auth. v. Pine Island Inc., 265 N.C. 109, 120, 143 S.E.2d 319, 327 (1965) (“The term ‘includes’ is ordinarily a word of enlargement and not of limitation,” and “the use of examples is not intended to be exhaustive or exclusive.”); State ex. rel. Utilities Comm. v. Envir. Def. Fund, 214 N.C. App. 364, 367, 716 S.E.2d 370, 372 (2011) (“the word ‘including’ would be illustrative, rather than exhaustive,” and “expresses legislative intent to list examples.”). If the Legislature had wanted the county to spend the revenue only any specific set of items, it would have said so. Instead, it gave authority to the commissioners to use their judgment and said that judgment could apply to beach nourishment and capital projects.

“The principal goal of statutory construction is to accomplish the legislative intent. The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, ‘the spirit of the act[,] and what the act seeks to accomplish.’ ” Lenox Inc. v. Tolson, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citation and quotations omitted). However, “[i]f the statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.” Id.

When a court analyzes a statute, “it is always presumed that the Legislature acted with full knowledge of prior and existing law.” Dickson v. Rucho, 366 N.C. 332, 341, 737 S.E.2d 362, 369 (2013). “The court presumes that the Legislature acted in accordance with reason and common sense, and that it did not intend an absurd result.” Matter of Brake, 347 N.C. 339, 341, 493 S.E.2d 418, 420 (1997). “Also, when construing a statute, [the court] always look[s] to its purpose.” Id.

A. The statute’s history shows that public safety spending was always considered related to tourism.

The statute’s language and history are the best guides of legislative intent.

The public safety spending Appellants object to was considered proper when the statute was first enacted. The 1987 version of the law provided that 75 percent of the revenue could be used 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,” and the rest could be used “for any lawful purpose.” N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e) (emphasis added). Thus, police and emergency services were “tourist related purposes” in 1987. When it amended the law in 2004, the Legislature knew the statute allowed spending on these things because they were related to tourists. It could have specifically barred using occupancy-tax revenue for such purposes, but it did not. Instead, it left that up to the commissioners.

Appellants argue that the 1987 and 2004 statutes are different, but they must be read together. “ [S]tatutes which are in pari materia, i.e., which relate to or are applicable to the same matter or subject, although enacted at different times must be

construed together in order to ascertain legislative intent.’ ” Friends of Hatteras Island Nat. Hist. Forest Land Trust Inc. v. Coastal Resources Comm., 117 N.C. App. 556, 566, 452 S.E.2d 337, 344 (1995) (citation omitted).

The 1987 statute provided specific examples of “tourist-related” expenditures, including “maintenance of public facilities . . . police protection, and emergency services.” N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). The 2004 statute is general and defines “tourism-related expenditures” as those that, “in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county.” N.C. Sess. Law 2004-95, H.B. 1721, § 2(4). The 2004 statute provides only two examples – capital expenditures and beach nourishment – and does not specifically exclude any expenditures but leaves it up to the commissioners to determine what attracts tourists.

The tourism-related textual changes that were adopted in 2004 did not restrict the county’s discretion to determine which uses — such as police protection and emergency services — would attract tourists or tourism. The 1987 statute limited expenditures to two separate categories – “tourist related purposes” and “any lawful purpose” – and the “tourist-related” category included “police protection, and emergency services.” N.C. Sess. Law 1987-209 § 1(e).

The 2004 Amendment kept the tourist-related provision but removed the general “any lawful purpose” category. See N.C. Sess. Law 2004-95, H.B. 1721. The

statute replaced the term “tourist related” with “tourism-related,” which the statute then defined. The tourist- or tourism-related category thus has been present in the Act since 1987. It originally included key examples of subjects that were considered to be related to tourism, including public safety services. “[P]olice protection” and “emergency services” were classified as tourist-related and not placed in the “any lawful purpose” category. See N.C. Sess. Law 1987, Chapter 209, § 1(e).

By asking the Court to classify “police protection” and “emergency services” as general services, Appellants ignore the clear difference between the tourist-related category, which was retained in 2004, and the general “any lawful purpose” category, which was removed after 2004. Appellants want the Court to ignore the express inclusion in 1987 of “police protection” and “emergency services” as tourist-related rather than general-purpose. But the 2004 Amendment did not delete the tourist-related category – it expanded it and broadly defined it, stating that “[t]ourism-related expenditures” are “[e]xpenditures that, *in the judgment of the Currituck County Board of Commissioners*, are designed . . . [for] attracting tourists or business travelers to the county.” N.C. Sess. Law 2004-95, § 2 (emphasis added).

The Currituck County commissioners could reasonably believe that the definition of what was related to tourism and tourists in the 1987 statute carried forward. If, in 1987, the Legislature determined that “tourist-related” expenditures included, inter alia, “police protection, and emergency services,” it follows that, in 2004, it could consider “tourism-related expenditures” as including these things too.

Thus, if police protection was a tourist-related expenditure in 1987, it was a tourism-related expenditure in 2004.

Appellants claim there is a difference between the words “tourist,” which was used in the 1987 statute, and “tourism,” which was used in the 2004 statute, but this is a distinction without a difference. “Tourism” is defined as: “1. *The practice of traveling, for pleasure.* 2. *The business of providing tours and tourist services,*” and “tourist” is defined as “*One who travels for pleasure.*” AMERICAN HERITAGE COLLEGE DICTIONARY (3d. ed. 1997). Thus, the definitions overlap. Appellants claim that general public services “may relate to tourists, but not to tourism generally” (App. Brf., p. 21), but this fails the logic test. The statute defines “[t]ourism-related expenditures” as those that are “attracting tourists and business travelers to the county.” N.C. Sess. Law 2004-05, H.B. 1721, § 2(e)(4) (emphasis added).

Legislative intent can be found from a statute’s spirit and purpose, both of which are clear here. The statute is designed to allow the county to attract tourists. However, someone has to make this determination. Appellants want to do this, but this is the duty of the commissioners. The commissioners have judged that the best way to attract tourists is to provide them a safe environment, and this requires spending on public safety services. Under Appellants’ narrow interpretation of what is a tourism-related expenditure, however, there would be “an absurd result,” Brake, 347 N.C. at 341, 493 S.E.2d at 420, if the county could pay for lifeguards, who rescue swimmers, but not EMS crews, who treat them after they are pulled from the ocean. But this is what Appellants want. See White Dep. p. 18; Tr. Summ. Judg. Mot. Hrg.,

p. 29. They want to substitute their judgment for that of the commissioners. The Legislature did not intend this.

Appellants must believe that lifeguards and ocean rescue teams attract tourists. This is a reasonable conclusion, because such services provide safety and security to tourists. But, if that is the case, it also follows that police, fire, and EMS services do the same.

The commissioners, the elected representatives of the residents of the county, are in the best position to determine how to accomplish the purpose of the statute, and the Legislature gave them that authority. This is why the appropriate standard for analyzing this case is whether the commissioners have abused their discretion as public officials, as discussed below.

The 2004 statute does not exclude public safety services as a permissible expenditure. If such expenditures are not excluded, if the previous statute allowed them, and if the amended statute gives authority to the board to use its judgment to determine expenditures, it is reasonable to conclude that public safety expenditures are allowed. If, as their testimony shows, the commissioners could so conclude, and could reasonably believe that such services help attract tourism, then the commissioners have not abused their discretion.

If the Legislature had specifically set out what the county could spend occupancy-tax revenue on, the Court could look at a specific expenditure and determine whether it falls under the list of authorized expenditures. But the

Legislature chose not to be specific. Instead, it broadened the law and placed decision-making authority with the commissioners.

Appellants are correct that the Legislature “adopted a specific definition of tourism-related expenditures.” (App. Brf., p. 14.) But that definition placed authority for determining what attracts tourists with the commissioners, and the statute “include[d]” two types of expenditures but did not exclude any expenditures, as long as the commissioners judged them as helping to attract tourists.

Appellants claim that the Legislature wanted to “prohibit the County from using occupancy tax proceeds for general public services.” (App. Brf., p. 15.) The county is not doing this, but if the Legislature had wanted to prohibit it from using this revenue for certain public safety services, it would have said so. The legislative intent is clear from the statute’s language or absence thereof.

Appellants claim that the county’s position is that “the 2004 amendment changed nothing” (App. Brf., p. 19), but this is not so. It changed the percentage of funding allocations, for one. It also changed the purposes for which the revenue could be used, but Appellants view this as only going one way – that is, constraining the county – even though giving the commissioners the duty to use their judgment shows an intent to go in the other direction and to broaden their authority to determine what attracts tourists. Though in some respects the statute narrowed the commissioners’ authority, because it removed the language allowing the county to spend the revenue for “any lawful purpose,” in another way it broadened it, by

allowing the commissioners to judge what attracts tourists. As long as their judgment is reasonable, the county is not violating the statute.

Appellants claim that the commissioners believed that they could not spend occupancy-tax revenue the way they have after the 2004 bill was enacted and asked the Legislature to amend the statute to return to its previous language. (App. Brf., p. 17.) However, the board wanted the spending formula in the statute returned to the old formula so it would not be required to spend as much on promotion of travel and tourism as it was required under the new law because it was having a hard time finding ways to spend all it was required to. (R. pp. 195-96; J. Owen Etheridge Dep. pp. 53-57.) A return to the old formula also would have meant virtually no restrictions, with no required connection to tourism, on some spending. If the law had been changed, the county would not have been required find a connection between some expenditures and tourism.² The law remained as is, but that does not mean the commissioners have spent money in an unrestricted way; they are required to find a connection between spending and tourism and they have. The old law gave the board greater flexibility in some respects, but that does not mean that the current law does not also give it that – hence, the statute uses the term “judgment,” which implies discretion.

² The county also sought to have language related to police services placed back in the statute – not because it did not believe it could spend on police services but only to remove any doubt that it could. (R. pp. 195-96.) This was prudent considering that there remains doubt on the part of Appellants.

The statute is not ambiguous just because it does not spell out an itemized list of expenditures. Rather, it is clear in giving the board the duty to make its own judgment about what attracts tourists.

Appellants argue that paying for beach lifeguards is permissible, presumably because visitors are more likely to visit beaches that have lifeguards, but that paying for emergency medical services is not. But, if a lifeguard pulls a drowning person out of the water and there is no EMS crew there to treat the person and no ambulance to take the person to a hospital, would that help attract tourists? The commissioners believe that it would not, and, under the statute's plain language, it is their judgment that matters. The commissioners feel the same about not having enough law enforcement officers present when the population doubles during tourist season. (K. Etheridge Dep. pp 25-28. 31.)

B. Appellants misconstrue the statutory history.

Appellants' understanding of the statutory history is one-sided and erroneous. They claim that the "deletion of the 'general public services' language" in the 2004 Amendment meant that the county could no longer spend occupancy-tax revenue on "general public services." But the county can spend money on certain public services if the commissioners judge those things as helping to attract tourists. This judgment must be reasonable, however, and the board has set out a reasonable basis for its decisions. It could not just use occupancy-tax revenue for things with no connection to tourism – such as paying the salaries of social workers, since there is no evidence that tourists bring the need for increased social services.

Appellants claim that the county is using its “judgment” to rewrite the statute, but the word “judgment” is in the statute for a reason. The Legislature trusted the county to come to the correct conclusion. Appellants claim that the county has used its “‘judgment’ to ignore the definition of ‘tourism-related expenditures’ ” (App. Brf., p. 21), but Appellants ignore the term “judgment” altogether.

Appellants claim that the 2004 Amendment was a shift “away from ensuring that the County could meet the general public services demand[s] of tourists and toward generating tourism and the economic benefits that flow therefrom.” (App. Brf., p. 23.) But if that was the case, the Legislature would have required the county to spend 100 percent of revenue on promotion of tourism or on specific items that it believed were related to tourism. Instead, it said that the commissioners knew best and could spend accordingly, with a fixed amount spent on promotions.

Appellants claim that, with the 2004 Amendment, “[t]he legislature eliminated the County’s power to spend occupancy tax dollars on general public services” (App. Brf., pp. 2, 14), but the county is not spending in this way. It is spending money on some public safety services that the commissioners believe help attract tourists. A reasonable person or public official could believe this. The county is not spending on social services or refurbishing the courthouse – both of which are general public services and would be a “lawful purpose” under the 1987 statute. The Legislature did not eliminate the county’s authority to make certain expenditures, as long as the commissioners judge that they will help attract tourists. Public safety services normally may be general services, but in Currituck County some are related to

tourism. If the county were spending revenue strictly on general public services, it would be using occupancy-tax revenue “for any lawful purpose,” as the 1987 statute allowed. (R. 202.)

Appellants claim that the county has acted “as if the 2004 amendment never happened” and “that the 2004 amendment changed nothing.” (App. Brf., pp. 3, 19.) But the commissioners are following the 2004 amendment by using what the statute prescribes – their “judgment.”

Appellants claim that the 2004 Act narrowed the purposes for which the county could spend occupancy-tax revenue, but this is true only in one sense. The 2004 Act removed the county’s authority to use such revenue to pay for items with no connection to tourism, but left in place the authority to spend money on services that the commissioners judged would attract tourists. A reasonable public official could conclude that certain public safety services, such as police, fire, and EMS services, do this. Even Appellants concede that beach lifeguards and ocean rescue teams do this. As long as the commissioners’ judgment is not so illogical that a reasonable public official would not consider an expenditure as related to tourism, the board is acting in accordance with the statute.

The 2004 Amendment gave the commissioners broad, though not unlimited, discretion. No reasonable public official could say that a new courthouse would bring tourists to the county, and thus such an expenditure would fail this test. The same is true for increased funds for local schools or social workers, absent other facts not

present here. But public safety services that ensure that tourists have a safe place to visit are proper.

Appellants claim that the county “cannot use its judgment to rewrite the 2004 amendment” (App. Brf., p. 21), but it is doing exactly what the statute empowers it to do. Removing the words “judgement of the Currituck County Board of Commissioners” from the statute would be re-writing it. Appellants want to substitute their judgment instead.

III. The Currituck County Board of Commissioners has not abused its statutorily-vested discretion in determining how to spend occupancy-tax revenue because its decisions have been reasonable, rational, and in accordance with the purpose of the statute, and it has not acted capriciously or in bad faith.

The Currituck County Board of Commissioners has not abused its discretion to spend occupancy-tax funds as allowed by the statute because its decisions have not been capricious, in bad faith, or in disregard of the law.

A. Public official abuse-of-discretion standard.

Public officials and bodies have discretion to carry out their duties, and courts will not set their decisions aside unless they “act[] capriciously, or in bad faith, or in disregard of the law, and such action affects personal or property rights.” Pue v. Hood, 222 N.C. 310, 22 S.E.2d 896, 900 (1942).

The abuse-of-discretion standard “is applied to those decisions which necessarily require the exercise of judgment.” Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). “The test for abuse of discretion is whether a decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.” Id. In determining this, “[b]ecause the

reviewing court does not in the first instance make the judgment,” the court’s duty “is not to substitute its judgment in place of the decision maker,” but “only to insure that the decision could, in light of the factual context in which it was made, be the product of reason.” Id.

If public officials have “acted within the law and in good faith in the exercise of [their] best judgment,” and “after full consideration and in the best interest of the” governmental entity for which they serve, courts will not second-guess their decisions. Burton v. City of Reidsville, 243 N.C. 405, 407-08, 90 S.E.2d 700, 703 (1956).

This principle is engrained in our law. “The acts of administrative or executive officers are not to be set at nought by recourse to the courts. Nor are courts charged with the duty or vested with the authority to supervise administrative and executive agencies of our government.” Id. at 407, 90 S.E.2d at 702. A court may only “determine whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law.” Id. This requires evidence of an “arbitrary abuse” of discretionary authority. Id. at 407, 90 S.E.2d at 703.

“The ‘arbitrary or capricious’ standard is a difficult one to meet,” and requires evidence of decisions that were “‘patently in bad faith,’” or “‘whimsical’ in the sense that ‘they indicate a lack of fair and careful consideration’ or “‘fail to indicate any course of reasoning and the exercise of judgment.’” Act-Up Triangle v. Comm. for Health Services, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (citations omitted).

If an “officer acted within the law and in good faith in the exercise of his best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action.” Burton, 243 N.C. App. at 407-08, 90 S.E.2d at 703.

Our courts’ deference to public officials and bodies is an inherent part of our system of government. As our Supreme Court has said:

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

Id. at 408, 90 S.E.2d at 703 (emphasis added).

Thus, “[c]ourts have no right to pass on the wisdom with which they [public boards] act.” Barbour v. Carteret County, 255 N.C. 177, 181, 120 S.E.2d 448, 451 (1961). They “cannot substitute their judgment for that of the . . . officials honestly and fairly exercised,” unless they have “acted in wanton disregard of public good.” Id. Accord, Painter v. Wake County Bd. of Educ., 288 N.C. 165, 176, 217 S.E.2d 650, 657 (1975) (school board’s decisions “are vested in the sound discretion of the [b]oard,” and such authority “cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of the law.”); Alamance County v. N.C. Dep’t of Human Resources, 58 N.C. App. 748, 749, 294 S.E.2d 377, 378 (1982) (“ ‘When discretionary authority is vested in [a] commission, the court has no power to substitute its discretion for that of the commission; and, in the absence of fraud, manifest abuse of

discretion or conduct in excess of lawful authority, the court has no power to intervene.’” (citation omitted).

Moreover, a plaintiff has the burden to prove an abuse of discretion because it is “presumed . . . [t]hat public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law,’ and ‘[e]very reasonable intendment will be made in support of the presumption.’” Painter, 288 N.C. at 178, 217 S.E.2d at 658 (citations and quotations omitted). Thus, “[t]he burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence.” Id. (citation and quotations omitted). A “mere assertion of a grievance” is insufficient. Alamance County, 58 N.C. App. at 750, 294 S.E.2d at 378. “North Carolina law recognizes a strong presumption that governmental bodies act in good faith” and there is a “strong presumption of lawfulness that attaches to the actions of public bodies.” Reese v. Mecklenburg County, 204 N.C. App. 410, 422, 424, 694 S.E.2d 453, 462-63 (2010).

B. The commissioners have not abused their discretion.

Appellants claim that the county commissioners have abused their discretion and that there is not enough evidence to make this determination because such “inquiries are factual in nature and not normally suited to summary adjudication.” (App. Brf., p. 30.) The first assertion is not supported by the evidence, and the second is undermined by the record, which was assembled after 2½ years of discovery.

Appellants claim that the commissioners did not “discuss or deliberate whether general public services are tourism-related” before approving expenditures (App. Brf.,

p. 32), but the commissioners testified otherwise (White Dep. pp. 14, 30, 32, 49; McCord Dep. pp. 14-15; K. Etheridge Dep. pp. 35-36).

Appellants claim that the board chairman does not feel limited in spending occupancy-tax funds (App. Brf., p. 32), but cite only half his statement. The chairman actually testified: “I don’t think it limits us much at all except that we need to draw some correlation between that expenditure and the tourism-related portion of that.” (White Dep. p. 14 (emphasis added).) This is evidence of deliberation and it falls squarely within the statutory requirement that the board use its “judgment.” The chairman testified that the board is limited by the statute’s definition of tourism-related expenditures. (White Dep. p. 47.)

Appellants claim that a commissioner’s statement that a tourism-related expenditure “is anything that ‘is needed to support tourism’ ” does not meet the statutory definition of tourism-related expenditures because the statute defines such expenditures as those that “ ‘increase’ the use of lodgings ‘by attracting tourists.’ ” (App. Brf., p. 32.) However, a reasonable official could believe that supporting tourism attracts tourists and increases lodging.

Appellants claim that Commissioner Kevin McCord admitted “that police and EMS services are not [tourist] attractions” (App. Brf., p. 32), but McCord testified that “they’re needed and required” and tourists have told him they appreciate them. (McCord Dep. pp. 25-28.) Commissioner White concurred. (White Dep. pp. 31, 44.)

Appellants claim that the county “admits it has no evidence that general public services attract tourists” (App. Brf., p. 33), but, as it pertains to certain public safety

services, county officials believe otherwise. Appellants note that “the County does not advertise its EMS, police, and fire services, nor does it think doing so would be wise” (App. Brf., p. 33), but they fail to explain why. The chairman testified that “it may make people question whether or not it’s safe coming here. Why would you advertise that you have a good medical and police department here?” (White Dep. p. 19.) A reasonable public official could make this conclusion.

The commissioners testified that public safety services are a major consideration in building the tourist trade and that tourists often compliment them on the safety and public services they experience. On this point, the commissioners just disagree with Appellants, and they have the benefit of hearing from tourists. (White Dep. pp. 31, 44; McCord Dep. pp. 17-18, 25-28, 45.)

Appellants claim to know better than the commissioners what attracts tourists – even though one commissioner has run a tourism business on Corolla since 1996. (R. p. 192; White Dep. pp. 6, 15.) The Legislature believed the commissioners were in the best position to make the determination, so it charged them with that duty. Appellants, who are isolated from the rest of the county and focused on narrow interests and not those of the county as a whole, have no such responsibility.

Appellants believe that their interpretation should control even when those who are elected by the voters disagree with them. The county Board of Commissioners has seven members, all elected at-large, and it has been unanimous in its spending decisions. (R. p. 195.) Appellants can try to convince the

commissioners to change their interpretation or elect commissioners who see things their way.

Appellants claim that the board does not scrutinize the need for public safety spending, but the commissioners draw on their experiences to determine what expenditures are appropriate and rely on county officials, including the sheriff and EMS director, to guide them. (White Dep. pp. 14, 28-32, 44; Jarvis Dep. pp. 19-20, 24-27; K. Etheridge Dep. pp. 17-23.) Operating a tourism business for over 25 years, communicating with tourists regularly, and working or living on Corolla also inform such judgments. (White Dep. pp. 15, 31, 34; McCord Dep. pp. 18, 26-28.)

The commissioners are not abusing their discretion in making their spending decisions. They are paying for costs incurred because of the increase in tourism and providing services that they reasonably believe will keep tourists coming back. They are using the judgment the Legislature gave them.

Appellants also seem to believe that the use of occupancy-tax funds anywhere but Corolla is improper. They claim that, except for Corolla, the county is not a tourist destination and tourists “are seldom seen” on the mainland. (App. Brf., pp. 5, 8.) They cite the chairman’s testimony for their assertion. However, the chairman testified only that Corolla is “the bulk of our tourist economy,” but not the only part, and in any case the county spends 80 percent of its occupancy-tax revenue there. (White Dep. pp. 19-20; R. p. 192.)

The statute does not require the county to use its revenue only on Corolla; it applies to the whole county. The county is trying to make the mainland more

attractive to tourists, and tourists and visitors do visit the mainland – including duck hunters, golfers, horseback riders, players and fans who attend baseball and softball tournaments, boaters who stop at the Coinjack Marina on the Intracoastal Waterway, and visitors to the Currituck Historic Courthouse and the Historic Jarvisburg Colored School Museum. (R. pp. 193-94; White Dep. p. 43; McCord Dep. pp. 22, 32, 48-51.) Appellants claim that the county spends on things “that attract no tourists” (App. Brf., p. 8), but the commissioners disagree.

If the Legislature had wanted the county to spend only on Corolla, the statute would say so. Appellants accurately note that “there are twice as many tourists on Corolla as there are residents in the entire County” (App. Brf., p. 6), but that is also why more public safety services are needed on Corolla.

Appellants claim that tourists are not concerned with whether a place has sufficient public safety services when they decide to visit, but a reasonable person might disagree.³ Two commissioners testified about their personal experiences as tourists on this issue. (McCord Dep. pp. 45-46; White Dep. p. 16.)

Appellants are trying to draw a strict line around occupancy-tax revenue that does not exist. The word “judgment” in the statute necessarily implies discretion on the part of the commissioners. Under Appellants’ theory, public safety services

³ See, e.g., “SF’s ‘dirty streets’ hurting international tourism as conventions struggle to come back,” **ABC-7 News, San Francisco** (found at: <https://abc7news.com/sf-tourism-san-francisco-streets-international-travelers-conventions-in/12227886/>) (last visited Nov. 1, 2022) (quoting president and chief executive officer of San Francisco Travel as stating, “A lot of visitors are concerned, concerned for their own safety,” and citing “open drug markets” and “brazen” street crime).

(except for beach lifeguards) and utility spending do not attract tourists. But this reading of the statute leads to absurd rationalizations. Appellants claim that using occupancy-revenue for a water treatment plant “is not a tourism-related expenditure.” (App. Brf., pp. 8, 31, 37.) But that water treatment plant – which was paid for by a loan, not a grant, of occupancy-tax revenue – was used to “create a safe, efficient drinking-water system on Corolla to replace a system that was deteriorating.” (R. p. 193.) It provides safe drinking water to tourists. The board’s chairman, who lives on Corolla and runs a tourism business there, testified that, in his experience, tourists want safe drinking water. (R. p. 193.) This is a reasonable conclusion.

The same rationale applies to fire hydrants and road and water service districts. (App. Brf., pp. 8, 38.) Appellants claim, “No tourist comes to the County to delight in standing in a road or fire service district,” but few would come if they had to navigate impassable roads or if there was no way to put out a fire at their beach rental on Corolla, which is isolated from the mainland. The commissioners believe it is “common sense” that, if they did not provide fire protection on Corolla, tourists would not return. (K. Etheridge Dep. pp. 19-21, 23, 29-31.) A reasonable official would conclude that tourists might not visit a place where firefighters could not put out a fire because of a lack of fire hydrants.

Appellants claim that “[g]eneral public services do not increase the use of lodgings or attract tourists” (App. Brf., p. 3), but the county is not doing this; it is only using such revenues for services that, in its judgment, attract tourists. Appellants

ignore the importance that certain public safety services have in ensuring that tourists will want to return. Appellants claim, “Tourists do not visit the County to admire its police department, fire stations, and sewer plants.” (App. Brf., p. 3.) But tourists would not go back if there were not enough sheriff’s deputies to respond to emergencies, such as a traffic accident or a shooting; enough firefighters, with sufficient equipment, to put out a fire at a beach house or inn; or safe water to drink. Appellants claim that “no tourist visits an area because of these public services.” (App. Brf., p. 4.) This might be true for campers in a state or national park, but it is not true in Corolla because few tourists would visit an expensive beach destination that did not have such services.

Appellants list items spent in other jurisdictions as examples of acceptable uses of tourism tax revenue – such as fairs, races, museums, fishing tournaments, festivals, and visitor centers – but Currituck’s statute does not prescribe any list of items on which the county must spend revenue. The county has spent money on some of these things, but it has made a judgment to spend on other things too. Even Appellants concede that “the failure to pay for basic public services likely would harm the tourism industry.” (App. Brf., p. 24.)

Appellants claim that “other local governments, with similarly limited local acts,” do not spend their occupancy-tax revenue on “general public services.” (App. Brf., p. 8.) First, public safety services required because of tourism are not “general public services.” Second, Appellants fail to point to any other statute that requires a governing body to use its “judgment” to determine what attracts tourists. Currituck

County's statute is a local law and unique, and so it cannot be compared to any other. If another jurisdiction, with its own local statute, spends money in a certain way, that does not limit Currituck County. Thus, Appellants' comparison to statutes in Dare County misses the mark because Currituck's law requires the commissioners to use their "judgment" to determine what expenditures attract tourists and Dare's does not.

Appellants' hypothetical examples miss the mark. Appellants point to "a hypothetical town in rural North Carolina," which spends a lot of money on public safety and has no crime but has no tourist attractions or tourists. (App. Brf., p. 24.) The town cannot claim that its spending on public safety services attracts tourists, Appellants claim. But this argument is flawed because the town, unlike Currituck County, is not a tourist destination in the first place. Currituck County is, and people will visit as long as it is safe to do so; but fewer will visit if there are no police when they are needed (such as to respond to a mass shooting⁴), no firefighters to put out a fire, no ambulances to take them to the hospital or medics to treat them when they are sick, and no clean water to drink. Currituck County wants visitors to keep returning and for more to come.

Appellants also cite Raleigh as an example. Appellants claim that "it would be silly to say that people visit Raleigh because of the police," but even Appellants concede that, without a sufficient police presence, "[t]here may be fewer visitors."

⁴ A mass shooting recently occurred just north of the county. See "Six People Killed in Shooting at Virginia Walmart," The New York Times, Page A1, Nov. 23, 2022 (found at: <https://www.nytimes.com/live/2022/11/23/us/walmart-shooting-virginia> (last visited on Nov. 23, 2022)).

(App. Brf., p. 25.) The same is true in Currituck County and applies to other public safety services.

Appellants claim that, if the residents of the county “expect the service to be provided, whether tourists come or not, then the service is a general public service” and not tourist-related. (App. Brf., p. 25.) But there would be no need for the increased services, or the costs to provide them, if not for tourists.

Appellants are attempting to dictate to the board how to implement its “judgment,” which the Legislature gave it. Appellants and the commissioners simply have different views about how to spend occupancy-tax revenues. Appellants are free to petition the board or get elected to it in order to accomplish their objectives.

IV. Appellants’ Remedy Does Not Lie With the Courts.

Appellants claim that their interpretation of the statute, not the county’s, is the proper one. They argue that, if the county wants its view to control, “then it needs to resume lobbying.” (App. Brf., p. 20.) Appellants claim that, if the county cannot use its other revenue streams, it should “either change its governance or petition the General Assembly” to change the law. (App. Brf., p. 29.)

This is ironic considering that the tourism industry, which filed an amicus brief in this case, apparently cannot get the Legislature to change the law so it comports with what it and Appellants want. If the Legislature is not satisfied with what the county is doing, it will change the law. However, one can presume that it is satisfied and sees no reason to change it after 18 years. It is Appellants or the tourism industry

who should lobby the Legislature if they want the law changed. Thus, this is sound advice for Appellants.

Until then, this Court should apply the law as written and let the commissioners use their judgment about what attracts tourists.

CONCLUSION

For the reasons and authorities cited herein, Defendant-Appellees respectfully request that this Court affirm the trial court's order granting them summary judgment.

Respectfully submitted, this 14th day of December, 2022.

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CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using 12-point Century Schoolbook typeface, a proportionally spaced typeface; and that, exclusive of the cover page, table of contents, table of authorities, captions, and certificates of compliance and service, this brief is no more than 8,750 words, as required by Rule 28(j) of the North Carolina Rules of Appellate Procedure.

/s/ Christopher J. Geis

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CERTIFICATE OF SERVICE

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

I hereby certify that, on December 14, 2022, I electronically filed the foregoing **BRIEF OF DEFENDANT-APPELLEES** with the Clerk of the Court using the CM/ECF system, which will send notification of such to the following CM/ECF participants and a copy also will be mailed to the following:

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NORTH CAROLINA COURT OF APPEALS

GERALD CONSTANZO, et al.,)	
)	
Plaintiffs,)	
v.)	<u>From Currituck County</u>
)	
CURRITUCK COUNTY,)	
NORTH CAROLINA, et al.,)	No. 19 CVS 171
)	
Defendants.)	

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Kevin McCord Deposition,, pp. 5-6, 14-18, 22, 25-32, 42, 45-46, 48-51 App. 57-80

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Transcript of Hearing on Motion for Summary Judgment, p. 29 App. 109-110

1 Q. And in particular is there anything that
2 stands out to you about Sheriff and EMS, particular
3 data, particular criteria when it comes to assessing
4 what the statute says you can use it for, and how
5 Sheriff and EMS fall under that statute. How those
6 expenditures actually qualify as tourist related
7 expenditures.

8 A. In my opinion, we have to have more Sheriffs
9 or EMS because of the influx of the tourists on our
10 county.

11 Q. So the more people the more --

12 A. More protection --

13 Q. -- public safety services that you need?

14 A. Yes, sir.

15 Q. And what's your understanding, during your
16 time on the board, and again I'm strictly talking about
17 -- most of this deposition is going to be about Sheriff
18 and EMS services. What was the advice coming from the
19 county manager, who would generally of course make the
20 budget proposal. And there are obviously other
21 departments that present as well, but what was your
22 understanding of the county manager's advice on what
23 these expenditures for Sheriff and EMS, what they were
24 actually intended to cover? In other words was it a

1 particular portion of the year, or what were these
2 expenditures intended to cover, according to the county
3 manager?

4 A. It was to cover the costs that we had
5 incurred because of tourism in the county. Down on the
6 Outer Banks you certainly have to have more EMS. You
7 have to have more Sheriff's Department. On the
8 mainland, if you've lived in Currituck County you know
9 that the traffic is tremendous. There are accidents.
10 So it certainly has to be -- it just makes sense that
11 we have to have more protection and more services.

12 Q. And is it fair to say that the historical
13 advice, so long as you've been on the board at least,
14 has been that any of these expenditures from OT for the
15 public safety services, that they were intended to
16 cover the increased cost of services for a particular
17 period of time; so for example, the summer season?

18 A. Well it's more than -- you have to have them
19 year round. I mean you can't have -- you're not going
20 to be able to hire somebody and say I'm just going to
21 have you work six months when we're busy, or nine
22 months when we're busy. It would have to be for the
23 whole fiscal year, in my opinion.

24 Q. Okay. So then is it fair to say then that

1 the cost that were expended from OT -- so now what I'm
2 looking at actually is Column 2, which states Audit
3 Schedule C: OT Transfers to General Fund. And then
4 you'll see the corresponding item regarding EMS. Is it
5 fair to say that those expenditures during your time on
6 the board, those transfers to the general fund from OT,
7 is it fair to say they were intended to cover the
8 entire year of services on Currituck Outer Banks?

9 A. The entire year for the Sheriffs and the --

10 Q. On Currituck Outer Banks only though, not
11 mainland Currituck.

12 A. For the entire year?

13 Q. Uh-huh.

14 A. No.

15 Q. And that's what I'm trying to drive at. So
16 what were those transfers intended to cover? If not
17 the entire year, then?

18 A. I mean it would cover the entire year. I
19 thought you meant the entire portion of their pay.
20 But, no, it wouldn't cover the entire portion.

21 Q. Right, right. So in other words, it didn't
22 cover the entire cost to the county. Okay, I see what
23 you're saying there.

24 So do you believe that any of these costs

KITTY ETHERIDGE: PAGE 15

1 were ever presented to you, and was your judgment based
2 on a particular time during the year when an increase
3 in services came about; or a need for an increase?

4 A. It wasn't presented to us that this is just
5 going to pay for three months.

6 Q. Uh-huh. How was it presented?

7 A. That we needed to have more people down there
8 protecting for the Sheriff's protection as well as EMS.
9 And this was the cost -- it didn't pay the entire
10 portion of the services, but it helped to supplement
11 it.

12 Q. Okay. So then, Ms. Etheridge, so is it your
13 understanding then that when you were approving these
14 transfers from occupancy tax that it was not intended
15 to cover a particular, a specified portion of the year?

16 A. No, sir.

17 Q. Okay. And is there any, call it scale, if
18 you will, that you can give me that would substantiate,
19 you know, where this increase came from? In other
20 words, you're told by your county manager, or your
21 individual departments, for example, that in year '19
22 we need 1.26 million for Sheriff's costs from OT. And
23 then in '19 for EMS we need 1.6 million. Where exactly
24 did that number, how was it derived, how was it

1 calculated? Do you know?

2 A. Well, like with EMS they would say that we
3 might need more people down there so we were having to
4 pay for two or three more extra people. And the same
5 with Sheriff. We increased the number of people who
6 are down on the Outer Banks. And so therefore that's
7 where the number came from.

8 Q. And do you recall, were you given any
9 specific -- and I don't want it to be confused because
10 if I said data, your thoughts, or mine would, go to
11 numbers. And I'm not necessarily talking about just
12 numbers. Was there any specific evidence that was ever
13 presented to you that allowed you to look at, okay,
14 here's 1.6 and here's why. Here's where that number
15 came from. Was there any specific evidence in document
16 form or in just presentation that was given to you that
17 provided the foundation for those transfers, the actual
18 amount of those transfers?

19 A. I know when we talked about the EMS they were
20 talking about the number of -- and there was
21 documentation showing us the number of firemen and
22 slash EMS that we were going to need in the area, yes,
23 sir. I don't remember -- I don't recall for the
24 Sheriff's department.

1 Q. Was any of that information you were
2 provided, was it in document form? And I'm asking just
3 because I need to make sure that I've got what I need
4 in discovery that's been produced by you guys.

5 A. I don't remember if it was in document form
6 or not. I know there was more discussion concerning
7 the EMS/firefighters than it was, that I recall, than
8 it was for the Sheriff's Department.

9 Q. So you don't lose your train of thought
10 there, the discussion about the EMS, to your
11 recollection what did that entail?

12 A. I know that the fire chief came in and spoke
13 to us. His assistant spoke. The county manager gave a
14 presentation.

15 Q. So would it sound, and this is actually in
16 regards to the fiscal year '19 budget. If you don't
17 remember, that's a hundred percent fine. Where I'm
18 pulling this quote from is actually from the You Tube
19 video regarding the budget proposal. When Mr. Scanlon
20 in that particular case presented the quote for what
21 these additional costs were, were additional costs
22 associated with additional EMS units in the OBX to
23 account for influx during the summer and some
24 additional law enforcement that's required. So do you

1 recall references to summer or to seasonal increases
2 justifying, so in other words, the tourist influx
3 during a particular period of time justifying the
4 amount that's expended out of OT?

5 A. I don't recall it being said seasonal. In my
6 opinion I would think it would be hard to hire people
7 just for a season.

8 Q. So then I'm supposing it would be redundant
9 then for me to ask what is a season for these purposes?

10 A. I think now the season in Currituck County is
11 all season long.

12 Q. So all year long?

13 A. Yes, sir.

14 Q. It's getting longer.

15 And in your opinion do you think that you
16 were given and apprised of all the necessary
17 information to allow you, prior to your vote of course,
18 to substantiate whether the expenditures I'm showing
19 there in Column 2 for sheriff and EMS, whether or not
20 they were valid tourist-related expenditures pursuant
21 to the statute there that you've got in front of you?

22 A. Yes, sir.

23 Q. Okay. Do you recall being given any specific
24 evidence which demonstrated that providing for sheriff

1 and EMS services on Currituck Outer Banks actually
2 attracted tourists, actually made people come to the
3 area and use the lodging facilities and things of that
4 nature?

5 A. I don't remember anything specifically being
6 given to us, but it just makes common sense that if we
7 don't have fire protection, if we don't have police
8 protection, people are not coming to an area that they
9 don't feel is safe.

10 Q. And at any point in time just from your
11 recollection, and this is to you personally, whether it
12 was within an open meeting or outside of an open
13 meeting. Did you ever question county staff, the
14 county attorney, anyone concerning how Sheriff and EMS
15 expenditures actually attract these tourists and
16 business travelers? Did you question these people?

17 A. I personally did not, no, sir.

18 Q. Do you recall whether or not -- does the
19 county advertise public safety services to its tourists
20 and business travelers? Is that part of the
21 promotional funds spent?

22 A. To say I know personally, but I would think
23 if somebody were to call the tourism department and
24 specifically ask that they would certainly promote it.

1 Q. Right, right.

2 A. But personally seeing it on an advertisement
3 or something like that, no.

4 Q. Okay. Now, this question, and it's a bit
5 confusing, so please don't hesitate to say, I don't
6 understand what you're asking.

7 A. That's a good one.

8 Q. So, was there any documentation and any
9 presentation made to you that showed the influx of or
10 the impact on, as tourists started coming in, the
11 impact on the Sheriff and on the EMS services? In
12 other words, were you ever given any tabulated data
13 showing what -- how the calls increased during peak
14 season, for example, as compared to other times of the
15 year on Currituck Outer Banks?

16 A. I wasn't given any data specifically, but I
17 do know that during different times we would hear about
18 accidents all up and down the road caused by tourists
19 or fire protection over on the Outer Banks. But to say
20 this is exactly what happened and a time frame, no,
21 sir.

22 Q. Okay. All right. And do you think or were
23 you given any evidence that showed that residents on
24 Currituck Outer Banks or tourists coming to Currituck

1 Outer Banks had a greater need for these services than
2 folks on the mainland, for example, during peak season?

3 A. We've never been given any evidence besides -
4 - not written evidence. We've heard evidence of
5 different issues that have occurred on the Outer Banks
6 where the EMS, the fire department or the sheriff's
7 department did certain things, but it wasn't written
8 information. But during my tenure on the board we've
9 been given information about how there's been an influx
10 of needing more protection down there, and this is what
11 happens.

12 Q. And would the same apply to time periods
13 outside of the peak tourist season, in other words,
14 annual on Currituck Outer Banks, any specific data to
15 show you how the calls and the service needs come into
16 the county over a given fiscal year?

17 A. As I said before, not written data, but we
18 have been given information.

19 Q. And at any point in time did you question the
20 county manager or staff that were making presentations
21 on Sheriff and EMS? Did you ask them, what is the
22 validity? How did you come up with this particular
23 number? Again, for example, 1.2 million in '19 for
24 Sheriff, 1.6 million in '19 for EMS. Did you ever

1 question how these increased costs came to be?

2 A. Usually in the presentations the county
3 manager explained to us how he got to the numbers.

4 Q. Okay. And was his explanation that, here's
5 the number and it's for the beach, or was there other
6 data that went into him describing to you guys why it's
7 worth putting 1.6 million dollars, for example, into
8 EMS on a given year?

9 A. Well, he would usually do a good presentation
10 of telling us what we needed, this is why we need it,
11 and this is how the money is going to be spent.

12 Q. And speaking about how the money was going to
13 be spent, are you aware of any documentation that would
14 -- because it's my understanding, and correct me if I'm
15 wrong, but the transfer, the OT transfer for these two
16 particular services, the numbers essentially shown in
17 Column 2 there, they were transferred in a lump sum to
18 the general fund, correct?

19 A. I assume that's how it was done. I don't
20 work in finance.

21 Q. Understood, understood. And do you have any
22 information, line item expenditures, if you will,
23 anything you could rely on to tell me and not verbatim
24 today, just in general, where every penny of this 1.6

1 million went for EMS and vice versa for Sheriff?

2 A. No. You could find the information through
3 the Finance Department, and usually the budget is
4 posted on our website. But if anybody wants a copy of
5 it they can get one off though.

6 Q. Yes, ma'am. And before you voted on those
7 items, were those particular itemizations discussed, or
8 was that just not part of the process?

9 A. When we voted on them it was not part of the
10 process that I recall.

11 Q. Okay. So why, and just again, in your
12 opinion, if you have an opinion on this, the real
13 property taxes that are assessed against residents and
14 non-residents alike, why were those taxes not
15 sufficient to cover the cost of services on the Outer
16 Banks, on Currituck Outer Banks? In other words, why
17 was the money from OT needed to begin with? Do you
18 have any opinion on that?

19 A. In my personal opinion when you have such an
20 influx of people I don't feel like the property tax is
21 sufficient for the services. Because of having an
22 influx of people making us need more police protection,
23 more fire protection, more everything, property tax
24 won't cover that.

1 Q. Okay. And do you know about how many more
2 tourists there were during peak season, for example,
3 than county residents, what the actual numbers are?

4 A. No, sir.

5 Q. Do you recall ever having any discussions
6 with staff or any of your commissioners, fellow
7 commissioners about the actual impact on the property
8 tax rate if you guys elected not to fund these
9 services, Sheriff and EMS, from occupancy tax?

10 A. No, sir.

11 Q. So do you have any idea what the impact on
12 property taxes would be if today you guys decided to
13 just cut the expenditures off from OT?

14 A. It would be substantial.

15 Q. So now I want you to take a look at Column 2
16 for me, and, again, that's the Audit Schedule C: OT
17 Transfers to General Fund for Sheriff. And then
18 there's the corresponding column for EMS. So these
19 are, as testified to and confirmed by Sandra Hill -- as
20 you are aware we did her -- you were in the room as a
21 matter of fact.

22 A. Yes.

23 Q. She confirmed that these were the numbers
24 that were transferred from OT for these particular

1 services on the corresponding fiscal year. If you
2 would look, let's just take a look at fiscal years '18
3 through '20. Is it true, or can you confirm that the
4 cost of what I'm saying are the annual personnel costs
5 on Currituck Outer Banks, which is shown in Column 3,
6 in other words Column 3 is what Ms. Hill confirmed as
7 being the full annual cost attributed to sheriff and
8 EMS on Currituck Outer Banks for the entire year, okay?
9 Does that make sense?

10 A. Uh-huh.

11 Q. Okay. So is it true, or what is your opinion
12 on the nearness in number for sheriff services? And
13 what I mean by that is the annual cost versus what was
14 transferred to the general fund for what the county
15 manager promoted as seasonal cost. Are they near in
16 number? Does it appear that a bulk of the annual costs
17 were funded through OT for sheriff?

18 A. In my opinion some of the money for the
19 sheriff was also being used here on the mainland.

20 Q. Okay. All right. And what do you mean by
21 that? I'm not questioning that. I think I understand
22 it, but what do you mean by, was being used on the
23 mainland and why?

24 A. Well, if you hire a sheriff, a deputy

1 sheriff, they're going to work full time and if it's
2 kind of slack on the beach, they might be pulled up to
3 the mainland to work.

4 Q. And in your opinion if that's the case, so in
5 other words if the sheriff is working on the mainland
6 and not just out on Corolla or Currituck Outer Banks,
7 would that be a justified use of occupancy tax, to pay
8 for that sheriff on the mainland?

9 A. In my opinion, yes.

10 Q. Why do you think that?

11 A. Because to get competent people to work for
12 you, they've got to be year round employees.

13 Q. Now looking at -- now we'll go down to the
14 EMS table there. And my question to you is essentially
15 the same. If you would take a look at Columns 3 and
16 Column 2. For fiscal years 2018 through 2020, do you
17 see anything that's alarming to you regarding what was
18 transferred from OT and what the annual cost attributed
19 to EMS services on Corolla or Currituck Outer Banks
20 was?

21 A. In '19 and '20 it's a large difference.

22 Q. And do you know why that difference occurred?

23 A. I assume it's because of putting more, the
24 EMS, and we made it full time and brought in more EMS

1 down on the Outer Banks and the fire department because
2 they weren't able to -- they were having problems with
3 the volunteer fire department. Most of them had aged
4 out.

5 Q. And what was done to combat that?

6 A. We had to hire people to get protection.

7 Q. All right. So EMS then is really fire and
8 EMS?

9 A. Fire and EMS.

10 Q. Okay. So do you know then exactly how --
11 like you brought up in fiscal year '19 and '20, we've
12 got 1.6 million coming from occupancy tax fund into the
13 general to purportedly cover EMS services, but we've
14 got about a 1.1 million dollar difference in what the
15 total annual costs were. Do you know where that 1.1
16 million dollars went? Do you know how it was expended?

17 A. No, sir.

18 Q. Do you believe any of it may have been used
19 on the mainland for EMS and fire services?

20 A. As I said, with the sheriff's department
21 sometimes you pull people and put them in other areas.

22 Q. So then what would be your best, I guess,
23 explanation, or what's your rationale for voting to
24 expend 1.6 million dollars from OT on EMS in '19 and

1 '20, yet the annual costs were actually 500 and some
2 odd thousand dollars? What's your, I guess,
3 explanation or reasoning for why you think that the OT
4 funds, which were promoted as these increased seasonal
5 cost of the particular service, why these OT
6 expenditures or transfers to the general fund were
7 legitimate and actually were going for the purposes
8 they were promoted as?

9 A. Because with tourism brings the need for more
10 services. And that, to me, if we need the services
11 it's not right for the citizens to have to pay the
12 extra cost. And if it wasn't for the tourist coming in
13 we wouldn't need the extra services.

14 Q. So in March of 2018, and I'm going to throw a
15 number out there, and I want to see if it clicks with
16 you, but there was an occupancy tax tourist related
17 expenditure or transfer to the general fund, and it was
18 in the amount of about \$485,000, 485,863 to be exact.
19 And the purpose of it was to fund the start up of the
20 Corolla Fire Tax District. Do you recall that
21 particular vote or that particular transfer?

22 A. Yes, sir.

23 Q. All right. And what, again, is the rationale
24 to support expending OT funds on the Corolla Fire Tax

1 District? And I know it might sound redundant, but I'm
2 just looking to make sure I'm not missing something
3 here. How do you think such an expenditure qualifies
4 as a tourist-related expenditure?

5 A. Because if we didn't have protection, people
6 wouldn't come to the Outer Banks anymore. And, like I
7 said, the fire department, the volunteers had aged out.
8 I think the average age was in the '70s or something
9 like that, so you have to spend money to make sure that
10 your tourists feel like that if they come down here
11 they've got protection.

12 Q. And, again, was there any particular
13 evidence, if you will, that pointed to the fact that
14 folks would stop coming if these public safety services
15 didn't exist, or was that more of a common sense basis?

16 A. To me it's common sense.

17 Q. So you were not presented though with any
18 evidence I don't think.

19 A. I mean, nobody said if we don't spend this
20 money, tourist will stop coming and here is the
21 evidence why.

22 Q. Right. And the county finance director
23 indicated in the deposition and then we also in
24 discussing the audit report for the year 2019 it would

1 and EMS services on the mainland, why would that equate
2 to attracting tourists and increasing the lodging
3 facilities in the true tourist areas of Currituck?

4 A. In my opinion if somebody came down to the
5 Outer Banks and coming through Currituck County, the
6 mainland, and got in an accident and nobody responded,
7 you know information like that could be very
8 detrimental to how people perceive the county.

9 Q. But wouldn't there be services funded out of
10 the general tax for the mainland anyway? Wouldn't
11 those services already exist?

12 A. The services exist but when tourist season
13 starts, everything -- there's a bigger need for
14 everything we have here in the county.

15 Q. So there's a need for heavier staffing on the
16 mainland as well?

17 A. We're affected by the tourists also.

18 Q. Now going back to the current legislation,
19 which I believe is Plaintiff's Exhibit [2].

20 A. Yes, sir.

21 Q. Do you believe there to be any limitations on
22 how occupancy tax funds can be expended, or what are
23 the limitations, in your own words, as to how these
24 funds can be used? And now I'm talking in general.

1 have you ever had any specific conversations with the
2 board or with county staff or with the county attorney
3 regarding what -- in other words a work session that
4 you guys went through. This is a legitimate tourist
5 related expenditure. This is what that amounts to and
6 this is why. Do you having any specific work sessions
7 such as that?

8 A. Anytime that we have had big projects or
9 voted on anything, it's definitely been explained to
10 us.

11 Q. Okay. And what do those explanations
12 generally consist of?

13 A. If it's a tourist-related expenditure we can
14 use occupancy tax.

15 Q. And in the discovery responses that the
16 county issued, so one of the questions was, how did the
17 Board of Commissioners determine whether or not any
18 given expenditure, in this particular case, Sheriff and
19 EMS, but whether any given expenditure was actually
20 supported by statutory authority. And the response to
21 that was that there were deliberations on these
22 expenditures. So can you just talk to me briefly about
23 what was meant by deliberations?

24 A. As I said before, anything before we voted on

1 it was explained to us thoroughly, told what exactly
2 the money was going to be used for.

3 Q. And do you recall in an open meeting, for
4 example, there being any form of open communication or
5 deliberation between the board, the boards that you've
6 served on, between the board members?

7 A. A lot of the board members would ask a lot of
8 questions.

9 Q. And do you recall what those questions might
10 have been?

11 A. No, sir, not offhand.

12 Q. And is it your opinion that when these
13 questions were being answered or asked and answered,
14 was there an analyzation of the statute and how it
15 applies to the particular expenditure? In other words,
16 was there any discussion on how this expenditure
17 complies with the statute?

18 A. They didn't specifically say according to
19 General Statute Session Law 2004, no, sir, that was not
20 done.

21 Q. What would you say the best piece of advice
22 or the best explanation of OT funds and expenditures of
23 OT funds, proper expenditures, where would you say that
24 came from? Who provided you with that explanation, if

1 anybody?

2 A. The county manager, as well as the county
3 attorney.

4 Q. Okay. And were these generally in open
5 meetings, or did they occur outside of open meetings
6 sometimes?

7 A. They were always in open meetings.

8 Q. Have you and any other board members ever had
9 a conversation regarding, not necessarily an open
10 meeting, but just a conversation regarding what
11 constitutes legal occupancy tax expenditures, to your
12 recollection?

13 A. Something we discuss over lunch, no.

14 Q. And over there, there is a Plaintiff's
15 Exhibit [3], and if you would, just take a look at that
16 and let me know after you've absorbed it.

17 A. Okay.

18 Q. All right. So is it indeed a fact that the
19 county approved this \$100,000 expenditure from
20 occupancy -- or I'll say transfer from occupancy tax,
21 the occupancy tax fund for defending the lawsuit?

22 A. Yes, sir.

23 Q. And what, perhaps very obvious, but for the
24 record, what lawsuit is that in regards to?

1 further discussion on it. So I guess my question is,
2 why do you feel as though that was a sufficient
3 justification for authorizing \$110,000 expenditure on
4 patrol vehicles?

5 A. They said the ones that they had were
6 outdated and they needed more beach patrol. I think
7 Currituck County has been blessed with no deaths in the
8 water this year, and I think it's because we do have a
9 lot more patrol going up and down the Outer Banks.

10 Q. Okay. Now, do you believe that -- obviously
11 your financial statements as a county, gets audited
12 every year and there's a report that's released.

13 If the audit report comes back and there's no
14 red, what I'm calling red marks on it, there's nothing
15 from the auditor that states, we believe this to be a
16 nonlegal or an improper expenditure of occupancy tax
17 proceeds, do you believe that to confirm the legality
18 of the expenditures, the auditor's report?

19 A. The auditor as well as the finance director I
20 would think would catch any problems if they weren't
21 legitimate expenditures.

22 Q. And to your knowledge are there any other
23 outside authorities, other than the county auditor,
24 that has ever provided any input on the legality of

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.

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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

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?

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.,)

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

PLAINTIFFS,)

OF

VS.)

SANDRA HILL

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.)

* * * * *

1:35 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

1 SANDRA HILL, being by me first duly sworn to
2 speak the truth, deposes and says:

3 **ON EXAMINATION CONDUCTED BY CASEY C. VARNELL,**
4 **ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:**

5 Q. Good afternoon. Please state your name and
6 address for the record, if you would.

7 A. 194 Tabernacle Lane, Aydlett, North
8 Carolina.

9 Q. Ms. Hill, what is your occupation.

10 A. Finance Director.

11 Q. Of?

12 A. Currituck County.

13 Q. How long have you served in that particular
14 role?

15 A. Since 2001.

16 Q. And what various occupations, if any, did you
17 have prior to becoming the Finance Director.

18 A. I was an accounting clerk starting in 1988
19 here, so I've worked with the county since 1988. Prior
20 to that I worked at the Cotton Gin for awhile during
21 college, but this has basically been my career.

22 Q. Understood. You have been with the county
23 for quite awhile.

24 And as an accounting clerk, what were your

1 Q. Understood. Who within the county is
2 responsible for preparing and facilitating the budget
3 for a given fiscal year?

4 A. Statutorily the County Manager.

5 Q. And as a general matter are transfers from
6 the occupancy tax fund incorporated into this annual
7 budget?

8 A. Yes.

9 Q. In your role as Finance Director, are you
10 involved with developing the budget? I know you've
11 testified that you sat in on budget meetings, but is
12 there a more expansive role maybe that you take? Do
13 you work with the county manager, for example, in
14 developing the budget?

15 A. Yes. Because my office prepares the
16 document.

17 Q. Okay. All right. Again, in general terms,
18 what would that typically involve, the interactions
19 between you and the county manager when developing any
20 given annual budget?

21 A. Typically either the county manager or me or
22 someone from my staff will meet with departments.
23 Specifically with the Tourism Department, most of the
24 time that is the advisory board might bring something

1 or just the tourism director will bring information to
2 -- typically we have public hearings or public meetings
3 to discuss the budget before it's approved with the
4 county commissioners. And then once they have gone
5 through the highlights of everything, then it's brought
6 to a county meeting, to a commissioner's meeting. And
7 it's usually presented at one meeting and then the next
8 meeting it is usually adopted and it's out for the
9 public to review during that time period.

10 Q. And getting to the point where it's finally
11 at a public hearing for approval, have you and the
12 county manager over the course of the years discussed
13 the regulations concerning Currituck County's ability
14 to make occupancy tax expenditures?

15 A. I mean we have reviewed the statutes and
16 basically as long as it's not specifically the
17 commissioners thinks it's not the purpose they want to
18 use it for or they don't believe it's a purpose that
19 they should use it for, then it has always -- they have
20 always approved the budget and the expenditures.

21 Q. And just out of curiosity have any Board of
22 Commissioner members, to your recollection, have they
23 ever requested you, particularly, so not just the
24 county manager for something that you may know about

1 and question you particularly about what the proper
2 uses of occupancy tax may be? Have they ever made
3 those requests?

4 A. No.

5 Q. I'll mark this as Plaintiff's Exhibit [2].

6 So what I've just handed over and marked as
7 Plaintiff's Exhibit [2], it is not a form you created.
8 Obviously you've already noticed that. It's a form
9 that we prepared. But what we've worked up here and
10 what the focus of this particular deposition concerns
11 is our sheriff and EMS services and expenditures from
12 occupancy tax for sheriff and EMS services. So, again,
13 this is the financial tabulation. All of these figures
14 are based on numbers we have found through our public
15 records request, be it an audit report, be it a tax
16 planning outline, for example. I'm going to go through
17 these figures with you. And, again, I've got support
18 here for the numbers that we've put on there if you
19 would like me to show those to you. So I'll ask a
20 question and if you tell me you need to verify, you
21 need to see the numbers, then I'm going to be happy to
22 walk those over to you. And what I've marked or,
23 better said, what is shown as Column 1 there, it
24 states, Audit Report: Sheriff's Department, Total

1 A. Typically it's been a seasonal cost, but
2 there are some annual costs, because most of the -- you
3 can't just have an employee that only works part of the
4 year but sometimes they might shift them over here some
5 during the winter and so it might not be a full year
6 for a specific deputy or EMS person, but for the most
7 part moving people in and out it averages.

8 Q. Okay. And I'm sorry I want to make sure I'm
9 hearing you correctly. So it would average out to an
10 annual cost?

11 A. It would -- it would average out to an annual
12 cost because you have to have people over there during
13 the whole season, but it would be the cost of what it
14 is to provide the services over there, not necessarily
15 what -- so it might be a percentage of a specific
16 person, but annually that's what it would cost to staff
17 in Corolla while they have coverage and while they have
18 higher volumes of people over there.

19 Q. Thank you. That was kind of exhausting there
20 for you probably looking at all those numbers. I
21 appreciate your indulgence and patience however.

22 You just mentioned that generally it's a
23 seasonal cost.

24 A. Right.

1 A. Not for the full staff, but there are one or
2 two people that are year-round just to keep up with
3 having coverage and -- I mean there are also fully
4 staffed fire people that are over there all year, and
5 they are also funded from other things other than
6 occupancy tax. Because all of their salaries are not
7 occupancy tax. There are some general fund money and
8 Corolla specifically, there's a fire district now,
9 which has not been through this whole thing. That's
10 just started three or four years ago.

11 Q. Okay. And I'm just going to ask another way
12 just to make sure I've got it clear for the record
13 then. So seasonal costs as promoted by the County
14 Manager, like we've discussed, the increased need for
15 these services during the season, these seasonal costs,
16 they're intended to cover only a certain portion of the
17 given years, given fiscal year's cost over on Corolla
18 Outer Banks for sheriff and EMS. Correct?

19 A. Yes.

20 Q. And when it comes to determining, and perhaps
21 this may even go back to the tax planning table. You
22 don't have to pull it back out, because I'm not going
23 to ask about specific numbers, but in terms of planning
24 or assessing what's been promoted as the increased need

1 A. I do not.

2 Q. I'm going to hand you Plaintiff's Exhibits
3 [11] and [12] now.

4 Take a look, and the reason I'm bringing this
5 up is because you were mentioned in paragraph 3, so if
6 you would just read paragraph 3 for me -- not outloud,
7 to yourself, and see if you can decipher for the record
8 what that means.

9 A. Basically what that means is that we have --
10 basically a third has to go for promotions and two-
11 thirds can be used for other things and --

12 Q. And those other things?

13 A. Tourism related activities that are not
14 promotions.

15 Q. Right. I just wanted to make sure.

16 A. So that's basically a third of ten million
17 dollars or it kind of fluctuates but kind of hovers
18 around ten million dollars. Three and a half million
19 dollars are promotions, a year collectively, it's a lot
20 of promotion money. And they were talking about
21 building bike paths and expanding the use of the
22 Whalehead Club property and bath houses and that type
23 of thing on the beach, so if there was a way to
24 transfer some of the promotion money so that they could

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.,)

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

PLAINTIFFS,)

OF

VS.)

SELINA JARVIS

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.)

* * * * *
9:12 A.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
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: MR. BOB WHITE

COURT REPORTER: STEPHANIE C. GRAHAM, CVR-M

1 SELINA JARVIS, being by me first duly sworn
2 to speak the truth, deposes and says:

3 ON EXAMINATION CONDUCTED BY CASEY C. VARNELL,
4 ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:

5 Q. Good morning.

6 A. Good morning.

7 Q. Would you please state your name for the
8 record?

9 A. Selina Jarvis.

10 Q. And, Ms. Jarvis, what is your current
11 occupation?

12 A. I am a retired school teacher, and I'm
13 currently the District 2 Currituck County Commissioner.

14 Q. And if you would, please, just a general
15 background of your past employment history.

16 A. For 29 years I taught social studies at
17 Currituck County High School. I moved to the county in
18 1990. The previous year I taught at Concord High
19 School.

20 Q. Twenty-nine years of social studies?

21 A. Yes, at Currituck High School. I retired in
22 June of 2019.

23 Q. And just again for the record are you an
24 elected official of Currituck County?

1 A. I am. I was appointed to fill Bobby Hanig's
2 spot in January of 2019, and in November of 2020 I was
3 elected to my first four year term.

4 Q. Congratulations on that.

5 A. Thank you.

6 Q. And so since January of '19, I believe,
7 that's how long you've served, that's your tenure as a
8 Board Commissioner?

9 A. Yes, sir.

10 Q. And you haven't served any previous terms?

11 A. No.

12 Q. And what are your functions, just in general
13 terms. You don't have to give me an exhaustive list,
14 but what are your functions as a Currituck County
15 Commissioner?

16 A. I believe my functions are to deliberate and
17 make decisions concerning the UDO, decisions for
18 budgeting, decisions about personnel and tax rates.

19 Q. And what district, again, did you say you
20 represent?

21 A. District 2, which is the southern part of
22 Grandy all the way to the bridge, the Wright Brothers
23 Bridge.

24 Q. Headed down towards my neck of the woods

1 how these funds are going to be spent, the occupancy
2 tax proceeds, do you have any idea what the process of
3 deciding on those expenditures entails, what criteria
4 is being assessed when making those expenditures?

5 A. Yes, I do.

6 Q. Please, could you elaborate?

7 A. Well, 25 percent have to be on promotions and
8 the other 75 percent, in the judgment of the Board,
9 have to be on tourist related expenditures.

10 Q. And when in the past, in the past, and
11 currently in the present, are you aware that certain
12 expenditures are being made from the occupancy tax fund
13 for the purpose of funding a portion of the share of
14 the Sheriff and EMS service costs in Currituck County?

15 A. Yes, because that's a tourist related
16 expenditure.

17 Q. Okay. I'm going to hand you an exhibit.

18 **MR. VARNELL:** Chris, I'm going to do just
19 like I did. I'm just going to give you everything I'm
20 going to be handing over, but I'll make reference to
21 the ones I'm actually using.

22 **MR. GEIS:** Can I ask you a question?

23 (Off the record discussion regarding marking
24 of exhibits)

1 which fiscal years did you vote on again?

2 A. '20 and '21, the last two.

3 Q. Okay. And are you familiar with the
4 statutory regulations which governs Currituck County's
5 ability to expend occupancy tax proceeds?

6 A. Yes.

7 Q. Now I want to go to that particular exhibit.
8 And we'll call this Plaintiff's Exhibit [2]. It is in
9 there, Stephanie, but I'm just going to hand over a new
10 one to keep things running a little smoother.

11 So just, again, in your own words, and we
12 don't have to talk too much about the 25 percent which
13 is supposed to go to promotions, so I'm focused on
14 tourist related expenditures.

15 A. Okay.

16 Q. In your own words would you explain your
17 understanding of the county's ability to make
18 expenditures from OT on tourist related expenditures,
19 what criteria must be met.

20 A. Well, it's what's related to tourism and the
21 promotion to try to -- not the promotion, but to try to
22 attract tourists. That is in our best judgment and
23 what we believe is our judgment to increase and to make
24 Corolla, the mainland, Carova, Knotts Island, anywhere

1 in the county a great place to visit and make them want
2 to come back again. That's what my understanding is,
3 that it is in our judgment what is best for tourism.

4 Q. So when voting on the budgets that you voted
5 on here, what criteria did or do you use in order to
6 judge whether, and I'm talking in particular now
7 whether Sheriff and EMS costs qualify as a legitimate
8 tourist related expenditure?

9 A. Well, because the population of our county,
10 both on the mainland highways and of course in Corolla
11 and Carova, is explosive in many months out of this
12 year. This year has been even a longer period than
13 most years. We have to make sure people get here
14 safely as efficiently as possible. It's not an easy
15 journey to get anywhere to Corolla and Carova. We have
16 to make sure once they're here that they're safe and
17 that they feel comfortable and that they feel like it
18 is a family oriented safe community. And I feel like
19 we have done that. I feel like the judgment we have
20 used has made Corolla and Carova, the trip through the
21 mainland, a great place to visit and want to return.

22 Q. And are you familiar with how the county
23 manager, both past and current, actually, and I'm
24 saying this from looking back at video presentations of

1 meetings, how the managers historically advised the
2 Board of Commissioners that OT expenditures for sheriff
3 and EMS are intended to fund only the cost of services
4 which were increased because of the summer season. So
5 in other words, or I'll ask that another way.

6 When presentations are made to you about why
7 Sheriff and EMS costs are expended from OT, what's the
8 basis for that, according to your advisers, to the
9 county manager?

10 A. Once again, it's to make sure that our
11 visitors are safe and that the people who live here
12 know that they're going to be safe with this many
13 people as well. I mean you have to make sure that
14 people who come here are safe and that they have that
15 feeling of safety. So to me that's the rationale, and
16 that's how it's explained. It's a public safety issue
17 for our thousands and thousands and thousands of
18 visitors.

19 Q. Again, so those funds are really intended to
20 cover the increase in the population and during the
21 summer season, that's how it was presented to you guys
22 in the budget meeting?

23 A. Not just the summer season. I would just say
24 a tourist season.

1 Q. Okay.

2 A. Because it's not just summer. Summer is from
3 mid-June until September. Our season is much longer
4 than a summer season.

5 Q. Okay. All right. Are you aware that at
6 these meetings when you guys face folks that the only
7 reference made to season was using the word summer?

8 A. No, I'm not aware of that.

9 Q. Okay. So -- and this is just kind of to
10 bring it full circle. So now we can go and we can look
11 at what I'm calling Column 2 on that table, Plaintiff's
12 Exhibit [1]. And that column again on Schedule C, OT
13 transfers to general fund for sheriff and then OT
14 transfers to general fund for EMS in the corresponding
15 table below. Are the figures shown in Column 2 of that
16 table, are they intended to cover the increase or
17 additional costs of these particular services on
18 Corolla Outer Banks during the season, and you're
19 saying tourist season, which were not covered by
20 property taxes?

21 A. I would take exception with the word, for
22 Corolla, because, no, --

23 Q. For Currituck Outer Banks is what I meant to
24 say.

1 A. Well, I would say for Currituck County.
2 Because those tourists that are visiting Corolla and
3 Carova have to travel through the county. They don't
4 just magically appear in Corolla. They have to travel,
5 so I would say, yes, that that's the increase to the
6 county, not just to one tiny part of the county. The
7 whole county is affected by the tourist season.

8 Q. And what would be your response to somebody
9 who would say, well, how can you guarantee or how can
10 you be assured that those folks out there traveling on
11 168 in Mainland Currituck are actually -- their
12 destination is Currituck County, anywhere within
13 Currituck County? How can you be assured -- so if
14 we're saying there's this increase.

15 A. So you're asking me to speculate on where
16 these people are going? I'm not going to speculate on
17 where these people are going, but we have data that
18 shows how many people come to the Outer Banks in
19 Corolla and Carova through the rental program. We have
20 data how many people stop at the welcome center, so
21 there's data, but I'm not going to speculate on where
22 these people are all going, because obviously more than
23 just people going to Corolla travel through the county,
24 but to get to Corolla and Carova you have to travel

1 through the county.

2 Q. And that is correct. I certainly wouldn't
3 refute that. However, the reason I was asking that is
4 the funds that are expended, in what I'm hearing you
5 say, are supposed to account for the county's tourists.

6 A. Correct.

7 Q. So that was the basis for my question. So if
8 they're not necessarily Currituck County tourists, then
9 why, in your opinion, would Mainland expenditures be
10 okay. So mainland expenditures for Sheriff and EMS,
11 why would they be okay?

12 A. Because our tourists have to travel through
13 the county.

14 Q. Okay.

15 A. You can't have roads and any infrastructure
16 without safety. I mean if you have no additional EMS
17 and no additional Sheriff, it becomes a very dangerous
18 way to try to travel. I live in lower Currituck.
19 There are no stoplights from Grandy until you cross
20 that bridge in Southern Shores. It's a dangerous
21 place, and you have to have additional help to manage
22 the accidents, the traffic. Because there are no
23 stoplights, people treat it as the Autobahn, and you
24 have to have additional help during that tourist

1 season. That's my best answer for that.

2 Q. Okay.

3 A. Because they doesn't magically appear in
4 Corolla.

5 Q. So back to the season in terms of the OT
6 expenditures accounting for these increased seasonal
7 costs, now what I was saying earlier, and I'm going to
8 continue referring to as the summer, because that's how
9 it was presented in the videos of these public meetings
10 that I've seen on budget proposals, but just in your
11 own words what constitutes the duration of a, and I
12 will say summer season, for the purposes of justifying
13 OT expenditures for Sheriff and EMS.

14 A. I think it varies from year to year. I would
15 say the start of the tourist season is around Easter.
16 And because Easter is not a fixed date, nor spring
17 breaks for colleges and universities, I think it starts
18 around those two events. And --

19 Q. Spring break was the start -- sorry. I
20 didn't mean to interrupt you.

21 A. Easter or spring break. Sometimes Easter
22 comes before that time. Sometimes spring break comes
23 before that time. It varies from year to year. And it
24 generally goes. It has a leveling off at Labor Day,

1 mainland to Carova and Corolla safe. So, yes, that is
2 my judgment as to why we funded that amount out of
3 occupancy taxes because it funds our tourists and the
4 increase in our population and our -- we have rentals
5 even through Christmas. And I would say that, yes,
6 that is the cost that funds that portion.

7 Q. So yes to an entire year's worth of costs?

8 A. To the costs that it -- to the costs per year
9 that it takes to keep our visitors safe, yes.

10 Q. And what information was expressed to you or
11 provided in document form, perhaps, and to any Board
12 Commissioner for any fiscal year? In this case you,
13 again, have only voted on 2020 and 2021, but what
14 information was given to you to enable you to evaluate
15 and substantiate the validity of these seasonal
16 expenditures as occupancy tax expenditures, as tourist
17 related expenditures?

18 A. Well, we have lots of departments that
19 testify before us and provide us information before we
20 approve a budget. We have presentations by EMS. We
21 have presentations by the Sheriff's Department. We
22 have presentations by the Tourism Department. We have
23 presentations by the Finance Director. We have
24 presentations by our County Manager. So all of those

1 presentations help me to use my judgment to vote for
2 this budget.

3 Q. Okay. And do you recall there being anything
4 outside of strict numbers that were presented to you
5 regarding these expenditures?

6 A. I'm not sure what you're asking me.

7 Q. So, again, back to this information that's
8 being provided to you regarding why these expenditures
9 are valid and within the law, within the statute that I
10 handed over as Plaintiff's Exhibit [2], was there
11 anything outside of this is a number that amounts to
12 the increased seasonal cost of sheriff and EMS on the
13 Currituck Outer Banks? Was there any other
14 documentation or information provided to you?

15 A. Not that I recall. Once again, I'm not sure
16 what you're asking, but not that I recall. Once again,
17 the presentations, they weren't given to us as
18 opinions. They were given to us with information with
19 data.

20 Q. Right.

21 A. And using that data is how we arrive at our
22 judgment to approve a budget.

23 Q. All right. So is it your opinion that you
24 were properly apprised of any and all information which

1 tourists or business travelers? In other words, is
2 that a promotional item?

3 A. I don't think there's a billboard that says
4 we have additional EMS and Sheriff's Department, but I
5 think in being labeled a family beach I think that that
6 is implied.

7 Q. Okay. Were you shown or given any evidence,
8 to your knowledge, that purported to show that a home
9 or a neighborhood on Currituck Outer Banks had a
10 greater need than a home or a neighborhood on mainland
11 Currituck for EMS and sheriff's services during the
12 peak tourist season?

13 A. So you're asking me if a home in Corolla
14 needs more than my home in Harbinger?

15 Q. During the peak tourist season.

16 A. The home itself, no, it does not, but the
17 traffic in trying to respond to a fire or an emergency
18 with our EMS and our Sheriff's Department is greater.
19 There are more people in Corolla and Carova even, and
20 accessing those structures is more difficult than my
21 home in Harbinger, but the house itself, no, it does
22 not need anymore, but they need more in manpower, woman
23 power, whatever, and vehicles to be able to get there
24 safely. And you don't need a four-wheel drive vehicle

1 to access my home in Harbinger but you would in Carova.
2 So that structure itself, no, but accessing those
3 structures, yes.

4 Q. And before placing your vote did you make any
5 or did you review any information concerning perhaps
6 how many sheriff and EMS calls were made during the
7 peak tourist season historically?

8 A. Historically, no, but we get data routinely
9 still even, you know, every, I don't know, week, month.
10 We get something from the Sheriff's Department that
11 talks about -- you know, in the summer we got regular
12 emails about how many calls they responded to and it's
13 numerous. It's a great increase in the height of the
14 tourist season.

15 Q. Okay.

16 A. So, yes, we get information about calls and
17 responding to calls, especially EMS and the Sheriff
18 routinely in the summer, and then throughout the
19 tourist season.

20 Q. Okay. So the increase that you're referring
21 to, a spike, if you will, you see that occur during the
22 tourist season?

23 A. Yes.

24 Q. Were you shown or given any evidence, again,

1 other than a number, to demonstrate why, for example,
2 in 2020, 1.26 million was determined to be the seasonal
3 increase, were you given -- for Sheriff, expenditures
4 from OT and then 1.6 million in 2020 for EMS? Were you
5 given any background regarding where that number was
6 derived from?

7 A. Yes. Once again, the sheriff presented -- as
8 part of the entire budget process the sheriff himself
9 came in and presented, along with his chief deputy
10 data, and that data is what I used to make my best
11 judgment as to how we fund the budget.

12 Q. And what exactly did the sheriff present, to
13 your recollection, or the EMS Director?

14 A. The cost of equipment, the cost of personnel,
15 the cost of overtime, all of those things were
16 presented.

17 Q. To your recollection did any of the
18 presenters, did they tie those costs directly to the
19 summer season? And, again, I'm going to keep calling
20 it summer, but for your purposes you're calling it a
21 tourist season and I understand that. Were those costs
22 tied to the particular season that we're talking about
23 here?

24 A. Not in the presentations of the sheriff

1 directly, but the cost was broken down by area. The
2 cost was broken down, once again, by equipment,
3 personnel, and other specific expenditures that the
4 sheriff has. We got an entire folder and I went
5 through that. So as far as additional costs to just
6 Corolla, no, I don't know that it was broken down --

7 Q. Or the Outer Banks area, Currituck Outer
8 Banks. I didn't want to keep it to just Corolla?

9 A. I don't recall specifically if it was broken
10 down by just how much that area costs, but I do know it
11 was broken down by manpower.

12 Q. So if the manager's presentation is that
13 these expenditures are legal because they are intended
14 to cover the increased cost of the particular season,
15 then without direct evidence as to these increased
16 costs and how these increased costs were derived for
17 the season, how would you be able to make a well-
18 founded judgment?

19 A. Well, once again, we had presentations, not
20 just by the Sheriff's Department. Using data from all
21 of those departments, we have an increase. And that
22 was presented about the number. Once again, tourism,
23 Tameron Kugler, she presents how many rentals we have,
24 what the increase is. So we have -- we have the data

1 presented. That's what helps me use my judgment. We
2 see the increase. It's not presented by the sheriff.
3 It's not his job to say how many people visited.
4 That's Tameron Kugler's job. So with those
5 presentations we were able to use our judgment as to
6 what the increase in population is; therefore, what the
7 increased cost is going to be.

8 Q. So the increase then is just based on the
9 transient population numbers? That's the evidence that
10 you used?

11 A. It's a lot of data. It's rentals, it's the
12 information of how many people visited, the welcome
13 centers. You know, it's a lot of data, number of
14 stops, number of incidences, number of rescues by EMS.
15 There's a lot of data. It's not just an isolated set
16 of data that this is how much this is going to cost;
17 therefore, that's what we spend. It's a cumulative set
18 of data that we are presented. It's not even one
19 hour. It's days that we sit and listen to cumulative
20 information about all sorts of aspects about the
21 county, including the Outer Banks.

22 Q. Okay. Now why in your opinion were the real
23 property taxes that are assessed against permanent
24 residents and non-resident property owners alike on

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

KEVIN EDWARD McCORD

* * * * *
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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1 KEVIN McCORD, being by me first duly sworn to
2 speak the truth, deposes and says:

3 **ON EXAMINATION CONDUCTED BY CASEY VARNELL,**
4 **ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:**

5 Q. Good afternoon, Mr. McCord.

6 A. How we doing?

7 Q. Even though I just addressed you by your last
8 name, if you would, just state your full name for the
9 record, please.

10 A. Kevin Edward McCord.

11 Q. And, Mr. McCord, what is your current
12 occupation, your day job?

13 A. I am a Patrol Sergeant at the Currituck
14 County Sheriff's Office. I've been employed there
15 since 2001 with a one year interruption. I took a
16 magistrate position in '14, but I came back to the
17 sheriff's department 364 days later. And I also am a
18 business owner here in the county. I have McCord's
19 landscaping, commercial and residential.

20 Q. And historic, just over the course of your
21 employment history, is there any -- have you been
22 employed in any other industries or buy any other
23 business. Have you owned any other businesses, just
24 over the course of your career?

1 A. Me and my father used to own a golf course in
2 Grandy.

3 Q. That's cool. Which course?

4 A. We bought Goose Creek, and it was Grandy Golf
5 Club for right at two years. Then we sold it. It's a
6 solar farm now, but we sold it.

7 Q. Got you. And are you currently an elected
8 official for Currituck County?

9 A. Yes, sir.

10 Q. What role do you serve in that elected
11 official capacity?

12 A. I am one of the Commissioners at Large.
13 There's two of us. Myself, and Ms. Etheridge is the
14 other one. So we serve the entire population, not just
15 the district.

16 Q. Absolutely. And how long have you served in
17 this role? When did you get elected?

18 A. I was elected --

19 Q. Current, sorry, in your current term?

20 A. In my current term two years ago.

21 Q. Okay. So '18?

22 A. Yes, sir. November of '18 I was sworn in,
23 December, whatever, 18th, I think of 2018. Just
24 roughly two years and a week maybe.

1 Q. Okay.

2 A. Handouts. You know, group conversation.

3 Q. All of which is public record.

4 A. Public record. I'm just speaking for the
5 last two years.

6 Q. Sure.

7 A. There are typically maybe two to five
8 citizens, you know, maybe for a certain part. And then
9 there was the county manager, the county attorney, the
10 finance director, us, obviously the County Clerk,
11 Leeann.

12 Q. Right.

13 A. And maybe a half dozen -- even since COVID
14 there was maybe a half a dozen other people, citizens,
15 besides county employees or elected officials.

16 Q. Less than ten?

17 A. Five to seven would probably be a good
18 number.

19 Q. And at these work sessions would you guys
20 dedicate a portion of time to discussing occupancy tax
21 and the expenditures for the upcoming year?

22 A. Yeah. I mean there was always a slide show
23 or something or handouts, like I said. Like I said, I
24 know the -- I'm just going to say it. I'm a county

1 employee, I always have people from the schools as well
2 as I'm a county commissioner. I'm in that rare, dual
3 role. And I have people saying, you can't spend it on
4 that, you can't spend it on that. I get that question
5 a thousand times.

6 Q. Which is not necessarily in the work session
7 is what you're saying?

8 A. Yes, pretty much. But I mean the stuff, it's
9 discussed. Where if somebody says, we need new
10 textbooks at Knapp School, it's not an occupancy tax,
11 travel and tourism thing, so it's like that's not
12 something that's even brought up. And I basically
13 just kind of nix it right there to whoever asks that
14 question.

15 Q. And in particular the root, if you will, of
16 today's deposition, if you'll look on the table right
17 in front of you. As a matter of fact, it's sitting
18 right on top there, and it's Plaintiff's Exhibit [1].
19 What this table is, of course it's the same table that,
20 as you're aware, Ms. Sandra Hill got deposed. I
21 deposed her last week, and I had her confirm the
22 numbers that are shown here on the table. And I guess
23 just in general terms right now, for the 2020-2021 time
24 period, the last two budgets, are you aware that money

1 has been spent from -- or money has been transferred
2 from the occupancy tax fund to the general fund for
3 Sheriff and EMS services within the county?

4 A. Am I aware of that?

5 Q. Yes.

6 A. Yes, sir.

7 Q. That's all I'm asking right now, if you're
8 aware of it. Okay. And actually if you'll look at
9 what I'm calling Column 2. And Column 2 says OT
10 Transfers to General Fund for Sheriff, Schedule C, do
11 you see that column? It's actually the third column,
12 but I'm calling it Column 2 for these purposes. And
13 then same thing for EMS on the bottom half.

14 So when you guys were at the work sessions
15 and in particular, again, for these Sheriff and EMS
16 costs, what in your experience has been the course of
17 action, what's been the discussions that were had at
18 these work sessions over why you're expending money on
19 Sheriff and EMS from occupancy tax?

20 A. It's travel and tourism related to keep the
21 beaches safe, keep the vacationers safe, as well as
22 some of our -- you know, we've had our citizens. I
23 think this summer we had 194 ocean rescue saves on the
24 beach. It's a hundred and ninety something. It might

1 not be 194, but it's 194 I believe.

2 Q. And concerning the Sheriff and EMS, was there
3 -- and the focus point here -- obviously, you can look
4 at the numbers yourself, and you're well aware of this
5 because you voted on it, they're some of the --
6 actually, the two biggest expenditures from occupancy
7 tax on any given year as a general matter. So that's
8 why I'm focused on those. When these slide shows and
9 things of that nature were presented at these work
10 sessions, were there -- you're correct, were all public
11 record -- were there any other documents that you guys
12 were given beyond those slide shows? Was there any
13 information you were provided beyond what the manager
14 would have given you at the work session meeting?

15 A. I mean everything is, you know, obviously the
16 Clerk took notes on everything. We discussed -- you
17 know, some of the newer commissioners might not have
18 known what goes on in the day to day operation in
19 Corolla. A perfect example, I'd been a deputy in the
20 sheriff's department 18 years. Prior to 2018 I think I
21 worked beach duty four times. I mean it's not
22 something I wanted to do. And the reason why I worked
23 it a few times the last two years, when I'd get those
24 emails of citizens from New Jersey complaining about

1 something we did or didn't do or something we done
2 wrong, or something we did good, I worked a few shifts
3 out there just -- they didn't know I was Commissioner
4 McCord. They see me as Sergeant McCord and kind of see
5 the boots on the ground to see how the operation runs.
6 I mean, that's one of the things that we hear from the
7 citizens and the traveling tourism, they rave on our
8 beaches, that they're clean and they're safe. And
9 that's what people that are spending their ten grand or
10 15 grand for a house for a week they want clean and
11 safe beaches, and I don't blame them.

12 Q. Okay. All right. How would you say -- so
13 now, Column 1, which is Audit Report Sheriff, Audit
14 Report EMS. But what that represents is the actual
15 total county cost for the annual services for entire
16 Currituck County.

17 A. And on the sheriff too, that includes the
18 jail too.

19 Q. Okay. All right.

20 A. I didn't know if you knew that.

21 Q. So how -- we've got X amount of dollars, for
22 example in 1920 we've got 1.26 million coming from
23 occupancy tax, which is that number in Column 2 there,
24 to fund a portion of those costs. How's the balance of

1 Q. Okay. So then from your own understanding,
2 your own opinion or interpretation, what -- how is
3 Currituck County able to spend occupancy tax? What's a
4 legitimate expenditure on occupancy tax? And to not
5 confuse matters I'll go ahead and get out of the way,
6 I'm not focused on promotion and marketing. We're well
7 aware that X percentage of occupancy tax has to go
8 solely to promotion and marketing. So what I'm really
9 referring to, if you look on page 2 of that same
10 document, Plaintiff's Exhibit [2], Subsection 4 is
11 Tourism-related expenditures. What is your
12 interpretation of what a tourist-related expenditure
13 actually is?

14 A. Anything -- and I'm going to use the word
15 promote, but I'm not just --

16 Q. I understand.

17 A. Anything to promote travel and tourism for
18 Currituck County, anything to promote what Currituck --
19 I mean, what Currituck County has to offer. We have
20 people come here that are duck hunting. We have people
21 that come here fishing. We have people that come here
22 for baseball, softball tournaments, various different
23 things. People come to Currituck County for the beach,
24 you know, there's tons of different reasons why they

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

1 was talking about Corolla. And the word clean and safe
2 came up in their thing nonstop. Nobody likes getting
3 in trouble if I have to write somebody a ticket for
4 doing something wrong in my other capacity, but the guy
5 that called the complaint in, he likes us being there,
6 as far as the public safety. So I mean it's a huge --
7 they go hand in hand.

8 Q. And in your experience, and I recognize we
9 are talking about public safety services, and you serve
10 in that field, so I can appreciate the fact that you've
11 got a different, perhaps, outlook in that field.
12 You've got resources available to you that aren't
13 necessarily available to other commissioners. So were
14 you ever presented, you being in your capacity as a
15 board member, were you ever presented with any
16 information or evidence that, oh, indeed services,
17 public safety services are an attraction? People have
18 stated that they are attracted to, they want to come
19 here because of sheriff and EMS?

20 A. I've received emails where they are thanking
21 the EMS for being there and like the ocean rescue
22 saves. I think I was a part of two or three of them,
23 maybe. I was there. And I didn't work beach duty this
24 summer, eight times, seven times, maybe, and I think I

1 was at three of them. EMS, you know, as far as the
2 safety, when you put that many people in that one area,
3 you know, and you're going to have somebody with
4 alcohol and somebody with -- you put a lot of families
5 together, you put them in a house, and you'd be amazed
6 at how many domestics are at houses in Corolla.

7 Q. I probably don't want to see those stats.

8 Your experience though in having people say
9 the thank you's and this, that and the other, is that
10 generally on the personal level? In other words, is it
11 on your day to day as a sheriff? Does it come to you
12 as a commissioner? Does that information come to you
13 at board meetings?

14 A. I would say it more comes in the capacity of
15 a deputy sheriff, but I have received numerous emails
16 where citizens from, we'll use out of state,
17 Pennsylvania, wherever, thanking the services of EMS
18 where they've done some multiple different things from
19 something bad that happened. And, you know, the --
20 like I said, you Google Currituck County or whatever.
21 The guy when we had a thing here, the word clean and
22 safe came up. He said -- I can't remember the exact
23 amount of times. It was a presentation on branding,
24 you know, like promoting Currituck. One of the biggest

1 things that people said was keeping the beaches clean,
2 keeping the beaches safe. I mean that's something
3 that's highly stressed.

4 Q. Okay. And do you consider that to be
5 marketing for sheriff and EMS in saying that?

6 A. No. I think it's more marketing for -- you
7 know, you're not going to take your family if you have
8 three kids and a dog or something you're not going to
9 take them to somewhere, to a destination if it's not
10 safe. I quit going to major league baseball games in
11 the last few years because there was a city, and I'm
12 not going to say the city, because it's just not safe
13 to go there anymore. So I mean people are not going to
14 go if they don't feel safe.

15 Q. Right. And so back to this table here, and
16 I'm talking at this point Sheriff and EMS, so when
17 these particular, in Column 2, those transfers from OT
18 to the general fund, when they were proposed, were they
19 proposed to you, the Board -- were they proposed in a
20 manner that you felt like they were funding a
21 particular portion of services, in other words, a
22 particular time of the year, or were you funding the
23 full annual cost on Currituck Outer Banks? What's your
24 understanding of what those OT transfers were funding?

1 A. I would say that they're funding a portion.

2 Q. Okay. Elaborate just a little bit if you
3 could.

4 A. I mean just in the typical summertime, you
5 know, there's more medic units from Memorial Day to
6 Labor Day. There's more -- a typical beach duty day is
7 a 12-hour shift. That's a long day. But it's, you
8 know, they're geared up more, stacking for it, that's
9 the busiest time. Obviously, like this year, and this
10 is a perfect example. April, when the governor put the
11 shut down order, we have marine patrol as well, which
12 was keeping people from sneaking to the Outer Banks.
13 That wasn't taken out of occupancy tax. That was taken
14 out of, basically, the general fund. Unfortunately, in
15 April I wore my uniform every day. I'm one of the guys
16 certified to do the boat. I don't have a Captain's
17 license, but I'm one of the guys that's certified.
18 There's five of us. And then obviously you have
19 somebody like a mate, so we had to work every day in
20 April because we turned away I think 26 people trying
21 to sneak in April to Carova so they could get to
22 Corolla that if their driver's license didn't say, part
23 of the governor's shutdown they couldn't go there. And
24 we had to turn them away. Of my entire career of doing

1 that job that was the least funest to do. You own a
2 half a million dollar home, you want to ride over and
3 look at it in your boat, you can't go. And that was
4 not fun.

5 Q. Right.

6 A. But that's just an example of, you know,
7 stuff, additional stuff that is done that, you know, I
8 don't know if anybody knew, the people in Carova saw
9 the boat riding around in the canals, that we're
10 turning people away. I mean they were trying to sneak
11 people at night. We'd have to switch the shifts. We
12 had to cover it 24/7. Obviously, we couldn't, but --

13 Q. Yeah, I remember that.

14 A. Yeah, April was a tough month. It was not
15 fun.

16 **MR. GEIS:** That was a local ordinance
17 though. It was not --

18 A. No, it was the governor said you could not --
19 it was part of the stay at home. You know, you
20 couldn't go to -- where we had said you couldn't go to
21 neighboring counties. The governor of Virginia owns a
22 home in Pirate's Cove. He couldn't go there. If he
23 pulled up to the bridge or if he pulled up -- it was a
24 stay at home order. You know, you could not stay at

1 your second home. Like I said, it was just a scenario
2 where that wasn't OT, I mean occupancy tax at all.
3 Which it was basically somebody, you know, it was a
4 second home.

5 Q. Right, right.

6 A. And there was some contractors trying to go
7 to work on somebody's house, and it was just during
8 that -- I don't know, it was five weeks, maybe; it was
9 terrible.

10 Q. I fully remember that.

11 A. I was working the bridge. And all that
12 stuff, and that work at the bridge was not occupancy
13 tax money either.

14 Q. Right. So then the expenditures from OT for
15 Sheriff and for EMS, they were -- am I hearing it
16 right, they were to cover the additional costs that
17 were associated with the influx of tourists?

18 A. Yeah, staffing costs as well as -- and I mean
19 like if you look at 2018, and I can tell you with
20 108,907 the vehicles, there were more Jeeps purchased.
21 There were Jeeps purchased. And I'm going to know that
22 budget as well as the EMS one pretty good too. There
23 was Jeeps purchased for beach duty. Because we'll just
24 use if she was a deputy and she worked the mainland

1 she's not going to be able to drive her Dodge Charger,
2 so there's beach duty vehicles that are driven every
3 day during that time.

4 Q. Right, right.

5 A. Because, you know, they get -- not sand, they
6 get -- I mean they're used heavy. Especially this year
7 because the beach duty was extended. It was probably a
8 little bit more use than normal.

9 Q. As a matter of fact I talked with Kitty
10 Etheridge about the vehicles, so you're correct, there
11 were beach patrol vehicles.

12 Do you believe that when you voted on the OT
13 expenditure for Sheriff, for example, for EMS, but was
14 it intended to cover the staffing cost year round in
15 Currituck OBX?

16 A. A portion of that as far as, because there is
17 travel and tourism year round in OBX, like we discussed
18 with number 2 in golf packages. People don't go play
19 with golf packages in June, July, August, even
20 September. They don't really kick off until October
21 when the beach is slower, so we still have a pretty
22 good influx of people in the off season, which our off
23 season, I mean or they want to say shoulder seasons. I
24 mean you can ride on 168. It's getting busier and

1 knowledge. It's a completely different animal.

2 Q. So let me ask this then on that, since this
3 is a different animal. So we've got the OT transfers.
4 This is Column 2 to the general fund for EMS, right.
5 In 2019 and '20 that number stayed static with the year
6 prior, which was still \$500,000 more than what the
7 personnel costs were in 2018. There's a \$500,000
8 difference between the amount transferred from OT and
9 the actual personnel costs in '18. But then you go to
10 '19, and that 1.6 million transfer stays the same. You
11 guys approved that. Yet staffing costs, there's a 1.1
12 million dollar difference in OT transfer and what the
13 actual costs were. Do you have any idea why that was?

14 A. I don't know if some of that is still linked
15 together, like I said, on that one. As far as linked
16 together, fire and EMS.

17 Q. So then do you know where that -- and I think
18 you just answered that, you said you didn't know. But
19 are you aware of where the additional 1.1 million
20 dollars in both '19 and '20, where that money went?

21 A. I do know there's additional -- I don't want
22 to say this wrong. I do know there's -- I want to say
23 there is an additional two medics in the summertime,
24 you know, where that number where, you know if you're

1 you could be a fireman. There's four of us in the
2 room, two of them could be working as medics and two of
3 them might be paid fire. I mean, there's a couple of
4 those guys that are dual role. I do know that.

5 Q. And do you recall if at any point in time
6 you've ever had any discussions with anybody within the
7 county ranks about what would happen, for example, if
8 that 1.6 million dollars from OT for EMS, vice versa,
9 1.2 for sheriff, okay, each year, if that funding from
10 OT was cut off, have you had any discussion with
11 anybody about what would happen to the tax rate, the
12 property tax rate, for example, if that occurred? Do
13 you know what would happen to the tax rate if that
14 occurred?

15 A. I mean as far as if those funds were cut?

16 Q. Right.

17 A. I don't ever remember a conversation, but I
18 know if the services weren't there the people wouldn't
19 be there, and you wouldn't have your clean, safe
20 beaches, and you wouldn't probably find those two terms
21 when you google Currituck County beaches.

22 Q. Right.

23 A. So I know the importance of -- like I said,
24 it's not a service that we sell, but like I said, I

1 quit going to major league baseball games. I went for
2 15 years in a row taking my kids because the city's not
3 safe anymore. I'm not going to say the city, but --

4 Q. And I think the reason I was asking it is, so
5 why in your opinion are the real property taxes, the
6 property taxes that are collected and assessed against
7 permanent and non-resident property owners alike,
8 considering Currituck OBX makes up half of the total
9 tax value in the county in terms of that real estate
10 and personal property, why would the general tax not be
11 sufficient to cover the cost of services in Currituck
12 OBX? Why would you need OT funds? Why wouldn't the
13 general tax just be enough considering there's, again,
14 50 percent of the tax base is in the Outer Banks of
15 Currituck?

16 A. Well, I mean, just a perfect example, we got
17 a wreck on 158 in Grandy, and there's four people in
18 the car from Pennsylvania, I don't call a Corolla
19 deputy to do the wreck; I do the wreck.

20 Q. Right.

21 A. Or my guys on the mainland do the wreck.

22 Q. Right.

23 A. You know, I mean, they're in Currituck County
24 on the mainland because they're going to Corolla.

1 Back to Plaintiff's Exhibit [2], the statute.
2 Again, for the record -- it is, and as you've admitted,
3 it's in the judgment of the Currituck County Board of
4 Commissioners. And so what I'm interested in is
5 understanding where your mind is at when you're making
6 those judgment calls, essentially, on what is a valid
7 tourism-related expenditure. What limitations, or
8 better said, what criteria do you use when assessing
9 whether or not something attracts a tourist and thereby
10 increases lodging facilities? I know it's somewhat
11 repetitive, but I just want to hear it from you.

12 A. Oh, you're fine. If it's something that's
13 promoting the county that's bringing business to the
14 county, bringing people to the county, whatever it's
15 for as far as, you know, can we use, as you refer OT,
16 not overtime, OT for that, is it something as far as
17 somebody is coming here. The people that go to the
18 Rural Center on the south end of the county. My
19 daughter-in-law she has a horse. I would never own a
20 horse. That's a very expensive habit or hobby, worse
21 than golf, maybe worse than drugs, maybe. But they
22 spend money. And the Rural Center, how busy it is when
23 they have events out there. Obviously 2020, COVID's an
24 issue. The people that come here from Williamston,

1 that come here. They travel like every weekend. It's
2 crazy that they come here to those things. So anybody
3 that's coming here for a, be it a golf package, a horse
4 event, a ball tournament, you know, different things
5 that attracts somebody that's not -- my buddy owns
6 seven golf courses in the Tidewater area. Every
7 weekend, not every weekend, probably 12 weekends out of
8 the year -- not this year because of the COVID it was
9 different. He comes down here and they stay at a beach
10 house. I mean he comes down here and he loves the ball
11 fields. They love them. His kid plays travel
12 baseball, so he comes. He's in the tourist golf --
13 maybe not tourist, but they have people play from all
14 over.

15 Q. That's another -- leads into another good
16 question. What in your, I guess, interpretation is a
17 tourist?

18 A. Somebody that doesn't live here that's coming
19 here for a reason as far as, you know, as far as -- I
20 mean a tourist is somebody that's coming here for -- I
21 don't know how I want to say this. Let me word this
22 correctly. A tourist is somebody that's coming to this
23 destination that's not residing here.

24 Q. A permanent resident.

1 A. Yeah, a permanent resident. Somebody that
2 wants to come and -- come and spend their money, you
3 know, come and spend their money here.

4 Q. The same for a business traveler, I would
5 assume?

6 A. Yeah. I mean believe it or not we have
7 people, you know, Chesapeake area will get in their
8 boat, and they'll drive down. Maybe they'll eat lunch
9 at Coinjock Marina. I would consider that, you know,
10 they're not -- they don't live here.

11 Q. Understood. And when we talk about the
12 tourists coming in, I think its by default almost a yes
13 answer here, but when you're talking about these folks
14 coming in and thereby increasing the use of facilities
15 within the county, not living at the rental homes,
16 meeting facilities, convention facilities, the use of
17 these facilities do you believe the statute to limit
18 that use to tourists and business travelers, or could
19 it also be citizens, permanent residents of Currituck
20 County?

21 A. No, I mean it's like you said, it's something
22 promoting travel and tourism, somebody coming here for
23 a reason. Not -- you know if I get in my vehicle --
24 obviously I'm not going to go play golf today because

1 it's raining, but I rode to The Pointe I would be
2 considered a local going to play golf at The Pointe.

3 Q. Right.

4 A. But if I lived in Virginia Beach, there's 30
5 golf courses I could play at, and if I get in my
6 vehicle and ride to The Pointe I would classify that
7 guy as a -- I would term him a tourist. But they said
8 in one of our meetings tourist is not the -- they
9 didn't like being called tourists. Which I mean
10 they're tourists. I mean I hate to say it.

11 Q. Right. And along that same line then do you
12 think expenditures or transfers from occupancy tax can
13 be made that are specifically designed to benefit a
14 mainland citizen of Currituck County?

15 A. Not a citizen, not as far as -- I mean if
16 it's something with travel and tourism.

17 Q. In other words if they're a second home owner
18 or something like that on the mainland, but I'm talking
19 about primary residence?

20 A. I think the money -- like you said, based on
21 the statute, what we're advised what can be spent, if
22 it's something travel, tourism related to that, it
23 would fall under, you know, that. Not something that
24 we could -- anything to promote Currituck that brings

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

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
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KITTY HAWK, NC 27949

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Elizabeth City, NC 27907-0385
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1 ROBERT "BOB" WHITE, being by me first duly
2 sworn to speak the truth, deposes and says:

3 **ON EXAMINATION CONDUCTED BY CASEY VARNELL,**
4 **ESQUIRE, ATTORNEY FOR THE PLAINTIFFS:**

5 Q. Good afternoon.

6 A. Good afternoon.

7 Q. If you would, please state your name, full
8 name for the record.

9 A. It's Robert M. White.

10 Q. And, Mr. White, what is your current
11 occupation, your day job?

12 A. I have -- I own wild horse tour companies
13 currently.

14 Q. And are those here in Currituck County?

15 A. Yes, they're in Corolla.

16 Q. And past employment history, what other
17 occupations have you had over the course of time?

18 A. Well, started off as a young adult as a
19 Marine, in the Marine Corps. Left that, came down here
20 and went to work for my dad at his hotel, The Inn at
21 Corolla Light, for a little over a decade. And had
22 various and sundry businesses over the years, all
23 related around the tourist industry.

24 Q. Okay. And you're currently serving as an

1 elected official of Currituck County, correct?

2 A. I am.

3 Q. And what role do you serve?

4 A. I am a County Commissioner for District 1,
5 which is Corolla, Carova, Knotts Island and Gibbs
6 Woods. And I am also the current Chairman of the Board
7 for Currituck County.

8 Q. And you said -- I know obviously, Corolla and
9 Carova. Gibbs Woods and Knotts Island is in District 1
10 as well? Is that -- okay.

11 A. Yeah. I don't know why, but it is.

12 Q. And what's been your tenure on the board?
13 How long have you served in your current term?

14 A. Four years.

15 Q. Okay. So you were elected in '18?

16 A. '16.

17 Q. Okay. Yeah. Sorry. I can't even do math
18 obviously. How about previous terms? Have you ever
19 served prior to your election in '16?

20 A. Not as a commissioner, no. I've served on
21 our Tourism Advisory Board when that was -- had its
22 inception.

23 Q. Okay.

24 A. Back in, I believe that was '06.

1 A. Well, really it starts probably at our annual
2 retreat, when we go through and we set our, you know,
3 goals for the year, whatever those may be.

4 Q. Right.

5 A. And then we go on, you know, from there. The
6 staff takes it, so they bring it back to us in a more
7 polished form, obviously. and whittle down that in our
8 budgetary talks in the spring before we do our entire
9 budget, in work sessions.

10 Q. And when the staff brings that back to you,
11 who does the staff first present to? Is it the Tourism
12 Development Authority or the Board of Commissioners?

13 A. Board of Commissioners.

14 Q. Okay. All right. And where does the Tourism
15 Development Authority fit in? What's the function of
16 the Tourism Development Authority?

17 A. That's interesting. So, they -- we generally
18 sit, obviously, as a Board of Commissioners. We have
19 our annual work sessions or budgetary sessions. And we
20 sit and we, we work in that and we talk about things.
21 So -- but if we go into the Tourism Development
22 Authority, we open a meeting for that, a special
23 meeting for that purpose to approve the budget for that
24 portion of the overall budget or any budgetary

1 on that table there, which of these fiscal year budgets
2 did you actually vote on?

3 A. It would have been '17 forward. I believe.
4 I came in '16. Would have had July of '17. Yeah.

5 Q. Okay.

6 A. That's about right.

7 Q. And we've talked about already that statute
8 in front of you, Plaintiff's Exhibit [2]. Just -- not
9 specific to sheriff and EMS yet, just yet, but what's
10 your understanding of Currituck County's ability to use
11 occupancy tax funds? And outside of the fact that we
12 know that a certain percentage has to go to promotion
13 and marketing. There's no dispute about that, and
14 that's what you've testified the authority, advisory
15 board is for.

16 A. Right.

17 Q. Or part of what they advise of. So, what, I
18 guess, limitations are placed on the way in which
19 Currituck can spend occupancy tax?

20 A. Well, it's just for tourism-related
21 expenditures. And that's in our -- in our opinion, I
22 guess or judgment.

23 Q. Uh-huh.

24 A. That's actually explained in here, but it's

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 A. Absolutely.

2 Q. -- over the years in issuing, I suppose,
3 advice on the legitimacy of these transfers?

4 A. Yes.

5 Q. Now, let's -- you can call it personal, but
6 really what I'm driving at here is just your judgment
7 sitting up there as a board -- as a board member. What
8 is your, I suppose, definition, if you will? I mean
9 we've got what's written there on paper, but what, in
10 your mind, in general terms that that encompass a
11 tourist-related expenditure? What must the expenditure
12 be in order for it to be a tourism-related expenditure?
13 What must that expenditure do? What must its purpose
14 be?

15 A. Well, I've been in tourism since 1996. I
16 talk to tourists every single day of my life just
17 about, with the exception of wintertime, there aren't
18 many around. So, for me, my understanding of their --
19 everything that they do and say and enjoy on vacation
20 comes into play in what is a tourist-related
21 expenditure and what will entice them to come here.
22 And so for me it's very simple, providing a safe
23 environment with ample resources for them. Things for
24 them to do while they're on vacation, such as going to

1 the Whalehead Club, our historic boat building, other
2 things that we have done. Any of those things can
3 easily affect someone's decision where they're going to
4 go and spend their tourist dollars.

5 Q. Okay. So, the table -- now we can kind of
6 get into some of the specifics here. So the table that
7 I'm showing you, as you've already deciphered, I'm
8 sure, is related to Sheriff and EMS only.

9 A. Uh-huh.

10 Q. So, what -- and again, this would just be a
11 more general question, but it does pertain to Sheriff
12 and EMS. What, in your own words qualifies Sheriff and
13 EMS expenditures from occupancy tax proceeds as a
14 tourist-related expenditure? Why would Sheriff and EMS
15 be a tourist-related expenditure?

16 A. I think the better question is why wouldn't
17 it be. I'm certainly not taking my family to Baltimore
18 right now. It's not safe. I'm not taking my family --
19 if I want to go somewhere with my family, so knowing
20 tourists and their mindset, they don't think about
21 that. Right? You're not going to think about that
22 except to the extent of a negative. So you can't prove
23 a negative. But I'm going to go where it is safe. And
24 having adequate fire, police and EMS for them without

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

1 largely the bulk of our tourist economy.

2 Q. Sure.

3 A. Is at our Outer Banks. And, you know, the
4 problem is, you can't, you have to staff for the worst
5 possible occasion. So, you're staffing up, but you
6 can't staff down in order to keep a competent staff.
7 And a big chunk of that is also overtime for our
8 deputies.

9 Q. So, I was looking back at budget
10 presentations at meetings and comments that the
11 manager, both Mr. Scanlon and Mr. Stikeleather have
12 made over the course of the years. I guess Mr.
13 Stikeleather has made -- I don't know if he's made even
14 more than one presentation as a matter of fact.

15 A. Right.

16 Q. But in looking and rehearsing and seeing the
17 minutes, what I keep seeing and what I keep hearing is
18 that, for example, Mr. Scanlon has said before that
19 these costs, the TRE transfers are for additional
20 hirees for the summer season, for additional ambulance
21 units for the season, for example. Mr. Stikeleather
22 has stated when presenting his budgets that these are
23 not EMS year round figures being transferred. These
24 are specific times of increased demand and the same

1 would go for the sheriff.

2 A. Uh-huh.

3 Q. The year prior to -- so I guess, it's
4 actually 2019's budget, Mr. Scanlon states that the
5 addition of these transfers are for the additional cost
6 associated with additional EMS units in the OBX to
7 account for the influx during this summer. And some
8 additional law enforcement is required. So I guess
9 what I'm trying to nail down is what -- is there a
10 specific time of the year that these particular numbers
11 shown in Column 2 -- I totally get what you mean by
12 can't staff down.

13 A. Uh-huh.

14 Q. I'm trying to get to the genesis of this
15 particular number from Column 2.

16 A. That number is derived in large part from the
17 overtime budget. I mean there's a huge amount of money
18 to bring over off-duty deputies and give them overtime.
19 So, that's a big part of it. So the number is somewhat
20 inflated because of that. And the other thing is we
21 have deputies here that we probably wouldn't have. So
22 Corolla and Currituck Outer Banks in general, we have a
23 need for more deputies because of the properties over
24 there. So if it was -- if you took away the beach, and

1 you just had deputies there, so have like a normal
2 neighborhood, we might only need three or four deputies
3 over there to patrol. Given the nature of what it is,
4 we need an increased presence there. And they also
5 have to be there in the off season to protect the
6 property. Our crime rate, theft goes up during the
7 winter and the shoulder season. When construction is
8 going on, they can see which houses are empty,
9 etcetera, etcetera, etcetera. So we end up, we need
10 deputies there to protect those assets of those
11 individuals who have invested in Currituck County.

12 Q. All right. And let's, we can look at 2000,
13 fiscal year '19 for example.

14 A. Okay.

15 Q. And we've got 1.2 -- and this is sheriff I'm
16 referring to. We've got 1.26 million coming from OT
17 into the general fund.

18 A. Uh-huh.

19 Q. And then the total cost of services for the
20 whole year for the sheriff's department were 7.2
21 million.

22 A. Yep. Uh-huh.

23 Q. So that 1.2 million, was that, first off, was
24 it -- was the transfer based in staffing costs or total

1 service costs for just Currituck Outer Banks? Was
2 there a mainland tint to it as well? In other words --
3 and was a time -- was there a time period put on it?
4 For example, the tourist season?

5 A. Uh-huh.

6 Q. The summer season? So what was the basis for
7 the number, at least in your understanding?

8 A. Well, we didn't, we don't get into the line
9 by line items in the budget. You can. They give us
10 that. So you can go through if you care to. Most of
11 us probably don't delve in that deep. So I can't
12 answer whether or not a portion of that money went to
13 deputies on the mainland that may do service over here.
14 It wouldn't surprise me. We do several events every
15 year on the mainland that are tourist-related
16 activities. So they need to be staffed. And so it
17 would make sense that partial, part of that money could
18 be spent over here as well.

19 Q. Do you think, would that have coincided with
20 what you voted on? In other words, you know, you voted
21 on X amount of dollars and approved X amount of dollars
22 to be transferred from OT to the general fund for
23 Sheriff and for EMS. If some of those, if some of
24 those figures were used to fund mainland costs, would

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 pertains to them.

2 Q. Okay. All right. And were there any -- was
3 that just a verbal discussion, perhaps, or were there
4 any documents that --

5 A. He put the stuff on the white board and went
6 over that. So, no, there was discussion about it.

7 Q. That as in the statute; correct?

8 A. Yes; the statute. I'm sorry. Yes.

9 Q. It's not a big deal at all. I just wanted to
10 make sure. Okay. All right. And you guys, I guess,
11 at that point would walk through the statute,
12 understand what percentage must go here and what
13 percentage must go there.

14 A. Yes.

15 Q. But more importantly, focus on what, in your
16 collective opinions, were valid expenditures that
17 attracted tourists and increased the use of lodging
18 facilities by attracting those tourists and business
19 travelers?

20 A. Yes.

21 Q. And do you know if there is anything that
22 would not be public record, for example? I doubt
23 anything.

24 A. No.

1 Q. It's not a lot. And we both know that, but
2 in document form that you guys have ever been provided
3 concerning occupancy tax, transfers and the validity of
4 those transfers?

5 A. No. Everything has been -- because we need a
6 majority, we've always done everything in open meetings
7 and obviously work sessions and the like.

8 Q. Okay. All right. Have you guys ever as a
9 board, any board you've served on, were you given or
10 shown any substantial or, I will say quantitative
11 evidence that showed the need for services during the
12 peak season? Okay; I'm calling it the peak. So let's
13 limit it to the June, July and August.

14 A. Okay.

15 Q. All right. On Currituck Outer Banks and
16 mainland Currituck. Have you ever seen a comparison of
17 the number of calls coming from Currituck Outer Banks
18 and coming from the mainland during August, or June,
19 July and August? Have you seen any analysis on that?

20 A. The last 18 months or so, the new sheriff and
21 the new deputy sheriff have shared information with us,
22 the kind of the calls they're getting, how many things
23 they've responded to, that sort of thing. Most of it
24 has gone -- most of that has been reporting on the

1 Outer Banks portion of it. And in and around COVID
2 when we were shut down, people they intercepted trying
3 to sneak in and stuff like that.

4 Q. Right.

5 A. So, yeah. We get a little bit out of the
6 sheriff's department, what they do and don't do. The
7 mainland not so much. I just hear from fire and EMS
8 staff over here, the types of calls. And occasionally,
9 we'll hear from Chief Melton, our Chief of Fire and
10 EMS, calls that they have responded to. We get letters
11 back from tourists pretty routinely that talk about and
12 thank us that we had that level of service and
13 professionalism that was there, the lives we saved.

14 Q. Okay. And I guess the reason I was asking is
15 because the transfers that were approved were approved,
16 if you will, based on this substantial increase and the
17 cost of services perhaps from a seasonal perspective.
18 And I know there's a different view on the season, if
19 you will. But I was wondering if before making that
20 vote you guys ever actually saw any data that supported
21 the fact that there was actually an increased need for
22 the services. Granted, there's more people; we know
23 that.

24 A. Right.

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

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 call volumes, for example, in June through August are,
2 there is more on average. There's more calls coming in
3 from Currituck Outer Banks --

4 A. Absolutely.

5 Q. -- than there are on the mainland.

6 A. Uh-huh.

7 Q. Okay. And you talked about the fact that
8 general tax, the property tax could pay for these
9 services, but you'd have to raise the general tax rate?

10 A. Uh-huh.

11 Q. What effect on the property tax rate would be
12 had, if you're aware? What kind of increase would we
13 be looking at if these expenditures from OT were cut
14 out entirely for Sheriff and EMS?

15 A. It depends on how you look at it. So if we
16 did a tax district on Corolla, probably about 12 or 13
17 cent. And if we just canvas the whole county, probably
18 half that. Because, again, they count for about 52
19 percent of the tax base.

20 Q. Okay. I see what you're saying there. All
21 right. And have you had any discussions at length with
22 the county manager or anybody within the finance
23 department about the specific increase that would occur
24 in the event that those services were no longer funded

1 Q. Do you believe it would be a lawful
2 expenditure from OT, from occupancy tax if it did fund
3 services on, EMS services on the mainland?

4 A. To some degree, yes.

5 Q. Can you -- just because you said some degree,
6 could you explain?

7 A. Well, we have events that go on here that are
8 tourist-related activities. So, we have the ball
9 fields over here. We have scheduled ball games every
10 weekend. It's not inconceivable that a player can get
11 injured, and therefore, need EMS services. And they
12 are tourists in our county. And we do Bulls and BBQ
13 down on the mainland, and they definitely get hurt. So
14 it's not inconceivable that they would need -- and they
15 are tourists as well, and they bring tourists in.

16 Q. But if there was any precise number, like if
17 mainland --

18 A. I don't think -- there's never been a precise
19 number that I can recall that's been presented to me
20 that would have been applied to the mainland.

21 Q. Understood; understood. In March of 2018
22 there was a transfer from occupancy tax, and it was for
23 a tourist-related expenditure. The amount was
24 \$485,863, and the purpose of that actually was to fund

1 the Corolla fire tax district start up.

2 A. Uh-huh.

3 Q. Do you recall that?

4 A. I do.

5 Q. Does that sound about right?

6 A. Sounds about right; yeah.

7 Q. Now, what's the rationale behind how the
8 start-up costs were appropriately funded by OT? So, I
9 guess I keep going back to what's the rationale of
10 making a Corolla fire tax district a tourist-related
11 expenditure that's going to attract tourists and
12 increase the use of lodging facilities?

13 A. I'll go back to my original, you can't prove
14 a negative. So, I believe that, and it's in my opinion
15 that it absolutely is crucial to the tourist experience
16 here in attracting them through a positive tourist
17 experience. And -- and re-attracting them. So once
18 they come here, thank God for Twitter and Facebook and
19 all those other things. They talk positively about
20 their experience here, and that encourages more
21 tourism.

22 Q. All right. And so, same ordeal occurred in
23 fiscal year of '19. In that particular case there was
24 a \$1.55 million transfer from occupancy tax fund that

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 A. Through the county attorney and the county
2 manager.

3 Q. Anything beyond what's occurred at a public
4 meeting or what you testified to earlier regarding your
5 meeting, I believe it was in Mr. Scanlon's office with
6 Kitty and Bobby Hanig. Anything beyond that that you
7 can recall? Outside of what would have happened at a
8 public forum.

9 A. No. Maybe conversations over time here and
10 there with the county manager about stuff, but nothing
11 stands out at least.

12 Q. And do you recall any substantive
13 conversations regarding the legitimacy of occupancy tax
14 expenditures with your fellow board members, between
15 you and your fellow board members outside of a public
16 setting?

17 A. No.

18 Q. Or outside of an open meeting?

19 A. No. They've been -- everything has been in
20 the public view.

21 Q. I'll going to ask Chris' favorite question.

22 A. Okay.

23 Q. If you go to Plaintiff's Exhibit Number [3] -

24 -

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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GERALD COSTANZO, BRYAN DAGGETT,)
JOHN DUMBLETON, PHILIP)
SCHNEIDER, CLARA SCHNEIDER,)
MARGARET BINNS, MOHAN NADKARNI,)
GREGORY A. WANDER, RONALD)
BUCHANON, 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.)
BRIGNATI, ROBERT RICHARDSON,)
MARYANN DUMBLETON, and COROLLA)
CIVIC ASSOCIATION,)
Plaintiffs)

vs.)

CURRITUCK COUNTY, NORTH)
CAROLINA; CURRITUCK COUNTY)
TOURISM DEVELOPMENT AUTHORITY;)
CURRITUCK COUNTY BOARD OF)
COMMISSIONERS; and DANIEL F.)
SCANLON II; CURRITUCK COUNTY)
MANAGER and CURRITUCK COUNTY)
BUDGET OFFICER,)
Defendants)

CURRITUCK COUNTY

19 CVS 171

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TRANSCRIPT - MOTION FOR SUMMARY JUDGMENT
Monday, December 6, 2021

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December 6, 2021 Civil Session
Honorable Wayland J. Sermons, Jr., Judge Presiding
Heard in Pasquotank County

* * * * *

1 expenditure means that as long as they can find a rational
2 nexus to a tourist or to tourism in general, then by default
3 it's a legal expenditure. Well, our position is that, no,
4 no, the General Assembly was far more strict. They did not
5 give that type of discretion to the County. Why? Because
6 there is a definition to a tourism-related expenditure,
7 which, again, is to increase the use of these facilities
8 that are generating this tax by making the area more
9 attractive to the tourists.

10 So back to the idea of them protecting properties
11 in the off-season -- the tourists don't know that. That's
12 not an attraction to a tourist. You can't say that somebody
13 in New Jersey has looked up the fact that Currituck
14 polices -- all they care about is whether or not their
15 property is going to be available come June of next year.
16 So, again, protecting the attraction is what the County's
17 argument is going to be, but it's not about protecting
18 the attraction. It's about attracting the tourists. That's
19 what it's all about.

20 And it should be noted, Your Honor, that we're
21 not -- and we have excluded from our definition of general
22 public safety services, we've excluded lifeguards and ocean
23 rescue. Now, the reason, though, that we're doing that for
24 the record is that, first off, these are actually seasonal
25 employees. They are only contracted throughout certain