

**OFFICIAL COPY**

Jul 13 2022

**THE VILLAGE'S  
RESPONSE TO  
RESPONDENTS' MOTION  
TO COMPEL**

## INTRODUCTION

Despite the incredibly narrow scope of the factual issues in this proceeding, Respondents seek communications made by the Village's Councilmembers regarding (1) the "ferry and on-island tram systems," (2) the "vehicle parking facility on the

mainland” and the “tug and barge operation,” and (3) all of the allegations set forth in the Complaint. Respondents’ Motion at 1.

The Village has produced all requested documents related to the parking facilities and the barge. To avoid a discovery dispute, the Village also tried to appease Respondents by providing descriptions of all of the communications the Village had with various entities regarding the ferry, the tram, the parking facilities, and the barge. *See Exhibit A* (Village’s Response to 1st Data Request) at Request Nos. 1-2 through 1-7. The Village is also producing all documents and official communications received by the Village related to the parking facilities and the barge since January 1, 2021. *See id.*, at Request No. 1-20. The Village provided all of this information to Respondents even though those communications do not bear directly on the factual issues before the Commission

Respondents, though, continue in their demand for “all Documents received by any elected or appointed official of the Village, since January 1, 2021, through any email, text, social media or other electronic account personally maintained by that official.” This is simply a bridge too far. Although the rules of discovery are liberal, they are not without limits. First, Respondents are not entitled to the full breadth of requested documents because the majority of the requested documents are not likely to lead to the discovery of admissible evidence. Second, the Village has no obligation to produce information documents that are not in its possession, custody or control.

### **ARGUMENT**

#### **I. Respondents are not seeking information that is reasonably calculated to lead to admissible evidence.**

The Supreme Court has admonished that a party should not “be allowed to roam at will in the closets of the other.” *Willis v. Duke Power Co.*, 291 N.C. 19, 34, 229 S.E.2d

191, 200 (1976). Rather, Rule 26 of the North Carolina Rules of Civil Procedure provides that:

Parties may obtain discovery regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]

N.C. R. Civ. P. Rule 26(b)(1) (emphasis added).

Information is deemed relevant only if it is “reasonably calculated to lead to the discovery of admissible evidence.” *Willis*, 291 N.C. at 33, 229 S.E.2d at 200. “Evidence must be relevant to be admissible[.]” *State v. Jennings*, 212 N.C. App. 422, 713 S.E.2d 793 (2011) (citing N.C. Gen. Stat. § 8C-1, Rule 402). Evidence is relevant only if it has a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C–1, Rule 401. Therefore, for information to be discoverable, the requested information must be likely to lead to evidence that will make a consequential fact more or less probable.

Respondents have failed to explain how documents received by the Village’s Councilmembers through their personal accounts—accounts over which the Village does not have possession, custody or control—that relate to the ferry, tram, or any allegations in the Complaint are relevant to the elements of Plaintiffs’ claims.

*First*, Request No. 1-21 is grossly overbroad, burdensome, and serves only to harass the Village officials. The Request captures, for example, a personal text received by a Councilmember from their spouse about arriving at the ferry terminal, a personal email from friends complaining about how long they waited for a tram, or an Instagram post by

a relative showing how much baggage they are loading on the ferry. The Councilmembers should not be burdened with sifting through seven months of personal communications in order to disclose such irrelevant and private exchanges. Given the overbreadth of the request and lack of connection to any conceivable admissible fact, the request for Councilmembers' personal, non-public communications would only serve to harass them. The Councilmembers should not be subject to such invasive discovery simply because of their work with the Village.

*Second*, Respondents misapprehend the Village's objection to the scope of Request No. 1-21. Respondents argue that the Village's objection would prevent Respondents from obtaining information about discussions "in which the Village officials have been involved regarding any purported relationship—'integral' or otherwise—between the regulated assets and the unregulated assets. That is simply not true. To be clear, the Village did not object to Request No. 1-21 to the extent it sought documents *related to the parking facilities and barge*. The Village recognized documents about the parking facilities and the barge could lead to the discovery of admissible evidence, as they could relate to the relation between those assets and the ferry service. Respondents' first justification for its discovery request is unavailing.

*Third*, the Village is not on trial here. Respondents' second justification for Request No. 1-21 is that the requested documents could "support . . . *their* [Respondents'] contentions in the docket" regarding the Village's interactions with the Bald Head Island Transportation Authority ("BHITA"), the Village pursuit to acquire Respondents' assets, and the Village's communications with state agencies. Respondents' Mot. Compel, at 4. Respondents' contentions in this proceeding appear aimed at painting the Village in a

negative light; thus, they are seeking to search the Councilmembers' personal accounts for evidence that this proceeding "is a multi-pronged approach by the Village to acquire" the transportation assets and that the Village "undercut the public authority its helped create." *See Respondents' Resp., Mot. Dismiss & Ans.*, at 8, 9. But an individual Councilmember's *motivations* have no consequence to the issues at hand—i.e., the regulatory status of the parking facilities and the barge. The consequential facts here are whether the parking facilities are integral to the ferry service and whether the barge transports household goods and people. Even if the Village had an ulterior motive—which is what Respondents seek to unearth—such a motive will *not* make a consequential fact more or less probable. Respondents' second justification for its discovery request is unavailing.

Respondents' Motion to Compel makes plain that Respondents are not seeking information that is likely to lead to the discovery of admissible evidence. Request No. 1-21 is not in search of evidence that the parking facilities and the barge should not be regulated. Respondents are seeking public officials' communications—*made in their personal accounts*—to find information that will paint the Village officials in a negative light. Data requests are not intended to allow a party to "roam at will in the closets of the other." *Willis*, 291 N.C. at 34, 229 S.E.2d at 200.

**II. The Village does not have possession, custody or control over the requested documents.**

The Village cannot produce documents that it does not have. Respondents seek documents that Village officials received "through any email, text, social media or other electronic account *personally maintained by that official*." Respondents' Mot. Compel, at 1. The Village does not have possession, custody, or control of its officials' *personal* accounts. Therefore, the Village cannot produce the materials sought in Request No. 1-21.

Rule 34 of the N.C. Rules of Civil Procedure limits production of documents to materials “which are in the possession, custody, or control of the party upon whom the request is served.” N.C. R. Civ. P. 34(a). “[D]ocuments are deemed to be within the possession, custody or control of a party for purposes of Rule 34 if the party has actual possession, custody or control of the materials or has the legal right to obtain the documents on demand.” *Pugh v. Pugh*, 113 N.C. App. 375, 380–81, 438 S.E.2d 214, 218 (1994) (internal quotation omitted).

The Village does not have possession or custody of its officials’ personal accounts; they individuals possess the accounts in their personal capacity. The Village also does not have control of the accounts; the individuals alone have access to the account and control the usage of the accounts. Nor does the Village have a legal right to obtain communications in the accounts. Thus, the Village has no right to rummage through the personal accounts of its Councilmembers. To say otherwise is to eradicate the critical distinction between government communication accounts and personal communication accounts.

Respondents, however, argue that the Public Records Act entitles Respondents to demand of which the Village does not have possession, custody, or control. Respondents are wrong.

To begin with, this is not public records request under Chapter 132 of the General Statutes. Respondents are engaged in discovery subject to the North Carolina Rules of Civil Procedure. Rule 34 plainly—and understandably—limits discovery to documents in a party’s possession, custody, or control. North Carolina’s Public Records Act does not empower Respondents to expand the scope of civil discovery simply because the Village is a government agency. For civil discovery, the specific limitations on document discovery

set forth in N.C. Gen. Stat. § 1A-1, Rule 34 trump whatever obligations the Village might have under Chapter 132. *State ex rel. Utils. Comm’n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969 (“[A] section of a statute dealing with a specific situation controls . . . other sections which are general in their application.”))

Moreover, even if the Public Records Act were relevant to this discovery dispute, it would not expand the scope of discoverable information. Similar to Rule 34, North Carolina’s Public Records Act only requires a government agency to produce documents in its possession and custody. Section 132-6(a) states that

Every custodian of public records shall permit any record *in the custodian’s custody* to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, *furnish copies thereof* upon payment of any fees as may be prescribed by law.

N.C. Gen. Stat. § 132-6(a) (emphasis added). The Supreme Court of North Carolina has held that the Public Records Act requires a “determination of possession or custody of the public records requested.” *State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010). Notably, the Supreme Court described Section 132-6(a)’s custody element as “the *critical determination* of whether the agency had possession of certain public records.” *Id.* at 213, 695 S.E.2d at 97 (emphasis added). Thus, because the Village does not have custody of Village officials’ personal accounts, the Public Records Act has no bearing here.

Respondents offer no legal authority that refutes the plain language of Section 132-6(a) and the binding precedent of the Supreme Court. Instead, Respondents offer a lone online quote from a member of the North Carolina School of Government. Respondents’ Mot. Compel at 5. Documents issued by the School of Government, though helpful in many

cases, are not precedential. *In re Vogler Realty, Inc.*, 208 N.C. App. 212, 218, 703 S.E.2d 159, 162 (2010) (manual published by School of Government is not “binding authority on this Court, whereas the North Carolina General Statutes and prior case law of our Court are”), *aff’d*, 365 N.C. 389, 722 S.E.2d 459 (2012). Notably, the statement by the School of Government is unsupported by any citation to legal precedent. It is simply not the law.

Although not cited in their Motion, Respondents will likely point to *Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council*, 181 N.C. App. 1, 3, 639 S.E.2d 96, 98 (2007), as supporting their reading of the Public Records Act. Such reliance would be misplaced. *Womack* involved the question of whether a law firm, which was appointed as attorney of the Town of Kitty Hawk, had to produce records in its possession in response to a public records request received by the Town. The court held that the law firm had to produce its client files. Importantly, the documents in *Womack* were the *Town’s legal records* held by the Town’s attorney. The *Womack* court held that such client’s files held by an attorney “*belong[] to the client.*” *Id.* at 13, 639 S.E.2d at 104 (emphasis added). In other words, the Town had legal possession of the requested legal documents—it could obtain them on demand. *Accord Pugh*, 113 N.C. App. at 380–81, 438 S.E.2d at 218 (“[D]ocuments are deemed to be within the possession, custody or control of a party . . . if the party . . . has the legal right to obtain the documents on demand.”).

*Womack* does not justify the Respondents’ demand for personal communications of the Councilmembers. *Womack* is consistent with the Supreme Court’s ruling in *SEANC* that the Public Records Act only requires production of documents in “the possession or custody” of the agency. *SEANC*, 364 N.C. at 214, 695 S.E.2d at 97. In *Womack*, the requested materials *belonged to the Town*; the Town had possession or custody of the

documents at issue. Respondents, in contrast, are seeking personal communications that do not belong to the Village.

Finally, even if Respondents could invoke the Public Records Act, the Act does not justify the immense burden placed on Councilmembers to search through and produce personal communications within two weeks. The pace of discovery in this proceeding is brisk. The Public Records Act does not impose such demanding timelines. Indeed, it only requires agencies to furnish documents in “as promptly as possible,” N.C. Gen. Stat. § 132-6(a); it does not burden an agency with producing documents in a matter of days.

The law in North Carolina is that the Public Records Act does not govern discovery, Chapter 1A-1 does. Even if the Public Record Act were applicable here, the Supreme Court has held that the Act does not obligate an agency to produce documents that are not in the agency’s possession or custody. The Public Records Act does not conscript a government official’s personal email and text accounts to the service and scrutiny of the public.

WHEREFORE, the Village respectfully asks the Commission to deny Respondents’ Motion to Compel.

This 13th day of July, 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing REPLY TO RESPONDENTS' RESPONSE TO THE VILLAGE'S MOTION TO JOIN NECESSARY PARTY has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

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This the 13th day of July, 2022.

By: /s/ Craig D. Schauer

# EXHIBIT A

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

**Docket No. A-41, Sub 21**

VILLAGE OF BALD HEAD ISLAND,	)	
	)	
Complainant,	)	<b>VILLAGE OF BALD HEAD</b>
	)	<b>ISLAND’S OBJECTIONS</b>
v.	)	<b>AND RESPONSES TO THE</b>
	)	<b>FIRST SET OF DATA</b>
	)	<b>REQUESTS FROM BALD</b>
BALD HEAD ISLAND	)	<b>HEAD ISLAND</b>
TRANSPORTATION, INC. and BALD	)	<b>TRANSPORTATION, INC.</b>
HEAD ISLAND LIMITED, LLC,	)	<b>AND BALD HEAD ISLAND</b>
	)	<b>LIMITED, LLC</b>
Respondents.	)	

Village of Bald Head Island (the “Village”), by and through its undersigned counsel, hereby serves its Objections and Responses to the first set of Data Requests served by Bald Head Island Transportation, Inc. (“BHIT”) and Bald Head Island Limited, LLC (“BHIL” or “Limited”) (collectively, “Respondents”) in the above-captioned docket.

**GENERAL OBJECTIONS**

1. The Village objects to and will not employ the “Definitions and Instructions” contained in this First Set of Data Requests to the extent that they vary the standard usage of the English language, purport to impose ambiguous, overly broad, or unduly burdensome demands or duties, and/or seek to impose duties and obligations in addition to or beyond those prescribed by the discovery provisions of the North Carolina Rules of Civil Procedure and other applicable laws.

2. The Village objects to each and every request to the extent it seeks disclosure of information:

a. Protected by attorney-client privilege;

- b. Prepared in anticipation of litigation or for trial;
- c. Constituting attorney work product;
- d. Constituting or containing mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the Village concerning this litigation; or
- e. Otherwise protected from discovery by an applicable privilege or protection afforded by the North Carolina Rules of Civil Procedure, the North Carolina Rules of Evidence, or other applicable state or federal laws, on the grounds that privileged matter, attorney work product, and trial preparation materials are exempt from discovery.

3. The Village has not fully completed its continuing search for information relating to the facts of this case, or its preparation for trial. The following responses, and the documents produced herewith, are made without prejudice to the Village's right to supplement or amend these responses, or to produce evidence of any fact or facts, or to produce any witnesses, which the Village may later discover or recall. The Village reserves the right to supplement or amend any and all responses herein as additional facts or documents are ascertained or located, analyses are made, and contentions by other parties are made, to the extent that such supplementation is required and/or allowed by the North Carolina Rules of Civil Procedure and/or the Rules of the State of North Carolina Utilities Commission.

### **FIRST SET OF DATA REQUESTS**

- 1-1. Provide copies of any formal or informal data requests sent to Complainant by the Public Staff or any Intervenor, and responses thereto, in or related to this Docket or the issues raised by Complainant's requests for relief in this Docket.

**RESPONSE:** Subject to third-party claims of confidentiality, the Village will serve Respondents with data requests, and responses thereto, received by the Village in this Docket or related to this Docket or the issues related to the Village's request for relief in this Docket.

- 1-2. Describe in detail any communications that Complainant has made to or received from the Bald Head Island Transportation Authority ("BHITA" or "Authority") since January 1, 2022 that relates in any way to (i) BHIT's ferry and on-island tram systems ("the Regulated Assets"), (ii) BHIL's vehicle parking facility on the mainland, (iii) BHIL's tug and barge operation ("ii" and "iii" together, "Unregulated Assets"), or (iv) the facts and allegations set forth in the Complaint.

**RESPONSE:** To the extent that Request No. 1-2 seeks information about communications that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-2 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any communications the Village may have had with BHITA are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility) are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the Village objects to the extent this Request is

seeking information that is protected by legislative immunity or quasi-judicial immunity.

Subject to and notwithstanding these objections and the General Objections, the Village states the following:

- BHITA Chair Susan Rabon was copied on letters to BHIT and BHIL, including the letters dated January 13 and 26, 2022, regarding the Village's position on matters relating to the Bald Head Island Transportation System (the "Transportation System"). All such letters will be produced in response to these requests.
- On various dates since January 1, 2022, Mayor Peter Quinn and BHITA Chair Susan Rabon have spoken by phone to coordinate times, locations, and similar logistics matters for BHITA meetings.
- The Village was provided with copies of all public meeting notices of BHITA during the requested time period by the BHITA Clerk, including the agendas and related documents for the March 16 and June 15, 2022 Regular BHITA Meetings.
- During the relevant period, Mayor Peter Quinn and Mayor Pro Tempore Scott Gardner, have engaged in various discussions with BHITA Chair Susan Rabon and BHITA Members Paul Cozza, Claude Pope, Jr., and Rex Cowdry regarding the possibility of interlocal cooperation between the two public entities to acquire and operate the Transportation System in a manner that best served residents and visitors to Bald Head Island. These discussions have taken place in person, over telephone/video calls, and via

email and have included the exchange of draft interlocal agreements. These discussions ceased following the May 31, 2022 announcement of the potential sale of the Transportation System to SharpVue Capital, LLC. All email communications related to these discussions, including attachments thereto, will be produced.

- 1-3. Describe in detail any communications that Complainant has made to or received from the Bald Head Island Club (“BHIC”) since January 1, 2022 that relates in any way to (i) BHIT’s ferry and on-island tram systems (“the Regulated Assets”), (ii) BHIL’s vehicle parking facility on the mainland, (iii) BHIL’s tug and barge operation (“ii” and “iii” together, “Unregulated Assets”), or (iv) the facts and allegations set forth in the Complaint.

**RESPONSE:** To the extent that Request No. 1-3 seeks information about communications that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-3 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village’s action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any communications the Village may have had with BHIC are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity.

Subject to and notwithstanding these objections and the General Objections, the Village states the following:

- BHIC President Slaughter Fitz-Hugh was copied on letters to BHIT and BHIL, including the letters dated January 13 and 26, 2022, regarding the Village's position on matters relating to the Bald Head Island Transportation System (the "Transportation System"). All such letters will be produced in response to these requests.
- During the relevant period, Mayor Pro Tempore Scott Gardner has had various in-person conversations with members of the BHIC Board of Governors, including President Fitz-Hugh, regarding the Village's decision to file this action and BHIC's possible intervention in the same.
- Former Mayor Pro Tempore Michael T. Brown was previously President of the BHIC Board of Governors. Mr. Brown resigned from Village Council effective February 10, 2022.
- Council Member Ginnie White, who was appointed to fill a vacancy on Council on February 18, 2022, and sworn into office on March 2, 2022, is currently a member of the BHIC Board of Governors.

- 1-4. Describe in detail any communications that Complainant has made to or received from the Bald Head Association ("BHA") since January 1, 2022 that relates in any way to (i) BHIT's ferry and on-island tram systems ("the Regulated Assets"), (ii) BHIL's vehicle parking facility on the mainland, (iii) BHIL's tug and barge operation ("ii" and "iii" together, "Unregulated Assets"), or (iv) the facts and allegations set forth in the Complaint.

**RESPONSE:** To the extent that Request No. 1-4 seeks information about communications that do not concern the utility status of the Deep Point Parking

Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-4 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any communications the Village may have had with BHA are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity.

Subject to and notwithstanding these objections and the General Objections, the Village states the following:

- BHA President Alan Briggs was copied on letters to BHIT and BHIL, including the letters dated January 13 and 26, 2022, regarding the Village's position on matters relating to the Bald Head Island Transportation System (the "Transportation System"). All such letters will be produced in response to these requests.
- During the relevant period, Mayor Peter Quinn and Mayor Pro Tempore Scott Gardner spoke by telephone with BHA President Alan Briggs regarding the Village's decision to file this action. Mayor Pro Tempore

Scott Gardner emailed Mr. Briggs a copy of the notice of filing after this action was filed.

- 1-5. Describe in detail any communications that any Village-nominated member of BHITA (to include Andy Sayre, Michael Brown, Claude Pope, Peter Quinn and Scott Gardner) has made to or received from (i) the North Carolina Local Government Commission or any of its officials, members or employees; (ii) North Carolina Treasurer Dale R. Folwell; or (iii) North Carolina Auditor Beth Wood, since December 1, 2019 that relates in any way to (i) BHIT's ferry and on-island tram systems ("the Regulated Assets"), (ii) BHIL's vehicle parking facility on the mainland, (iii) BHIL's tug and barge operation ("ii" and "iii" together, "Unregulated Assets"), or (iv) the facts and allegations set forth in the Complaint.

**RESPONSE:** To the extent that Request No. 1-5 seeks information about communications that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-5 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of the public utility status of the Deep Point Parking Facilities and Barge services. Any communications the individuals named in Request No. 1-5 may have had with the North Carolina Local Government Commission, North Carolina Treasurer, and/or North Carolina Auditor are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Further, the Village objects Request No. 1-5 to the extent it purports to seek knowledge of any individual's official actions or communications solely as a member of BHITA;

such requests should be directed to BHITA. Additionally, the Village objects to Request No. 1-5 to the extent it purports to impute an obligation on the Village with respect to the knowledge of BHITA Member Claude Pope Jr. Mr. Pope is a private citizen for whom the Village has no direct knowledge of his communications with the entities or persons listed in Request No. 1-5. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity.

Subject to and notwithstanding these objections and the General Objections, the Village states the following:

- During the relevant period, the Village and its elected officials, including former Mayor Andy Sayre, former Mayor Pro Tempore Mike Brown, Mayor Peter Quinn, and Mayor Pro Tempore Scott Gardner, have corresponded by letter with the Local Government Commission (“LGC”), including by letters addressed to Treasurer Dale Folwell in his official role as LGC Chair, regarding various matters responsive to this request. All responsive documents will be produced in response to these requests.
- Upon information and belief, former Mayor Andy Sayre discussed matters responsive to this request, including the BHITA revenue bond application, with Treasurer Folwell at times during the requested period. These conversations may have occurred by telephone and in-person.
- In May 2022, former Mayor Andy Sayre and Mayor Peter Quinn met with LGC Member John Burns to discuss the pending BHITA revenue bond application and the pending Village general obligation bond application.

- 1-6. Describe in detail any communications that Complainant has made to or received from any elected or appointed official of the State of North Carolina (including any staff, employee or person working on behalf of any such official) since January 1, 2022 that relates in any way to (i) BHIT's ferry and on-island tram systems ("the Regulated Assets"), (ii) BHIL's vehicle parking facility on the mainland, (iii) BHIL's tug and barge operation ("ii" and "iii" together, "Unregulated Assets"), or (iv) the facts and allegations set forth in the Complaint.

**RESPONSE:** To the extent that Request No. 1-6 seeks information about communications that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-6 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any communications the Village may have had with State of North Carolina officials are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility) and are not relevant to any of the claims or defenses in this action. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity.

Subject to and notwithstanding these objections and the General Objections, the Village states the following:

- All responsive communications summarized in Request Nos. 1-2 to 1-5 are incorporated herein by reference.

- On January 18, 2022, and June 1, 2022, counsel for the Village spoke by telephone with Eric Fletcher, General Counsel to North Carolina Governor Roy Cooper, regarding news stories that related to the Transportation System. The first call on January 18, 2022, followed the WRAL story titled “NC Auditor suggests Cooper administration tried to sway Bald Head Island deal,” available at <https://www.wral.com/nc-auditor-suggests-cooper-administration-tried-to-sway-bald-head-island-deal/20078545/>.

The second call on June 1, 2022, followed the widely publicized announcement of the potential sale of the Transportation System to SharpVue Capital, LLC.

- 1-7. Describe in detail any communications that Complainant has made to or received from any member, official or employee of the North Carolina Local Government Commission (“LGC”) since December 1, 2019 that relates in any way to (i) BHIT’s ferry and on-island tram systems (“the Regulated Assets”), (ii) BHIL’s vehicle parking facility on the mainland, (iii) BHIL’s tug and barge operation (“ii” and “iii” together, “Unregulated Assets”), or (iv) the facts and allegations set forth in the Complaint.

**RESPONSE:** To the extent that Request No. 1-7 seeks information about communications that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-7 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village’s action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any communications the Village may have had with the North Carolina Local Government Commission are not

relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility) and are not relevant to any of the claims or defenses in this action. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity.

Subject to and notwithstanding these objections and the General Objections, the Village states the following:

- All responsive communications summarized in Request No. 1-5 are incorporated herein by reference.
- During the relevant period, Village staff, primarily consisting of Village Manager Chris McCall and Village Finance Director Zachary Hewett, and other Village agents, including bond counsel Ed Lucas and Brandon Lofton from the Robinson Bradshaw law firm and financial advisor David Cheatwood of First Tryon Securities, have communicated by telephone and email with LGC staff, including Tony Blaylock, Tim Romocki, and Sharon Edmundson, regarding the BHITA revenue bond application, the Village general obligation bond application, and other matters responsive to this request. All responsive, non-privileged documents will be produced in response to these requests.

- 1-8. Describe in detail why, after passing a resolution on or about August 7, 2017 that created BHITA along with similar resolutions by the City of Southport and Brunswick County, the Village instead chose to become, as it describes in paragraph 43 of its Complaint, a “potential purchaser” seeking to acquire the Regulated Assets and the Unregulated Assets to own and operate apart from the Authority.

**RESPONSE:** To the extent that Request No. 1-8 seeks information that does not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-8 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Matters concerning public policy determinations by the Village are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility) and are not relevant to any of the claims or defenses in this action. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity.

Subject to and notwithstanding these objections, the Village states the following: In and around 2017, the Village supported the BHITA's formation and certain agreements among local government entities to provide funds to assist with the BHITA's formation. The Village, however, did not express any support for BHITA's ultimate acquisition of Limited's assets because the Village wanted to scrutinize the terms of such an acquisition and BHITA's planned operations of the assets. BHITA and Limited provided no information to the Village or the public about potential terms of and due diligence concerning BHITA's acquisition of Limited's assets prior the announcement of a deal. BHITA publicly announced the terms of a potential deal in December 2020 and began the process of seeking final approval from the Local Government Commission. When the details of the

proposed transaction became public, the Village concluded BHITA's acquisition and operation of Limited's assets were not in the public's interest. Therefore, the Village pursued acquisition of Limited's assets.

- 1-9. Describe in detail the basis for the assertion in paragraph 46 of the Complaint that a decision by the Commission to exert regulation over the Unregulated Assets would impact "whether they can be sold [or] transferred" or operated "outside the control and jurisdiction of the Commission."

**RESPONSE:** If the Commission determines the parking lot is a public utility service or asset and the barge is a common carrier, then the Commission would have oversight over the ownership and operations of those assets, which includes the transfer or sale of the asset. *See* N.C. Gen. Stat. §§ 62-3, 62-32, 62-111. Additional factual and legal bases for these assertions are set out in detail in the Complaint and Request for Determination of Public Utility Status.

- 1-10. Describe in detail how BHIL's "ability to freely raise parking rates for ferry passengers without constraint or regulatory oversight" has operated, since the inception of such service, as the type of "clear and present threat to the ability of ferry passengers to receive regulated utility service from BHIT" as stated in paragraph 58 of the Complaint.

**RESPONSE:** Limited's provision of parking for ferry passengers is an integral ancillary service to the ferry service. Because the Commission has yet to regulate Limited's operation of the parking lot, Limited has had complete discretion to, at any time, increase parking rates to an amount that would be cost prohibitive for the public to use the regulated ferry service.

- 1-11. Describe in detail any facts that Complainant alleges demonstrate that any rates charged by BHIT for ferry or on-island tram service are, or have been, unjust or unreasonable.

**RESPONSE:** To the extent that Request No. 1-11 seeks information that does not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-11 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any facts related to rates for ferry or on-island tram services are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility) and are not relevant to any of the claims or defenses in this action.

Subject to and notwithstanding these objections and the General Objections, the Village states the following: Because the Commission regulates the prices of ferry tickets, which includes use of the on-island tram services, the Commission determines just and reasonable rates for these services.

- 1-12. Describe in detail any facts that Complainant alleges demonstrate deficiencies in ferry or on-island tram service, or that BHIT has failed to follow any Commission rules, regulations, or orders regarding the conduct of its regulated activities.

**RESPONSE:** To the extent that Request No. 1-12 seeks information about "deficiencies" that do not concern utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-12 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action

brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any facts related to deficiencies in ferry or on-island tram services are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Otherwise, as alleged in the Complaint, the Village's contention is that the Parking Facilities and Barge are subject to the regulatory authority of the Commission under Chapter 62 of the General Statutes and that BHIT and/or Limited have failed to comply with various regulatory requirements applicable to the provision of regulated services and ownership of regulated assets. These allegations are set forth in detail in the Complaint.

- 1-13. Describe in detail Your understanding of the types, and nature of, services provided by BHIL's tug and barge operations to and from Bald Head Island that support or are relevant to the allegations of Your Complaint.

**RESPONSE:** The Village's understanding of the types, and nature of, services provided by BHIL's tug and barge operations to and from Bald Head Island that are relevant to the Village's claims are set forth in the Complaint and Request for Determination of Public Utility Status. Furthermore, the "types" and "nature" of the tug and barge services provided by Limited are fully known by Limited. The Village reserves the right to supplement its response based on information provided by Respondents through discovery in this proceeding.

- 1-14. Describe in detail Your understanding of the charges, at any and all times from 2000 to the present, for each of those types of services You set forth in response to Data Request 1-12.

**RESPONSE:** To the extent that Request No. 1-14 seeks information about matters that do not concern utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-14 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any understanding of deficiencies related to ferry or on-island tram services are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the charges for the ferry and tram services provided by BHIT from 2000 to the present are fully known by BHIT.

- 1-15. Describe in detail Your understanding of the types, and nature of, parking services provided at the Deep Point Terminal and Marina owned by BHIL that support or are relevant to the allegations of your Complaint.

**RESPONSE:** The Village's understanding of the types, and nature of, parking services provided at the Deep Point Terminal and Marina owned by BHIL are set out in the Complaint and Request for Determination of Public Utility Status. Furthermore, the "types" and "nature" of the parking services provided by Limited are fully known by Limited.

- 1-16. Describe in detail Your understanding of the charges, at any and all times from 2000 to the present, for each of those types of services (e.g. daily, annual pass, etc.) set forth in response to Data Request 1-14.

**RESPONSE:** To the extent that Request No. 1-16 seeks information about matters that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-16 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Any understanding of deficiencies related to ferry or on-island tram services are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the charges for the ferry and tram services provided by BHIT from 2000 to the present are known by BHIT.

- 1-17. Produce all Documents identified or referenced in any of Complainant's responses to Data Request Nos. 1-1 through 1-16, or which were in any way consulted or used to prepare such responses.

**RESPONSE:** Subject to and without waiving its objections to any of the foregoing Responses and the General Objections, the Village will produce all non-privileged documents that were consulted or used to prepare the responses to Request Nos. 1-1 through 1-16.

- 1-18. Produce all Documents that state, memorialize, or summarize any action taken by the Village in support of its decision to no longer support its August 7, 2017 resolution that created BHITA and instead decide to acquire the Regulated Assets and the Unregulated Assets to own and operate apart from the Authority.

**RESPONSE:** To the extent that Request No. 1-18 seeks information that does not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-18 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Documents concerning public policy determinations, if any, by the Village are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence. Further, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity. Furthermore, the Village objects to the Request's statement that the Village "no longer supports" the August 7, 2017 resolution.

Subject to and notwithstanding these objections and the General Objections, the Village will produce documents in its possession, custody, and control regarding the Village's pursuit to acquire Limited's assets.

- 1-19. Produce all Documents that state, memorialize, or summarize any financial analyses or evaluations commissioned or received by the Village in support of its decision to become, or actions taken in support of its self-proclaimed status as a “potential purchaser” of the Regulated Assets and/or the Unregulated Assets.

**RESPONSE:** To the extent that Request No. 1-19 seeks information that does not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-19 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village’s action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Documents concerning financial determinations, if any, by the Village are not relevant to the subject matter of this action (i.e., whether the Deep Point Parking Facilities and Barge services are or should be subject to treatment as a public utility), are not relevant to any of the claims or defenses in this action, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and notwithstanding these objections and the General Objections, the Village will produce non-privileged documents in its possession, custody, and control that are responsive to this request.

- 1-20. Produce all Documents received by the Village (including its Council, elected and appointed officials, and any of its employees or agents) since January 1, 2021 that relate in any way to (i) BHIT’s ferry and on-island tram systems (“the Regulated Assets”), (ii) BHIL’s vehicle parking facility on the mainland and/or its tug and freight barge operation (“Unregulated Assets”), or (iii) the facts and allegations set forth in the Complaint.

**RESPONSE:** To the extent that Request No. 1-20 seeks information about communications that do not concern the utility status of the Deep Point Parking

Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-20 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. The Village's action brings a request for determination of public utility status of the Deep Point Parking Facilities and Barge services. Specifically, documents the Village received regarding the ferry and on-island transportation system are not relevant to any of the claims or defenses in this action. In addition, the request for documents from as early as January 1, 2021, is overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objection, and subject to the General Objections, the Village will produce non-privileged documents it received related to the parking lot and the barge that the Village received since January 1, 2021.

- 1-21. Produce all Documents received by any elected or appointed official of the Village, since January 1, 2021, through any email, text, social media or other electronic account personally maintained by that official that relate in any way to (i) BHIT's ferry and on-island tram systems ("the Regulated Assets"), (ii) BHIL's vehicle parking facility on the mainland, (iii) BHIL's tug and barge operation ("ii" and "iii" together, "Unregulated Assets"), or (iv) the facts and allegations set forth in the Complaint.

**RESPONSE:** In addition and subject to the General Objections, to the extent that Request No. 1-21 seeks documents that are duplicative with Request No. 1-20, the Village objects to Request No. 1-21 as overbroad, unduly burdensome, irrelevant, duplicative, and not reasonably calculated to lead to the discovery of admissible

evidence. To the extent that Request No. 1-21 seeks information about communications that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-21 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity. Finally, the Village is not in possession, custody, or control of email, text, social media or other electronic accounts personally maintained by any elected or appointed official of the Village.

This 8th day of July, 2022.

BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.

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*Attorneys for Village of Bald Head Island*

OFFICIAL COPY

JUL 13 2022

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **VILLAGE OF BALD HEAD ISLAND'S OBJECTIONS AND RESPONSES TO THE RESPONDENTS' FIRST DATA REQUEST TO VILLAGE OF BALD HEAD ISLAND** has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail.

This the 8<sup>th</sup> day of July, 2022.

By: /s/ Craig Schauer