

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 8378

WAKE COUNTY

DELMA BLINSON, JERRY R. JOHNSON,)
KELLIENE FISHER, DONALD R. REID,)
BRIAN GOSSAGE, WILFORD R. DOWE,)
and KENT MISEGADES,)

Plaintiff)

v.)

STATE OF NORTH CAROLINA;)
JAMES T. FAIN, III, Secretary of the N.C. Dept.)
of Commerce, in his official capacity; CITY OF)
WINSTON-SALEM, North Carolina and)
ALLEN JOINES, Mayer of Winston-Salem, in)
his official capacity; FORSYTH COUNTY,)
North Carolina and GLORIA D. WHISENHUNT,)
Chairperson of the Board of Commissioners of)
Forsyth County, in her official capacity; THE)
MILLENIUM FUND; WINSTON-SALEM)
BUSINESS, INC.; THE WINSTON-SALEM)
ALLIANCE; and DELL INC.,)

Defendants)

**DELL INC.'S MEMORANDUM IN SUPPORT OF
ITS MOTION TO DISMISS
PLAINTIFFS' AMENDED COMPLAINT**

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Defendant Dell Inc. (“Dell”) respectfully submits this memorandum of law in support of its motion to dismiss the Amended Complaint (“Complaint”) on the grounds that it fails to state a claim under the federal or State constitutional provisions pleaded by Plaintiffs.

NATURE OF THE CASE

“Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion.” Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996). Of the myriad state and local incentives that are intended to encourage specific activities, including business development, “[t]he most common form of state tax incentive in this country is the income tax credit.” *Id.* at 817. Plaintiffs evidently believe that such tax incentives are bad public policy. Instead of petitioning the Legislature for a change in policy, Plaintiffs, who are neither businesses nor corporations, but simply individual taxpayers and residents of North Carolina, have brought a facial challenge to state and local business legislation providing for economic development incentives. (Cmplt. ¶¶ 1-2, 4-10) While their suit ostensibly is aimed at the tax credits and local economic incentives that Dell will receive for locating a new manufacturing facility in the State of North Carolina, their constitutional theories are so broad, so sweeping, they would render unconstitutional *any* economic development incentives in this State, thus putting North Carolina at a competitive disadvantage vis-à-vis its sister states which continue to offer economic incentives to attract new businesses. In essence, Plaintiffs are inviting the courts to intervene in a quintessential political controversy on taxation. The Court should reject the invitation.

FACTS PLEADED IN THE COMPLAINT

The following facts are alleged in the Complaint or revealed in the exhibits attached to the Complaint, which are expressly incorporated in the Complaint.

“This action arises from legislation adopted by the General Assembly on November 4, 2004” to amend Chapter 105 of the General Statutes, our State’s tax code. (Cmplt. ¶2) The centerpiece of the legislation (Legislation) is Section 1. It adds a new Article 3G to the tax code entitled, “Tax Incentives for Major Computer Manufacturing Facilities.” (Cmplt. Ex. A at Section 1) Generally, the new Article 3G provides that a taxpayer is eligible for a tax credit against income and franchise taxes if: the taxpayer locates a major computer manufacturing facility in North Carolina; the taxpayer is expected to invest at least \$100,000,000 in private funds to construct the facility over a five-year period; and the taxpayer has or is expected to have an increased employment level at the facility of at least 1,200 within the first five years. *Id.* These eligibility requirements (e.g., the meaning of “increased employment level”) are further defined or delineated in the Legislation. *Id.* The amount of the tax credit is based on the computer manufacturing facility’s unit output and employment levels. *Id.* The Legislation (in Section 2) also amends the William S. Lee Quality Jobs and Business Expansion Act (the Lee Act), which for a decade has been used to provide tax incentives for new and expanding businesses in North Carolina, *see* N.C.G.S. Ch. 105, Art. 3A, so that now a taxpayer eligible for tax credits under new Article 3G is also eligible for enhanced tax credits under the Lee Act. (Cmplt. Ex. A, at Section 2) The Legislation also amends the section of the tax code dealing with sales and use tax refunds to provide that “computer manufacturing” includes the manufacturing or assembly of computer peripheral equipment, if it occurs at a facility at which the taxpayer also manufactures or assembles electronic computers. (Cmplt. Ex. A, at Section 3)

The General Assembly enacted the Legislation on the basis of these legislative findings:

- (1) It is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for the citizens of the State in strategically important industries.
- (2) Both short-term and long-term economic trends at the regional, State, national, and international levels have made the successful implementation of the State's economic development policies and programs both more critical and more challenging; in particular, national trade policies and the resulting impact on domestic competitiveness have made the retention of manufacturing jobs more difficult at a time of transition in the national, State, and regional economies.
- (3) Manufacturing employment in the State has been disproportionately affected by trade policies and global economic trends, resulting in the loss of jobs by many in the State's capable industrial workforce.
- (4) Computer manufacturing and distribution has been an important industry for the State and has prospered in this State due to our strong and productive workforce, focused worker training programs, research capabilities, tradition of innovation, and concentration of companies.
- (5) The computer manufacturing and distribution industry will remain a vital part of the world's, nation's, and State's future economy as society becomes more dependent on advanced computer technology.
- (6) It is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies, investments in training capacity, and other policies and programs.
- (7) The State must be an innovative leader in creating policies and programs that encourage the maintenance of manufacturing jobs in this country and State and in the development of efforts to support manufacturers during the transitional period as they adapt to rapidly changing global conditions.

(Cmplt. Ex. A, § 105-129.60)

The impetus for the Legislation was Texas-based Dell's decision to open a new computer manufacturing facility; the State used the Legislation to entice Dell to build and operate the facility in North Carolina, as opposed to another state. (Cmplt. ¶¶ 2, 18, 25, 29) Although Dell

was the impetus, the Legislation is not limited to Dell and indeed does not mention Dell.

(Cmplt., Ex. A) Any computer manufacturing facility satisfying the statutory requirements is eligible for a tax credit under the terms of the Legislation. *Id.*

The City of Winston-Salem (City) and Forsyth County (County) also offered economic development incentives to encourage and aid the location of Dell's new facility in their local jurisdictions. (Cmplt., Exs. D-H) The elected representatives on the City Council and the County Board of Commissioners approved resolutions (Resolutions) authorizing these incentives. *Id.* They did so after holding public hearings. *Id.* They did so pursuant to N.C.G.S. § 158-7.1, which authorizes cities and counties to dispense incentives to private corporations for purposes of economic development. The Resolutions reveal the determination of the City Council and the County Board of Commissioners that the incentives for the Dell project will stimulate the local economy, create new full-time jobs, increase the local property tax base and revenues, and increase local business prospects. (Cmplt., Exs. F-G)

The Resolutions authorized the City and County to enter into the "Agreement For Job Creation And Economic Development" (Agreement), which is Exhibit H to the Complaint and which is referenced in the Resolutions. (Cmplt., Exs. F-G). The Agreement was executed by Dell, the City, the County, and certain non-profit entities which are also defendants in this case. (Cmplt., Ex. H) The Agreement recites the findings of the City and County that Dell's industry is "strategically important" and its business model is advantageous for local business prospects; that the Dell project will bring direct and indirect benefits to the City and the County, including job creation, economic diversification, and training in technology and important skills; that the project will result in at least \$100,000,000 in taxable buildings and equipment (thus increasing

the property tax base); and that the project is expected to create at least 1,700 “qualified jobs” with an average wage of \$28,000 per year. (*Id.*, pp. 1-2)

The Agreement obligates the City and County to appropriate money to Dell, from their general funds, in the form of Annual Incentive Grants, if certain conditions are satisfied by Dell. (*Id.*, pp. 5-8) The Agreement also entailed (*see id.*, pp. 2-3) the City conveying to Dell, for a purchase price deemed a fair market value by the City, the site on which Dell has constructed its facility. (*Id.*, pp. 2-3; Cmplt., Ex. F) “The Agreement ... provides that Dell will purchase the Site upon which it is building its plant by paying \$7,000,000 for it.” (Cmplt. ¶72)

Plaintiffs challenge the Legislation, the Resolutions, and the Agreement. They advance numerous constitutional claims. Their claims are addressed below.

ARGUMENT

I. PLAINTIFFS CANNOT PREVAIL ON THEIR COMPLAINT UNLESS THEY SHOW, BEYOND A REASONABLE DOUBT, THAT THE ACTS ARE CLEARLY UNCONSTITUTIONAL

The Constitution of North Carolina and the government it created were entirely the result of the people’s exercise of their direct popular sovereignty. *See McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961); John V. Orth, *The North Carolina State Constitution, A Reference Guide* 40 (Greenwood Press 1993) (“The American Revolution, while it dissolved the tie with Great Britain, did not dissolve the political society of North Carolina. As all democratic politicians know, power comes from the people....”); *Griffin v. Graham*, 8 N.C. (Hawks) 96 (1820) (“[U]pon the revolution, the political rights and duties of the King devolved upon the people in *their* sovereign capacity”). In our State the people retained to themselves the right to enact the laws by which they are to be governed and to do all that is not denied to them by their Constitution that *they* enacted. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (“[I]t is firmly established that our State Constitution is not a grant

of power.... All power which is not expressly limited by the people in our State Constitution remains with the people”). Thus, “an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.” *Id.*

This principle of popular sovereignty is reflected in the fact that in this State the Legislature -- “as the lawmaking agent of the people,” *Martin*, 325 N.C. at 448, 385 S.E.2d at 478 -- is the dominant organ of government. Indeed, “the *preponderant power* has always rested with the legislature,” Orth, *N.C. Constitution* 42 (emphasis added), which explains why the “Separation of Powers” provision in North Carolina’s Constitution does not provide that the three branches of the State’s government are co-equal. *See* N.C. Const., Art. I, § 6.

Recognition of our State’s constitutional history has naturally led to a very modest form of judicial review in cases where the Constitution is invoked to invalidate legislative acts. This modest form of judicial review is reflected in two principles that control this case.

First, the judiciary in this State has always held that it may not declare a legislative act unconstitutional unless it is unmistakably established, *beyond a reasonable doubt*, that the act is clearly prohibited by the Constitution; if there is any reasonable doubt, the judiciary must stay its hand.

The right to declare an act unconstitutional should be exercised sparingly, and the conflict between the fundamental law and the legislation should be *manifest, and clear beyond any reasonable doubt*. We should endeavor, by the use of all reasonable logic, to harmonize the two, and only resort to the power as a last expedient, where our plain duty requires us to exercise it in order to preserve the supremacy of the Constitution.

Kornegay v. City of Goldsboro, 180 N.C. 441, 445, 105 S.E. 187, 189 (1920) (emphasis added).

See also id. (“a court will not adjudge an act of the Legislature invalid, unless its violation of the Constitution is, in their judgment, clear, complete, and unmistakable”); *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 647, 360 S.E.2d 756, 761 (1987) (the act’s unconstitutionality thus

must “plainly and clearly” be established beyond a reasonable doubt) (quoting *Glenn v. Board of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). In applying this principle, “every presumption is in favor of the validity of an act of the Legislature, and all doubts are resolved in support of the act.” *City of New-Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 435, 450 S.E.2d 735, 738 (1994). “If there is *any* reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.” *Sutton v. Phillips*, 116 N.C. 502, 504, 21 S.E. 968, 968 (1895) (emphasis added); *accord. State v. Brockwell*, 209 N.C. 209, 212, 183 S.E. 378, 379 (1936). In short, an act may “be declared unconstitutional only when no doubt exists”; “courts will not exercise this power in cases of doubt,” *State v. Moss*, 47 N.C. 66, 1854 WL 1395, *2 (1854), and “a statute will not be declared unconstitutional unless our Constitution *clearly prohibits* that statute,” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004) (emphasis added).¹

The beyond-a-reasonable-doubt rule of judicial restraint “is founded upon a proper respect for” the legislature, “which derives its authority from, and is responsible to, the people of the State,” *Brockwell*, 209 N.C. at 212, 183 S.E. at 379; which is presumed to know how its acts might affect “all the diversified interest of society” and to balance “individual happiness and the common weal,” *Hoke v. Henderson*, 15 N.C. (Dev.) 1, 8, 1833 WL 45, *6; *overruled on other grounds, Mial v. Ellington*, 134 N.C. 131, 46 S.E.2d 961 (1903), and which itself, as the

¹ See also, e.g., ; *Brannon v. N.C. State Bd. of Elections*, 331 N.C. 335, 339, 416 S.E.2d 390, 392 (1992); *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991); *Gardner v. City of Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967); *Turner v. City of Reidsville*, 242 N.C. 42, 46, 29 S.E.2d 211, 214 (1944); *Briggs v. City of Raleigh*, 195 N.C. 223, 227, 141 S.E. 597, 600 (1928); *State v. Moss*, 47 N.C. 66, 1854 WL 1395, *2 (1854); *President and Directors of the Bank of Newbern v. Taylor*, 6 N.C. (1 Mur.) 266, 1813 WL 124, *1 (1813); *State v. Watson*, 169 N.C.App. 331, 337, 610 S.E.2d 472, 477 (2005); *Guilford County Bd. of Educ. v. Guilford County Bd. of Elections*, 110 N.C.App. 506, 510, 430 S.E.2d 681, 684 (1993).

