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TITLE

RESOLUTION AMENDING POLICY OF UNIFORM STANDARDS FOR CLAIMS AGAINST GUILFORD COUNTY EMPLOYEES, OFFICERS, AND OFFICIALS

SPONSOR

Yvonne Moebs, Risk Management Director

RESOLUTION

RESOLUTION

POLICY OF UNIFORM STANDARDS FOR CLAIMS AGAINST GUILFORD COUNTY EMPLOYEES, OFFICERS, AND OFFICIALS

As authorized by the Resolution Approving and Adopting a Policy Regarding Settlement of Certain Negligence and Tort Claims Against Guilford County in Limited Circumstances, adopted by the Guilford County Board of Commissioners on May 4, 2017, the following Policy is hereby implemented in order to ensure due process and equal protection pursuant to law, and to ensure that similarly situated individuals are treated alike:

1. Except as specifically set out here, it shall remain the Policy of Guilford County to assert the affirmative defense of governmental immunity as a complete bar and defense in all cases in which government immunity is applicable, and to pursue this defense, in addition to all other appropriate defenses, at all stages of proceedings including the claim

stage, and trial and appeal stages of judicial arbitration, mediation, administrative, or other procedure.

2. The County Attorney and Risk Manager shall review all insurance policy provisions before the County's renewal of, or purchase of, any insurance applicable to or affecting the County's governmental immunity defense. All negligence and tort claims to the extent not covered by the County's insurance will be reviewed initially by the Risk Manager, who shall investigate the claim and consult with the County Attorney regarding the results of the investigation and whether the defense of governmental immunity may apply and whether the matter should nevertheless be settled based on analysis and applicability of the factors set forth herein. The County Attorney may conduct additional investigation as deemed necessary. It is the express policy of Guilford County that it will assert its defense of governmental immunity in all lawsuits where it is determined that such defense is applicable. If the County Attorney determines that the defense of governmental immunity applies to the claim, this policy will apply. The County Attorney, after consultation with the Risk Manager and such other county staff as necessary, shall make a recommendation to the County Manager regarding any possible settlement of the claim. For settlement amounts of \$200,000.00 or less, the County Manager is authorized to execute a settlement agreement when appropriate under the provisions of this Policy. For settlement amounts over \$200,000, the Guilford County Board of Commissioners must approve, when appropriate under the provisions of this Policy, and settlement amount not covered by the County's insurance. If governmental immunity does not apply, the claim shall not be subject to this Policy and will be reviewed like any other liability claim.
3. The County retains the right to plead, assert and interpose governmental immunity on unique claims, and cases of first impression as to which there may appear to be no clearly established precedent. No such claim to which the County Attorney deems governmental immunity may apply shall be otherwise settled by the County or any agent acting on behalf of the County. Notwithstanding anything to contrary herein, this Policy shall not apply to any claim relating to any act or omission of the County for which the State of North Carolina provides relief pursuant to the Tort Claims Act or any other provision.
4. If in the opinion of the County Attorney, but for the defense of governmental immunity, the County would be liable for property damage, personal injury damages, or wrongful death to a claimant, the County may resolve such claims, but only to extent authorized in this Policy and only if consistent with the stated conditions and factors in this Policy.

The evaluation of the merits of any claim inherently involves the application of this Policy is intended to require that the same set of factors and considerations be claims and legal proceedings, as well as the subjective nature of predicting the outcome of legal claims and proceedings. In making a determination of whether to

settle a negligence or tort claim notwithstanding the potential availability of the affirmative defense of governmental immunity, the County shall:

- a. Consider and evaluate evidence, presumptions and conclusions, including, but not limited to, the following: statements and observations of witnesses, statements and evaluations of the parties, oral and written reports (including investigative reports), affidavits, admissions, physical evidence, any available scientific or expert data or opinion, and any other facts and observations appropriate for the Risk Manager, claims adjusters or other persons regularly charged with the duty to evaluate liability claims to assess in evaluating the County's potential liability or exposure.
- b. Confirm that the injury or damage claim has substantial merit pursuant to established negligence or tort law in North Carolina. Among other legal requirements the loss damage or injury must have resulted from the breach of a duty to the injured party or deceased on the part of a County employee, officer, or official (collectively "employee"). The injury must have been foreseeable and proximately caused by a negligent act or tort of a County employee, who at the time of the occurrence was acting within the course and scope of his/her employment and which resulted in injury to the person or property of the claimant.
- c. Consider the following factors:
 - i. Whether there appears to have been a negligent act or intentional tort committed by an employee of the County acting within the scope and authority of their employment;
 - ii. Whether it appears that the damage or loss was the result of any gross negligence, willful misconduct, or intentional or criminal act by a County employee acting within the scope and authority of his/her employment;
 - iii. Whether there are defenses available to the County, in addition to governmental immunity, including, but not limited to, contributory negligence, statute of limitations or repose, laches, assumption of risk, last clear chance, and other common law or statutory defenses;
 - iv. Whether any defenses, including governmental immunity or public duty doctrine, are available to the County employee in his/her individual capacity;
 - v. Whether the County employee violated any departmental regulation, traffic

or criminal laws; or other ordinance or regulation;

- vi. Whether the claimant appears to have violated any traffic or criminal laws, or other ordinance or regulation, assumed any risk, or to have been contributorily negligent;
- vii. The likely cost of the County of defending the claim;
- viii. The efficient use of taxpayer funds in a cost effective manner, including the division and distraction of management and/or supervisor's time and attention from the primary duties;
- ix. Whether there are other joint tortfeasors, contributors, or other parties, which may be able to compensate the claimant in whole or in part of the loss, damage or injury;
- x. Whether the claimant is indebted, or becomes indebted, to the County, or the County has a claim or counterclaim against the claimant such that the amount owed to the County, whether arising from the occurrence or accident or otherwise, may be set off against the compensable damages payable to the claimant.
- xi. Whether claimant has insurance coverage which will compensate claimant for the loss, damage or injury in whole or in part;
- xii. Whether the claimant was able to clearly document their damages, through investigation, physical tests, or other credible independent data; and
- xiii. The credibility of witnesses who may be available for either the claimant or the County.

In order to afford due process and equal protection and to avoid any arbitrary or capricious treatment of its citizens, this Policy will be applied fairly and consistently by Guilford County, based on the above factors and considerations, to everyone who, based on the facts of their case, is similarly situated, irrespective of age, race gender, religion, political affiliation, ethnicity, color, disability status, national origin, or any other classification.

- d. Exclude from consideration any damage, injury, or loss covered in whole or in part the claimant's insurance, including but not limited to underinsured and uninsured coverage, or which may be recouped from any collateral source, as not recoverable from the County. The claimant must provide a copy of all relevant insurance policies to the County before a claim may be settled.

5. This Policy covers claims and matters, below the County's insurance coverage, which can be settled on a mutually-acceptable basis. It does NOT apply, nor does Guilford County waive the right to assert and/or interpose any defense, in any administrative, mediation, judicial, agency, or other involuntarily process, or any other adversarial forum, instituted against the County or its employees or officers on behalf of the claimant or any third party based upon the occurrence giving rise to the injury, loss or damage. However, nothing herein shall limit the County's right to consider settlement of any such proceeding irrespective of this Policy if it is deemed at such time to be in the County's best interest.
6. The following elements of damages, only, will be compensable in settlement of any claim pursuant to this Policy: actual monetary loss sustained for personal injury, or for injury to real property or tangible personal property, including reasonable loss of time and wages, actual medical expenses, ambulance costs, and any other compensable out of pocket loss actually incurred and not prohibited by this Policy.

Excluded, among other similar elements, from any damage or loss payment by the County are:

- a. Lost profits or business loss, consequential damages, pain and suffering, mental anguish, other economic loss, disfigurement or scarring, exemplary, vindictive, punitive or aggravated damages, penalties, loss of consortium or other injury to spousal or familial relationships, or any other payment other than to the person actually suffering physical injury or impact, or his or her, legal representative; excluded are payments to anyone claiming injury because of observing, or witnessing, the accident or occurrence;
- b. Loss of intangible property;
- c. Damages paid from a collateral source, including, but not limited to, workers' compensation, insurance, or contribution; should any part of the loss or damage, be so compensated the County will only consider those elements of damage not so paid;
- d. Interest, delay damages relating to the time value of money, on any settlement;
- e. Libel, slander, defamation, or injury to reputation;
- f. Loss of use, or rental value, for a motor vehicle or other equipment;
- g. Any subrogated, indemnified, or third party claims as a result of the occurrence;
- h. Lost contract revenues as a result of the occurrence; and

- i. Attorney's and fees and court costs.

7. Other conditions of this Policy are:

- a. This Policy does not provide for, authorize or effect a waiver of any other immunity or defense available to the County including, but not limited to, legislative, quasi-judicial, public official, officers, or employees, or volunteer's immunity; qualified immunity; or any other immunity established by statute or law.
 - b. Nothing in this Policy shall be construed as a total waiver of the affirmative defense of governmental immunity as to the County, its officers or employees.
 - c. This Policy shall not create any rights of claimants for which the County, but for governmental immunity, would not otherwise be liable.
8. To the extent that liability or casualty insurance which has been purchased by the County for any hazard, loss or occurrence with the intent to waive governmental immunity, applies to a particular claim, the provisions of the insurance policy shall govern, apply and prevail and this Policy shall not apply and shall be of no force or effect. In the alternative, if the County, or any entity on its behalf, has purchased liability or casualty insurance policies which by their terms specifically exclude or fail to include or cover losses, injury, and damage occurring from accidents or incidents to which governmental immunity would otherwise apply to a particular claim, then, to that extent, this Policy would apply to consideration of settlement with respect to claims for such losses.
9. The words, terms and phrase used in this policy shall be given their ordinary, usual and reasonable meaning. If the intent or meaning of any such words, terms or phrases is ambiguous, the County Attorney shall make a determination of such meaning or intent and that determination shall be final.

Effective upon adoption this 4th day of May 2017.

REQUESTED ACTION

Approve Resolution Amending policy of uniform standards for claims against Guilford County Employees, Officers and Officials.