
 SUPREME COURT OF NORTH CAROLINA

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

Plaintiff)

v.)

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

From Wake County
 05 CVS 8378

Defendants)

 DEFENDANT-RESPONDENT DELL INC.'S RESPONSE TO
 PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW

This is a political controversy. Plaintiffs are individuals who believe that tax and other economic incentives used to encourage private sector job creation are bad public policy. Instead of seeking to change established public policy through the Legislature, they have petitioned the Judiciary. While their Amended Complaint ostensibly is aimed at tax credits and local incentives that Dell Inc. (Dell) may receive for locating a new manufacturing facility and creating new jobs in the State, their legal theories would render unconstitutional *all* economic development incentives in this State, thus putting North Carolina at a competitive disadvantage vis-à-vis its sister States which offer incentives to attract new businesses and create jobs. In fact, their petition goes so far as to argue that it is unconstitutional for North Carolina to encourage job creation and investment *in North Carolina*. See Petition at pp. 13-15.

Plaintiffs' petition makes no bones about the breadth of the ruling they desire from this Court. In addition to targeting tax credits for major computer manufacturers (the focus of their Amended Complaint), Plaintiffs' petition reveals they want a ruling that will, in effect, invalidate the Bill Lee Act, the Job Development and Investment Grant Program, the One NC Fund, and other economic development programs (Petition p. 7) — popular public policy initiatives which have helped this State secure tens of thousands of new jobs and billions of dollars in corporate investment which otherwise might have gone elsewhere, including overseas. Hoping “the outcome of this appeal will determine . . . the continued scope of economic development programs and projects across the State” and “affect present and future budgets of the State and all 100 counties and their respective municipalities,” Plaintiffs want this Court to decide categorically, like a super-legislature, “whether [those who support incentives] may continue to promote incentives.” (Petition p. 6)

Dell cannot consent to the petition, because this case does not meet the statutory standard for discretionary review before a determination by the Court of Appeals. *See* G.S. § 7A-31(b).

BACKGROUND

“This action arises from legislation adopted by the General Assembly on November 4, 2004” to amend the tax code. (Cmplt. ¶2) In passing the Legislation, the General Assembly made these findings (Cmplt. Ex. A):

(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.

The Legislation adds a new Article 3G to the tax code entitled, "Tax Incentives for Major Computer Manufacturing Facilities." (Cmplt., Ex. A) Generally, Article 3G provides that a taxpayer is eligible for a tax credit against income and franchise taxes if the taxpayer locates a computer manufacturing facility in North Carolina, invests at least \$100,000,000 in private funds to construct the facility, and adds 1,200 new jobs within the first five years. *Id.* The amount of the tax credit is based on the facility's unit output and employment levels. *Id.* The Legislation also amends the William S. Lee Quality Jobs and Business Expansion Act ("Lee Act"), which for a decade has provided tax incentives for new and expanding businesses in North Carolina. A taxpayer eligible for tax credits under new Article 3G is now also eligible for enhanced tax credits under the Lee Act. *Id.*

The tax credits were used to entice Dell to build and operate its largest facility in North Carolina, as opposed to another State. (Cmplt. ¶¶ 2, 18, 25, 29) But the Legislation is not limited to Dell and does not even mention Dell. Any computer manufacturing facility satisfying the statutory requirements is eligible for a tax credit under the terms of the Legislation.

After holding public hearings, the City of Winston-Salem (City) and Forsyth County (County) also offered incentives to encourage and aid the location of Dell's new facility in their jurisdictions. (Cmplt., Exs. D-H) They acted pursuant to G.S. § 158-7.1, which authorizes cities and counties to dispense incentives to corporations for economic development. *Id.* The City Council and County Board of Commissioners determined that Dell's industry is "strategically important" and that the incentives will stimulate and diversify the local economy, will create a larger number of new full-time jobs at good salaries with training in important skills, and will increase the local property tax base and revenues. (Cmplt., Exs. F-H)

DISCRETIONARY REVIEW IS NOT WARRANTED

This matter is not one appropriate for this Court's intervention, because this matter is not about law but instead is a public policy dispute about the wisdom of economic development programs and incentives used to create jobs and stimulate the economy. It is a controversy appropriate for resolution only by the political branches, not the Judiciary. This Court, faithful to principle of judicial restraint, has long emphasized that the Legislature is the policy-making agent of the People and that the Court will not intervene in policy disputes even if it believes the Legislature has acted contrary to the best interests of the State and its citizens. *See, e.g., Rhyne v. K-Mart*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004); *See also Galloway v. Dep't of Motor Vehicles*, 231 N.C. 447, 452, 57 S.E.2d 799, 803 (1950); *Hoke v. Henderson*, 15 N.C. (Dev.) 1, 1833 WL 45, *5 (1833). Plaintiffs' petition itself states that this case involves an ongoing "public debate" about economic development programs and incentives. (Petition p. 6) Public debate belongs in the political process, not the courts. While Plaintiffs may have "economic questions regarding the State's efforts to encourage economic development" (Petition p. 6 (emphasis added)), "[i]t is not for this Court to say whether the Legislature made a good or a bad bargain." *President and Directors of the Bank of Newbern v. Taylor*, 6 N.C. (1 Mur.) 266, 1813 WL 124, *1 (1813). Under our State's Constitution, the Legislature may determine that "the State will ... suffer economically in the future if the incentive programs ... are discontinued." *Maready v. City of Winston-Salem*, 342 N.C. 708, 726-27, 467 S.E.2d 615, 627 (1996).

As for the law, resolution of this case entails a straightforward application of well-established legal standards or settled precedent. *See, e.g., Deadwood, Inc. v. N.C. Dep't of Revenue*, 356 N.C. 407, 411, 572 S.E.2d 103, 106 (2002) ("rational basis" standard applicable to Plaintiffs' uniformity-clause challenge). The "public purpose" clause claim is controlled by this

Court's decision in *Maready, supra*, which rejected a challenge to economic incentives for private corporations based on the public purpose clause in Article V, § 2 of the State's Constitution. Plaintiffs do not like some of the precedents. But a case is not worthy of discretionary review simply because a taxpayer or resident thinks a precedent was wrongly decided and hopes this Court will revisit it. If that were the standard, discretionary review would be the norm, not the exception, and *stare decisis* would be a meaningless doctrine.

While Dell will not burden this Court with briefing on each constitutional argument made in Plaintiffs' petition (all of which Dell disputes), their characterization of *Maready* should not go unanswered. Plaintiffs contend that *Maready* has no bearing because, they say, *Maready* involved only a facial challenge to section § 158-7.1, not an as-applied challenge to any actual incentives. This argument is patently incorrect. Also before this Court in *Maready* was an as-applied challenge to two dozen expenditures by Forsyth County and Winston-Salem (*i.e.*, two dozen applications of § 158-7.1). The plaintiff sought an injunction directing the County and City to recover all funds expended for those projects. *Maready*, 342 N.C. at 713, 467 S.E.2d at 618-19 ("This action challenges twenty-four economic development incentive projects entered into by the City or County pursuant to N.C.G.S. § 158-7.1."); *see also id.* at 736-37, 467 S.E.2d at 632-33 (table). When the trial court failed to issue that injunction, the plaintiff filed a cross-appeal which assigned error to the trial court's denial of injunctive relief and to the trial court's "failure to make an alternative finding that the statute . . . did not authorize the expenditures in question." (See Record on Appeal in *Maready*) The cross-appeal clearly was before this Court and was addressed. *See, e.g., Maready*, 342 N.C. at 730-34, 467 S.E.2d at 628-31 (addressing plaintiff's cross-appeal assignment of error that the trial court erred in concluding that the County and City did not violate the Open Meetings Law).

That the as-applied challenge was resolved by this Court was recognized by the dissent in *Maready*, which voted to resolve the as-applied challenge against the City and County. *Id.* at 734, 735, 467 S.E.2d at 631, 632, (Orr, J., dissenting) (“In conclusion, for the foregoing reasons . . . N.C.G.S. § 158-7.1 . . . is unconstitutional on its face *and as applied* . . .” (emphasis added)).

It is implausible to read *Maready* as suggesting that this Court thought the statute might be unconstitutional *as applied*. Had this Court left open the possibility of as-applied challenges as the Plaintiffs suggest, it would have been remand required to the case to the trial court with instructions to examine the constitutionality of each of the two dozen expenditures on an as-applied basis. But this Court did not do so. It is, therefore, unreasonable to conclude that this Court in *Maready* intended to sanction expenditure-by-expenditure public-purpose challenges along the lines proposed by Plaintiffs here – particularly given this Court’s stated concern that “the State will . . . suffer economically in the future if the incentive programs created pursuant to N.C.G.S. § 158-7.1 are discontinued.” *Id.* at 726-27, 467 S.E.2d at 627.

In any event, the apparent point of Plaintiffs’ argument that *Maready* involved only a facial challenge is to try to create the illusion that their case does not involve a facial challenge and thus is distinguishable. But that is not true. Plaintiffs are raising a facial challenge to the Legislation. They argued below that the Legislation is unconstitutional as a matter of law, on its face, because, they argued, when the State offers economic incentives to private corporations to create jobs and stimulate the economy, corporations are the primary beneficiaries, and the public benefits only incidentally. That theory of course was rejected in *Maready*.

Finally, Plaintiffs also have failed to demonstrate a need for bypassing the Court of Appeals. The Court of Appeals is capable of applying precedents and adjudicating the issues raised in this straightforward case. Bypass is not needed. The petition expresses a concern about

delay, but the Dell manufacturing facility is up and running in Forsyth County and has been for quite some time, with over 1,000 new full-time jobs already created. While Plaintiffs allude to the need for certainty, nothing could create more *uncertainty* than the standard they want to unleash on this State through an overruling of *Maready*: their petition argues for a *case-by-case* review of every economic development incentive (past, present, and future) under indeterminate guidelines that Plaintiffs themselves cannot identify. See Petition p. 11 (arguing that the constitutionality of economic incentives “must be determined on a case-by-case basis,” and asking this Court “to set out the guiding principles by which such case-by-case determinations may be made” in the form of “guidelines” to the “executive and legislative branches” and “the lower courts”).

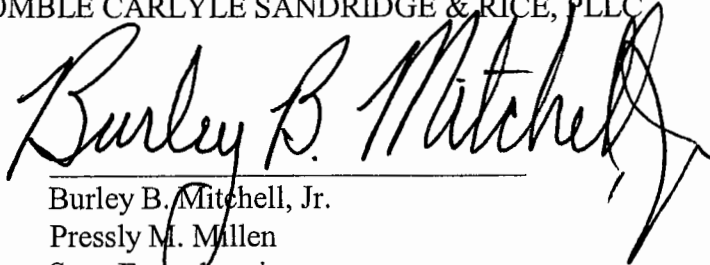
CONCLUSION

Dell respectfully opposes the petition for discretionary review before a determination by the Court of Appeals. This case, the core of which is a political question, is controlled by *stare decisis*. There is no need for this Court to revisit *Maready* every time the elected representatives of the State or a local government determine that economic development incentives are warranted. The Court of Appeals can be trusted to resolve the claims correctly, and there is no reason to believe that this Court will ever have to review the resulting application of established precedent to these facts.

Respectfully submitted this the 26 day of October, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of DEFENDANT-RESPONDENT DELL INC.'S RESPONSE TO PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW, via the U.S. Post Office, first class mail, upon the following, addressed as shown below:

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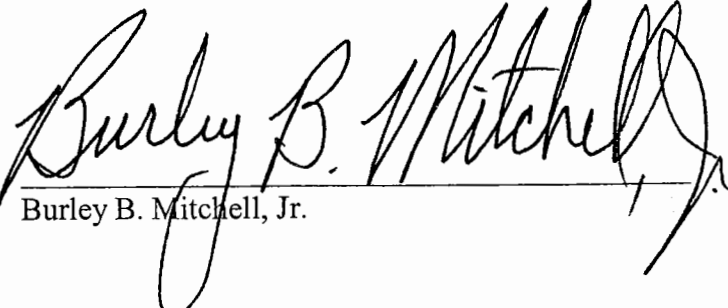
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This the 26 day of October, 2006.



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