

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR DIVISION

05 CVS 8378

WAKE COUNTY

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

Plaintiffs, )

v. )

STATE OF NORTH CAROLINA; JAMES T. )  
FAIN, III, Secretary of the N.C. Department of )  
Commerce, in his official capacity; CITY OF )  
WINSTON-SALEM, NORTH CAROLINA and )  
ALLEN JOINES, Mayor 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 )  
MILLENNIUM FUND; WINSTON-SALEM )  
BUSINESS, INC.; THE WINSTON-SALEM )  
ALLIANCE; and DELL, INC., )

Defendants. )

**STATE DEFENDANTS’  
MEMORANDUM OF LAW IN  
SUPPORT THEIR MOTION TO  
DISMISS**

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Defendants. )

**STATE DEFENDANTS’  
MEMORANDUM OF LAW IN  
SUPPORT THEIR MOTION TO  
DISMISS**

NOW COME defendants State of North Carolina and James T. Fain, III, Secretary of the North Carolina Department of Commerce (hereinafter jointly referred to as “State Defendants”), and urge the Court to dismiss plaintiffs’ action as against the State Defendants in its entirety, for the reasons set out below.

**INTRODUCTION**

This action involves various constitutional challenges to the economic incentives and tax credits granted major computer manufacturing facilities provided for in legislation adopted by the North Carolina General Assembly on 4 November 2004 [Session Law 2004-204 Extra Session, hereinafter referred to as “Chapter 204”]. Additionally, actions by the City of Winston-Salem and

Forsyth County to provide economic development incentives and tax benefits to encourage Dell to locate, construct and operate a computer manufacturing facility in Winston-Salem are challenged as violative of the North Carolina Constitution.

The reasons for creating the “Tax Incentives for Major Computer Manufacturing Facilities” established in Chapter 204 are delineated in N.C.G.S. § 105-129.60, where the General Assembly finds that it is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for citizens of the State in strategically important industries. The General Assembly notes that manufacturing employment has been disproportionately affected by national trade policies and global economic trends, resulting in the loss of many jobs in the State’s industrial workforce, and that the computer manufacturing and distribution industry will remain a vital part of the future national, world, and State economy as society becomes more dependent on advanced technology. The General Assembly then declares that “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.” N.C.G.S. § 105-129.60(6) (2005).

### **STATEMENT OF THE CASE**

The initial pleading filed on 23 June 2005 was supplanted by an “Amended Complaint and Petition for Declaratory Judgment” (hereinafter referred to as the “Complaint”) filed on 9 September 2005. In their Complaint plaintiffs challenge Chapter 204 and acts of the local defendants pursuant to numerous state constitutional provisions and N.C.G.S. § 158-7.1. Plaintiffs also challenge Chapter 204 under provisions of the federal constitution. Each of the named defendants has filed a motion to dismiss the Complaint pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, with the State Defendants’ Motion to Dismiss having been filed on 12 October 2005.

Upon the recommendation of the Senior Resident Superior Court Judge for Wake County, this matter was designated as an “exceptional” case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the Honorable Robert H. Hobgood. This memorandum of law is submitted as provided for in the “Preliminary Scheduling Order” that resulted from a scheduling conference held by Judge Hobgood on 13 January 2006.

### **Parties**

The named plaintiffs are seven persons proceeding “individually,” each of whom is identified as a North Carolina “citizen, resident and taxpayer.” (Compl. ¶¶ 4-10) Two plaintiffs are identified as residents of Wake County; two as residents of Forsyth County; one as a resident of Beaufort County; one as a resident of Yadkin County; and one as a resident of Mecklenburg County. (Compl. ¶¶ 4-10) Each of the plaintiffs is alleged to have paid ad valorem taxes imposed upon real and personal property by the County in which such property is located along with other types of taxes “including state and local sales taxes on items purchased as well as state income taxes.” (Compl. ¶¶ 4-10)

The Complaint names as party-defendants the State of North Carolina and James T. Fain, III, the Secretary of the North Carolina Department of Commerce. (Compl. ¶¶ 11-12) Secretary Fain is named in his official capacity and is alleged to be “responsible for promoting statewide economic development,” together with being responsible “for assigning an economic distress tier designation to each of the 100 counties in the State” pursuant to N.C.G.S. § 105-129.3 [the “Bill Lee Act”]. (Compl. ¶ 12) The Secretary is further alleged to be responsible pursuant to N.C.G.S. § 105-129.62 for making a “written determination” that a taxpayer has reached threshold employment and investment levels so as to be eligible for various tax credits contained in Chapter 204. (Compl. ¶ 13)

Additional named defendants are the City of Winston-Salem together with its Mayor, and

Forsyth County together with the Chairperson of its Board of Commissioners. (Compl. ¶¶ 14-17) These local government defendants are alleged to have “authorized the granting of discriminatory tax subsidies and/or direct grants related to the computer manufacturing facility for defendant Dell which were not allowed for Plaintiffs.” (Compl. ¶¶ 14, 16)

Other named defendants include three non-profit corporations “operating in Winston-Salem, Forsyth County, North Carolina” for the purpose of promoting local economic development and for the promotion of common business interests. (Compl. ¶¶ 18-21)

The final named defendant is Dell, Inc., a Delaware corporation headquartered in Texas that is licensed to do business in North Carolina. (Compl. ¶ 18) The Complaint alleges that Dell “will build or is building a manufacturing plant for the construction, assembly, and/or manufacture of computers in Forsyth County.” (Compl. ¶18)

### **The Legislation at Issue**

Plaintiffs allege that their action “arises from legislation adopted by the North Carolina General Assembly on 4 November 2004 providing several income, franchise and sales tax subsidies, as well as training, transportation infrastructure, and other direct grant assistance” related to the construction of a computer manufacturing facility in North Carolina’s “Triad” region. (Compl. ¶ 2)

A review of the challenged legislation reveals that Section 1 of Chapter 204 adds a new Article 3G to Chapter 105 of the General Statutes entitled “Tax Incentives for Major Computer Manufacturing Facilities.” (Compl. Ex. A at § 1) The legislation allows tax credits against corporate franchise taxes and corporate income taxes for an eligible taxpayer that is found by the Secretary of Commerce to expect to invest at least \$100,000,000 in private funds to construct a computer manufacturing and distribution facility over a five-year period and that expects to have an increased employment level at such facility of at least 1,200 within five years after the facility is first put into

use. (Compl. Ex. A p. 3, § 105-129.62(a)) The eligible taxpayer is allowed to include jobs created by “related entities” and “strategic partners” in the taxpayer’s expected increased employment levels if the taxpayer has obtained written consent from such affiliated businesses. (Compl. Ex. A p. 4, § 105-129.62(f)) The Secretary must make the factual determination of eligibility for the credit “in any case in which the taxpayer can demonstrate performance or can provide a credible plan for performance,” and the taxpayer can forfeit any claimed credits if it fails to create the required number of new jobs or to make the required investment and information provided by the taxpayer was known to be false at the time of application. (Compl. Ex. A pp. 4-5, § 105-129.63)

The amount of the credit allowable in a taxable year is determined based on the unit output of the facility, the production factor, and the increased employment level at the facility. (Compl. Ex. A p. 5, § 105-129.64(a)) A taxpayer may elect a different allocation of his credit against franchise taxes and income taxes for each year in which he qualifies for a credit (Compl. Ex. A p. 7, § 105-129.65(a)), and any unused portion of a credit may be carried forward for up to 25 years. (Compl. Ex. A p. 8, § 105-129.65(d))

Section 2 of Chapter 204 provides that a taxpayer eligible for the tax credits established in Section 1 is also eligible under the Bill Lee Act for specific “major computer facility enhancements.” (Compl. Ex. A pp. 8-9, § 105-129.4(b7)) These “major computer facility enhancements” include the inapplicability of the wage standard requirement, an increased credit for creating jobs, and preferred credits for investment in machinery, equipment, worker training and substantial investment in other property. (*Id.*)

Section 3 of Chapter 204 amends the eligibility for sales and use tax refunds to include computer manufacturing facilities at which the manufacture or assembly of peripheral equipment [such as storage devices, printers, monitors and terminals] occurs at “a facility or campus at which

the taxpayer also manufactures or assembles electronic computers.” (Compl. Ex. A p. 10, § 105-164.14(j)(3)(d.))

### **The Local Economic Development Incentives at Issue**

Plaintiffs further allege that their action arises from the decisions of the City of Winston-Salem and Forsyth County to provide economic development incentives and other assistance to “entice” Dell to locate a computer manufacturing facility in Winston-Salem. (Compl. ¶ 3) Attached to the Complaint are various Resolutions and other documents evidencing actions taken by the local government defendants pursuant to N.C.G.S. § 158-7.1 to provide economic development incentives to encourage Dell to select Winston-Salem for the location of its facility. (Compl. Exs. D - G)

A review of the challenged local government actions reveals that Forsyth County adopted a resolution on 20 December 2004, which was amended on 25 July 2005, authorizing economic development incentives to Dell that were “contingent upon the capital investments and the creation of approximately 1700” new jobs resulting from Dell’s potential expenditure of \$100,000,000 over a five year period for the location of a manufacturing facility in Forsyth County. (Compl. Ex. D) Similarly, the City of Winston-Salem adopted a resolution on 20 December 2004, which was amended on 18 July 2005, authorizing an economic incentive package that was also contingent upon Dell’s investment in buildings and equipment that created at least 1,700 local jobs. (Compl. Ex. E)

As authorized by the resolutions, the City and the County, along with the defendant non-profit corporations, entered into an “Agreement for Job Creation and Economic Development” with Dell on 26 July 2005. (Compl. Ex. H) In the Agreement Dell agrees to locate a computer manufacturing and distribution facility on a specified industrial park site consisting of approximately 200 acres to be purchased from the City for \$7,000,000. (Compl. Ex. H pp.1-2) The local government defendants and the non-profits further agreed to spend collectively up to \$17,125,000

on specified “site preparation work” on and around the site for the facility, as well as to make specific roadway infrastructure improvements by various specified completion dates. (Compl. Ex. H pp. 3-5) The Agreement further documented the commitment of the City and the County to provide annual economic development cash incentive grants over a 15-year period beginning July 1, 2007, in a cumulative amount of \$13,926,250 from the City and \$8,760,000 from the County pursuant to a “Schedule of Annual Incentive Grants.” (Compl. Ex. H pp. 5-9) The Agreement sets forth various conditions required to be satisfied before Dell would be entitled to the maximum annual grants including the investment of “at least \$100 million in taxable capital costs in the Project” and the creation of at least 1,700 qualified jobs within five years after operations at the facility. (Compl. Ex. H p. 6) The Agreement sets out a reimbursement percentage schedule should Dell cease operations at the facility within 10 years of its opening. (Compl. Ex. H p. 10)

## **ARGUMENT**

### **I. PLAINTIFFS’ COMMERCE CLAUSE CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING, AND THE CLAIMS ARE WITHOUT MERIT AS A MATTER OF LAW.**

In their amended Complaint, plaintiffs claim that what they refer to as the Dell legislation, Chapter 204, violates the Commerce Clause (Counts 1-3). Specifically, they contend that the major computer manufacturing credit (Count 1), the enhanced Bill Lee Act credits (Count 2), and the sales and use tax refund (Count 3) all violate the Commerce Clause. Plaintiffs cannot succeed on these claims for two reasons: first, plaintiffs lack standing to raise these claims; and second, plaintiffs are wrong as a matter of law.

**A. THE NEGATIVE COMMERCE CLAUSE DOCTRINE FORBIDS DISCRIMINATION AGAINST INTERSTATE COMMERCE.**

Plaintiffs rely on what has been referred to as the “negative” or “dormant” Commerce Clause for their contentions that Chapter 204 violates the Commerce Clause.

In its negative aspect, the Commerce Clause prohibits economic protectionism -- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. This reading effectuates the Framers’ purpose to prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.

*Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31, 116 S. Ct. 848, 853, 133 L. Ed. 2d 796, 804-05 (1996) (citations and internal quotations omitted). “The negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby imped[es] free private trade in the national marketplace.” *GMC v. Tracy*, 519 U.S. 278, 287, 117 S. Ct. 811, 818, 136 L. Ed. 2d 761, 773 (1997) (citations and internal quotations omitted). Accordingly, “the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.” *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 99, 114 S. Ct. 1345, 1350, 128 L. Ed. 2d 13, 21 (1994) (citations and internal quotations omitted). In this context, “‘discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former *and burdens the latter*.” *Id.* (emphasis added) With regard to state taxation, a principal concern is whether it “‘tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.’” *Fulton Corp.*, 516 U.S. at 331, 116 S. Ct. at 854, 133 L. Ed. 2d at 805 (citations omitted).

**B. PLAINTIFFS LACK STANDING TO RAISE A COMMERCE CLAUSE CLAIM.**

Plaintiffs have made no allegations, and cannot make any allegations, that would support their right to bring a negative Commerce Clause claim based on what they refer to as the Dell legislation. Significantly, they have not alleged any way in which they have personally been harmed, or will be harmed, by any Commerce Clause violations they contend exist as a result of Chapter 204.

The rule is that

A litigant generally may not assert the rights of another person, *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984), or present generalized grievances about the conduct of government which are more appropriately addressed in the representative branches, *United States v. Richardson*, 418 U.S. 166, 174-75, 41 L. Ed. 2d 678, 94 S. Ct. 2940 (1974), and the litigant's complaint must fall within the "zone of interests" protected by the law invoked.

*Alabama v. United States EPA*, 871 F.2d 1548, 1555 (11<sup>th</sup> Cir.) (holding that taxpayers as taxpayers lacked standing to bring their constitutional challenges, including Commerce Clause claim), *cert. denied*, 493 U.S. 991, 110 S. Ct. 538, 107 L. Ed. 2d 535 (1989). In this case, plaintiffs' connection to any alleged negative Commerce Clause "'violation' is too attenuated from the supposed 'harm' to provide standing on the part of [plaintiffs] to contest it." *United States v. Al-Talib*, 55 F.3d 923, 930 (4th Cir. 1995) (citing *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556, 569-70 (1984), for the proposition that a "party must allege [a] personal injury fairly traceable to [the] allegedly unlawful conduct.") Because plaintiffs have made no allegations to suggest that they have suffered any harm from the alleged Commerce Clause violations, they are not entitled to challenge Chapter 204 on Commerce Clause grounds.

The fact that plaintiffs have brought their lawsuit as one for a declaratory judgment in state court does not relieve them of the need to meet standing requirements to proceed with their litigation. Essential to a court's jurisdiction over any claim, including one brought for a declaratory judgment,

is “an actual or real existing controversy between parties having adverse interests in the matter in dispute.” *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984). *See also Andrews v. Alamance County*, 132 N.C. App. 811, 813-14, 513 S.E.2d 349, 350 (1999); *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) (actual controversy is a jurisdictional prerequisite for declaratory judgment action). Because standing is a jurisdictional prerequisite, plaintiffs’ inability to establish standing is fatal to their claim. *See Transcontinental Gas Pipe Line Corp. v. Calco Enters.*, 132 N.C. App. 237, 241, 511 S.E.2d 671, 675 (1999); *Union Grove Milling & Mfg. Co. v. Faw*, 109 N.C. App. 248, 251, 426 S.E.2d 476, 477, *aff’d per curiam*, 335 N.C. 165, 436 S.E.2d 131 (1993). *See also Tucker*, 312 N.C. at 346, 323 S.E.2d at 307 (“actual and existing case or controversy” is a jurisdictional prerequisite to an action, including a declaratory judgment proceeding).

Significantly, standing requirements apply equally to federal Commerce Clause claims as to other types of claims. Thus, plaintiffs in Commerce Clause cases decided in other jurisdictions have been compelled to satisfy the same inexorable requirement of a showing, or valid factual allegation, of actual harm to the plaintiffs in order to establish the necessary standing to proceed. *See, e.g., Ben Ohrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372, 1381-82 (8<sup>th</sup> Cir.) (some plaintiffs lacked standing because they could not show that they were asserting their own rights or that their interests fell within the zone of interests protected by the Commerce Clause, in contrast to another group of plaintiffs that did establish standing), *cert. denied*, 322 U.S. 1029, 118 S. Ct. 629, 139 L. Ed. 2d 609 (1997); *Mariana v. Fisher*, 338 F.3d 189, 204-05 (3d Cir. 2003) (plaintiffs lacked what federal courts deem to be “constitutional standing” to raise Commerce Clause claims because they lacked injury in fact, and they also lacked “prudential standing” because they were not within the zone of interests protected by the Commerce Clause), *cert. denied*, 540 U.S. 1179, 124 S. Ct.

1413, 158 L. Ed. 2d 80 (2004); *Individuals for Responsible Gov't v. Washoe County*, 110 F.3d 699, 703 (9<sup>th</sup> Cir.) (individuals complaining of county's requirement that they subscribe to garbage collection services from county's exclusive garbage collection licensee could not raise a Commerce Clause claim as the injury they asserted was "not even marginally related to the purposes underlying the dormant Commerce Clause"), *cert. denied*, 522 U.S. 966, 118 S. Ct. 411, 139 L. Ed. 2d 315 (1997); *Jones v. Gale*, Nos. 8:04CV645, 4:04CV3194 2005, U.S. Dist. LEXIS 29013 (D. Neb. Dec. 15, 2005) (plaintiffs with no showing of injury in fact lacked standing to challenge on Commerce Clause grounds a Nebraska initiative prohibiting corporations and syndicates from farming and ranching in the state); *L.A.M. Recovery, Inc. v. Department of Consumer Affairs*, 377 F. Supp. 2d 429 (S.D.N.Y. 2005) (domestic tow truck operator complaining of licensing provisions for New York tow truck operators has no standing to raise Commerce Clause claims where he has no injury in fact based on the alleged discrimination against interstate commerce, and he does not have the necessary connection to injured foreign tow truck operators for third-party standing); *Commonwealth v. Louisville Atlantis Community/Adapt*, 971 S.W.2d 810, 817 (Ky. Ct. App.1997) (resident charitable organizations lacked standing to challenge residency requirement of state gaming laws on Commerce Clause grounds); *Textron, Inc. v. Commissioner of Rev.*, 435 Mass. 297, 756 N.E.2d 1142 (2001) (with regard to claims by corporate taxpayers contending that corporate excise tax provisions violated the Commerce Clause, taxpayers had standing only to challenge those provisions by which they had actually been harmed), *cert. denied*, 535 U.S. 986, 122 S. Ct. 1537, 152 L. Ed. 2d 464 (2002); *Retailers Alliance v. New York State Liquor Authority*, No. 84 Civ. 5496 (TPG), 1984 U.S. Dist. LEXIS 24430 (S.D.N.Y. Aug. 10, 1984) (holding that retail liquor associations could not challenge on Commerce Clause grounds provision allowing grocery stores to sell New York wine because plaintiffs were not harmed by the discriminatory aspects of alleged Commerce Clause

violation, and any harm to them from the additional competition were not related to the allegedly discriminatory aspects of the law).

Importantly, “plaintiffs have the burden of *proving* that standing exists.” *American Woodland Indus. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002) (emphasis added), *disc. rev. denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). To continue in their action, they must have alleged facts that would, if true, establish that they have “sustained an ‘injury in fact’ as a direct result of” the challenged legislation. *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993). *See also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 444, 358 S.E.2d 372, 375 (1987) (plaintiffs in declaratory judgment action must show they have “sustained an injury or [are] in immediate danger of sustaining an injury as a result of” the challenged governmental action); *accord Andrews*, 132 N.C. App. at 814, 513 S.E.2d at 350. Because plaintiffs have not made, and could not make, any allegations that they have suffered or will suffer an injury in fact based on alleged Commerce Clause violations, they have failed to meet their burden of establishing standing to bring their Commerce Clause claims.

Without some direct, personal connection to any Commerce Clause harm they allege exists, plaintiffs cannot rely on the theory that the incentives they challenge violate the Commerce Clause. Indeed, plaintiffs are not affected in the slightest by the incentives they wish this Court to declare unconstitutional. Consequently, plaintiffs are not entitled to raise the Commerce Clause claims they attempt to assert in Counts 1 through 3.<sup>1</sup>

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<sup>1</sup> Significantly, the only major Commerce Clause state incentives case is currently pending before the United States Supreme Court. *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738 (6<sup>th</sup> Cir. 2004), *cert. granted*, 126 S. Ct. 36, 162 L. Ed. 2d 933 (U.S. 2005). In granting certiorari, the Supreme Court directed the parties to brief the issue of standing, which had not been discussed by the Court of Appeals.

**C. PLAINTIFFS HAVE ALLEGED NO FACTS WHICH WOULD, IF TRUE, ESTABLISH A COMMERCE CLAUSE VIOLATION.**

Even if plaintiffs could somehow establish they had standing to challenge Chapter 204 on Commerce Clause grounds, they have alleged no *facts* which would support their claims. On consideration of defendants' motion to dismiss for failure to state a claim upon which relief may be granted, "all allegations of fact are taken as true but conclusions of law are not." *Jackson v. Bumgardner*, 318 N.C. 172, 174-75, 347 S.E.2d 743, 745 (1986) (citing *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970)). "Dismissal . . . is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim." *Id.* at 175, 347 S.E.2d at 745 (citing *Oates v. JAG, Inc.* 314 N.C. 276, 333 S.E.2d 222 (1985)). "In determining whether a complaint is sufficient to survive a motion to dismiss under G.S. § 1A-1 Rule, 12(b)(6), the question presented is 'whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.'" *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 225, 517 S.E.2d 406, 413 (1999) (quoting *Isenhour v. Hutto*, 129 N.C. App. 596, 598, 501 S.E.2d 78, 79 (1998), *aff'd in part and rev'd in part*, 350 N.C. 601, 517 S.E.2d 121 (1999)). Because plaintiffs' factual allegations are insufficient as a matter of law to support their Commerce Clause claims, those claims cannot succeed.

Plaintiffs contend that the State has violated the Commerce Clause by providing corporate income or franchise tax credits for major computer manufacturing facilities based on the investment of at least \$100,000,000 to construct a computer manufacturing and distributing facility and an

increase in employment of at least 1200 at the facility. (Compl. ¶¶ 31-41, 79-81); *see also* N.C.G.S. §§ 105-129.62(a), 105-129.64 (2005). Plaintiffs further complain that the State has violated the Commerce Clause by providing various tax credits in the form of amendments to the “Bill Lee Act” that allow a major computer facility to qualify for enhanced Bill Lee Act credits. (Compl. ¶¶ 43-50, 83-84); *see also* N.C.G.S. § 105-129.4 (2005). Finally, plaintiffs assert that sales and use tax refund provisions that allow refunds of sales and use taxes for investment of funds in constructing a facility in this State are in violation of the Commerce Clause. (Compl. ¶¶ 51-54, 86-87); *see also* N.C.G.S. § 105-164.14(j)(2) (2005). None of the challenged provisions in fact constitute Commerce Clause violations because none of them, in fact, burden or discriminate against interstate commerce.

The [Commerce] Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution. This aspect of the Clause's purpose was eloquently expressed by Mr. Justice Jackson:

“Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality . . . .” *H. P. Hood & Sons v. Du Mond, supra, at 539.*

*Hughes v. Secretary of Transportation*, 426 U.S. 794, 807-08, 96 S. Ct. 2488, 2496-97, 49 L. Ed. 2d 220, 230 (1976) (footnote omitted). Thus, the Commerce Clause “prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses ‘would invite a multiplication of preferential trade areas destructive’ of the free trade which the Clause protects.” *Boston Stock Exchange v. State Tax Comm’n*, 429 U.S. 318,

329, 97 S. Ct. 599, 607, 50 L. Ed. 2d 514, 524 (1977).

Simply put, the negative Commerce Clause protects interstate commerce against discriminatory or burdensome treatment by the states. Here, however, the State has in no way burdened interstate commerce or discriminated against it. The incentives at issue here are intended and designed to foster investment and employment in North Carolina. They do not involve the taxation of interstate transactions or burden interstate transactions in any way. The incentives are not offered solely to domestic corporations; out-of-state or in-state corporations could qualify for the incentives, as Dell presumably will. It makes no difference whether Dell or any other corporation qualifying for the incentives then sells its wares outside or inside North Carolina or purchases goods outside or inside North Carolina.<sup>2</sup> In sum, nothing about the incentives which plaintiffs challenge limit or restrict or restrain or burden or discriminate against interstate commerce in any way.

North Carolina has enacted legislation designed to promote the very types of goals which the Supreme Court of the United States has approved states' encouraging. The Commerce Clause "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy." *Boston Stock Exchange*, 429 U.S. at 336-37, 97 S. Ct. at 610, 50 L. Ed. 2d at 528-29. *See also Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 385, 111 S. Ct. 818, 835, 112 L. Ed. 2d 884, 912 (1991) ("It is a laudatory goal in the design of a tax system to promote investment

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<sup>2</sup> Plaintiffs allege, incorrectly, that "N.C. Gen. Stat. § 105-164(j)(2) and (3)" distinguish between building materials, supplies, fixtures and equipment used in projects in North Carolina according to whether those items are purchased in North Carolina. (Compl. ¶ 86) Plaintiffs are wrong. There is no such distinction made in the relevant statute, § 105-164.14(j), or in any other provision related to this litigation.

that will provide jobs and prosperity to the citizens of the taxing State.”)

To be sure, the United States Supreme Court has never addressed the application of the Commerce Clause to tax incentives of the type at issue here. *West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n.15, 114 S. Ct. 2205, 2214 n.15, 129 L. Ed. 2d 157, 170 n.15 (1994). It has, however, noted that subsidies of various forms may well pass constitutional muster.

The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State’s regulation of interstate commerce*. Direct subsidization of domestic industry does not ordinarily run afoul of that prohibition; discriminatory taxation of out-of-state manufacturers does.

*New Energy Co. v. Limbach*, 486 U.S. 269, 278, 108 S. Ct. 1803, 1810, 100 L. Ed. 2d 302, 311 (1988) (emphasis in original). “A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business.” *Id.* at 199, 114 S. Ct. at 2213, 129 L. Ed. 2d at 170. Nor is a state confined to pure cash subsidies in encouraging local industry and economic development. *See also Hughes*, 426 U.S. at 816, 96 S. Ct. at 2500-01, 49 L. Ed. 2d at 235 (Stevens, J., concurring) (Commerce Clause does not “inhibit a State’s power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a ‘burden’ on commerce.”)

Only one case, *Cuno v. Daimler Chrysler*, 386 F.3d 738 (6<sup>th</sup> Cir. 2004), *cert. granted*, 126 S. Ct. 36, 162 L. Ed. 2d 933 (U.S. 2005) has squarely addressed the issue of incentives measured against the Commerce Clause, and it upheld some incentives and declared others to be unconstitutional. *Cuno* involved the expansion of Daimler Chrysler through the construction of a new plant near an existing plant in Ohio, for which it was promised a ten-year property tax exemption as well as a 13.5 per cent investment tax credit against the state corporate franchise tax,

conditioned on an investment in new or existing property and maintenance of employees. The *Cuno* court concluded that the property tax credit did not violate the Commerce Clause because the “conditions for obtaining the favorable tax treatment are related to the use or location of the property itself.” *Cuno*, 386 F.3d at 746. The court deemed it significant that the credit did not reduce pre-existing tax liability, but merely allowed a taxpayer to avoid property tax liability if it chose to invest in the locality and under the terms offered by the incentive credit. *Id.* at 747. On the other hand, the *Cuno* court held invalid an investment tax credit applicable towards the state’s corporate franchise tax and allowable for purchases of new machinery and equipment that is installed in Ohio. The court concluded that the credit was coercive in rewarding businesses in Ohio for expanding locally rather than out-of-state, and it further concluded illogically that a tax credit was more likely to offend the Commerce Clause than a direct subsidy. *Id.* at 743, 746. The *Cuno* court was mistaken in assuming that it could distinguish between a direct subsidy and a credit paid from general revenues, which would have the same effect. Moreover, the court ignored the fact that none of the Supreme Court cases it cited found Commerce Clause violations in the absence of some burden or discrimination against commerce in comparison to a simple investment incentive or benefit for facilities, equipment and employment in the granting state. In other words, neither Ohio nor North Carolina incentives burden, discriminate, or even address the commercial transactions of the companies to which they offer incentives, and they make no distinction in taxing the transactions of such companies. Finally, the *Cuno* court’s distinction between different types of incentives is inapplicable in this case as Chapter 204’s attraction of Dell to North Carolina and Winston-Salem was not an expansion of existing operations as in *Cuno*, but the stimulation of an entirely new investment in an area in which the company had no similar facilities.

In sum, “[t]he Commerce Clause does not prohibit all state action designed to give its

residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy Co.*, 486 U.S. at 278, 108 S. Ct. at 1810, 100 L. Ed. 2d at 311. The State of North Carolina has structured certain tax provisions to encourage the growth and development of intrastate industry in an effort to provide jobs and prosperity to the citizens of this State. It has neither burdened nor discriminated against interstate commerce, and plaintiffs' claims in Counts 1 through 3 of their Complaint attacking Chapter 204 on Commerce Clause grounds must be dismissed.

## **II. PLAINTIFFS' EQUAL PROTECTION AND LAW OF THE LAND CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING, AND THE CLAIMS ARE WITHOUT MERIT AS A MATTER OF LAW.**

Plaintiffs have alleged that the major computer manufacturing credit and the amendments to the Bill Lee Act violate the Equal Protection Clause of the United States Constitution as well as the Equal Protection and "Law of the Land" provisions of Article I, Section 19 of the North Carolina Constitution. Plaintiffs further allege that the Resolutions entered into by the local authorities similarly run foul of the Equal Protection and Law of the Land provisions of Article I, Section 19. All these claims raise the same question – whether the actions of the General Assembly and the local governing bodies are rationally related to legitimate governing purposes. As demonstrated below, plaintiffs' Equal Protection and Law of the Land arguments fail on the merits and because plaintiffs lack standing to raise them. Consequently, these claims must be dismissed.

Plaintiffs' specific contentions are that the major computer manufacturing credit violates both federal and state equal protection provisions as well as the Law of the Land language on the theory that Dell, or a company taking advantage of the major computer manufacturing credit, receives credit based on the highest job total or employment level ever achieved, even if that highest job total is not sustained. According to the plaintiffs, other employers receiving credit under other legislation do

not receive similar credits for lost jobs. Also, two companies with identical output and employment levels in a single tax year might be eligible for different credits based on higher employment levels in earlier years. Additionally, plaintiffs contend that it is unconstitutional to allow major computer manufacturing companies to receive benefits under the Bill Lee Act normally reserved for employers locating in a less advantaged or “tier one” county regardless of the county in which they locate, such as Forsyth, a “tier five” county. Moreover, plaintiffs contend that the credits are rendered unconstitutional because Chapter 204 allows a major computer manufacturing facility to receive credits for investment and employment based on their “strategic partners and related entities” whereas other credits do not allow reliance on such related companies. (Compl. ¶¶ 88-94, 98-103 (Counts 4-5, 7-8)); *see also* N.C.G.S. §§ 105-129.4, 105-129.12A, 105-129.61-62, 105-129.64 (2005). Plaintiffs further attack the local actions by claiming that local benefits provided to Dell violate Article I, Section 19 both on equal protection and law of the land grounds specifically by providing benefits to Dell not available to other businesses or individuals creating new jobs and expanding businesses in the same area. Plaintiffs further complain that somehow local taxpayers are denied equal protection and the due process provided by the Law of the Land Clause in allegedly having to pay higher taxes because of diminishing tax revenue stemming from the benefits to Dell. (Compl. ¶¶ 118-21 (Count 16); *see also* Compl. Exs. D, F-H) All of these claims are based on a misunderstanding of the Equal Protection and Law of the Land Clauses, which cannot sustain any of plaintiffs’ claims.

**A. THE STANDARD FOR EQUAL PROTECTION AND LAW OF THE LAND ANALYSIS IN THIS CASE IS SIMPLY THAT THE LEGISLATIVE BODY'S ACTIONS BE RATIONALLY RELATED TO A LEGITIMATE GOVERNMENTAL PURPOSE.**

**1. The Equal Protection Standard.**

The Equal Protection Clause of the United States Constitution and that of Article I, Section 19 of the North Carolina Constitution both look, ordinarily, at the question of whether the challenged legislation is rationally related to a legitimate governmental interest.

The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws. N.C. CONST. art. I, § 19 (“No person shall be denied the equal protection of the laws.”); U.S. Const. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”). To determine if a regulation violates either of these clauses, North Carolina courts apply the same test. *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978). The court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the regulation meets the relevant standard of review. Strict scrutiny applies when a regulation classifies persons on the basis of certain designated suspect characteristics or when it infringes on the ability of some persons to exercise a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17, 36 L. Ed. 2d 16, 33, 93 S. Ct. 1278 (1973); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid. *San Antonio*, 411 U.S. at 16-17, 36 L. Ed. 2d at 33; *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149. Other classifications, including gender and illegitimacy, trigger intermediate scrutiny, which requires the state to prove that the regulation is substantially related to an important government interest. *Clark v. Jeter*, 486 U.S. 456, 100 L. Ed. 2d 465, 108 S. Ct. 1910 (1988); *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). If a regulation draws any other classification, it receives only rational-basis scrutiny, and the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid. *Nordlinger v. Hahn*, 505 U.S. 1, 10, 120 L. Ed. 2d 1, 12, 112 S. Ct. 2326 (1992); *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.

*Department of Transportation v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001), *cert. denied*, 534 U.S. 1130, 122 S. Ct. 1070, 151 L. Ed. 2d 972 (2002). Plaintiffs here are not members of a

protected group, and they have not alleged that the challenged provisions impinge on any fundamental right, so neither strict scrutiny nor intermediate scrutiny is required. Accordingly, both the state and federal constitutions require only that “the legislative classification in the statute could provide a reasonable means to a legitimate state objective.” *Powe v. Odell*, 312 N.C. 410, 412, 322 S.E.2d 762, 763 (1984). Indeed, plaintiffs have couched their allegations in terms of the rational-basis test. (See Compl. ¶¶ 89-91, 93-94, 98-100, 102-03, 120-21.) Their burden is thus to show that there is no legislative or governmental justification for the provisions to which they object. In doing so, they cannot simply argue that distinctions exist or that lines could have been drawn differently. “Rational basis review is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S. Ct. 2326, 2332, 120 L. Ed. 2d 1, 13 (1992) (citations omitted)). The “rational basis” standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity. *White v. Pate*, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983); accord *Grace Baptist Church*, 320 N.C. at 446-47, 358 S.E.2d at 377.

## **2. The Law Of the Land Standard.**

Plaintiffs shoulder a similar burden in their claims based on Article I, Section 19’s “Law of the Land” Clause, which is essentially a guarantee of due process. *Rhyne*, 358 N.C. at 180, 594 S.E.2d at 15. See also *Swanson v. North Carolina*, 330 N.C. 390, 395, 410 S.E.2d 490, 494 (1991),

*vacated on other grounds*, 509 U.S. 916, 113 S. Ct. 3025, 125 L. Ed. 2d 713 (1993), *on remand*, 335 N.C. 674, 441 S.E.2d 537, *cert. denied*, 513 U.S. 1056, 115 S. Ct. 662, 130 L. Ed. 2d 598 (1994). Significant to the evaluation of plaintiffs' claims is the extent to which Law of the Land analysis is similar to that of the Equal Protection rational-basis analysis. Indeed, "[a] single standard determines whether" a legislative body's actions "pass[ ] constitutional muster imposed by both section 1 and the 'law of the land' clause of section 19: [the challenged provisions] must be rationally related to a substantial government purpose." *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 778-79, 360 S.E.2d 783, 785 (1987). Put another way, each of the legislative or local actions to which plaintiffs object is simply required to "have a rational relation to a valid state objective." *Swanson*, 330 N.C. at 395, 410 S.E.2d at 494. As our Supreme Court recently observed, "[s]imilar to the rational basis test for equal protection challenges, 'as long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute.'" *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 15 (quoting *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985)).

### **3. Statutory Provisions Are Presumed Constitutional.**

In order to prevail, plaintiffs must show the irrationality of the actions of the General Assembly and the local governmental bodies. In doing so, they face the additional hurdle that the actions of the General Assembly, at least, are presumed constitutional. Indeed, it is often said that "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). In North Carolina, more so than in some jurisdictions, the decisions of the General Assembly are entitled to great weight because the people act through their General Assembly by

enacting legislation. This is so because:

our State Constitution is not a grant of power. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution. *Id.* See *Lassiter v. Board of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958); *Airport Authority v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946).

*State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989); accord *Baker*, 330 N.C. at 337-38, 410 S.E.2d at 891. See also *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (citations omitted) (The legislative power rests “with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people’s elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*”). Moreover, “[i]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Baker*, 330 N.C. at 338, 410 S.E.2d at 891 (citation omitted).

Nor does the federal Equal Protection Clause deny the State this presumption. The United States Supreme Court has recognized in the equal protection context that “[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.” *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393, 399 (1961). Accord *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 484, 539 S.E.2d 380, 381 (2000), *disc. rev. denied*, 353 N.C. 525, 549 S.E.2d 858 (2001). Plaintiffs, then, have the burden of establishing the invalidity of the legislation and governmental acts they challenge and, in the process, of overcoming the presumption of validity of the legislative acts.

**B. PLAINTIFFS LACK STANDING TO BRING THEIR EQUAL PROTECTION AND LAW OF THE LAND CHALLENGES.**

Before plaintiffs can even attempt to show any Equal Protection or Law of the Land violations, they will have to establish that they have standing to bring those challenges. That they cannot do. They have not been harmed by any of the distinctions or alleged discriminatory provisions they seek to have invalidated, and consequently they have no right to be heard in this Court questioning the validity of those provisions.

The very essence of an Equal Protection claim is that one has been discriminated against by the offending legislation or action which is being litigated. Where, as here, plaintiffs cannot establish and do not even assert that they have suffered from the inequities which they allege exist, they cannot proceed with their litigation. Indeed, “[t]o succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.” *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Plaintiffs make no allegations that they face different tax burdens from other persons in their situations. Nor do they claim that they are in competition with or similarly situated to Dell or any other major manufacturing corporation. Where plaintiffs’ very claims show that they are not similarly situated to the persons whom they assert were treated differently, they have themselves established that they have no viable equal protection claim. *See Williams v. Hansen*, 326 F.3d 569, 576 (4th Cir. 2003), *cert. denied*, 540 U.S. 1089, 124 S. Ct. 958, 157 L. Ed. 2d 794 (2003).

Our North Carolina appellate courts have also insisted that plaintiffs must demonstrate that they have standing in order to litigate Equal Protection claims. “The general rule is that a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for

that purpose unless he belongs to the class which is prejudiced by the statute.” *Jones*, 141 N.C. App. at 484, 539 S.E.2d at 301 (quoting *Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)). See also *Dunn*, 334 N.C. at 119, 431 S.E.2d at 181 (in order to succeed in equal protection case, plaintiffs “must allege [they have] sustained an ‘injury in fact’ as a direct result of” the challenged actions). As explained by our Supreme Court:

When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of the law. 11 A.J. 757. He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.

*State v. Trantham*, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949). Accord *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993). Because no plaintiff is “a member of the class subject to the alleged discrimination,” they are “precluded from challenging” the actions they wish to contest in this litigation. *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 772 (holding that county did not have standing to challenge statutory provisions under Article V, Section 2 uniformity rule) (citing *Trantham*, 230 N.C. 641, 55 S.E.2d 198).

Similarly, because the Law of the Land clause tests whether a person’s due process rights have been violated, using a standard virtually identical to the Equal Protection rational-basis test, plaintiffs also lack standing to pursue their Law of the Land claims. They have no allegations that would, if proven, show *their* due process rights to have been violated or subjected to a classification or scheme which was not rationally-based. Instead, they complain about what constitutes, at most, alleged due process violations of other businesses that might compete in one way or another with Dell or other major computer manufacturing facilities. Consequently, they cannot show they have any basis for challenging the state statutory provisions or the local actions.

The general rule with respect to those eligible to question the validity of a

statute was stated by Justice Sharp, writing for the Court, in *Stanley, Edwards, Henderson v. Dept. of Conservation & Development*, 284 N.C. 15, 199 S.E.2d 641 (1973), as follows:

Under our decisions [o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights.

*Appeal of Martin*, 286 N.C. at 72, 209 S.E.2d at 771 (internal quotations omitted). *Accord In re Appeal of Barbour*, 112 N.C. App. at 372, 436 S.E.2d at 173. Plaintiffs thus lack standing to bring forward any of their Equal Protection or Law of the Land claims, and this Court should dismiss all of them.

**C. THE CHALLENGED ACTIONS ARE NOT IN VIOLATION OF THE FEDERAL AND STATE EQUAL PROTECTION CLAUSES OR THE LAW OF THE LAND CLAUSE.**

Plaintiffs have alleged no facts which cast any doubt on the rational basis for the actions of the State and the local governments that plaintiffs seek to challenge. Certainly, plaintiffs have made no factual allegations that would, even if proven true, support plaintiffs' contentions that the State has violated the Equal Protection provision of the federal constitution or that the State and the local governments have violated the Equal Protection and Law of the Land provisions of the state constitution.<sup>3</sup>

**1. Chapter 204 Is Rationally Related To Legitimate Governmental Purposes.**

The General Assembly set out in detail the reasons for its enactment of what plaintiffs call the Dell legislation.

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<sup>3</sup> Plaintiffs seek to bring into their claims the action of the non-profit defendants. Those defendants are not bound by the Equal Protection or Law of the Land clauses as the Constitution speaks only to governmental action. Regardless, nothing about their actions, if viewed in conjunction with the local governments' actions, saves plaintiffs from their failure to establish their Equal Protection and Law of the Land claims.

§ 105-129.60. Legislative findings

The General Assembly finds that:

- (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.

N.C.G.S. § 105-129.60 (2005).

The General Assembly made it very clear that it is public policy to encourage and stimulate economic activity and employment in this State, that computer manufacturing has been significant for the economic well-being of the State, and that the State deemed it appropriate to encourage the maintenance and growth of computer manufacturing and employment in North Carolina. It is undeniable that the encouragement of employment and business activities in the State are appropriate governmental policies in this modern world. Indeed, “[e]conomic development has long been recognized as a proper governmental function.” *Maready v. City of Winston-Salem*, 342 N.C. 708,

723, 467 S.E.2d 615, 624 (1996). Similarly, “stimulation of the economy involves a public purpose.” *Id.* at 723, 467 S.E.2d at 625.

It is manifest that the establishment of new industry in North Carolina will enrich a whole class of citizens who work for it, will increase the per capita income of our citizens, will mean more money for the public treasury, more money for our schools and for payment of our school teachers, more money for the operation of our hospitals like the John Umstead Hospital at Butner, and for other necessary expenses of government. This to my mind is clearly the business of government in the jet age in which we are living.

*Id.* at 727, 467 S.E.2d at 627 (quoting *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 164, 159 S.E.2d 745, 764 (1968) (Parker, C.J., dissenting)). The General Assembly’s express purposes in enacting Chapter 204, as set out in N.C.G.S. § 105-129.60, fall well within the realm of legitimate governmental purposes.

Plaintiffs argue that providing Dell with credit based in part on jobs that may not continue to exist at the time of the credit and based on investments made by and employment increases attributable to partners and related entities are not actions rationally related to the State’s asserted goals. (Compl. ¶¶ 89-90, 98-99) First, plaintiffs contend that companies with similar employment levels and output might receive different tax credits because the major computer manufacturing credit is based in part on the maximum increased employment level. The actual computation of the major computer manufacturing credit takes into consideration jobs actually created in comparison to the target level as one element of a formula in calculating the credit for taxable years 2006-2009. The credit similarly takes into consideration decreases in employment level from previous years or failure to achieve at least 1500 in increased employment for calculation of the credit for the 2010-2014 taxable years and provides differing credit amounts based both on the number of jobs ever created and the increased number of jobs in effect at the time the credit is taken for the 2015-2019 taxable years. N.C.G.S. § 105-129.64(c)-(e).

Plaintiffs' unhappiness that, in their view, some credits may be attributable in part to jobs created that do not exist at the time the credit is taken does not demonstrate that the legislation fails the rational-basis test. The General Assembly may well have concluded that it was essential to provide the credit to reward the creation of computer manufacturing and distribution jobs without leaving a company in fear of losing the credit in the event of a recession or economic downturn or without penalizing the company for the ebbs and flows of business and employment. Plus, the General Assembly could rationally have determined that it wanted to reward the creation of new jobs that stimulated the economy even if two companies might end up with differing credit amounts under N.C.G.S. § 105-129.64(d) despite having the same output and employment levels in a particular year. Similarly, that other companies not eligible for the major computer manufacturing credit may have tax credits calculated based on a different formula does not make the legislation discriminatory. Those companies are part of a different classification, not the same classification as the major computer manufacturing facilities, and the General Assembly can rationally distinguish between them. *See Deadwood, Inc. v. North Carolina Dep't of Revenue*, 356 N.C. 407, 572 S.E.2d 103 (2002) (approving as reasonable for tax purposes distinction between live entertainment and moving pictures). *See also Clark v. Maxwell*, 197 N.C. 604, 150 S.E. 190 (1929) (approving as reasonable and not arbitrary for tax purposes a distinction between vehicles transporting property over highways for more than fifty miles and those transporting property for less than fifty miles), *aff'd*, 282 U.S. 811, 51 S. Ct. 211, 75 L. Ed. 726 (1931). The General Assembly, in its legislative findings in N.C.G.S. § 105-129.60, emphasized the importance of computer manufacturing and distribution to this State and to the future economy of the State and even the world. Based on those findings, the legislature could rationally distinguish between major computer manufacturing facilities and other types of manufacturing and distribution companies.

Moreover, it is certainly rationally related to the stated legislative goals to include related or connected entities in assessing the investment of funds and creation of jobs. This is true because Dell or any other major computer manufacturing facility might choose to operate in conjunction with associated companies and might not view the incentives as attractive if they were to require that the major computer manufacturing facility either forego some of the incentives or skew the way in which it structured its business.

Whether the legislative classifications are perfect is not the question before the Court. Even if some other means might be devised that could achieve the legislative goals, the effect of the General Assembly's actions need not be perfectly congruent with the conceivable legitimate goals. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 435, 302 S.E.2d 868, 877 (1983) (“The equal protection clauses do not require perfection in respect of classifications.”) (quoting *State v. Greenwood*, 280 N.C. 651, 658, 187 S.E.2d 8, 13 (1972)). “Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the General Assembly] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required.” *Vance v. Bradley*, 440 U.S. 93, 108, 99 S. Ct. 939, 948, 59 L. Ed. 2d 171, 183 (1979) (internal quotations omitted). The challenged legislation “does not offend the Constitution simply because the classification is not made with mathematical nicety.” *Id.* (internal quotations omitted).

Plaintiffs also allege that allowing a major computer company to receive benefits normally restricted to businesses located in tier one counties under the “Bill Lee Act,” regardless of whether the company locates in a higher tier county, such as Forsyth, somehow fails the rational basis test. Plaintiffs contend that this deviation from the prior Bill Lee Act provisions, along with allowing the company to rely on the investment and employment actions of its “strategic partners and related entities,” violates the Equal Protection provisions of the state and federal constitutions. (Compl. ¶¶

93-94, 102-03) These allegations defy logic. There is no magic to the fact that the legislature previously allowed certain credits or incentives based on the tiers created in prior legislation. One legislature is not bound by another, and the legislature is free to amend prior statutes. “[N]o Legislature can by general or special act bind its successor.” *Kornegay v. City of Goldsboro*, 180 N.C. 441, 451, 105 S.E. 187, 192 (1920). *See also Dyer v. Ellington*, 126 N.C. 941, 945, 36 S.E. 177, 178 (1900) (“the laws of one Legislature do not bind another, except in so far as they may be absolute contracts”). The fact that the General Assembly previously conditioned certain incentives on location in tier one or tier two counties does not make it irrational for the General Assembly to conclude that the major computing manufacturing incentives should be provided without regard to the tier level of the county. The General Assembly may have rationally concluded that the computer manufacturing industry was especially important to this State and that the only reasonable way to achieve the goals of attracting such facilities was by providing the necessary incentives regardless of where in this State the computer manufacturing facility was located; otherwise, the manufacturer might go elsewhere and the advantages of its location here would be lost to the entire State.

Whether plaintiffs, or even the court, agree with these rationales is irrelevant in rational-basis analysis. “Whether in fact the Act will promote” the state goals “is not the question: the Equal Protection Clause is satisfied by our conclusion that the . . . Legislature could rationally have decided that” such legislation “might foster” the stated goals. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S. Ct. 715, 725, 66 L. Ed. 2d 659, 670 (1981). Plaintiffs “cannot prevail so long as ‘it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.’” *Rhyne*, 358 N.C. at 182, 594 S.E.2d at 16 (quoting *Clover Leaf Creamery Co.*, 449 U.S. at 464, 66 L. Ed. 2d at 669, 101 S. Ct. at 724). Indeed, relying on *Clover Leaf Creamery Co.*, our Court of Appeals has rejected arguments similar

to plaintiffs' that specific legislation might even frustrate the goals of the General Assembly:

Even if appellants' argument here is valid, the proper forum for its assertion is in the legislative chambers of the General Assembly, not in this Court. It is unimportant whether or not the General Assembly's use of a "public-private ownership" distinction to delineate between landowners who are "in need" of a tax incentive and ones who are not in fact frustrates one of the goals of the legislation. For the purposes of this proceeding, as long as it is arguable that the statutory scheme designed by our legislators *could* work, then we must uphold the challenged statute. The United States Supreme Court has consistently rejected attacks such as the one launched here under the guise of the Equal Protection Clause.

*In re Consolidated Appeals of Certain Timber Cos.*, 98 N.C. App. 412, 421-22, 391 S.E.2d 503, 508-09 (1990). Plaintiffs thus cannot succeed in their federal or state Equal Protection challenges to Chapter 204 because they cannot show that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker." *Powe*, 312 N.C. at 415, 322 S.E.2d at 765 (quoting *Vance v. Bradley*, 440 U.S. at 111, 99 S. Ct. at 949, 59 L.Ed. 2d at 184).

Because Law of the Land claims are measured by the same standards as Equal Protection claims, plaintiffs' objections to Chapter 204 under that provision are similarly flawed. Plaintiffs make no independent allegations for their Law of the Land claims, but merely include them with the state Equal Protection challenges to the legislative provisions. (Compl. ¶¶ 98-100, 102-03) Because "[a] single standard determines whether the [General Assembly's actions] pass[ ] constitutional muster imposed by both section 1 and the 'law of the land' clause of section 19: [the statutes] must be rationally related to a substantial government purpose," the Law of the Land Clause claims fail for the same reasons as do the Equal Protection claims. *Treants Enterprises*, 320 N.C. at 778-79, 360 S.E.2d at 785. Plaintiffs' Equal Protection and Law of the Land Clause claims (Counts 4-5, 7-8) against Chapter 204 must all be dismissed for failure to state a claim upon which relief may be granted.

**2. The Local Resolutions And Agreement Do Not Violate The Equal Protection And Law Of the Land Clauses of the North Carolina Constitution.**

Plaintiffs also allege that the incentives offered through the local Resolutions and Agreement attached to the Complaint violate the Equal Protection and Law of the Land Clauses of Article I, Section 19 of the Constitution of North Carolina. Plaintiffs are wrong, for reasons similar to the reasons that defeat their allegations against the legislative actions.

Plaintiffs complain in Count 16 of their Complaint that the subsidies and benefits provided to Dell by the local governments violate the Equal Protection and Law of the Land Clauses of Article I, Section 19 of the Constitution of North Carolina. (Compl. ¶¶ 119-21) Essentially, plaintiffs point to the fact that other individuals and businesses do not receive similar incentives even if they create new jobs or expand businesses in the same area (Compl. ¶ 119) and that, in plaintiffs' view, providing such benefits will diminish the tax revenue and potentially increase property taxes. (Compl. ¶ 120) According to plaintiffs, the incentives and benefits are not rationally related to the stated purposes of "stimulating the local economy, promoting business, creating new full-time jobs in the County, and increasing the property tax base and revenues." (Compl. ¶ 120) Further, plaintiffs contend that the Resolutions adopted by the local governmental units "are arbitrary and irrational" and therefore unconstitutional under Article I, Section 19. (Compl. ¶ 121)

Contrary to plaintiffs' allegations, the incentives do not violate the Equal Protection and Law of the Land provisions of the North Carolina Constitution. Plaintiffs themselves have recognized the legitimate governmental purposes underlying the incentives. (Compl. ¶ 120; *see also* Compl. Exs. F-G, & H (Recitals A-E)) Plaintiffs do not dispute that these are legitimate governmental purposes. Instead, plaintiffs contend that the incentives may increase property taxes and are not rationally related to the stated goals. Plaintiffs, however, have failed to allege any facts which would,

if proven, establish that the incentives are not rationally related to the legitimate goals. It is not sufficient that they can conjure up questions about whether the incentives will achieve the desired goal. The local acts satisfy the rational-basis test so long as “the question is at least debatable.” *Clover Leaf Creamery*, 449 U.S. at 464, 101 S. Ct. at 724, 66 L. Ed. 2d at 669. In *Clover Leaf Creamery*, the parties introduced conflicting evidence in the trial court, and the Minnesota Supreme Court concluded that the evidence established that the challenged legislation would not accomplish its goals. The United States Supreme Court reversed because “litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.” *Id.* This case, of course, is before the court on a motion to dismiss, not on an evidentiary showing. Nevertheless, plaintiffs’ case must be dismissed because plaintiffs can do no more than speculate about their expectations of what the incentives will accomplish. Plaintiffs cannot meet their burden of “convinc[ing] the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.” *Vance*, 440 U.S. at 111, 99 S. Ct. at 949, 59 L.Ed. 2d at 184. *Accord Clover Leaf Creamery*, 449 U.S. at 464, 101 S. Ct. at 724, 66 L. Ed. 2d at 669; *Powe*, 312 N.C. at 415, 322 S.E.2d at 765. Accordingly, plaintiffs’ Equal Protection and Law of the Land claims in Counts 4, 5, 7, 8 and 16 of their Complaint should be dismissed.

### **III. PLAINTIFFS’ 42 U.S.C. § 1983 CLAIMS MUST BE DISMISSED.**

Plaintiffs allege in Count 6 of their Complaint that their rights, privileges and immunities under the Commerce Clause and Equal Protection Clauses of the United States Constitution have been denied in violation of 42 U.S.C. § 1983. (Compl. ¶ 96) Because plaintiffs cannot establish any Commerce Clause or federal Equal Protection Clause violations, their § 1983 claim must be dismissed. “Section 1983 creates no substantive rights; it only provides for access to the courts to

vindicate those rights already guaranteed by the Constitution or other federal statutes. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433, 442 (1979).” *Harwood v. Johnson*, 92 N.C. App. 306, 311, 374 S.E.2d 401, 405 (1988), *aff’d in part, rev’d in part on other grounds*, 326 N.C. 231, 388 S.E.2d 439 (1990). *See also Gentile v. Kure Beach*, 91 N.C. App. 236, 238, 371 S.E.2d 302, 304 (1988) (“Section 1983 creates no substantive rights in and of itself; rather, it is a vehicle for enforcing federally protected rights derived from other sources.”) As a vehicle for plaintiffs’ federal constitutional complaints, plaintiffs’ § 1983 action cannot survive the rejection of their Commerce Clause and Equal Protection claims.

The plaintiffs’ federal claims brought under 42 U.S.C. § 1983 must be dismissed as against the defendant State for an additional reason. The State is not a “person” for purposes of § 1983’s provisions governing who may be sued. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). *See also Akers v. Caperton*, 998 F.2d 220, 226 (4th Cir. 1993) (observing that “states are not ‘persons’ within the meaning of § 1983”). Count 6 of the Complaint must therefore be dismissed.

#### **IV. PLAINTIFFS’ PUBLIC PURPOSE CLAIMS MUST BE DISMISSED BECAUSE THE INCENTIVE PROVISIONS CHALLENGED BY PLAINTIFFS ARE ALL, AS A MATTER OF CONSTITUTIONAL LAW, FOR PUBLIC PURPOSES.**

Plaintiffs contend in their Complaint (Counts 11, 13, 18, 20) that both Chapter 204 and the local resolutions, as well as any and all contracts or agreements entered into pursuant to the legislation and resolutions, violate the “public purpose” requirements of Article V, Sections 2(1) and 2(7) of the Constitution of North Carolina. Plaintiffs, however, lack standing to bring these claims and have failed to allege facts which would, if true, establish violations of Article V, Section 2. Their public purpose claims must, therefore, be dismissed.

Article V, Section 2(1) of the Constitution, in relevant part, directs that “[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only . . . .” Further, Article V, Section 2(7) provides, “[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.” In other words, taxes must be imposed for public purposes, and the State and local governments may provide money through contracts only for public purposes. Plaintiffs contend that Chapter 204 and the local government resolutions, as well as any contracts and agreements entered into as a result of the legislation and resolutions, are in fact for the benefit of Dell and its shareholders. (Compl. ¶¶ 109, 113, 125, 129) Plaintiffs are mistaken because, despite the advantages to Dell and its shareholders, or to any other major computer manufacturer, resulting from the legislation, the State and the local governments have acted principally for the benefit of the State of North Carolina, the County of Forsyth, the City of Winston-Salem, and the citizens thereof. The fact that Dell also benefits from these enactments, resolutions, and any contracts cannot change the reality that the governmental entities acted for a public purpose, and plaintiffs’ claims are without merit.

**A. PLAINTIFFS LACK STANDING TO RAISE THEIR PUBLIC PURPOSE CHALLENGES.**

No plaintiff alleges any personal harm or stake in the outcome of this litigation which would entitle that plaintiff to proceed with this action. Instead, their objections are those of taxpayers and persons philosophically opposed to the legislation and local incentives at issue here. Yet, even taxpayers cannot sue the government simply because they believe the government is acting wrongly with regard to the collection or spending of tax monies. Because plaintiffs have “shown only such interest as is shared generally by all residents, citizens, and taxpayers of the State,” or the city or

county<sup>4</sup>, they have “failed to show that individual interest which is requisite for standing” in order to raise their public purpose claims. *Green v. Eure*, 27 N.C. App. 605, 610, 220 S.E.2d 102, 106 (1975), *cert. denied*, 289 N.C. 297, 222 S.E.2d 696 (1976). *See also Cannon v. City of Durham*, 120 N.C. App. 612, 615, 463 S.E.2d 272, 274 (1995) (“Our courts have consistently held that a taxpayer has no standing to challenge questions of general public interest that affect all taxpayers equally.”), *disc. review denied*, 342 N.C. 653, 467 S.E.2d 708 (1996); *Nicholson v. State Education Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969) (“A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation.”).

As the Court of Appeals has explained, “[g]enerally, an individual taxpayer has no standing to bring a suit in the public interest.” *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). However, the taxpayer may have standing if he can demonstrate that

[a] tax levied upon him is for an unconstitutional, illegal or unauthorized purpose[;] that the carrying out of a challenged provision “will cause him to sustain personally, a direct and irreparable injury[;]” or that he is a member of the class prejudiced by the operation of [a] statute.

*Goldston v. State*, 618 S.E.2d 785, 788-89 (N.C. Ct. App. 2005) (quoting *Texfi Industries v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979), *aff’d*, 301 N.C. 1, 269 S.E.2d 142 (1980)). Plaintiffs cannot meet any of these criteria: First, they are not complaining about a tax levied upon them, but instead about the incentives, tax and otherwise, given to others. Additionally, plaintiffs cannot show that they will sustain a direct and irreparable injury, or that they are members of a class prejudiced by the legislation and resolutions they challenge. To the contrary, they stand

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<sup>4</sup> Only plaintiffs Jerry R. Johnson and Wilford R. Dowe are alleged to be citizens, residents, and taxpayers of Forsyth County, and only plaintiff Dowe is alleged to be a citizen and taxpayer of Winston-Salem. (Compl. ¶¶ 4-10) Thus, the remaining plaintiffs would have no standing to challenge the actions of the local governments, and even plaintiff Johnson has alleged no facts that would allow him to challenge the actions of the City of Winston-Salem.

generally in the position of taxpayers and citizens who oppose these governmental acts rather than competitors, for example, complaining of discriminatory treatment. *See Nicholson*, 275 N.C. at 448, 168 S.E.2d at 406 (taxpayer suit challenging statute requires showing of injury “apart from his general interest as a citizen in good government in accordance with the provisions of the Constitution”). Thus, plaintiffs cannot establish direct standing as taxpayers.

Nor can plaintiffs in this case establish what is sometimes referred to as “derivative standing.”

A taxpayer who otherwise lacks standing may nevertheless bring an action on behalf of a public agency or political subdivision, if “the proper authorities neglect or refuse to act.” *Guilford County Bd. of Comrs. v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996) (quoting *Branch v. Board of Education*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951)), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 52-53 (1997). “To bring this type of action, taxpayers must show they are a taxpayer of the public agency or political subdivision and must further establish that either: 1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision; or 2) a demand on the proper authorities would be useless.” *Id.* (citing *Branch*, 233 N.C. at 626, 65 S.E.2d at 126-27).

*Goldston*, 618 S.E.2d at 789. This type of standing is of no avail to plaintiffs as they have made no allegations that there was “a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision.” *Goldston*, 618 S.E.2d at 789 (citations omitted). The proper authority on whom to make such a demand for a derivative standing suit against the State is the Attorney General. *Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E.2d 426 (holding that plaintiffs could not bring action to recover funds for State for former Governor’s alleged misuse of State property), *disc. rev. denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). *See also Whitmire v. Cooper*, 153 N.C. App. 730, 735-36, 570 S.E.2d 908, 911-12 (2002), *disc. rev. denied & appeal dismissed*, 356 N.C. 696, 579 S.E.2d 104 (2003). Because plaintiffs have made no effort

to establish derivative standing with regard either to the State or the local governments, they cannot proceed on a derivative standing basis.

There is an additional type of taxpayer standing by which plaintiffs in some cases may be permitted to seek equitable relief against the threatened use of public money or property for unauthorized purposes. *See, e.g., Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975) (citizens may bring suit to prevent commission from constructing an unauthorized building with tax funds appropriated by General Assembly solely for purpose of building art museum); *Wishart v. Lumberton*, 254 N.C. 94, 118 S.E.2d 35 (1961) (action to restrain city from using as parking lot land that had allegedly been dedicated to use as a public park); *Shaw v. City of Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967) (taxpayer may bring action to enjoin performance of void agreement between city and Cablevision, to prevent use of tax funds and tearing up of city streets, sidewalks, and other areas). *See also Goldston*, 618 S.E.2d at 789. But plaintiffs are not in fact contending that tax monies are being used for unconstitutional or unauthorized purposes. In fact, as to the State, the plaintiffs are not even objecting at all to the manner or purposes for which tax money is being spent. Instead, they are upset because, in plaintiffs' view, Chapter 204 may cause the State to collect less money than plaintiffs think it should.

More basically, plaintiffs are not contending in this litigation that public funds are being used for unconstitutional or invalid purposes because they are in reality objecting to alleged potential discrimination against hypothetical businesses (not any of the plaintiffs) or they are questioning whether the legislation and local acts are likely to succeed in their goals. The distinction may be a fine point, but it is a real one. There is a difference between an allegation that governments are spending, or failing to collect, tax money that is being used for a completely unauthorized or unconstitutional purpose and simply saying that the challenged provisions suffer from a structural

flaw, which is really what plaintiffs contend in this case. *See Wynn v. Trustees of Charlotte Community College System*, 255 N.C. 594, 599-601, 122 S.E.2d 404, 408-09 (1961) (county taxpayer cannot challenge particulars or methods of use of bond proceeds for construction of colleges, even on grounds their ad valorem taxes may be increased to pay the bonds, when taxes are not for unconstitutional or unlawful purpose, bonds are not unconstitutional, and taxpayer is not affected directly by the colleges). *See also Cannon*, 120 N.C. App. at 615, 463 S.E.2d at 274 (taxpayer cannot challenge manner of funding athletic park).

Plaintiffs have no standing, and they cannot succeed on the merits of this case because their lack of standing will deny the Court jurisdiction even to address the merits.

**B. PLAINTIFFS' PUBLIC PURPOSE CHALLENGES FAIL AS A MATTER OF LAW.**

As noted above, plaintiffs' public purpose challenges depend on the notion that Chapter 204 and the resolutions and agreement of the local governments operate to the benefit of Dell and its shareholders or that they function as direct subsidies or benefits to Dell, a private company. (Compl. ¶¶ 109, 125) Plaintiffs further contend that any contracts that might be entered into by the State or its agencies with Dell (of which none in fact exist), and the Agreement entered into by the local governments will result in benefits that "will accrue to the ownership and control of Dell and will be utilized to generate a profit for Dell and Dell's shareholders and thus, would not be for the accomplishment of a 'public purpose only.'" (Compl. 113; *see also* Compl. ¶ 129) Both the Article V, Section 2(1) and Article V, Section 2(7) challenges, then, try to portray the effects of Chapter 204 and the local government resolutions and agreement as necessarily failing to comply with the public purpose limitations of those constitutional provisions on the principle that they benefit Dell instead. Plaintiffs misinterpret the constitutional restrictions on which they rely. Whether the legislation, resolutions, and any contracts based thereon benefit Dell is not the question in "public purpose"

analysis. Instead, the question is whether the challenged acts and actions were taken for a public purpose, regardless of any additional benefit to individual persons or entities. Because Chapter 204 and the local actions, and any agreements based thereon, were all enacted or entered into for public purposes, benefits to Dell are irrelevant.

Plaintiffs' objections are similar to those of plaintiffs in other cases in which the appellate courts have rejected public purpose challenges. Thus, in *Maready*, 342 N.C. at 725, 467 S.E.2d at 626, the Supreme Court concluded that local economic development incentive projects, as authorized by N.C.G.S. § 158-7.1, were nevertheless for public purposes despite the fact that "private actors will necessarily benefit from the expenditures authorized." Any benefit Dell enjoys from the legislation and local actions at issue here "is merely incidental." *Id.* Similarly, the Court of Appeals rejected public purpose challenges to agreements concerning the Charlotte Coliseum and funds paid to George Shinn and George Shinn Sports, Inc., in connection with the use of the Coliseum by the NBA Hornets. Plaintiffs especially objected to agreements with the Charlotte Coliseum Authority by which the Shinn defendants would receive profits from Coliseum operations other than Hornets games, claiming that certain amendments were made to the original agreement "to subsidize the Shinn defendants, increase the Shinn defendants' own revenue, and make the Hornets a more competitive basketball team." *Peacock v. Shinn*, 139 N.C. App. 487, 494, 533 S.E.2d 842, 847, *disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). The Court of Appeals concluded:

Here, as in *Maready*, a private party ultimately conducts activities which, while providing incidental private benefit, serve a primary public goal. Despite the Shinn defendants' benefit from the provisions of the agreements which plaintiff has singled out, where the Authority's primary purpose is for the public benefit, the Authority has discretion as to the manner of implementation

The face of plaintiff's complaint, along with the incorporated agreements, when all allegations are taken as true, not only reveals an absence of facts to support a claim under N.C. CONST. art. V, § 2, but also discloses facts which necessarily

defeat the claim. The claim was properly dismissed.

*Peacock*, 139 N.C. App. at 594, 533 S.E.2d at 848. See also *Piedmont Triad Airport Authority v. Urbine*, 354 N.C. 336, 554 S.E.2d 331 (2001), *cert. denied*, 535 U.S. 971, 122 S. Ct. 1438, 152 L. Ed. 2d 381 (2002). In *Piedmont*, plaintiff complained that the condemnation by an airport authority would inure to the benefit of Federal Express. Our Supreme Court noted that “the greater benefits flow to the people, as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved. Under these facts, the legislative declarations of public purpose, and the constitutional directives of the people, we are persuaded that” no Article V, Section 2(1) violation existed. 354 N.C. at 343, 554 S.E. 2d at 335.

In this case, the public purposes for which the challenged legislation and local government actions were taken are obvious. The General Assembly spelled out the governmental objectives for its actions, as did the local authorities. See Arg. II.C.1 & N.C.G.S. § 105-129.60; Arg. II.C.2 & Compl. Exs. F-G & and H (Recitals A-E). The encouragement of increased industry, investment in facilities, and employment is unquestionably a public purpose. “The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected.” *Maready*, 342 N.C. at 725, 467 S.E.2d at 625. Moreover, the legislative assessment of the appropriateness and need for such incentives and their benefit is entitled to deference from the courts. “The initial responsibility for determining what constitutes a public purpose rests with the legislature, and its determinations are entitled to great weight. *Id.* at 714, 467 S.E.2d at 619. Indeed, the Court in *Maready* distinguished the earlier case of *Mitchell*, 273 N.C. 137, 159 S.E.2d 745, in part on the grounds that the legislation at issue in *Mitchell* appeared to have been adopted by the General Assembly with only a half-hearted endorsement. In contrast, here, in N.C.G.S. § 105-129.60, the General Assembly provided a detailed

recitation of the public purposes which it intended Chapter 204 to foster. That “determination[] [is] entitled to great weight.” *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 644-45, 386 S.E.2d 200, 206 (1989). Similarly, the resolutions of the local government must be acknowledged as showing on their face that the local governments deemed the incentives offered to Dell a means to “stimulate the local economy, promote business, create new full-time jobs in the County, increase the property tax base and revenues and increase business prospects.” (Compl. Ex G; *see also* F & H (Recitals A-E)) Those recitals of the purposes behind the local incentives establish that, at least from the standpoint of the local governments, “the transaction will promote the welfare of the local government and results from the local government’s efforts to better serve the interest of its people.” *Peacock*, 139 N.C. App. at 494, 533 S.E.2d at 847-48.

The challenged legislation and local actions are all designed to foster economic prosperity in the State as well as the City of Winston-Salem and the County of Forsyth. Such goals fall well within the public purpose restrictions of the North Carolina Constitution.

New and expanded industries in communities within North Carolina provide work and economic opportunity for those who otherwise might not have it. This, in turn, creates a broader tax base from which the State and its local governments can draw funding for other programs that benefit the general health, safety, and welfare of their citizens. The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest. We therefore hold that N.C.G.S. § 158-7.1, which permits the expenditure of public moneys for economic development incentive programs, does not violate the public purpose clause of the North Carolina Constitution.

*Maready*, 342 N.C. at 727, 467 S.E.2d at 627. No matter how significant the benefits that Dell receives, those benefits are not the purposes of the state legislation or the local actions. Consequently, plaintiffs’ public purpose claims of Counts 11, 13, 18, and 20 of their Complaint are without merit as a matter of law and should be dismissed.

**V. PLAINTIFFS' EXCLUSIVE EMOLUMENTS CLAIMS ARE WITHOUT MERIT AS A MATTER OF LAW.**

Plaintiffs contend that the General Assembly and local government actions of which plaintiffs complain violate Article I, Section 32 of the Constitution of North Carolina. That section provides: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” Plaintiffs allege in Count 10 of their Complaint that the “preferential benefits, tax credits, grants and/or subsidies provided to Dell pursuant to [the challenged] legislation accrue to Dell’s private financial benefit and to the shareholders of Dell and are thus exclusive and separate emoluments not in exchange for any public service. Dell is provided a special tax benefit merely for operating its own private business.” (Compl. ¶ 107) In Count 17, plaintiffs complain “that the benefits, tax refunds, credits, grants and/or subsidies received by Dell pursuant to these Resolutions, Amendment and Agreement accrue to Dell’s private financial benefit and to Dell’s shareholders and are thus exclusive and separate emoluments not in exchange for any public service.” (Compl. ¶ 123) They add, as to the local governments, that “the land, improvements thereon, roadwork, and other structural work and benefits, including property tax rebates will accrue to the ownership and control of Dell and will be utilized to generate a profit for Dell and its shareholders.” (*Id.*) Plaintiffs further allege again that “Dell is provided a special tax benefit merely for operating its own business.” (*Id.*) Plaintiffs cannot succeed on these claims because, for the same reasons outlined with regard to their public purpose claims, they lack standing to challenge the incentives as exclusive emoluments. Further, plaintiffs ignore the fact that, because these incentives and benefits are all provided for public purposes, they cannot violate the exclusive emoluments provision. Plaintiffs’ exclusive emoluments claims are without merit and should be dismissed pursuant to N.C.G.S. § 1A-1, Rule12(b)(6).

The prohibition on exclusive emoluments contained in Article I, Section 32

does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is a reasonable basis for the Legislature to conclude that the granting of the exemption would be in the public interest.

*Town of Emerald Isle v. State*, 320 N.C. 640, 653, 360 S.E.2d 756, 764 (1987). Rather, “a statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.” *Id.* at 654, 360 S.E.2d 764. *Accord Peacock*, 139 N.C. App. at 495, 533 S.E.2d at 848 (holding that agreement for percentage of Charlotte Coliseum Authority profits to go to Hornets owners, even in non-Hornets games, did not constitute an exclusive emolument, and defendant’s motion to dismiss was properly granted by the trial court). While plaintiffs may disagree with the actions of the General Assembly and the local governments that could be viewed as working to the benefit of Dell, those actions were taken for the primary purpose of promoting the public good by stimulating the economy, increasing the tax base, and promoting the creation of new jobs for the citizens of this State and Winston-Salem, Forsyth County. For the same reasons that the challenged actions do not violate the public purpose provision of Article V, Section 2 of the North Carolina Constitution, they also fall well within the permissible limits of Article I, Section 32. Regardless of any benefits that redound to Dell, “the primary purpose was the promotion of the general public welfare and not a private interest.” *Town of Highlands v. Hendricks*, 164 N.C. App. 474, 596 S.E.2d 440 (2004). Consequently, plaintiffs have not alleged a viable exclusive emoluments claim, and Counts 10 and 17 of their Complaint must be dismissed.

**VI. THE MAJOR COMPUTER MANUFACTURING CREDIT DOES NOT PERMIT THE UNLAWFUL DELEGATION OF AUTHORITY OR VIOLATE THE SEPARATION OF POWERS CLAUSE.**

Plaintiffs allege in Count 9 of their Complaint that the major computer manufacturing credit is an unconstitutional delegation of taxing authority to the executive branch in violation of Article V, Section 2(3) of the Constitution of North Carolina and a violation of the separation of powers provision of Article I, Section 6 of the Constitution. (Compl. ¶ 105) Plaintiffs contend that this delegation and violation of the fundamental doctrine of separation of powers occurs as a result of the General Assembly, through legislation, “allowing the Secretary of Commerce to determine whether a taxpayer will receive tax credits and by failing to require a forfeiture of funds when Dell does not produce the expected jobs or make the expected investment.” (*Id.*) Plaintiffs have no standing to raise this question, for the same reasons they lack standing to raise their public purpose claims. Additionally, plaintiffs are wrong as a matter of law in contending that the General Assembly has delegated its taxing power to the Secretary or that any separation of powers violation has occurred; Count 9 of the Complaint must be dismissed.

Under Article V, Section 2(3) of the Constitution, the General Assembly may provide for exemptions from taxes. “No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.” N.C. CONST. art. V, § 2(3). In addition, the Constitution specifies that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. CONST. art. I, § 6. Apparently, plaintiffs believe that the major computer manufacturing credit somehow violates both these provisions. Plaintiffs are wrong.

The major computer manufacturing credit is spelled out in the new Article 3G of Chapter 125, N.C.G.S. §§ 125-129.60 *et seq.* The statutes specify both the conditions which a taxpayer must

meet to qualify for the credit and the amount of the credit itself. N.C.G.S. §§ 105-129.62, 105-129.64-65 (2005). The only thing the Secretary does is consider applications for the credit and determine whether an applicant has met the criteria. N.C.G.S. §§ 105-129.62(a), 105-129.63 (2005). Plaintiffs' claim that the General Assembly has unconstitutionally delegated its taxing power to the Secretary fails, first, because the constitutional prohibition on which plaintiffs rely concerns the delegation of the power to exempt property from taxation whereas plaintiffs are arguing about credits, not exemptions. Additionally, plaintiffs' claim fails because Chapter 204 contains no delegation of taxing power of any sort, merely the imposition on the Secretary of the responsibility to make an administrative determination. *See Martin v. Housing Corp.*, 277 N.C. 29, 55, 175 S.E.2d 665, 680 (1970) (General Assembly did not delegate legislative authority when it directed the North Carolina Housing Corporation to "determine[] factually, by application of the factors the General Assembly has prescribed," whether conditions were met for benefits provided by Housing Corporation Act).

Nor does the fact that the General Assembly did not necessarily require what plaintiffs characterize as "a forfeiture of funds" (Compl. ¶ 105) if a major computer manufacturing facility falls below the expected jobs or investment level somehow constitute a delegation of taxing authority. Rather, the lack of a "forfeiture," as plaintiffs call it, is simply part of the classification and policy judgment the General Assembly made. Plaintiffs may not agree with the choice, but the choice is for the legislature, not plaintiffs.<sup>5</sup>

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<sup>5</sup> In fact, N.C.G.S. § 105-129.63 does provide that credits previously taken are "forfeited" when "the taxpayer fails to create the required number of new jobs or to make the required investment, the information provided by the taxpayer on the application proves to have been false at the time it was given, and the person making the application knew or should have known that the information was false." Under such circumstances, the taxpayer is liable for the taxes avoided by virtue of taking the credit, plus interest. N.C.G.S. § 105-129.63.

Because Chapter 204 does not delegate any sort of taxing power, whether to determine exemptions or credits or any other tax component, the major computer manufacturing credit does not violate the separation of powers doctrine. “A violation of the separation of powers doctrine occurs when one branch of state government exercises powers that are reserved for another branch of state government. *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003).” *County of Cabarrus v. Tolson*, 169 N.C. App. 636, 639, 610 S.E.2d 443, 446, *disc. rev. denied and appeal dismissed*, 359 N.C. 630, 616 S.E.2d 229 (2005). The General Assembly has simply directed the Secretary to make the kind of administrative determination that is characteristic of the executive branch, not the legislative, and none of the taxing or exempting authority constitutionally committed to the General Assembly has been entrusted to the Secretary. Plaintiffs’ Count 9 must therefore be dismissed.

**VII. PLAINTIFFS’ UNIFORMITY OF TAXATION CLAIMS ARE WITHOUT MERIT AS A MATTER OF LAW.**

Plaintiffs contend in Count 12 of their Complaint that what they term the Dell legislation violates Article V, Section 2(2) of the Constitution of North Carolina. Specifically, they allege “that the refund or credit of taxes to Dell violates the requirement of uniformity of taxation within classifications and was not enacted by general law nor is it uniformly applicable to all businesses in every county, city and town and other unit of local government in that the legislation was specifically enacted for the benefit of Dell and for its location in the Triad area of North Carolina.” (Compl. ¶ 111) To the contrary, nothing about Chapter 204 violates the uniformity of taxation provisions or Article V, Section 2(2), and this claim must be dismissed.

Article V, Section 2(2) of the North Carolina Constitution reads as follows:

Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated.

No class of property shall be taxed except by uniform rule, and every classification shall be made by general laws uniformly applicable in every county, city and town, and other unit of local government.

Plaintiffs have attempted partially to track the constitutional provision by asserting that Chapter 204 violates the requirement of uniformity, was not enacted by general law, and is nor uniformly applicable to all businesses in all units of local government in this State.

Despite plaintiffs' allegations, Chapter 204 was enacted by general law and is uniformly applicable in all units of local government in this State. The General Statutes are general laws, and the legislation which plaintiffs challenge amends the General Statutes to add provisions generally applicable to a class of taxpayers. *See* N.C.G.S. §§ 105-129.60 *et seq.*, 105-129.4, 105-164.14(j)(2)-(3) (2005). Note that the constitutional prohibition does not require that a tax be "uniformly applicable to all businesses," (*see* Compl. ¶ 111), but only that "every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government," N.C. CONST. art. V, § 2(2). "A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class." *Emerald Isle*, 320 N.C. at 649, 360 S.E.2d at 761 (quoting *Adams v. North Carolina Dep't of Natural & Economic Resources*, 295 N.C. 683, 690-01, 249 S.E.2d 402, 407 (1978)). Chapter 204 is applicable to the specified class of taxpayers throughout the State. While no other computer manufacturer seeking the credit has currently been identified, the law would equally be available to other computer manufacturers who wanted to make similar investments in North Carolina.

Plaintiffs' Article V, Section 2(2) claim boils down to their notion that the classifications in what they call the Dell legislation violate the constitutionally mandated principle of uniformity in classification. As with their other constitutional claims, plaintiffs lack standing to attack the classification on Article V, Section 2(2) grounds because they are not a member of "the class which

is prejudiced by the statute.” *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 772 (internal quotations omitted). *See also In re Appeal of Barbour*, 112 N.C. App. at 372-74, 436 S.E.2d at 173-74. Moreover, they cannot show any violation of the rule of uniformity, which requires only that the classification at issue be “founded upon a reasonable distinction or difference and bear[] a substantial relation to the object of the legislation.” *Appeal of Martin*, 286 N.C. at 76, 209 S.E.2d at 773. *Accord In re Appeal of Barbour*, 112 N.C. App. at 374, 436 S.E.2d at 174. Boiled down to its essentials, the test under Article V, Section 2 is “whether these classifications are founded upon a rational basis.” *Id.* at 374, 436 S.E.2d at 174. The General Assembly’s stated purposes demonstrate why the classification of major computer manufacturing facility is a reasonable one for the credits and refunds at issue. Not only is stimulating the economy by investment in land and manufacturing facilities and the creation of jobs important, but computer manufacturing and distribution is viewed as an economic area that has been important to the State and needs to be encouraged. N.C.G.S. § 105-129.60. Once again, that plaintiffs disagree or that some other approach might have taken by the General Assembly is irrelevant. “In selecting subjects for taxation, ‘narrow distinctions are sometimes invoked, and if founded on a rational basis and reasonably related to the object of the legislation, the courts will not say that a different result should have been reached or that the differentiation is arbitrary.’” *Deadwood, Inc.*, 356 N.C. at 410, 572 S.E.2d at 105 (quoting *Leonard v. Maxwell*, 216 N.C. 89, 96, 3 S.E.2d 316, 322, *appeal dismissed per curiam*, 308 U.S. 516, 60 S. Ct. 175, 84 L. Ed. 439 (1939)). In essence, the uniformity principle presents the same test as the Equal Protection and Law of the Land Clauses. “[T]he requirements of ‘uniformity,’ ‘equal protection,’ and ‘due process,’ are, for all practical purposes, the same under both the State and Federal Constitutions.” *Broadwell Realty Corporation v. Coble*, 291 N.C. 608, 617, 231 S.E.2d 656, 662 (1977) (quoting *Hajoca Corp. v. Clayton*, 277 N.C. 560, 568, 178 S.E.2d 481, 486 (1971)). For

the same reasons, then, that plaintiffs cannot prevail on their Equal Protection and Law of the Land challenges, they are equally unable to prevail on their Article V, Section 2(2) claim. Count 12 of the Complaint must be dismissed.

**VIII. NEITHER CHAPTER 204 NOR THE LOCAL RESOLUTIONS VIOLATE THE CONSTITUTIONAL PROHIBITION ON SURRENDERING, SUSPENDING OR CONTRACTING AWAY THE POWER OF TAXATION.**

In Counts 14 and 19 of their Complaint, plaintiffs contend that the statutes and local resolutions and agreement at issue here run afoul of Article V, Section 2(1) of the Constitution of North Carolina. That sections directs that “[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.” Plaintiffs allege that Chapter 204 violates this provision “in that the tax credits and sales tax refunds given to Dell constitute the surrendering, suspending and/or contracting away of the taxing power of the State for at least 15 years by providing Dell with tax credits valued at least \$240,000,000 with a 25 year carry-forward.” (Compl. ¶ 115) They further avow that “[t]his action also denies the State taxpayers, as well as City and County taxpayers the benefits of Dell’s tax liability and increases the burden on Plaintiffs and other State and local taxpayers.” (*Id.*) Similarly, plaintiffs also specifically allege that the local resolutions and agreement at issue here violate the same provision “in that the tax rebates given to Dell pursuant thereto, constitute the surrendering, suspending and contracting away of the taxing authorities of the City of Winston-Salem and Forsyth County’s power to retain lawfully collected real property taxes on the value of Dell’s developed property for at least 15 years.” (Compl. ¶ 127) They further declare that “[t]his action also denies the City and County taxpayers of the benefits of Dell’s tax liability and increases the burden on Plaintiffs Jerry Johnson and Wilford Dowe, and other City and County taxpayers.” (*Id.*) Plaintiffs cannot succeed on these allegations. First, they lack standing to raise them for the same reasons they

lack standing to raise their public purpose claims. Second, these claims are without merits as a matter of law and therefore should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

Clearly, plaintiffs complain about actions which are not forbidden by Article V, Section 2(1). First, the State can grant credits, exemptions, and tax refunds; it is up to the General Assembly to determine the tax structure, including exemptions and credits. The constitutional prohibition on surrendering, suspending, or contracting away the power of taxation is not aimed at statutory provisions granting exemptions, credits, and refunds. Instead, the inclusion in a state constitution of this type of provision has “the purpose of restricting the legislature's right to alienate the power to tax anything and all persons. The prohibition is against the irrevocable grant of immunity from taxation.” *Switzer v. City of Phoenix*, 86 Ariz. 121, 127, 341 P.2d 427, 431 (1959) (relying on report of the Third Conference of the National Tax Association). Where, as here, the legislature merely provides a statutory credit or refund, there is no “irrevocable grant of immunity from taxation.” Nor has the General Assembly alienated its right “to tax anything and all persons.” *Id.* Just as “the granting of an exemption is not the same thing as relinquishing the ‘power’ of taxation,” so, too, the granting of credits and refunds is “not the same thing as relinquishing the ‘power’ of taxation.” *Bailey v. State*, 348 N.C. 130, 148, 500 S.E.2d 54, 64 (1998). It is equally obvious that the General Assembly has not contracted away its taxing power since the State has not entered into any contract in connection with what plaintiffs call the Dell legislation.

Nor are the local resolutions and agreements in violation of the provision against surrendering, suspending, or contracting away the power of taxation. Like the State, the local governments have not made an “irrevocable grant of immunity from taxation.” *Switzer*, 86 Ariz. at 127, 341 P. 2d at 431. In reality, they have merely provided benefits such as site preparation and cash incentives, not an immunity or exemption from taxation. (See Compl. Exs. D, F-H) Even if

one assumes, solely for the sake of argument, that plaintiffs are correct in believing that some of the cash incentives are designed to offset the property taxes that Dell might owe, the local governments have not abdicated their authority to tax Dell and Dell has acquired no immunity from taxation.

Plaintiffs also ignore the portion of Article 2, Section 2 of the Constitution which authorizes the General Assembly to “enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.” N.C. CONST. art. V, § 2(7). The Supreme Court of this State has specifically noted the relevance of this provision in upholding the State’s contracts with employees for tax exemptions for retirement benefits. The retirement contracts could last far longer than the fifteen or twenty-five years about which plaintiffs complain (Compl. ¶¶ 115, 127) since the retirement tax exemption contracts remain in force throughout the employees’ lives and, in some cases, until the end of beneficiaries’ lives so long as retirement benefits are being paid. *Bailey*, 348 N.C. at 148, 500 S.E.2d at 64. The incentives at issue here are of much shorter duration. Additionally, pursuant to N.C.G.S. § 158-7.1, counties and cities are authorized to provide incentives to encourage the location of manufacturers. That these objectives were accomplished through contracts or agreements with private industries was acknowledged and discussed with approval in *Maready*. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619. Thus, the mere fact that the local governments put their incentives into an agreement or contract in no way converts their actions into an unconstitutional surrendering, suspending, or contracting away of the power of taxation. Plaintiffs have failed to allege facts supporting their Article V, Section 2(1) claims, and Counts 14 and 19 of the Complaint should be dismissed as a matter of law.

## **IX. THE MAJOR COMPUTER MANUFACTURING CREDIT IS NOT UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS.**

In Count 15 of their Complaint, plaintiffs claim that the major computer manufacturing credit is unconstitutional as impermissibly vague and ambiguous. Specifically, plaintiffs claim that “delegation” to the Secretary of Commerce under N.C.G.S. § 105-129.62-63 to determine eligibility for the tax credit “is unconstitutional as impermissibly vague and ambiguous in that it is incapable of reasonably certain interpretation, and the statute does not prescribe objective standards, nor a forfeiture of tax credits already taken when the taxpayer fails to perform as promised. Thus, this delegation allows the Secretary to apply the statute in an arbitrary manner and unlawfully exercise the legislature’s taxing authority.” (Compl. ¶ 117) Plaintiffs once again lack standing to raise this question. Even if they had standing, the allegations fail to state a claim for which relief may be granted, and Count 15 should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

Contrary to plaintiffs’ allegations, the major computer manufacturing credit does not give rise to concerns of vagueness or ambiguity.

“[A] statute is unconstitutionally vague if it either: (1) fails to ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited’; or (2) fails to ‘provide explicit standards for those who apply [the law].’” The Constitution requires that the statute merely prescribe “boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly.” It is the plaintiffs’ burden to show, in light of the circumstances of this case, that the statute is “incapable of uniform judicial administration.”

However, “impossible standards of statutory clarity are not required by the constitution.” “Statutory language should not be declared void for vagueness unless it is not susceptible to reasonable understanding and interpretation.”

*Rhyne*, 358 N.C. at 186-87, 594 S.E.2d at 19 (citations omitted).

Plaintiffs cannot meet their burden of showing that the major computer manufacturing credit “fails to provide explicit standards for” the Secretary in determining whether a manufacturer

qualifies for the credit. *Id.* at 186, 594 S.E.2d at 19 (internal citation and quotations omitted). The statutory provisions actually provide detailed specifications for eligibility for the credit as well as the amount of the credit. N.C.G.S. §§ 105-129.61-62, 105-129.64-65. Moreover, they specify in clear language that the Secretary is to receive applications, ask for such additional information as he needs, and make a “factual determination.” N.C.G.S. § 105-129.63. The Secretary must make such a determination whenever the applicant can “demonstrate performance or can provide a credible plan for such performance.” *Id.* In order for the credit to be applied, the Secretary must make a written determination that the applicant “has or is expected to have an increased employment level at the facility of at least 1,200 within five years after the time that the facility is first used as a computer manufacturing and distribution facility” plus “that the taxpayer, either directly or indirectly through a related entity or strategic partner, has invested or is expected to invest at least one hundred million dollars (\$100,000,000) in private funds to construct a computer manufacturing and distribution facility over a five-year period.” N.C.G.S. § 105-129.62(a).

Nothing about the major computer manufacturing credit is vague or ambiguous and, contrary to plaintiffs’ allegations, the standards are very specific. In fact, N.C.G.S. §§ 105-129.64 contain detailed and complicated provisions for calculation of the credit itself, any carryover and makeup credit, and a cap on the amount claimed in a particular year.

Plaintiffs’ Count 15 reflects plaintiffs’ disagreement with the statute. They do not like having the Secretary determine whether the conditions for eligibility for the credit are met. They complain that “the statute does not prescribe . . . a forfeiture of tax credits already taken when the taxpayer fails to perform as promised. Thus, this delegation allows the Secretary to apply the statute in an arbitrary manner and unlawfully exercise the legislature’s taxing authority.” (Compl. ¶ 117) Plaintiffs’ problem with the delegation to the Secretary to determine eligibility appears to be less an attack

based on grounds of vagueness and ambiguity, or a lack of sufficient standards, than a reiteration of some of plaintiffs' other complaints and an attempt to manufacture constitutional problems because of their dislike for the statute.

The statute provides clear, explicit terms of eligibility for the credit and for the Secretary's determination. It is not rendered "constitutionally suspect merely because it must be interpreted and applied in light of particular facts in a given case." *Lowe v. Tarble*, 312 N.C. 467, 469, 323 S.E.2d 19, 21 (1984). Plaintiffs have not alleged, and indeed could not allege, any facts that even suggest that the major computer manufacturing credit is unconstitutionally vague or delegates authority to the Secretary without adequate standards. Because this Court can "apply the rules of statutory construction to discern a meaning from [the major computer manufacturing credit] that can be uniformly administered, [the Court should] conclude that the statute is not unconstitutionally vague." *Rhyne*, 358 N.C. at 187, 594 S.E.2d at 19. Plaintiffs' Count 15 should therefore be dismissed.

**X. THE SPECIFIC ACTS AUTHORIZED BY THE RESOLUTIONS AND CHAPTER 204 DO NOT VIOLATE N.C.G.S. § 158-7.1.**

In Count 21 of their Complaint, plaintiffs contend that "[t]he aforementioned specific tax credits, direct grants, and other subsidies authorized and/or granted to Dell by the City, the County, the State of North Carolina, and the agents thereof are not authorized by the General Statutes of North Carolina, specifically N.C. Gen. Stat. § 158-7.1." (Compl. ¶ 131) Plaintiffs' Count 21 must be dismissed pursuant to N.C.G.S. §§ 1A-1, Rule 12(b)(1) and (6) because plaintiffs lack standing to raise this claim and because plaintiffs have failed to allege a claim upon which relief may be granted.

Plaintiffs lack standing because they have not sustained, and are not in immediate danger of sustaining, an injury in fact as a direct result of the challenged governmental actions. *See Dunn*, 334

N.C. at 119, 431 S.E.2d at 181; *Grace Baptist Church*, 320 N.C. at 444, 358 S.E.2d at 375. Moreover, they stand in the position of taxpayers generally, not ones who have a direct injury from the challenged actions. Accordingly, they have not shown, and cannot show, that they have standing as taxpayers to challenge the actions of the State or the local governments (or the non-profit defendants). *See* Arg. IV.A. *supra*.

Even if plaintiffs had standing, they have made no allegations to support their contention that the legislation in question and the local actions violate, or are not authorized by N.C.G.S. § 158-7.1. First, as to the State and the legislation enacted by the General Assembly, the General Assembly can always enact new legislation, so the provisions of § 158-7.1 have no bearing on the validity of the legislation of which plaintiffs complain. Nor are any actions of the State relevant to any claims with regard to N.C.G.S. § 158-7.1, which authorizes actions by local governments and does not speak to what the State itself does in any way.

N.C.G.S. § 158-7.1 (2005) is captioned “Local development” and authorizes cities and counties to take various actions, including appropriations of funds, “for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city or in the county,” and “other purposes which, in the discretion of the governing body of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of any city or county.” N.C.G.S. § 158-7.1(a). The statute specifically authorizes the funding of such appropriations from property tax revenues or other revenues not restricted by law. *Id.* The statute further authorizes a county or city to undertake various economic development activities, including the following: acquiring, developing, and conveying land for or in an industrial park, “for industrial or commercial use,” N.C.G.S. § 158-7.1(b)(1); acquiring and holding for resale property “suitable

for industrial or commercial use,” N.C.G.S. § 158-7.1(b)(2); constructing and conveying buildings for industrial use, N.C.G.S. § 158-7.1(b)(4); building and extending utility facilities or water and sewer lines for an industrial facility, N.C.G.S. §§ 158-7.1(b)(5)-(b)(6); and “engag[ing] in site preparation for industrial properties or facilities,” N.C.G.S. § 158-7.1(b)(7). The county or city may convey such property by private negotiation under certain conditions. N.C.G.S. § 158-7.1(d). This statute was upheld against various constitutional challenges in *Maready*. 342 N.C. 708, 467 S.E.2d 615. The actions authorized by N.C.G.S. § 158-7.1 are exactly the types of actions taken by the local defendants in this case.

Although plaintiffs have made extensive allegations detailing the actions of the local defendants in this case (*see* Compl. ¶¶ 55-78), they have not made a single allegation specifying any reason they contend the local subsidies violate N.C.G.S. § 158-7.1. They appear to be particularly bothered by the idea that the incentives may compensate Dell for the price of the land they are purchasing. (*See* Compl. ¶¶ 71-78.) Nowhere in N.C.G.S. § 158-7.1 does it prohibit the City and County from taking into consideration the cost of land in determining cash incentives provided under that statute, and plaintiffs have made no allegation explicitly contending that this procedure violates N.C.G.S. § 158-7.1. Nor have plaintiffs alleged any procedural deficiencies in the acts of the local defendants or any express violation of N.C.G.S. § 158-7.1. In sum, the local defendants have taken advantage of a statute allowing them to provide various incentives to industry for economic development and stimulation purposes. Plaintiffs have not alleged a single reason why this Court should rule the local defendants’ actions unauthorized.

Count 21 of the Complaint must be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) and (6) because plaintiffs lack standing and have failed to allege a claim upon which relief may be granted.

**XI. PLAINTIFFS' DECLARATORY JUDGMENT ACT CLAIM MUST BE DISMISSED FOR ALL THE REASONS THAT REQUIRE DISMISSAL OF THEIR OTHER CLAIMS.**

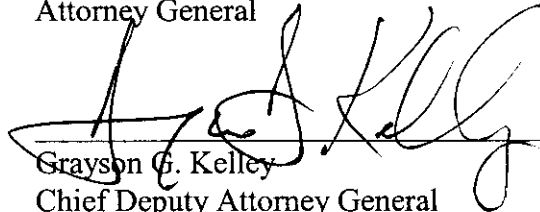
For the reasons discussed above, plaintiffs' declaratory judgment act claim must be dismissed on the grounds that plaintiffs lack standing to raise each of the claims in their Complaint and on the further grounds that each claim outlined in the Complaint is without merit as a matter of law. Count 22 of plaintiffs' Complaint should thus be dismissed.

**CONCLUSION**

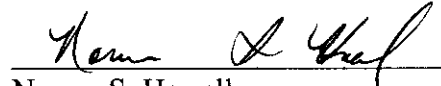
For all the reasons discussed above, the Court should grant the State Defendants' motion to dismiss (as well as the motions of the other defendants), and plaintiffs' action should be dismissed in its entirety.

Respectfully submitted this the 13<sup>th</sup> day of February, 2006.

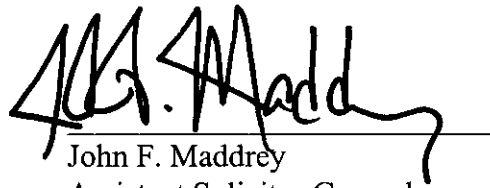
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*Attorneys for Defendants State of North Carolina  
and James T. Fain, III, Secretary of the North  
Carolina Department of Commerce*

## CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT THEIR MOTION TO DISMISS** in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal or e-mail; and
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

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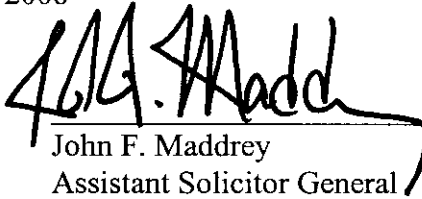
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This the 13<sup>th</sup> day of February, 2006

  
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Assistant Solicitor General