No. 101P24

No. _____ First Judicial District

SUPREME COURT OF NORTH CAROLINA
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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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PETITION FOR DISCRETIONARY REVIEW BY DEFENDANTS CURRITUCK COUNTY *ET. AL.*

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PETITION FOR DISCRETIONARY REVIEW BY DEFENDANTS CURRITUCK COUNTY *ET. AL.*

* *

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The Petitioners herein, Defendant-Appellants Currituck County and the Currituck County Tourism Development Authority, by and through the undersigned and counsel, and pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and Section 7A-31 of the North Carolina General Statutes, respectfully petition this Honorable Court to certify for discretionary review the opinion issued by the North Carolina Court of Appeals on March 19, 2024, a copy of which is attached to this petition as Exhibit "A."

This Court should certify this matter for review because the subject matter of the appeal involves two significant issues – one of significant public interest in the State and one that is significant to the jurisprudence of this State.

First, it is of significant public interest whether local government officials have the discretion to determine that spending on public safety services, such as law enforcement, is essential to attracting tourists to their jurisdictions. See Chris Mclaughlin, "Occupancy Taxes and 'Tourism-Related Expenditures,' " COATES CANONS: NC LOCAL GOVERNMENT LAW, UNC School of Government, April 4, 2024 (found at: https://canons.sog.unc.edu/2024/04/occupancy-taxes-and-tourism-related-expenditures/) (attached hereto as Exhibit "B").

Second, it is significant to the jurisprudence of this State whether courts must apply the well-established standard for determining whether public officials have abused their discretion in spending tax revenues under a statute that gives them broad authority to do so.

I. PROCEDURAL HISTORY

The plaintiffs filed this lawsuit on May 7, 2019, and sought declaratory and injunctive relief on 13 claims in connection with how Currituck County and its Tourism Development Authority spend occupancy-tax revenue collected pursuant to a local statute enacted by the Legislature for Currituck County. (R. pp. 3-78.)

On July 12, 2019, the defendants timely filed an answer and filed a partial motion to dismiss in which they sought dismissal of (1) all claims against the Currituck County Board of Commissioners; (2) all claims against County Manager/Budget Officer Daniel F. Scanlon; and (3) the Eighth Claim for Relief, a direct claim under the North Carolina Constitution. (R. pp. 95-118.)

The plaintiffs filed a motion for a preliminary injunction on August 1, 2019, in which they sought "to enjoin the use of any occupancy tax ("OT") proceeds by the Defendants for the purposes of funding police, emergency medical and fire services and equipment (referred to herein as 'public safety services and equipment')," except for "lifeguard services and related equipment or any services . . . related to beach clean-up." (R. pp. 119-21.) The trial court held a hearing on the matter on September 18, 2019, and denied the motion. (R. pp. 129-30.)

On December 9, 2019, the plaintiffs voluntarily dismissed all claims against defendant Scanlon in his individual capacity. (R. pp. 131-32.) On July 19, 2021, the Court dismissed all claims against defendant Scanlon in his official capacity as well as all claims against the Currituck County Board of Commissioners and the Eighth Claim for Relief. (R. pp. 172-74.)

That left two defendants – Currituck County and the Currituck County Tourism Development Authority – and 10 claims. Of the remaining claims, the first seven sought declaratory judgments that Currituck County had or was spending occupancy-tax revenues improperly, and the last three sought injunctions to bar future such spending.

Following discovery, on June 18, 2021, the plaintiffs filed a partial motion for summary judgment, limited to their Second Claim for Relief, which asserted that the county's use of occupancy-tax revenue to pay for public safety services was unlawful. (R. pp. 15-17, 133-34.) On November 19, 2021, the defendants filed a motion for summary judgment on all claims. (R. pp. 183-85, 188-90.)

On December 6, 2021, the trial court heard arguments on the summary judgment motions, and thereafter denied the plaintiffs' partial motion and granted the defendants' motion. (R. pp. 211-12.) The plaintiffs timely filed a notice of appeal. (R. pp. 213-15.)

On March 19, 2024, the North Carolina Court of Appeals issued an opinion reversing the trial court. It reversed the denial of partial summary judgment for the plaintiffs and the granting of summary judgment to the defendants. See Costanzo v. Currituck County, __ N.C. App. __, 2024 WL 1171799, *6 (Mar. 19, 2024) (attached as Exhibit "A"). The Court of Appeals ordered that summary judgment be entered in favor of the plaintiffs on the Second Claim for Relief, which involved spending of occupancy-tax revenue on public safety services. Id. It vacated the entry of summary judgment for the defendants and remanded the case to the trial court. Id.

The Court of Appeals held that the Currituck County Board of Commissioners' discretion in spending occupancy-tax revenue was limited and that it could spend "such funds . . . only as permitted by strict construction of the term 'tourism-related' expenditures," which is contained in a 2004 amendment to the local statute at issue. Id. The Court found that "the County did not act in accordance with" the 2004 Amendment to the statute because it spent "occupancy tax proceeds for public safety services and equipment." Id. The Court concluded, "This is not to say that the County has acted in bad faith," only that it had exceeded the authorization provided in the 2004 Amendment to the statute. Id.

However, the concurring opinion stated that Currituck County's spending on public safety services "might well be" proper under the statute, but said there was no evidence in the record that "the County – through its Board of Commissioners – exercised its judgement, or discretion, in doing so." Id. (Hampson, J., concurring).

II. FACTS

As the Court of Appeals observed, the facts are not in dispute. Id. at *5. The relevant facts are set out below.

A. Statutory authority and spending decisions

This case involves a local statute, enacted by the Legislature in 1987 and amended in 2004, that allows Currituck County to collect occupancy taxes. N.C. Sess. Law 2004-95, H.B. 1721, § 1(a2). (R. p. 198.) This statute allows the county to levy the occupancy tax on visitors who rent properties in the county, and it requires the county to use revenue from this tax "only for tourism-related expenditures, including beach nourishment." Id., § 2(e) (emphasis added). The county must spend a specific

portion of revenue from the 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.)

The parties agree that, 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. (Pl.-App. 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 the statute was enacted in 1987, it 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) (emphasis added). (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 Amendment to the 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 amended 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.)

Plaintiff-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.)

The county commissioners, who have used 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 Currituck County Board of Commissioners are elected at-large, but five must live in distinct geographic districts, one of which covers

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

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 Currituck Sound on one side and Atlantic Ocean on the other. (R. p. 192.)

Most of the county's land and population are on the mainland, not Corolla. Of the county's 28,100 year-round residents, only 1,159 live on Corolla, but the population of the county 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 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. Because Corolla is accessible only through the mainland, tourists headed to Corolla bring increased traffic to the mainland. (Selena Jarvis Dep. pp. 12, 15-17.)

The number of tourists who visit Currituck County has increased every year since 2006, except for 2009, when there was a recession. (R. pp. 194-95.)

The Plaintiff-Appellants focused 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 public-safety costs are year-round because the county cannot hire employees to work in such jobs for only part of the year and so it must hire them for full-time work and move them to Corolla during tourist season. (R. p. 192, 195; Hill Dep. pp. 19, 22.) The commissioners have judged these public-safety expenditures as tourism-related because they are caused by the influx of tourists. (R. p. 195.)

B. 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 the level of public safety services it provides, and this "absolutely is crucial to the tourist experience here in attracting them through a positive tourist experience. . . . [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 the recommendations of the county's professional staff, including the tourism director, and they know 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 also "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 "bring[] the need for more services," but tourists want those services and there are obvious benefits to providing those 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, believes that the public safety expenditures keep tourists safe. Because increased public safety spending on Corolla helps tourism, this spending 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; "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.)

III. REASONS WHY REVIEW IS NECESSARY

A. This case involves a matter of significant public interest because it addresses whether local governments, through their public officials, have the discretion to determine that spending on public safety services, such as law enforcement, helps attract tourists to their jurisdictions.

Because "[n]early 200 North Carolina counties and municipalities levy occupancy taxes" and "[a]lmost all of them are required to use some percentage of their occupancy tax revenues for 'tourism-related' expenditures," this case is of significant public importance in the State. See Chris Mclaughlin, "Occupancy Taxes and 'Tourism-Related Expenditures,' " COATES CANONS: NC LOCAL GOVERNMENT LAW, UNC School of Government, April 4, 2024 (attached as Exhibit "B").

The Court of Appeals held that the use of tax revenues for public safety services, such as law enforcement, is not a tourism-related expenditure – even though the original statute enacted for Currituck County specifically said that spending on "police protection, and emergency services" were "tourist-related purposes."

Local governments that collect and spend occupancy-tax revenue may now be unsure whether they can use this revenue to pay for police officers, sheriff's deputies, and other public safety employees and the services they provide even when the only reason these employees and services are needed is because of tourism and the need to ensure a safe environment for tourists. For example, could a town or county that hosts a fair, festival, concert, or other event that brings in tourists use occupancy-tax revenue to pay for law enforcement officers and emergency medical technicians to be present to ensure a safe experience for the visitors to such events? Under the Court of Appeals' opinion, the answer appears to be no.

However, as one legal observer has noted, "reasonable people can disagree on exactly what expenditures are related to tourism." (Ex. B, p. 2.) A reasonable official could believe that dozens of extra law enforcement officers and EMTs needed to cover a college basketball tournament, stock-car race, or music festival – all of which are attended primarily by visitors – are related to tourism and that the cost should not be borne by a local government's general funds, which come primarily from taxes paid by local residents and not visitors.

The reasoning and judgment of the Currituck County commissioners in this case thus could be applicable to other cases in North Carolina. The issue in this case of whether a local government can use occupancy-tax revenue on public safety services related to tourism is closely related to whether local government officials can reasonably believe that they can do so and whether they abuse their discretion when they so conclude.

B. This case is of significant interest to the jurisprudence of the State because it involves the standard for determining when public officials abuse their discretion in spending tax revenue under a statute giving them broad authority to do so.

The Currituck County Board of Commissioners has not abused its discretion to spend occupancy-tax funds as allowed by the local statute because its decisions have not been capricious, in bad faith, or in disregard of the law – which is the well-established standard for evaluating the decisions of public officials. The commissioners have acted reasonably, rationally, and in accordance with the purpose of the statute, and they have not acted capriciously or in bad faith.

Given this, under the long-time standard for reviewing public officials' decision, the Court of Appeals should have affirmed the grant of summary judgment for the defendants. However, the Court of Appeals' opinion, except for the concurrence, did not even address whether the commissioners abused their discretion, and the concurrence was limited to a holding that the commissioners simply had not stated sufficiently why they had made their spending decisions and that this is why they abused their discretion – not necessarily that they had abused their discretion in making the decisions in the first place, but simply that they had not stated why they made their decisions. See Costanzo, __ N.C. App. __, 2024 WL 1171799 at *7 (Hampson, J., concurring).

This Court should therefore address the standard for evaluating whether public officials have abused their discretion in making spending decisions under their statutory authority and it should apply that standard to the facts of this case or state why it is no longer the applicable law. This issue is therefore of significant interest to the jurisprudence of this State.

1. North Carolina has a well-established standard for determining whether public officials have abused their discretion, and the Court of Appeals did not address it.

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.

When 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)).

In this case, the Court of Appeals did not address whether the Currituck County Board of Commissioners "acted in wanton disregard of the public good," and instead made a judgment that the statute at issue prohibited spending occupancy-tax funds in the manner that the commissioners believe it allows. The Court of Appeals held this despite the principles set out in Barbour.

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).

In the case at bar, the Court of Appeals did not afford the Currituck County commissioners the presumption to which they were entitled under our law. Except for the concurring opinion, the court did not address the applicable standard or whether the commissioners violated it by abusing their discretion. The Court of Appeals should have stated clearly whether, in its view, Currituck County's commissioners abused their discretion in determining that they could spend occupancy-tax revenue on public safety services when the statute allowing them to do so specifically gave them the authority to use their "judgment" in determining what is related to tourism.

2. The evidence shows that the Currituck County commissioners did not abuse their discretion, but the Court of Appeals did not address the issue.

In the court below, the Appellants claimed that the commissioners did not "discuss or deliberate whether general public services are tourism-related" before approving expenditures. (Pl.-App. Brf., p. 32.) The commissioners testified otherwise. (White Dep. pp. 14, 30, 32, 49; McCord Dep. pp. 14-15; K. Etheridge Dep. pp. 35-36.) The concurring opinion sided with Appellants. Costanzo, 2024 WL 1171799 at *6 (Hampson, J., concurring). But the majority opinion did not even address this issue except for a passing reference in which it said, "This is not to say that the County has acted in bad faith[.]" Id. at *6.

This Court should correct that omission. It is of significant importance to the jurisprudence of this State that public officials know whether they have discretion to make spending decisions, whether the long-standing standard still applies to them, what constitutes an abuse of their discretion if it does, or even whether public officials

no longer have discretion but are simply strait-jacketed by a court's interpretation of the language in statues, as the Court of Appeals seems to have held. Id. at *3.

The Court of Appeals also incorrectly asserted that the county commissioners believe they have "unlimited discretion" and are entitled to "total deference to the judgment of the Board of Commissioners." Id. However, the county commissioners simply believe the Legislature gave them authority under the statute to use their "judgment" to determine what tourism-related expenditures are.

Appellants below claimed that the board chairman did not feel there was any limit on spending occupancy-tax funds (Pl.-App. Brf., p. 32), but the chairman testified that the board was required "to draw some correlation between that expenditure and the tourism-related portion of that." (White Dep. p. 14.) 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.)

In the Court below, Appellants claimed that a commissioner's statement that a tourism-related expenditure "is anything that 'is needed to support tourism' " did 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.' " (Pl.-App. Brf., p. 32.) However, a reasonable official could believe that ensuring that sure tourists feel safe when they visit is related to supporting tourism, attracting tourists, and increasing lodgings.

Though Commissioner Kevin McCord conceded "that police and EMS services are not attractions" that bring in tourists (Pl.-App. Brf., p. 32), he also testified that "they're needed and required" and that tourists want them. (McCord Dep. pp. 25-28.) Chairman White concurred. (White Dep. pp. 31, 44.)

Appellants below claimed that the county had "no evidence that general public services attract tourists" (Pl.-App. Brf., p. 33), but, as it pertains to certain public safety services, county officials disputed this. Appellants noted that "the County does not advertise its EMS, police, and fire services, nor does it think doing so would be wise" (Pl.-App. Brf., p. 33), but the board chairman explained 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 provided. (White Dep. pp. 31, 44; McCord Dep. pp. 17-18, 25-28, 45.)

The commissioners' judgment is informed not only by having heard from tourists but also by their experiences. The chairman of the board has run a tourism business on Corolla since 1996. (R. p. 192; White Dep. pp. 6, 15.)

Appellants claimed below that the board did not scrutinize the need for public safety spending, but the commissioners have drawn 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 inform their judgments. (White Dep. pp. 15, 31, 34; McCord Dep. pp. 18, 26-28.)

The Legislature believed the commissioners were in the best position to make the determination, so it charged them with that duty. The plaintiffs who brought this lawsuit, who are isolated from the rest of the county, were not given any such responsibility under the law.

The Legislature, in crafting the 2004 Amendment, gave the county board of commissioners authority to use its "judgment" for a reason. The board has seven members, all elected at-large, and its spending decisions have been unanimous. (R. p. 195.) Appellants have been unable to convince the commissioners to change their interpretation or to elect commissioners who see things their way, but this is how representative, democratic government works. The courts should not disturb the Legislature's design or the board's judgment.

The commissioners did not abuse their discretion in making their spending decisions. They paid for costs incurred because of the increase in tourism and provided services that they reasonably believe will keep tourists coming back. They used the judgment the Legislature gave them.

This judgment included spending occupancy-tax revenue on the mainland part of Currituck County, not just Corolla. The Appellants argued below the mainland is not a tourist destination and tourists "are seldom seen" there. (Pl.-App. Brf., pp. 5,

8.) However, the chairman of the board testified that, though Corolla is "the bulk of our tourist economy," with 80 percent of occupancy-tax revenue spent there, it is not the only part. (White Dep. pp. 19-20; R. p. 192.)

The statute does not require the county to use its revenue only on Corolla but rather applies to the whole county. The county has tried to make the mainland more attractive to tourists, and tourists and visitors do visit the mainland. This includes 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 claimed below that the county has spent on things "that attract no tourists" (Pl.-App. Brf., p. 8), but the commissioners disagreed with that and the statute provides them the authority and discretion to do so. If the Legislature had wanted the county to spend only on Corolla, it would have said so in the statute. Appellants asserted below that "there are twice as many tourists on Corolla as there are residents in the entire County" (Pl.-App. Brf., p. 6), but that is why more public safety services are needed on Corolla – and, in any case, why 80 percent of occupancy-tax revenue is spent there.

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.[2] Two commissioners testified about their personal experiences as tourists in other places on this issue. (McCord Dep. pp. 45-46; White Dep. p. 16.)

In its decision, the Court of Appeals agreed with Appellants, who asserted that a strict line should be drawn around occupancy-tax revenue. However, that line does not exist. The word "judgment" in the statute necessarily implies discretion on the part of the commissioners.

Under Appellants' theory, with which the Court of Appeals agreed, public safety services (except for beach lifeguards) and utility spending are not designed to attract tourists. But reading the statute this way leads to absurd rationalizations. Appellants claimed that using occupancy-revenue for a water treatment plant was "not a tourism-related expenditure." (Pl.-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.) The plant 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 not only a reasonable conclusion, but the only reasonable conclusion.

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[2] See, e.g., Stephanie Sierra, "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 April 19, 2024) (quoting San Francisco Travel president/chief executive officer as stating, "A lot of visitors are concerned, concerned for their own safety," and citing "open drug markets" and "brazen" street crime).

The same rationale applies to fire hydrants and road and water service districts. (Pl.-App. Brf., pp. 8, 38.) But the Court of Appeals rejected this. In their brief below, the Appellants claimed, "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. It is "common sense" that, if the commissioners 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 claimed that "[g]eneral public services do not increase the use of lodgings or attract tourists" (Pl.-App. Brf., p. 3), but the county has used such revenues only for services that, in its judgment, help attract tourists – such as services that help keep the public safe. The Court and the Appellants disregarded the importance that certain public safety services have in ensuring that tourists will want to return. Appellants claimed below, "Tourists do not visit the County to admire its police department, fire stations, and sewer plants." (Pl.-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 claimed that "no tourist visits an area because of these public services." (Pl.-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. The Court of Appeals ignored this argument.

Appellants below listed items spent in other jurisdictions as examples of acceptable uses of occupancy-tax revenue – such as on 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. A festival or a fair surely requires law-enforcement officers to be present, if for no other reason to assure attendees that it was safe to attend. Even Appellants conceded that "the failure to pay for basic public services likely would harm the tourism industry." (Pl.-App. Brf., p. 24.)

Appellants claimed that "other local governments, with similarly limited local acts," have not spent their occupancy-tax revenue on "general public services." (Pl.-App. Brf., p. 8.) First, public safety services that are required because of an influx of tourists are not "general public services." Second, neither the Court of Appeals nor the Plaintiff-Appellants pointed to any other statute that requires a governing body to use its "judgment" to determine what attracts tourists. In this respect, Currituck County's statute, which is a local law, is unique and makes it broader than other occupancy-tax statutes. Other jurisdictions, with their own particular local laws, may not be able to spend money as broadly as Currituck County. Currituck County's local

law requires the commissioners to use their "judgment" to determine what expenditures attract tourists, yet the Court of Appeals disregarded this.

However, the Court of Appeals' holding may affect the more than 200 jurisdictions in the State that take in occupancy-tax revenue because it held that spending on public safety services is not related to increasing tourism. Costanzo, 2024 WL 1171799 at *6. Thus, the decision is of significant public interest and also significant to the jurisprudence of this State.

Can local government officials reasonably believe that public-safety services help promote tourism, and do those officials have the discretion to make such a determination? Under the Court of Appeals' opinion, the answer to both questions is no, but the arguments and authorities submitted herein show that the answer should be otherwise. This Court should therefore address both issues.

IV. CONCLUSION

For the reasons and authorities cited herein, the Defendant-Petitioners respectfully request that this Court grant their petition for discretionary review.

V. ISSUES TO BE PRESENTED

1. Whether local government officials have the discretion to determine that spending on public safety services, such as law enforcement, is necessary to attracting tourists to their jurisdictions.

2. What standard should be applied in determining whether public officials have abused their discretion in spending tax revenue under a statute that gives them broad authority to do so.

Respectfully submitted, this 22nd day of April, 2024.

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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 April 22, 2024, I electronically filed the foregoing **PETITION FOR DISCRETIONARY REVIEW BY DEFENDANTS CURRITUCK COUNTY *ET. AL.*** 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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Exhibit A

2024 WL 1171799
Only the Westlaw citation
is currently available.
Court of Appeals of North Carolina.

Gerald COSTANZO, et al., Plaintiffs,
v.
CURRITUCK COUNTY, North Carolina, et al., Defendants.

No. COA22-699
|
Filed March 19, 2024

Synopsis

Background: Taxpayers brought action against county, among other parties, seeking declaratory and injunctive relief in connection with county's allocation of occupancy tax revenue. The Superior Court, Currituck County, Wayland Sermons, Jr., J., 2021 WL 11629839, granted county's summary judgment motion, and denied taxpayers' request for partial summary judgment. Taxpayers appealed.

Holdings: The Court of Appeals, Stading, J., held that:

[1] legislature's intent in amending statute relating to use of net proceeds of levied occupancy tax limited discretion of Board of Commissioners by requiring that such funds be spent only as permitted by strict construction of the term "tourism-related expenditures," and

[2] county's spending of occupancy tax proceeds for general public safety services and equipment was not in accordance with plain language of amendment to statute.

Reversed in part, vacated in part, and remanded.

Hampson, J., filed concurring opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (22)

[1] **Statutes**

Questions of statutory interpretation are reviewed de novo.

[2] **Statutes**

The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature.

[3] **Statutes**

When the language of a statute is clear and without ambiguity, it is the duty of the Court of Appeals to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.

[4] **Statutes**

When the language of a statute is ambiguous, the Court of Appeals will

determine the purpose of the statute and the intent of the legislature in its enactment.

[5] **Statutes**

Where the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be.

[6] **Statutes**

If the words of a statutory definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction.

[7] **Municipal Corporations**

It is not consonant with the court's conception of municipal government that there should be no limitation upon the discretion granted municipalities.

[8] **Counties**

Counties exist solely as political subdivisions of the state and are creatures of statute.

[9] **Counties**

Counties are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given.

[10] **Counties**

Powers which are necessarily implied from those expressly granted to counties by statute are only those which are indispensable in attaining the objective sought by the grant of express power.

[11] **Counties**

Statutorily granted powers to counties are to be strictly construed.

[12] **Statutes**

Legislative history is a factor to consider in determining legislative intent.

[13] **Statutes**

A statutory amendment serves as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history.

[14] **Statutes**

When the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose.

[15] **Taxation**

Legislature's intent in amending statute concerning use of funds relating to occupancy tax on rentals of rooms and other lodgings was to narrow scope of how county was permitted to use net proceeds of levied occupancy tax, and limited discretion of Board of Commissioners by requiring that such funds be spent only as permitted by strict construction of the term "tourism-related expenditures"; by enacting amendment legislature intentionally removed previously permitted uses of occupancy tax proceeds, provided a narrower definition with definitive perimeters to prohibit some of county's customary expenditures permitted by original law, and created a Tourism Development Authority to expend net proceeds of tax levied, total deference to judgment of Board of Commissioners defied strict construction of their statutorily granted powers under amendment, and amendment's title, which included notating a change to purpose for which occupancy tax could be used, displayed intent by legislature to limit scope of how occupancy tax expenditures could be used. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

[16] **Counties**

While counties have discretion in deciding how to dispel occupancy taxes, it must do so within the directives set by the legislature.

[17] **Summary Judgment**

For purposes of deciding a summary judgment motion, an issue is "material" if the facts alleged would constitute a legal defense, or would affect the result of the action. N.C. R. Civ. P. 56(c).

[18] **Summary Judgment**

When deciding a summary judgment motion, an issue is denominated "genuine" if it may be maintained by substantial evidence. N.C. R. Civ. P. 56(c).

[19] **Summary Judgment**

When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. N.C. R. Civ. P. 56(c).

[20] **Summary Judgment**

The trial court may not resolve issues of fact and must deny a summary judgment motion if there is a genuine

issue as to any material fact. N.C. R. Civ. P. 56(c).

[21] **Taxation**

The expenditures of the occupancy tax proceeds in the judgment of the Board of Commissioners are reviewable and subject to the constraints contained in the law. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

[22] **Taxation**

County's spending of occupancy tax proceeds for general public safety services and equipment was not in accordance with plain language of amendment to statute that narrowed scope of how county was permitted to use net proceeds of levied occupancy tax on rentals of rooms and other lodgings, which limited Board of Commissioners' discretion by requiring that such funds be spent only as permitted by strict construction of the term "tourism-related expenditures"; plain language contained in amendment as the authority to expend these resources in this manner was neither expressly conferred upon county nor necessarily implied from those expressly given. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

Appeal by plaintiffs from order entered 28 December 2021 by Judge Wayland J. Sermons, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 8 February 2023. Currituck County, No. 19-CVS-171

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Opinion

STADING, Judge.

***1** Gerald Costanzo, et al., ("plaintiffs") appeal an order granting summary judgment for Currituck County, et al., ("the County"). For the reasons set forth below, we reverse the order in part, vacate in part, and remand for further proceedings.

I. Background

Currituck County is North Carolina's northernmost coastal county containing a strip of land that is part of the Outer Banks. The town of Corolla, situated on this strip of land, is a tourist destination. This area generates most of the County's occupancy tax revenue from lodging facilities. Although comprising approximately one-tenth of the County's land, this area also contributes to more than half of the County's property tax base. The property tax, sales tax, and other tax revenue generated

in this area feeds into the County's General Fund allocated for public purposes throughout the County under N.C. Gen. Stat. §§ 153A-149, 153A-151, and 105-113.82 (2023).

In 1987, the General Assembly gave the County authority to collect an occupancy tax on rentals of rooms and other lodgings ("the Session Law"). *See* 1987 N.C. Sess. Laws 209, § 1(a). The Session Law required that "at least seventy-five percent (75%) of the net proceeds" of the occupancy tax levied be used "only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). The County then had to deposit the remaining net proceeds of the occupancy tax into its General Fund, which could "be used for any lawful purpose." *Id.* In 1999, the Session Law was modified, and the County was permitted to levy an "[a]dditional occupancy tax" under its subsection 1(a1). N.C. Sess. Law 1999-155, H.B. 665 § 1(a1). The County could use the net proceeds of taxes levied under this subsection for the Currituck Wildlife Museum. N.C. Sess. Law 1999-155, H.B. 665 § 1(a1); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

In 2004, the General Assembly amended the Session Law ("the Amendment"), narrowing the scope of how the County may use occupancy tax proceeds. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). In contrast to the Session Law, the Amendment deleted the phrase "tourist related purposes," opting instead for "tourism-related expenditures, including beach nourishment." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 §§ 1(a2), 2(e). Moreover, the Amendment removed the language that authorized the County to make certain expenditures, "including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e).

Even so, after the Amendment's enactment, the County continued to allocate occupancy tax revenue to expenditures previously authorized under the Session Law. The County's continued allocation of these funds, in a manner not specifically authorized by the Amendment, prompted plaintiffs to file their complaint on 7 May 2019, suing for declaratory judgment and injunctive relief. Plaintiffs alleged that defendants "improperly and unlawfully diverted [tax levies] to purposes other than those purposes permitted by the [Amendment]." Specifically, plaintiffs sought relief as follows: (1) declaratory judgment that transfers of occupancy tax proceeds from the designated tourism development fund to the County's General Fund are unlawful, (2) declaratory judgment that the County's expenditures of occupancy tax proceeds for public safety services are unlawful, (3) declaratory judgment that the County's expenditures of occupancy tax proceeds for non-promotional operations and activities of the County's Economic Development Department are unlawful, (4) declaratory judgment that the County's expenditures of occupancy tax proceeds for two ongoing projects—park facility construction and

historic building restoration—are unlawful, (5) declaratory judgment that the County's loan of occupancy tax proceeds to finance the construction of a water treatment facility is unlawful, (6) declaratory judgment that the County's expenditures of occupancy tax proceeds to fund special service districts are unlawful, (7) declaratory judgment that the aforementioned claims violate the Amendment and N.C. Gen. Stat. § 159.13(b)(4) (2023), which prohibits expenditures of revenue for purposes not permitted by law, (8) declaratory judgment that the County's use of occupancy tax proceeds violates the North Carolina Constitution, (9) preliminary injunction against the use of occupancy tax proceeds for public safety services and equipment, (10) permanent injunction against the transfer of occupancy tax proceeds to the County's General Fund, and the use occupancy tax proceeds for public safety services or any other unlawful purpose, (11) court construction of the term "tourism-related expense" under N.C. Gen. Stat. § 1-254 (2023), (12) permanent injunction requiring the County to restore and replace unlawfully used occupancy tax proceeds, and (13) inclusion of the County Manager in his individual capacity.

***2** The County filed its answer and partial motion to dismiss plaintiffs' claims pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6) (2023). The motion to dismiss alleged that: (1) the Board of Commissioners did not have the legal capacity to be sued, [1] (2) the County Manager was not a proper party, [2] and (3) plaintiffs' claim under the North Carolina Constitution was unavailable. [3] Plaintiffs then moved to preliminarily enjoin use of the funds for contested purposes, which the trial court later denied. Thereafter, plaintiffs moved for partial summary judgment as to their second cause of action concerning expenditures of occupancy tax proceeds "for public safety services, including police, emergency medical and fire services and equipment." The County moved for summary judgment as to all of plaintiffs' claims and requested the trial court to strike an affidavit submitted in plaintiffs' motion. The trial court held a hearing on the cross-motions in which it assessed "such weight and relevancy as it deem[ed] appropriate" to the contested affidavit, ordered summary judgment for the County on all claims, and denied plaintiffs' request for partial summary judgment. Plaintiffs timely entered their notice of appeal.

1 The trial court dismissed the Board of Commissioners from the suit.

2 Plaintiffs filed a notice of voluntary dismissal of the County Manager in his individual capacity and the trial court granted a dismissal in his official capacity from the suit.

3 The trial court dismissed this cause of action from the suit.

II. Jurisdiction

Jurisdiction is proper under N.C. Gen. Stat. § 7A-27(b)(1) (2023) since the trial court's order granting summary judgment is a final judgment.

III. Analysis

A. Tourism-Related Expenditures

The Session Law, enacted in 1987, allowed for three-quarters of the net proceeds of the tax levied under its subsection 1(a), to be spent "only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e). But, in 2004, the Amendment deleted this text and directed that the net proceeds of such tax levied under this subsection *shall* be used "only for tourism-related expenditures, including beach nourishment." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). The Amendment also removed the text directing the County to deposit the remainder of the net proceeds into its General Fund to "be used for any lawful purpose." N.C. Sess. Law 1987, Chapter 209, H.B. 555, § 1(e); N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Additionally, the Amendment authorized a "Second Additional Occupancy Tax" under its subsection 1(a2) only if the County "also levies the tax under subsections (a) and (a1)."[4] N.C. Sess. Law 2004-95, H.B. 1721 § 1(a2). However, the Amendment modified how the County "may" use the net proceeds of tax levied under subsections (a1) and (a2) to "shall use at least two-thirds" of these funds "to promote travel and tourism and shall use the remainder ... for tourism-related expenditures." N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Moreover, the Amendment required the County to create a Tourism and Development Authority to "expend the net proceeds of the tax levied under this act." N.C. Sess. Law 2004-95, H.B. 1721 § 3.

4 Referencing 1987 N.C. Sess. Laws 209, § 1(a) and N.C. Sess. Law 1999-155, H.B. 665 § 1(a1).

Not only did the Amendment eliminate portions of the Session Law, but it also provided greater specificity with definitions to direct the use of funds. N.C. Sess. Law 2004-95, H.B. 1721 § 2(e). Notably, the Amendment defined "tourism-related expenditures" as those that "in the judgment of the ... 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.* And it defined expenditures that "promote travel and tourism" as those that "advertise or market an area or activity, publish and distribute pamphlets and other materials, conduct market research, or engage in similar promotional activities that attract tourists or business travelers to the area; the term includes administrative expenses incurred in engaging in these activities." *Id.* Language was also added to clarify the definition of net proceeds as "[g]ross proceeds less the cost to the county of administering and collecting the tax, as determined by the finance officer, not to exceed three percent [ ] of the first five hundred thousand dollars [ ] of gross receipts collected each year." *Id.*

***3** The parties do not dispute that the Amendment eliminated the term "tourism related purposes," which the 1987 Session Law defined to include "construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection

and disposal, police protection and emergency services." Also, the parties do not dispute that the Amendment replaced the term "tourism related purposes" with "tourism-related expenditures." The dispute concerns whether the Amendment prohibits certain expenditures that the County has classified as tourism-related expenditures. Plaintiffs contend that the County acted *ultra vires* by using these funds to pay for general public services because the General Assembly deauthorized such spending in the Amendment. However, the County points to language in the Amendment that allows for the "the judgment of the ... Board of Commissioners," to determine which expenditures are categorized as tourism-related.

[1] [2] [3] [4] [5] [6] Questions statutory interpretation are reviewed *de novo*. *In re Ernst & Young, L.L.P.*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted). "The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009), *disc. review denied*, 364 N.C. 241, 698 S.E.2d 400 (2010). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* "Where ... the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 203 (1974). "If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction, including those above stated." *Id.* at 220, 210 S.E.2d at 203. With these principles in mind, we must consider whether the disputed expenditures 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(e).

[7] [8] [9] [10] [11] To the extent any ambiguity exists in the Amendment's use **of** the language "the judgment of the ... Board of Commissioners" or "tourism-related expenditure," our analysis is guided by precedent which weighs against constructing the text as giving the Board of Commissioners unlimited discretion. "It is not consonant with our conception of municipal government that there should be no limitation upon the discretion granted municipalities...." *Efird v. Bd. of Comm'rs for Forsyth Cnty.*, 219 N.C. 96, 106, 12 S.E.2d 889, 896 (1941) (citations omitted). "Counties ... exist solely as political subdivisions of the State and are creatures of statute. They are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given." *Davidson Cnty. v. High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987) (citations omitted). And, "[p]owers which are necessarily implied from those expressly granted are only those which are indispensable in attaining

the objective sought by the grant of express power." *Id.* (citation omitted). Furthermore, such statutorily granted powers are to be "strictly construed." *Id.* (citations omitted). Thus, total deference to the judgment of the Board of Commissioners defies strict construction of their statutorily granted powers under the Amendment. *See Nash-Rocky Mount Bd. of Educ.*, 169 N.C. App. 587, 589, 610 S.E.2d 255, 258 (2005).

***4** **[12]** **[13]** We are also guided by the actions of the Legislature in their enactment of the Amendment. "[A] change in the language of a prior statute presumably connotes a change in meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012). "Legislative history is a factor to consider in determining legislative intent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990) (citation omitted). The Amendment serves as "an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history." *Id.* (citations omitted). Here, we cannot ignore the Legislature's deliberate actions that eliminated some explicitly permitted uses of occupancy tax proceeds and crafted a definition of "tourism-related expenditures." N.C. Sess. Law 2004-95, H.B. 1721, § 2(e)(4). Likewise, it is difficult to overlook the Amendment's creation of a Tourism Development Authority "to expend the net proceeds of the tax levied under this act...." N.C. Sess. Law 2004-95, H.B. 1721, § 3. *See Bryant v. Wake Forest Univ. Baptist Med. Ctr.*, 281 N.C. App. 630, 642, 870 S.E.2d 269, 277 (2022) ("[A] statute should not be interpreted in a manner which would render any of its words superfluous. We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because it is always presumed that the legislature acted with care and deliberation.").

[14] Our interpretation is correspondingly informed by the Amendment's title: "AN ACT TO ALLOW AN INCREASE IN THE CURRITUCK COUNTY TAX AND TO CHANGE THE PURPOSE FOR WHICH THE TAX MAY BE USED." N.C. Sess. Law 2004-95, H.B. 1721; *see State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 763-64 (1992) ("We therefore cannot, as defendant would have us do, ignore the title of the bill.") When "the meaning of a statute is in doubt, reference may be made to the title and context of an act to determine the legislative purpose." *Preston v. Thompson*, 53 N.C. App. 290, 292, 280 S.E.2d 780, 782 (1981); *see also Sykes v. Clayton*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968) (holding the title of a bill is "a legislative declaration of the tenor and object of the act"). Though not dispositive, the Amendment's title—which includes notating a change to the purpose for which the occupancy tax may be used—displays an intent by the Legislature to limit the scope of how occupancy tax expenditures may be used. *See, e.g., In re FLS Owner II, LLC*, 244 N.C. App. 611, 616, 781 S.E.2d 300, 303 (2016); *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012); *State v. Flowers*, 318 N.C. 208, 215, 347 S.E.2d 773, 778 (1986).

[15] **[16]** Considering the Legislature's actions—the significant changes in the text and title of the Amendment—we can only conclude that their intent was to narrow the scope of how the County is permitted to use

occupancy tax funds. While the County has discretion in deciding how to dispel occupancy taxes, it must do so within the directives set by the Legislature. *See Nash-Rocky Mount Bd. of Educ.*, 169 N.C. App. at 590, 610 S.E.2d at 258. Our *de novo* review leads us to conclude that although the County was permitted some discretion in determining the use of net proceeds from occupancy tax levies, the Legislature intentionally removed some previously permitted uses and provided a narrower definition with definitive perimeters to prohibit some of the County's customary expenditures permitted by the Session Law.

B. The Trial Court's Order for Summary Judgment

Following the dismissal of plaintiffs' claim under the North Carolina Constitution and denial of a preliminary injunction, plaintiffs moved for partial summary judgment and the County moved for summary judgment as to the remaining claims. Among those remaining claims, plaintiffs requested that the trial court enter declaratory judgment that the County's expenditures of occupancy tax proceeds for the following purposes are unlawful: (1) public safety services and equipment, (2) non-promotional operations and activities of the County's Economic Development Department, (3) construction of a park and restoration of a building historically used as a jail, (4) loan of occupancy tax proceeds to finance the construction of a water treatment facility, and (5) funding of special service districts. Further, plaintiffs maintained that these disputed uses of occupancy tax proceeds violate the Amendment and N.C. Gen. Stat. § 159.13(b)(4) (2023), which prohibit expenditures of revenue for purposes not permitted by law and sought judgment declaring the transfer of these funds from the Tourism Development Authority Fund to the County's General Fund unlawful. Additionally, plaintiffs requested court construction of the term "tourism-related expense" under N.C. Gen. Stat. § 1-254 (2023). In view of the foregoing claims, plaintiffs requested a permanent injunction against the transfer occupancy tax proceeds to the County's General Fund, used for any unlawful purpose, as well as a permanent injunction requiring the County to restore and replace unlawfully used occupancy tax proceeds. The parties presented the trial court with their cross-motions for summary judgment based on conflicting interpretations of the Amendment and its impact on expenditures originally authorized under the Session Law. N.C. Sess. Law 2004-95, H.B. 1721; N.C. Sess. Law 1987, Chapter 209, H.B. 555. The trial court denied partial summary judgment for plaintiffs and granted summary judgment for the County as to all claims.

***5 [17] [18] [19] [20]** A trial court should grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action.... The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186

S.E.2d 897, 901 (1972). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

Plaintiffs moved for summary judgment only as to their second cause of action, asserting an "impropriety of occupancy tax expenditures by the County on what [it] termed general public safety services." Plaintiffs characterized "general public safety services" to include police, fire, and emergency medical services and equipment. Further, plaintiffs maintained that other taxes, such as lodging and sales tax from tourists, are available to cover costs incidental to the impact of tourism with respect to these items. In support of their position, plaintiffs presented an affidavit citing documents and records of the County. The data displayed unrefuted instances of occupancy tax proceeds appropriated for the Currituck Outer Banks area's seasonal law enforcement and emergency medical services correlating to full annual costs. Moreover, the numbers showed that these funds covered the costs of equipment for law enforcement and a fire hydrant. The County does not dispute the expenditures alleged by plaintiffs. Rather, it moved the trial court for summary judgment as to the balance of the claims, arguing that "finances are just not relevant in this motion," and that the law "allow[ed] the County Board of Commissioners to determine what is a tourism-related expenditure." The record reveals no controversy as to the facts but as to the legal significance of those facts.

[21] **[22]** While plaintiffs' claim sought declaratory relief, this case is proper for summary judgment determining the applicability of the Amendment. *See Blades v. Raleigh*, 280 N.C. 531, 545, 187 S.E.2d 35, 43 (1972) ("Here, there is no substantial controversy as to the facts disclosed by the evidence. The controversy is as to the legal significance of those facts. Such controversy as there may be in respect of the facts presents questions of fact for determination by the court."). The County does not dispute the actions of the Legislature and contents of the Amendment but contends that since tourists create an increased need for services, it is permitted to use occupancy tax dollars to offset such costs. However, our analysis of the text of the Amendment and the Legislature's intent leads us to a different conclusion. The expenditures of the occupancy tax proceeds in the "judgment" of the Board of Commissioners are reviewable and subject to the constraints contained in the law. *See Efird v. Bd. of Comm'rs for Forsyth Cnty.*, 219 N.C. at 106, 12 S.E.2d at 896. The constraints here are readily apparent from the plain language contained in the Amendment as the authority to expend these resources in this manner was neither expressly conferred upon the County nor necessarily implied from those expressly given. *See Davidson Cnty. v. High Point*, 321 N.C. at 257, 362 S.E.2d at 557. Moreover, any alleged ambiguity within the law is resolved by the title of the Amendment and the Legislature's removal of specific language. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. at 216,

388 S.E.2d at 141; *see State ex rel. Cobey v. Simpson*, 333 N.C. at 90, 423 S.E.2d at 763-64.

***6** We conclude that the disputed expenditures in plaintiffs' second cause of action are not "designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities ... by attracting tourists or business travelers to the county." N.C. Sess. Law 2004-95, H.B. 1721 § 2 (e). Here, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law" as to plaintiffs' second claim for relief. N.C. Gen. Stat. § 1A-1, Rule 56(c). Accordingly, we reverse the trial court's denial of partial summary judgment for plaintiff and vacate the trial court's grant of summary judgment for the County as to the remaining claims. We remand this matter for proceedings not inconsistent with this opinion.

IV. Conclusion

An application of guiding legal principles and precedent leads us to conclude that significant alterations to the original language contained in the Session Law and additions included in the Amendment convey an intent by the Legislature to narrow the scope of expenditures funded by the net proceeds of levied occupancy tax. The Amendment limits the discretion of the Board of Commissioners and requires that such funds shall be spent only as permitted by strict construction of the term "tourism-related expenditures." Considering the evidence contained in the record, in a light most favorable to the County, we hold that the County did not act in accordance with the Amendment when spending occupancy tax proceeds for public safety services and equipment. This is not to say that the County has acted in bad faith, rather our determination is based on expenditures contained in the record which were no longer authorized after the Amendment was enacted. Therefore, we reverse the trial court's denial of summary judgment for plaintiffs and remand to the Superior Court for entry of summary judgment for plaintiffs as to the past expenditures in their second cause of action. We also vacate the trial court's grant of summary judgment for the County on the remaining claims. Furthermore, we remand this matter to the trial court for proceedings not inconsistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judge MURPHY concurs.

Judge HAMPSON concurs in a separate opinion.

HAMPSON, Judge, concurring.

I agree with the Opinion of the Court that (a) summary judgment was improperly entered for the County on the second claim for relief; (b) summary judgment as to the remaining claims should also be vacated; and (c) this matter should be remanded to the trial court for further proceedings. I write separately to emphasize that—in my view—the County's use of occupancy tax funds to fund law enforcement, emergency medical services, and fire protection might well be expenditures

that, "in the judgment of the ... 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." 2004 N.C. Sess. Law 95, § 2(e)(4). Here, however, the Record does not disclose that in appropriating the proceeds of the occupancy tax, the County—through its Board of Commissioners—exercised its judgment, or discretion, in so doing.

The local legislation at issue provides a statutory mechanism whereby the County may enact occupancy taxes. *See* 1987 N.C. Sess. Laws 209, § 1(a); 2004 N.C. Sess. Law 95, § 1(a2). The Board of Commissioners then exercises its judgment to determine what are tourism-related expenditures. 2004 N.C. Sess. Law 95, § 2(e). As Defendants note in their briefing, the 2004 amended act also required creation of the Currituck County Tourism Development Authority (TDA). The act further imposes the duty on the TDA to expend the 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." 2004 N.C. Sess. Law 95, § 3(1.1).

***7** The Record here—including Defendants' own forecast of evidence—reflects, however, all occupancy tax revenue goes to the TDA, which keeps 1/3 of the funds for its tourism-related activities and submits the remaining 2/3 of the funds back to the County's general fund for spending by the County in the Commissioners' discretionary budgetary authority. Nowhere in this process is there any indication that the Board of Commissioners is exercising any judgment in determining what constitutes a tourism-related expenditure before funds are assigned to the general fund (or other special funds). In my view, while it facially appears the County is proceeding in good faith and there is no allegation the County's budgetary process does not conform to law, the County's appropriations of the occupancy tax is being performed under a misapprehension of the applicable law. *See Hines v. Wal-Mart Stores E., L.P.*, 191 N.C. App. 390, 393, 663 S.E.2d 337, 339 (2008) ("A discretionary ruling made under a misapprehension of the law, may constitute an abuse of discretion." (citations omitted)). Thus, I would conclude the County has abused its discretion in its appropriation of the occupancy tax revenues without exercising its judgment to determine it was expending those funds for tourism-related activities. Therefore, the trial court's order is properly reversed in part, vacated in part, and this matter remanded for further proceedings.

All Citations

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Exhibit B

UNC SCHOOL OF GOVERNMENT

Coates' Canons NC Local Government Law

Occupancy Taxes and "Tourism-Related Expenditures"

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Nearly 200 North Carolina counties and municipalities levy occupancy taxes. Almost all of them are required to use some percentage of their occupancy tax revenues for "tourism-related" expenditures. Last week our state courts issued their first appellate opinion examining exactly what types of expenditures qualify as "tourism related."

In Costanzo v. Currituck County, the county's use of occupancy tax funds was challenged by residents and businesses from Corolla, the town that generates a large majority of the county's occupancy tax revenues. The plaintiffs argued that the county's occupancy tax expenditures on public safety services and equipment, water treatment facility construction, park facilities maintenance, and historic building restoration were not related to tourism.

The trial court that originally heard the case ruled in favor of the county and rejected the plaintiffs' challenges. But the Court of Appeals disagreed. It reversed the trial court's decision and determined that at least one category of expenditures—public safety costs such as police, fire, emergency medical services and equipment—was not "tourism-related" and therefore constituted an impermissible use of occupancy tax funds.

Did the court get this case right? What does this opinion mean for the many other North Carolina local governments that are also required to spend their occupancy tax funds for "tourism-related" purposes? To answer those questions, we need to take a closer look at Currituck County's occupancy tax authority

and how it compares to others across the state.

It's All About the Local Bill

As I discussed in this blog post, North Carolina local governments may not levy occupancy taxes on the short-term rental of accommodations such as hotels and Airbnb units without first obtaining specific authorization from the General Assembly in the form of local bills.

Most local bills require local governments to create a tourism development authorities ("TDAs") to make specific decisions about how to spend occupancy tax funds. TDAs generally must use those funds to "promote travel and tourism" and for "tourism-related expenditures," a term usually defined as those that "in the judgment of the TDA, are designed to increase the use of lodging facilities, meeting facilities, or convention facilities in the city or to attract tourists or business travelers to the city. The term includes tourism-related capital expenditures."

Beyond that definition, local governments and TDAs did not have much guidance on what exactly qualified as a tourism-related expenditure. By far the most common question I receive about occupancy taxes is, "Can we spend occupancy taxes on [. . .]?" A new bandstand in the town park? Road improvements? Increased police patrols or trash pick-ups during tourist season?

My answers have always been a bit ambiguous, because reasonable people can disagree on exactly what expenditures are related to tourism. I could make a case that almost any expenditure other than education costs might be tourism related. Tourists likely do not care about the quality of local schools

when deciding where to spend their vacations. But they might care about whether they feel safe when walking around downtown or if public trash bins are overflowing or if there is sufficient public parking near the beach.

Absent additional guidance from the legislature or the courts, I often said, we don't really know where the line is drawn between tourism-related and non-tourism-related expenditures.

Now we have some additional guidance from the courts. Before we dive into that opinion and its potential lessons for other local governments, I offer a little legislative history from Currituck County.

Occupancy Taxes in Currituck County

When the county first obtained permission to levy a 3% occupancy tax in 1987, Currituck was required to use 75% of the proceeds "only for tourist related purposes, including construction and maintenance of public facilities and buildings, garbage, refuse, and solid waste collection and disposal, police protection, and emergency services." The remaining 25% could be used by the county for any lawful purpose. (Session Law 1987-209).

In 1999, the County was authorized to levy an additional 1% occupancy tax to be used to support the Currituck Wildlife Museum. (Session Law 1991-155).

In 2004, the General Assembly authorized the county to levy another 2% occupancy tax and amended the prior local bills to make Currituck County's occupancy tax administration more consistent with those across the state. (Session Law 2004-95)

The 2004 bill (i) eliminated the phrase "tourism-related purposes" and the specific examples used in the 1987 legislation and replaced them with "tourism-related expenditures, including beach nourishment," (ii) added the standard definition of "tourism-related expenditures" ("Expenditures that, in the judgment of the Currituck County Board of Commissioners, are designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities in a county by attracting tourists or business travelers to the county. The term includes tourism-related capital expenditures and beach

nourishment."), (iii) eliminated the ability of the county to use any occupancy tax funds for general public purposes, and (iv) required the county to create a tourism development authority to spend occupancy tax funds in accordance with the new requirements.

The county's occupancy tax was amended again in 2008 to increase the size of the TDA (Session Law 2008-54) and in 2013 to eliminate non-standard exemptions (Session Law 2013-414, Sect. 60(s)) Neither of these last two amendments affected the restrictions on the county's use of occupancy tax proceeds.

The Court's Reasoning

The Court of Appeals relied on Currituck County's convoluted occupancy tax legislative history to conclude that the county's use of occupancy tax funds for public safety costs was impermissible. The court placed great weight on the fact that in 2004 the General Assembly eliminated the half-dozen examples of "tourist related purposes" in the 1987 bill (which specifically included police and EMS) and replaced it with the shorter "tourism-related expenditures, including beach nourishment." In the eyes of the court, the intent of the 2004 bill was to "narrow the scope of how the County is permitted to use occupancy tax funds." The court concluded that because "police protection and emergency services" were no longer offered as examples of "tourism-related expenditures" in the 2004 bill, that was evidence that the General Assembly no longer viewed police and EMS services as related to tourism.

I'm not sure I buy that logic. Let's pretend that yesterday I said to my kids, "For dessert, you can choose something sweet, including ice cream or pie." Today, I tell them, "You can have something sweet for dessert tonight, including a cookie or a chocolate bar." Does this change in language mean that ice cream and pie are no longer considered acceptable options for a sweet dessert? I don't think so. The use of the word "including" implies that the list following that word is not exclusive; my decision not to include ice cream or pie on my non-exclusive list of dessert options today does not mean I no longer intended for them to be permissible options.

I think the same could be said for the General Assembly's decision to change from the long (non-exclusive) list of permissible uses of occupancy taxes in Currituck County's 1987 bill ("including . . . police protection and emergency services") to the much shorter list ("including beach nourishment") in the 2004 bill. I don't think that this change in language proves that the General Assembly intended to remove "police protection" from the universe of tourism-related purposes.

The Court of Appeals cited traditional statutory interpretation guidance to support its conclusion that a change in statutory language implies a change in meaning. Perhaps. But why else might have the General Assembly changed the language in Currituck County's local bill? One reason might have been

simply to standardize the language in local occupancy tax bills across the state. In the 1990s and 2000s, dozens of local authorizing bills were amended to use the boilerplate "tourism-related expenditure" definition now used in the Currituck County bill. (For examples, see this helpful list of all occupancy tax local bills maintained by the General Assembly staff.)

Besides, not every statutory word change denotes a substantive change in the intent of the law. Case in point: the 2004 amendments to Currituck's occupancy tax local bill also changed the phrase "tourist related purpose" to "tourism-related expenditures." But the court agreed with the county that this word change had no substantive impact on how the county may use its occupancy tax funds.

The court also pointed out that the title of the 2004 bill—"An Act to Allow an Increase in the Currituck County Tax and to Change the Purpose for Which the Tax May Be Used"—implied a narrowing of the county's permissible uses of the tax. I agree, but that narrowing was the 2004 bill's elimination of the county's (unusual) authority from the 1987 act to use excess occupancy tax funds for any legal purpose. I do not think the bill title suggests an intent to also narrow the definition of "tourism-related expenditures."

Of course, my opinion about the court's logic has as much value as does my bet on my beloved Duke Blue Devils to win the 2024 national championship. (Sigh.) But the county plans to appeal, and if that appeal is granted we will see whether the North Carolina Supreme Court agrees with me or the Court of Appeals.

What Does this Opinion Mean for Other Local Governments?

Assuming the Court of Appeals opinion stands, it is not entirely clear what impact it will have on other local governments who levy occupancy taxes.

One possibility is that the court's prohibition against spending occupancy tax funds on police and EMS is relevant only for local governments with occupancy tax legislative history like that of Currituck County. In other words, the only governments that are not allowed to spend occupancy tax funds on

police or EMS are those that had police and EMS included as permissible uses in their original authorizing bills but had that language removed by later amendments to those bills, as did Currituck County.

While I have not read all 200 original authorizing bills, an abbreviated review identified at least a handful that reflect legislative histories similar to that of Currituck County. See for example, Allegheny County, Session Law 1991-162, Caswell Beach, Session Law 1991-664, Holden Beach, Session Law 1987-963, and Sunset Beach, Session Law 1987-956. You can look up your government's local occupancy tax bills here.

Another possibility is that the court's opinion should be read more broadly to mean that police and EMS costs are never "tourism-related," regardless of a local government's particular legislative history. While the opinion spends a great deal of time discussing the evolution of Currituck County's local bills, the court phrased its ultimate conclusion very broadly. "We conclude that [police and EMS costs] are not "designed to increase the use of lodging facilities, meeting facilities, recreational facilities, and convention facilities . . . by attracting tourists or business travelers to the county." This is the same definition of "tourism-related expenditures" that currently applies to nearly all of the 200 local governments that levy occupancy taxes across North Carolina. A broad interpretation of the Court of Appeals' decision would mean that none of these counties may use occupancy taxes for police or EMS. A middle ground between these two interpretations might be found in the concurring opinion issued by Judge Hampson. Spending occupancy tax funds on police and EMS costs could be acceptable, wrote Judge Hampson, if the board of county commissioners were to first determine that such spending is related to tourism. The county's current occupancy tax legislation explicitly refers to the "judgment of Currituck County's Board of Commissioners" in its definition "tourism-related expenditures." (Similar

language deferring to the judgement of the TDA or local government governing board is found in the boilerplate definition of "tourism-related expenditures" used in nearly all current occupancy tax authorizing legislation.)

Because the Currituck County board had never expressly concluded that the police and EMS costs were tourism related, Judge Hampson concurred with the conclusion that such use of occupancy tax funds was impermissible. But, unlike the majority, Judge Hampson determined that such spending would be acceptable if the board made that necessary finding.

Given the uncertainty about how best to interpret the court's decision, for now my occupancy tax spending advice will likely reflect the middle ground described by Judge Hampson.

Were I approached by a local government that wanted to use occupancy tax funds on police or EMS costs, I would first determine if that local government's occupancy tax legislative history was similar to that of Currituck County. If so, then I would recommend against the use of occupancy tax funds for police and EMS costs.

But if not, I would advise that government to have the board charged with making those spending decisions (the county commissioners, the city council, or the TDA), to first make a finding that the police and EMS costs being funded with occupancy tax revenues are related to tourism. Perhaps the board could demonstrate the need to hire additional police and EMS personnel during the tourist season. Or it could show how calls for police and EMS services increased during tourist season. The details of the decision matter less than the fact that the board will have demonstrated that it judged the particular expense to be related to tourism.

In fact, I think a TDA or government board should always make a formal finding about the connection between a particular occupancy tax spending decision and tourism. Regardless of whether the expenditure's connection to tourism is obvious (purchasing land for a new public parking lot next to the beach) or less so (improving the lighting and streetscape in a downtown business district), formal findings about the connections between occupancy tax spending and tourism may minimize the risk of costly litigation like the Currituck County case.