No. COA 22-699 FIRST JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

From Currituck County

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Other Authorities:

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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The parties' contrasting briefs present the Court with two incompatible options. Either, as Plaintiffs say, the 2004 statutory amendment provides a workable standard to review the County's expenditure of funds derived from its occupancy tax or, as the County says, the County's power to spend those funds is virtually limitless.

The County has created tests for those expenditures that it cannot fail unless it wants to, as shown in its brief to this Court. In its brief, the County acknowledges that some expenditures, "absent other facts," would not be tourism related. Specifically, the County states that using those funds for school textbooks or for social workers' salaries would not be permissible "tourism related" expenditures. However, as detailed below, the tests that the county uses (or purports to use) can readily justify those impermissible expenditures.

The tests that the County applies when determining what expenditures are "tourism related," however, do not reflect what the General Assembly intended in 2004, nor are these adaptable tests consistent with what the 2004 amendment says. The canons of statutory construction uniformly support Plaintiffs' reading of the local act and condemn the County's.

This dispute over the interpretation of a statute falls within the judiciary's expertise. Whenever local governments have stepped beyond their delegated powers, our courts have not hesitated to intervene. Were it otherwise,

counties could nullify State law, even though the counties themselves are merely creations of the State. Nothing supports that outcome.

ARGUMENT

I. The County Wants to Grant Itself Unlimited Discretion.

The County's brief offers no meaningful limiting principle. Instead, the County's brief lists three different (and non-textual) tests that it uses when determining whether an expenditure of occupancy tax funds is "tourism related." In the County's interpretation of the 2004 act, these tests allow the County to spend occupancy tax dollars however it sees fit, as long as the County purports to find that, in its judgment, there is some relationship, however tenuous, with tourism.

First, the County suggests that it relies on a test in which it looks for "some correlation" between county expenditures on a facility or service and tourist use of that facility or service. (Resp. Br. at 26.) One commissioner testified, "I don't think [the 2004 amendment] 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. 14 (emphasis added).)

This standard is nowhere to be found in the 2004 amendment. Instead, the statutory standard asks whether an expenditure will increase the use of lodgings and other facilities by attracting tourists to the county. 2004 N.C. Sess. Laws 95, § 2(e)(4). By merely asking whether an expenditure "correlates"

(whether negatively or positively) with tourism, the commissioners fail to focus on the text and purpose of the amendment—using the tax funds to attract tourists and enhance tourism.

Second, the County posits a test based upon tourist use of county facilities and services. This approach, also a stranger to the statute, is based on the theory that expenditures of the occupancy tax funds are justified if tourists use the facilities and services. This test justifies spending occupancy tax dollars to *offset* the impact of tourists. The County's brief phrases this theory in the negative, stating that it could not spend occupancy tax proceeds on services if there is "no evidence" that tourists increase the demand for such services. (Resp. Br. at 19.) But the County's actual use of this "tourist-impact" theory is called into question by the record. On one hand, the County claims that this standard is the one that the commissioners actually apply. (Resp. Br. at 5 ("The commissioners have judged these expenditures as tourism-related because they are caused by the influx of tourists.") But on the other hand, the Commissioners admit that they do not collect "evidence" to determine what attracts tourists. (White Dep. 18:10-24.) As one commissioner testified, "evidentiary" is "too strong a word" for the County's speculations. (White Dep. 18:20-21.[1])

[1] There is even evidence that the commissioners do not deliberate about occupancy tax spending. (Resp. Br. at 25-26.) As Commissioner White testified, the commissioners no longer discuss whether expenditures can be made for general public services "because we've approved it again and again." (White

Moreover, this test puts the cart before the horse, focusing on existing use by tourists already in the County rather than on the attraction of tourists who are not yet using County facilities and services.

Third, the County claims to use a "reasonableness" standard, (*e.g.*, Resp. Br. at 16-21), which is also not found in the statute. Whether a commissioner thinks an expenditure is reasonable is a wholly different question from whether the expenditure is designed to attract tourists. Nor does this non-textual standard assist a court in deciding whether the statutory standard is met.

In fact, the actual standard applied by the County is something else. Instead of asking themselves whether an expenditure will attract tourists and enhance tourism, the Commissioners appear to ask whether tourists will keep visiting the County if a general public service is defunded. (*E.g.*, Resp. Br. at 30.) But this elastic standard is virtually limitless.

The County denies the flexibility of whichever standard it chooses to use by offering counterexamples, but these examples demonstrate the weakness of the County's position. For instance, the County asserts that it could not spend

---

Dep. 27:23-24; *accord* White Dep. at 26:20-27:1 (unable to recall any deliberation on something "questionable" within the past three or four years); Jarvis Dep. 42:9-17 (unable to recall a single time the commissioners deliberated whether an expenditure met the statutory definition of "tourism-related expenditures").)

occupancy tax dollars on social worker salaries. (Resp. Br. at 19.) Yet the way the County justifies spending on EMS services for the mainland can just as easily justify social worker salaries:

Social Worker Salaries	**EMS Services on Mainland**
If the County fails to pay adequate social worker salaries,	If the County stops funding EMS services on the mainland,
then the homeless population will increase.	then some tourists will go without needed services.
If the homeless population increases,	If some tourists go without needed EMS services,
then tourists will be less likely to visit the County again.	then tourists may be less likely to visit the County again.

The County's argument does not permit a principled distinction between the two government services.

This attenuated reasoning can justify almost anything. Providing school textbooks, the County's other negative example, (Resp. Br. at 6), is vulnerable to the same reasoning: if the County stops buying school textbooks, residents will be less educated, causing a labor shortage in tourist-focused retailers, causing the tourists not to return. The logic is just as stretchy under the "tourist impact" reasoning: tourists increase the demand for retail stores, which increases the demand for educated residents to manage and operate the stores, which increases the demand for adequate education, which increases the

demand for textbooks. No limiting principle emerges from the County's counterexamples.[2]

The County's approach is wholly inconsistent with the statute's intent. Although most county expenditures have nothing to do with tourism and should not be funded with occupancy tax dollars, s*ee* N.C. Gen. Stat. § 153A-149(c), with a little imagination all sorts of projects can be labeled "tourism-related," thereby unlocking occupancy tax dollars. For instance, tourists do not want to see bodies piled up, so occupancy taxes should pay for cemeteries. *Id.* § 153A-149(c)(8). Unhealthy local waitstaff cannot serve visiting tourists, so occupancy taxes should help build a new local health clinic. *Id.* § 153A-149(c)(13), (15). Tourists dislike rolling blackouts, so the County can use occupancy tax dollars on a windfarm. *Id.* § 153A-149(c)(10c).

While the examples above may seem extreme or even silly, reality outstrips imagination. In a near-perfect *reductio ad absurdum*, the County even approved using occupancy tax dollars to defend against the lawsuit, on the grounds that doing so would allow the commissioners "to keep the money we use to attract tourists." (White Dep. 51:11-12.)

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[2] The County even qualifies its counterexamples by saying that occupancy tax dollars could not be spent on these things, "absent other facts not present here." (Resp. Br. at 21-22.) The County is mum about what those "other facts" might be.

In addition to offering its own expansive standards, the County also attacks the viability of Plaintiffs' standard.[3] Plaintiffs have proposed that, if residents would reasonably expect a service to be provided, then that service cannot be funded by occupancy taxes because that service is not designed to attract tourists, just as the presence of such a service in a non-tourist town would not attract tourists. (Opening Br. at 24-25.) The County argues that this standard would make an "absurd" distinction between lifeguards and EMS medics. (Resp. Br. at 15.) Yet every North Carolina resident expects his or her county—tourist destination or not—to provide EMS services. By contrast, lifeguard services do attract tourists. A drive down any coastline reveals hotels advertising lifeguards on duty. Hotels know that tourists with young families will be attracted by this service.[4]

The same is true for beaches. Tourists with young families will choose safety and patronize beaches that have lifeguards *because of* the lifeguards.

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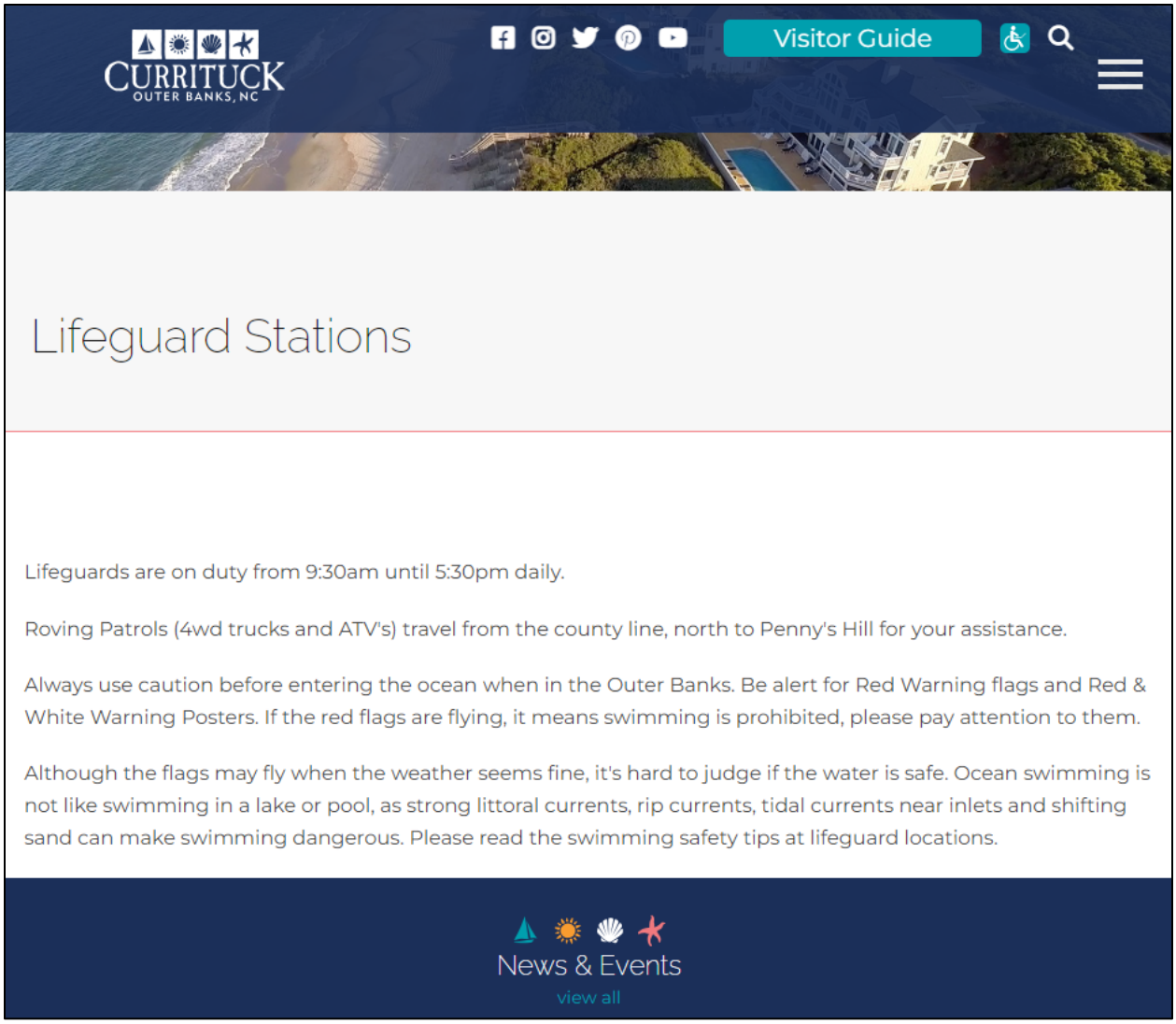
[3] The County attacks a strawman by arguing that the County should be able to spend occupancy-tax dollars to develop tourism outside Corolla, on the mainland. (Resp. Br. at 28-29.) Plaintiffs have not argued otherwise to this Court. Whatever their wisdom, such expenditures are designed to attract tourists.

[4] And, of course, no hotels are advertising or providing EMS services.

The County recognizes that in its tourist-facing website, VisitCurrituck.com, which specifically advertises lifeguards to tourists:



Currituck County, Lifeguard Stations, https://www.visitcurrituck.com/visitor-info/lifeguard-stations/ (last accessed Jan. 30, 2023) [App. 1-2]. There is no mention of EMS services on the website, no doubt because the provision of EMS services is routine in every county, tourist destination or not.

Ultimately, the parties have provided the Court with two interpretations of the statute. Plaintiffs' interpretation allows occupancy tax-based spending in ways that attract tourists and enhance tourism. The County's option allows such spending on just about anything. Only Plaintiffs' interpretation is faithful to the 2004 amendment.

II. The County's Arguments Conflict with the Canons.

In its brief, the County misapplies one canon of statutory construction and makes arguments that violate at least two others.

First, the County contends that its original 1987 act, which authorized the levying of occupancy tax, should be interpreted *in pari materia* with the 2004 amendment. (Resp. Br. at 12-13.) However, that canon does not apply to a statutory amendment. An amended version of a statute necessarily speaks to "the same matter or subject" as a prior version. *State v. Mayo*, 256 N.C. App. 298, 301, 807 S.E.2d 654, 657 (2017). The purpose of comparing two versions of the same statute is not to "harmonize[]" the old version of the law with the amended version, *id.*, but to discover what is "new" about the amendment.[5] For that, we turn to a different canon, the reenactment canon. According to

[5] By contrast, the point of comparing related statutes *in pari materia* is to harmonize different statutory provisions that both fully apply at the same time. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012). By definition, when a statute is amended, the old and new versions do not apply simultaneously, so there is no need to harmonize them.

the reenactment canon, a significant change in the language of a statute is presumed to entail a change in meaning. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256-60 (2012). That canon was explored in Plaintiffs' opening brief, (Opening Br. at 15-17, 19-20), but unaddressed in the County's response.

Even so, the *in pari materia* (or "related-statutes") canon has a role here. Two *different* statutes at play in this case are related to the same subject matter and should be harmonized: Dare County's local statute and Currituck County's local statute. Our Supreme Court has approved of comparing and contrasting local acts for different counties to determine meaning. *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 143, 731 S.E.2d 800, 803 (2012).

In *Lanvale*, dealing with impact fees, the Court considered whether the General Assembly had given Cabarrus County the power to assess school impact fees against developers for the purpose of building schools. *Id.* at 143, 731 S.E.2d at 803. The Court explained that, while the General Assembly had enacted local acts authorizing two other counties to assess school impact fees, it had not approved such a local act for Cabarrus County. *Id.* at 156, 731 S.E.2d at 810-11. Accordingly, if Cabarrus County also wanted to assess school impact fees, "specific enabling legislation" was required. *Id.* at 156, 731 S.E.2d at 811.

Such is the case here. The General Assembly has expressly authorized Dare County to spend occupancy tax dollars to offset the impact of tourism. 1991 N.C. Sess. Laws 177, § 7(2); (Opening Br. at 25-27). As in *Lanvale*, "[t]his language conclusively demonstrates that the General Assembly knows how to convey upon counties specific authority" to spend occupancy tax dollars to offset the impact of tourism. *Lanvale Properties*, 366 N.C. at 164, 731 S.E.2d at 815-16. No similar language to allow such spending is found in Currituck's statute.

The *Lanvale* analogy runs even deeper. The Supreme Court also relied on the fact that counties had been unsuccessfully lobbying the General Assembly for legislation to enable them to assess school impact fees. *Id.* at 156, 31 S.E.2d at 811 ("bolster[ing]" its holding with evidence that county had "sought—and was denied—such authority from the General Assembly on three occasions").

Currituck County finds itself stranded in that same position. The County sought—and (unlike Dare County) was denied—authority to spend occupancy tax dollars on general public services that would offset the impact of tourism. H. 1102, 2007-2008 Sess. (N.C. 2007). In a footnote, the County tries to spin the failed lobbying effort, saying that it only wanted the general public services language "to remove any doubt" about its spending authority. (Resp. Br. at 18 n.2.) This interpretation is contradicted by the County's own

testimony. The County's witnesses—both a commissioner and finance director from the time of the failed lobbying[6]—testified that the proposed bill would have "wipe[d] out everything" by letting the County spend 75% of its occupancy tax revenue on "anything and everything." (Hill Dep. 35:9; Owen Etheridge Dep. 55:20.) The unsuccessful attempt was pursued because a majority of the commissioners believed they were forced to spend "too much money" on tourism. (Owen Etheridge Dep. 54:9.)

Next, the County fails to acknowledge the effect that the reenactment canon has on the interpretation of the 1987 act and its 2004 amendment. According to the County, the listing of general public services in the 1987 act provided examples of "tourist related" expenditures that remain appropriate expenditures today, even though deleted in 2004. (Resp. Br. at 13-14.) Although the County acknowledges that the 2004 amendment retained two of the examples from the 1987 act while deleting the general public services examples, it fails to explain either the deletion or the retention. The reenactment canon reveals that the reason for the General Assembly to delete some

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[6] The County tries to create a conflict in the evidence by citing an affidavit of Bob White, who was first elected as a commissioner in 2016. (White Dep. 6:12-22.) The County's failed lobbying effort took place a decade before, in 2007. Commissioner White does not state that he has personal knowledge about the lobbying efforts. Other deponents, who were there at the time, gave contrary testimony. (Owen Etheridge Dep. 6:9-21 (serving as commissioner from 2004 to 2012); Hill Dep. 5:10-15 (serving as finance director from 2001 to present).)

examples, while leaving others, is because the deleted items are no longer appropriate expenditures. The Scalia and Garner treatise, which Plaintiffs cited above and in their opening brief, provides an eerily similar example of the working of the reenactment canon. Scalia & Garner, *supra*, at 256 (revision from statutory remedy of "'attorney's fees and expert-witness fees' to "only 'attorney's fees'" means the revised statute no longer permits award of expert-witness fees); (Opening Br. at 16-17).

Finally, the County's interpretation violates the reenactment and the surplusage[7] canons by arguing that the change from "tour***ist*** related purposes" to "tour***ism***-related expenditures" is inconsequential. Yet, "[u]nder well-settled canons of statutory canons of statutory construction, we must conclude that this change had meaning." *Coastal Conservation Ass'n v. State*, 2022-NCCOA-589, ¶ 38 (published) (quoting *Wells Fargo Bank, N.A., v. Am. Nat'l Bank and Tr. Co.*, 250 N.C. App. 280, 281, 791 S.E.2d 906, 908 (2016)). The County's reading implies the legislature acted without reason, rendering the change meaningless surplusage at best and arbitrary at worst. The more convincing interpretation, however, is that the General Assembly intended for Currituck County to cease using occupancy tax dollars to offset the costs

[7] "[W]e are guided in our decision by the canon of statutory construction that a statute may not be interpreted in a manner which would render any of its words superfluous." *State v. Geter*, 2022-NCSC-137, ¶ 10 (cleaned up).

imposed by individual tour***ists***, and instead focus on promoting the general tour***ism*** sector of its economy.

As these points show, only Plaintiffs' interpretation of the 2004 amendment can make sense of the text chosen by the legislature.

III. The Judiciary Is the Proper Check on the County.

Perhaps hoping to escape judicial review, the County argues that Plaintiffs' remedy, because of the County's longstanding violation of the 2004 amendment, now lies with the legislature. (Resp. Br. at 33-34.)

The General Assembly has already written the law and has spoken plainly. The question now is whether the County is violating the law. That question is adjudicative, and the answer lies not with the legislature but the judiciary, which has the duty "to interpret and apply the law as it is written." *See Barrow v. Sargent*, 278 N.C. App. 164, 2021-NCCOA-295, ¶ 17 (explaining that it is the duty "of the Legislature to make the law" and the duty of the judiciary "to interpret and apply the law as it is written" (quoting *State v. Scoggin*, 236 N.C. 19, 23, 72 S.E.2d 54, 57 (1952))).

The County's acquiescence argument also fails. The County contends that the General Assembly has acquiesced in the County's violation of the 2004 act, simply because no one has enforced the act against the County, nor has the County's violation been spotted by the legislature. (Resp. Br. at 33-34.) This argument, like the others, flunks the canons of statutory construction.

Statutes do not lose their vigor, nor are they repealed, "by nonuse or desuetude." Scalia & Garner, *supra*, at 336; *see also City of Durham v. Manson*, 285 N.C. 741, 744, 208 S.E.2d 662, 665 (1974) ("It is well established in North Carolina that a legislative act of local application is repealed only when a subsequent act of general application clearly expresses such an intent."). Indeed, there is no reason to believe the legislature is even aware of the County's illegal expenditures. The General Assembly has every reason and right to assume the County is obeying the amended statute and is not spending occupancy tax dollars on general public services, especially since the County asked for such power in 2007 and the legislature denied it.

Counties are mere instrumentalities of the State. They can exercise a power if, and only if, the State has authorized it. *Stam v. State*, 302 N.C. 357, 359-60, 275 S.E.2d 439, 441 (1981). Yet Currituck County is claiming for itself *carte blanche* to spend occupancy tax dollars on nearly anything, "no matter how tenuous the connection" between the expenditure and tourism. *Lanvale Properties*, 366 N.C. at 157, 731 S.E.2d at 811. Because it is "not persua[sive] that the General Assembly intended to give counties such expansive legislative power," this Court should stop it. *Id.*

CONCLUSION

The judgment below should be reversed and the matter remanded for determination of the proper remedy for the County's statutory violations.

Respectfully submitted this the 30th day of January, 2023.

FOX ROTHSCHILD LLP

Electronically submitted

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Plaintiffs-Appellants certifies that this brief contains less than 3,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 30th day of January, 2023.

/s/ Troy D. Shelton
Troy D. Shelton

CERTIFICATE OF SERVICE

I hereby certify that a copy of this reply brief was electronically filed and served this 30th day of January, 2023, by email, addressed as follows:

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Troy D. Shelton

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Defendants-Appellees.

From Currituck County

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CONTENTS OF APPENDIX

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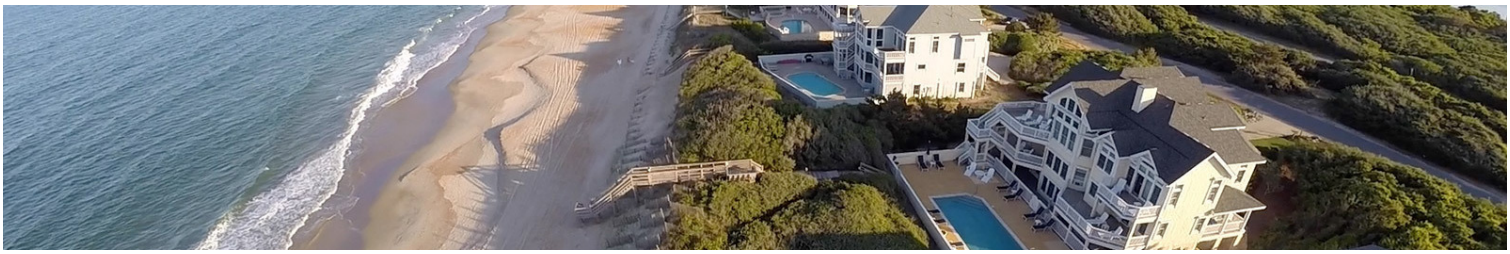
Appendix Pages



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Lifeguards are on duty from 9:30am until 5:30pm daily.

Roving Patrols (4wd trucks and ATV's) travel from the county line, north to Penny's Hill for your assistance.

Always use caution before entering the ocean when in the Outer Banks. Be alert for Red Warning flags and Red & White Warning Posters. If the red flags are flying, it means swimming is prohibited, please pay attention to them.

Although the flags may fly when the weather seems fine, it's hard to judge if the water is safe. Ocean swimming is not like swimming in a lake or pool, as strong littoral currents, rip currents, tidal currents near inlets and shifting sand can make swimming dangerous. Please read the swimming safety tips at lifeguard locations.

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