No. 22-699 First Judicial District

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. 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.	)	**From Currituck County** **No. 19 CVS 171**

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DEFENDANT-APPELLEES' REPLY TO AMICI CURIAE BRIEF

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DEFENDANT-APPELLEES' REPLY TO AMICI CURIAE BRIEF

* *

The Defendant-Appellees, by and through counsel, and, pursuant to Rule 28(i)(6) of the North Carolina Rules of Appellate Procedure, reply to the brief of Amici Curiae as follows:

ARGUMENT

The Defendant-Appellees respect the Amici Curiae parties, appreciate and value the role they play in supporting tourism in North Carolina, and agree that this case is one of a kind and should be judged on its own merits. However, the Defendant-Appellees respectfully submit that the Amici are wrong in asserting that Currituck County spends occupancy-tax revenue improperly or beyond the scope of the authority provided in the local statute at issue.

The Defendant-Appellees address the following points made in the Amici Curiae brief below:

1. The Occupancy Tax Guidelines Submitted by *Amici Curiae* Are Not the Law and Do Not Supersede or Explain the Local Statute at Issue.

In support of their argument, the Amici Curiae submitted "Occupancy Tax Guidelines," which they contend govern occupancy-tax statutes in North Carolina. (Amici Brf., p. 7.) However, guidelines are not the law; only the statute in question is the law and only the statute matters in this case.

The Guidelines are not administrative regulations issued by any state agency; they are a product of the tourism and travel industry, which offers them to the Legislature as a framework for how it wants the Legislature to enact local occupancy-tax statutes. But even if they were administrative regulations, they could not supersede the statute. See, e.g., Dalton v. United States, 816 F.2d 971, 974 (1987)

(stating that administrative regulations cannot "repeal, modify, or nullify a statute," and citing United States v. Doe, 701 F.2d 819, 823 (9th Cir. 1983) ("Where an administrative regulation conflicts with a statute, the statute controls."), and Bates v. United States, 581 F.2d 575, 579 (6th Cir. 1978) ("Nor may a regulation be used to alter or amend a statute by prescribing requirements which are inconsistent with its language.")); see also Aldana v. Holder, 499 F. App'x 322, *1 (4th Cir. 2012) (stating that "the plain meaning of the statute controls if the provision in question is unambiguous," not an agency's interpretation of an administrative regulation); Manhattan Gen. Equip. Co. v. Comm'r of Int. Rev., 297 U.S. 129, 135 (1936) (stating that a regulation "does not, and could not, alter the statute.") The Occupancy Tax Guidelines cannot supersede or change the Currituck County occupancy-tax statute. Moreover, there is no evidence that these Guidelines established the Legislature's intent in amending the Currituck County occupancy-tax statute in 2004. Thus, the statute controls and these Guidelines are irrelevant.

The Amici state that, according to the Guidelines, "tourism-related expenditures" are defined as those "that, in the judgment of the Tourism Development Authority, are designed to increase the use of lodging facilities, meeting facilities, and convention facilities in a city/county by attracting tourists or business travelers to the city/county." (Amici Brief, pp. 9-10.) However, the statue at issue in this case does not use the term "Tourism Development Authority." Rather, it uses the term "Currituck County Board of Commissioners." See N.C. Sess. Law 2004-95, H.B. 1721, § 2(e)(4). Whatever the presumed intent of the Legislature in using the

Board of Commissioners instead of the Tourism Development Authority, this is a significant deviation from the model language in the Guidelines because, instead of giving discretionary authority to an appointed tourism board, the Legislature gave such authority to the elected political board of the county. Perhaps this is because the Currituck County Tourism Development Authority board also sits as the Currituck County Board of Commissioners (Amici Brf., p. 11), but in any case the use of this term shows that Currituck County's statute is different from the model statute or other local occupancy-tax statutes. As Amici note, the 2004 amendment "brought [Currituck County] closer in line to the Guidelines, but only to a degree." (Amici Brf., p. 10.) That was the Legislature's choice. It treated Currituck County differently, and so this Court must analyze this case differently.

The Currituck County statute is also different in other ways. Amici note that the statute allows the county to spend two-thirds of its funds on "tourism-related expenditures," with the remaining one-third to promote travel and tourism, and that "[t]his is the opposite of the split which the Guidelines promote." (Amici Brf., p. 11.) This further supports the idea that the Guidelines are not appropriate for analyzing the Currituck statute, but rather that the statute stands on its own and should be read accordingly.

The Amici concede that the Currituck statute "also varies from the Guidelines in that one-half of its Tourism Development Authority ('TDA') does not consist of members currently active in the promotion of travel and tourism in the district, nor is one-third . . . affiliated with organizations that collect occupancy taxes (e.g.,

hotels)." (Amici Brf., p. 11.) As the Amici correctly note, the Currituck TDA consists of the entire membership of the Board of Commissioners "as voting members," with one non-voting member. One might presume that, by crafting the statute in this way, the Legislature wanted a broader, representative body in the county making decisions about how to spend occupancy-tax funds rather than a board with a more narrow focus, such as one made up only of non-elected persons from the travel and tourism industry. As the Amici admit, "This setup appears to be unique to Currituck County." If this is true, this further undermines any assertion that the Guidelines are relevant in determining the intent of the Legislature in enacting this statute and further supports the idea that Currituck's statute should not be compared to other statutes.

Thus, for example, the Currituck County Board of Commissioners, whose members are elected from throughout the county, have an interest in using occupancy-tax revenues to build ball fields on the mainland to attract weekend tournaments. The mainland is not the focus of travel and tourism in the same way that Corolla and the Outer Banks beaches are. But people who come to Currituck County for a weekend baseball or softball tournament are still tourists, even if they do not go to the beaches on Corolla. They would not come if the ball fields were not there, but the Board of Commissioners used occupancy-tax revenue to build the ball fields to attract them. (R. p. 194.) The board had the authority to do so under Section 2(e)(4) of the statute, which allows the use of occupancy-tax revenue for "recreational facilities" that attract tourists. This spending decision is the result of the discretion the Legislature granted the Board of Commissioners.

A travel and tourism representative who is focused on filling hotel rooms and rental homes at the beaches may not be focused or even consider trying to attract visitors to the mainland, including those who come for baseball or softball tournaments, but the county commissioners are responsible for the entire county, not just the beach destinations. Perhaps the Legislature was aware of this when it drafted the statute, but, if it was not, it certainly should be now and that is as good a reason as any as to why it has not changed the law – a remedy that the travel and tourism industry is free to seek if it so chooses.

2. Currituck County Has Been Transparent in How It Spends Occupancy-Tax Revenues.

Amici claim that the county hides how it spends occupancy-tax funds, asserting that some funds are not "traceable." (Amici Brf., p. 14.) But everything the county does with spending is done in full view of the public. All budget decisions of the board and TDA are made in public meetings and after public budget workshops in which residents can voice their opinions. (R. p. 195; Mary "Kitty" Etheridge Dep. p. 37.) All county budgets are open to public viewing and placed on the county's website. (R. p. 195; Robert (Bob) White Dep. p. 49.)

Amici claim that the county has no authority to "deposit[] occupancy tax revenue into its general fund for subsequent spending," but cite no law that prohibits this, including the statute, which does not prohibit this. If the TDA Board and the Board of Commissioners are one and the same, and Section 2(e) of the statute gives the Board the authority to spend the money ("Currituck County shall use"), it naturally follows that the county would place these revenues in its general fund so

the county spend the funds. There is no evidence that the county has separate bank accounts for different departments or spending concerns rather than one general fund from which all revenues are spent.

3. Tourism in Currituck County Is Thriving.

Amici assert that the use of occupancy taxes "in addition to the existing sales tax already imposed on lodging services" results in harm to tourism unless the occupancy-tax revenue is "invested to make the area more attractive to tourists and business travelers." (Amici Brf., p. 15.) If this is true in other tourist destinations, it does not appear to be true in Currituck County, which has seen an increase in visitors every year since 2006, except for 2009, when there was a recession. (R. p. 194.)

Or perhaps Currituck County's decision to spend occupancy-tax funds on public safety services, such as police, fire, EMS, and beach lifeguards, makes the county more attractive to tourists and other visitors, and that is why they keep returning to Currituck County. Thus, the county is investing occupancy-tax revenues in a way that helps to bring tourists to the county.

Either way, Amici's argument on this point is unavailing.

4. The Statute Was Changed in 2004 to Give the County Commissioners Discretion on How to Spend Occupancy-Tax Revenue.

Amici claim that the parties disagree about whether the purpose of the statute was changed when it was amended in 2004, but this is not so. (Amici Brf., pp. 15, 18.) The statute was changed, as its title indicates, but it was changed in several ways, including to give the county commissioners broad authority to determine how

to spend occupancy-tax revenue. Hence, the title of the statute, "To Change the Purposes for Which the Tax May Be Used," is accurate.

The purposes under the 2004 law changed to encompass what the board judged to be appropriate, whereas previously the purposes were limited to spending on the list of items enumerated in the statute. Thus, Amici's claim that "[t]he prior statute" was "made to be in closer conformity to the Guidelines" is incorrect. In fact, as Amici point out elsewhere in their brief, the 2004 statute "varies from the Guidelines" in significant respects. (Amici Brf., p. 11.) The Amici's arguments are thus not only logically inconsistent but flawed.

5. Currituck County's Statute Is Unique and Should Not Be Compared to Other Local Occupancy-Tax Statutes.

Amici claim that they "are not aware of any other local government that has used occupancy tax proceeds in this manner when subject to a statute using similar language." (Amici Brf., p. 16.) But it is not a regional or statewide statute; it is a local statute, particular to Currituck County. As Amici concede, there is no other statute like Currituck's. Thus, the statute stands on its own and must be interpreted that way, and it cannot be compared to other statutes.

A local law is by definition limited to a specific sub-jurisdiction. "Local means belonging or confined to a particular place or locality. A local law is one whose operation is intended to be restricted within certain limits less than the limits of the legislative jurisdiction. . . . It is local because it is operative in a limited jurisdiction only." Fletcher v. Collins, 218 N.C. 1, 9 S.E.2d 606, 610-11 (1940) (Barnhill, J., dissenting) (citation omitted) (emphasis removed). The statute at issue here is

unique to Currituck County, and its plain language controls. That language gives the commissioners the authority to use their judgment to determine how to spend occupancy-tax revenue to attract tourists. Whether other counties or towns have such discretion because of the language in their statutes is irrelevant, because those statutes do not control what the Currituck statute allows.

6. Currituck County Is Not Violating the Intent the Legislature Had When It Enacted This Specific Statute for the County.

Amici claim that the county's spending decision are "completely contrary to the background and history" cited in their brief, but the items cited in their brief are not relevant to interpreting the unique statute that applies to Currituck County. No evidence in the record supports Amici's assertions about the Legislature's intent in passing the law.

The Legislature obviously believed that the Currituck County Board of Commissioners was in the best position to determine what uses of occupancy-tax revenue would increase tourism in the county, and so it gave the board the authority to use its "judgment." Otherwise, if it did not believe this, it would not have used such language and the board would not have the authority to use its judgment. But the Legislature did give the Board of Commissioners that authority, and the board has exercised that authority and used its considered judgment in its spending decisions. This Court should not disturb the decision of the Legislature to let the Board of Commissioners do so, nor substitute its judgment for the board's. The Court should apply the statute as it is written, which is all the board has done.

CONCLUSION

For the reasons and authorities cited herein, the Defendant-Appellees respectfully request that the trial court's order granting their motion for summary judgment be affirmed.

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 less than 3,750 words, as required by Rule 28(j) of the North Carolina Rules of Appellate Procedure.

/s/ Christopher J. Geis
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Attorney for Defendants-Appellees

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 **DEFENDANT-APPELLEES' REPLY TO AMICI CURIAE BRIEF** 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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APPENDIX[1]

Mary "Kitty" Etheridge Deposition, page 37 ..... App. 23

Robert (Bob) White Deposition, page 49 ..... App. 106

[1] Appendix pages are reproduced from the Appendix to Defendant-Appellees' Brief.

anybody?

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

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

A. They were always in open meetings.

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

A. Something we discuss over lunch, no.

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

A. Okay.

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

A. Yes, sir.

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

A. Through the county attorney and the county manager.

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

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

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

A. No.

Q. Or outside of an open meeting?

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

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

A. Okay.

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