

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 11756

MICHAEL C. MUNGER, BARBARA HOWE,)
and MARK WHITELEY CARES,)
)
Plaintiffs,)

v.)

STATE OF NORTH CAROLINA; JAMES T.)
FAIN, III, Secretary of the North Carolina)
Department of Commerce, in his official)
capacity; REGINALD HINTON, Acting)
Secretary of the North Carolina Department of)
Revenue, in his official capacity; DAVID T.)
MCCOY, State Budge Officer for the Office of)
State Budget and Management, in his official)
capacity; MICHAEL F. EASLEY, Governor of)
the State of North Carolina, in his official)
capacity; GOOGLE INC,; and MADRAS)
INTEGRATION, LLC,)
)
Defendants.)

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

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capacity; GOOGLE INC,; and MADRAS)
INTEGRATION, LLC,)
)
Defendants.)

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

NOW COME the State of North Carolina, James T. Fain, III, Reginald Hinton, David McCoy, and Michael F. Easley (hereafter collectively referred to as the “State defendants”), by and through their undersigned counsel, and urge the Court to dismiss plaintiffs’ complaint in its entirety. Specifically, defendants submit that plaintiffs’ entire amended complaint (hereafter “complaint”) should be dismissed pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. For the reasons set out below, this Court should grant the State defendants’ motion to dismiss, filed on 18 October 2007, and enter judgment for the State defendants.

STATEMENT OF THE CASE AND FACTS

Plaintiffs seek to have this Court invalidate economic incentive legislation enacted in 2006, as well as the initial approval of a job development incentive grant, relating to internet or web search facilities and services. Plaintiffs' challenge, which is based on a number of provisions of the Constitution of North Carolina, is directed at legislation and executive actions which they construe as being solely for the benefit of defendants Google Inc. and Madras Integration, LLC (hereafter collectively referred to as "Google"). Plaintiffs' complaint reflects an underlying hostility to economic incentives in principle even more than any focused criticisms of the particular incentives at issue here. In effect, plaintiffs dispute the policy judgments made by the General Assembly. Moreover, they doggedly ignore the benefits flowing to the State of North Carolina and its citizens from the economic development and job opportunities resulting from the underlying legislative policies as well as from Google's location of a new facility in this State.

Specifically, in the 2006 Current Operations Appropriations Act, the General Assembly approved the exemption from sales and use taxes of certain property used in connection with internet provider services or web search portals and of sales of electricity to be used at such properties. *See* N.C. SESS. LAWS 2006-66 § 24.17 (attached to the complaint as Exhibit A); N.C.G.S. §§ 105-164.3 (8e), 105-164.13(55). The exemption is limited to facilities which, among other requirements, are accompanied by investments of at least two hundred fifty million dollars (\$250,000,000) within five years after the construction of the facility begins, as certified by the Secretary of Commerce. N.C.G.S. § 105-164.3(8e)d. The exemption is also limited to facilities located in counties that do not fall within one of the less distressed tiers for economic development, or the least distressed tier, according to rankings under former and current statutory schemes. N.C.G.S. § 105-164.3(8e)c

(referencing former N.C.G.S. § 105-129.3 or current N.C.G.S. § 143B-437.08). The exemption is merely one of a long list of a wide variety of items exempted from these taxes, N.C.G.S. § 105-164.13, including broad exemptions of the sale of electricity to farmers and manufacturers beginning in 2010. N.C.G.S. §§ 105-164.13(1b), (57). Finally, the exemption is forfeited if the level of investment is not met or the property or electricity is not located or used at the eligible internet or web search facility, and the taxpayer will have to pay past taxes that would have been due except for the forfeited exemption. N.C.G.S. § 105-164.13 (55).

Throughout their complaint, plaintiffs describe the 2006 legislation as the “Google legislation” and depict it as serving no purpose except to attract, and benefit, a Google internet data center in Lenoir, Caldwell County, North Carolina. *See* Compl. ¶¶ 20-38. Plaintiffs acknowledge that the legislation is not by its terms limited to Google. (Compl ¶ 36) Nevertheless, they portray the legislation as being enacted expressly and solely for the benefit of Google and its shareholders and the facility itself as providing benefits only to Google and its shareholders. (Compl. ¶¶ 36, 50, 55, 62, 66, 69, 73, 78, 89)

Plaintiffs are also challenging on constitutional grounds a Job Development Investment Grant (“JDIG”) which has been approved for Google, but never finalized. Through the Job Development Investment Grant Program, N.C.G.S. §§ 143B-437.50 *et seq.*, the General Assembly has provided for annual investment grants to be awarded to investment projects in this State, based on the recommendation of an Economic Investment Committee (the “Committee”). N.C.G.S. § 143B-437.55. The reasons and purposes for providing JDIG’s are thoroughly delineated by the General Assembly in extensive legislative findings. These findings reflect a concern with the State’s changing economic conditions and industrial foundations, and they make it indisputable that the

legislature created these grants from a desire to stimulate economic activity, create new jobs, enlarge the tax base, expand and diversify the industrial base, and create an increase in revenue for the State and its political subdivisions. N.C.G.S. § 143B-437.50.

The JDIG's are actually awarded through written agreements executed pursuant to that Committee's recommendations, including specific terms required by statute, with the review and signature of the Attorney General of North Carolina. N.C.G.S. § 143B-437.57. As plaintiffs have alleged, the Committee voted approval of a JDIG to Google for its internet data center in Lenoir. (Compl. ¶ 42) A JDIG agreement may be approved or awarded only if the Committee finds that it meets certain requirements, including that the project will create a net increase in employment, that it "will benefit the people of this State by increasing opportunities for employment and by strengthening this State's economy," that the project is consistent with the State's economic development goals, that the grant is necessary for completion of the project, and that the benefits to the State exceed the costs. N.C.G.S. § 143B-437.52(a). A maximum of 25 agreements may be entered into in any year, not to exceed \$30 million in 2006 or \$15 million in any other year. N.C.G.S. § 143B-37.52(b), (c). Plaintiffs alleged that the Committee had approved a grant to Google for 75% of its withholding taxes, Compl. ¶ 43, the maximum allowed by law, based on eligible or new positions created by the recipient. N.C.G.S. §§ 143B-437.56(a)-(c); 143B-437.51(5). Plaintiffs have not alleged, and could not allege, that any written agreement finalizing a JDIG award for Google has been executed. Plaintiffs repeatedly allege that the JDIG grant is unconstitutional on the grounds that the "benefits, tax credits, grants and/or subsidies provided to Google" pursuant to the JDIG award benefit only Google and its shareholders. (Compl. ¶ 65; *see also* Compl. ¶¶ 71, 82)

Plaintiffs initiated this action by filing their original Complaint and Petition for Declaratory Judgment on 25 July 2007. The complaint was amended as a matter of right on 15 August 2007. Plaintiffs seek declaratory and injunctive relief invalidating the challenged tax benefits as well as any JDIG grant, prohibiting any payments or benefits under the challenged legislation or any JDIG grant, requiring the State defendants to recoup any money paid out or not collected as the result of any grants or tax exemptions, along with other remedies such as costs and attorney's fees. (Compl. Prayer for Relief) All defendants obtained extensions of time to respond. The Google defendants filed their motion to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) on 16 October 2007. The State defendants filed their motion to dismiss, also based on Rules 12(b)(1) and (6), on 18 October 2007. In their motions to dismiss, all defendants asserted that plaintiffs that had failed to state any valid claims for relief. All defendants also moved to dismiss on the grounds that plaintiffs, who are all individual citizens and taxpayers (Compl. ¶¶4-6), lacked standing to raise the claims alleged.

Plaintiffs' specific constitutional claims will be addressed below, organized in a manner facilitating the arguments presented here by the State defendants. For the reasons set out below, plaintiffs' claims must be dismissed and judgment entered for defendants.

ARGUMENT

Plaintiffs face a heavy burden in pursuing their claims disputing the validity of the internet data center exemptions as well as the proposed JDIG grant.¹ Indeed, it is often said that “[e]very

¹ While plaintiffs' challenge to the proposed JDIG grant does not purport on its face to be a challenge to the statutes authorizing JDIG's, plaintiffs' broad, generalized objections to the proposed JDIG in fact equate to a facial challenge to the JDIG award program. Consequently, their challenge to the JDIG award can succeed only by overcoming the hurdles that face all attacks on the validity of legislative enactments.

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) (alteration in original) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). Our courts “give[] acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute.” *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997); *accord Rhyne v. K-Mart Corp.*, 358 N.C. 160, 167, 594 S.E.2d 1, 7 (2004). 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. 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.” *Id.* at 338, 410 S.E.2d at 891 (quoting *County of Fresno v. State of California*, 268 Cal. Rptr. 266, 270 (Cal. App. 5th Dist. 1990), *judgment aff’d*, 808 P.2d 235 (1991)). See also *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (“The Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision.”). It is the General Assembly, not the courts, entrusted with policy

decisions, and whether a particular policy “is wise or unwise is for determination by the General Assembly.” *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970). *See also Royal v. State*, 153 N.C. App. 495, 499, 570 S.E.2d 738, 740-41 (2002) (questions of public policy were for legislative, not judicial, determination, with regard to plaintiffs’ challenge of primary system which they claimed favored wealthy candidates and their supporters). In this case, plaintiffs hope to have the courts replace the judgment of the General Assembly because plaintiffs disagree with the policies favoring the tax exemption for internet data centers and the JDIG grants. This Court should reject plaintiffs’ specific arguments as well as their underlying premise that the courts should in effect overrule the legislature on a policy question which the General Assembly has decided in favor of economic incentives.

I. PLAINTIFFS’ PUBLIC PURPOSE CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

In Counts 4, 5, 6, 9 and 10 of their complaint, plaintiffs have alleged that the internet data center tax exemption and the JDIG grant approval, and any contracts signed pursuant to the tax exemption or the JDIG grant statutes, violate the “public purpose” portions of Article V, Sections 2(1) and 2(7) of the Constitution of North Carolina. Article V, Section 2(1), in relevant part, directs that “[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only” 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.” The thrust of plaintiffs’ complaint is that the tax exemption for internet data centers and any JDIG award to Google benefit only Google, its proprietors and its stockholders, and are of no benefit to

the State, the public, or the taxpayers. In plaintiffs' view, then, the tax exemption and any JDIG award are not for a public purpose within the meaning of the Constitution. Plaintiffs' claims, however, are foreclosed by unambiguous decisions of our appellate courts.

A. MAREADY AND ITS PROGENY ESTABLISH THAT PLAINTIFFS' CLAIMS ARE WITHOUT MERIT.

The seminal authority in this State measuring economic incentives against the public purpose requirement is *Maready*, 342 N.C. 708, 467 S.E.2d 615. In *Maready*, the Court concluded that local economic development incentive projects, as authorized by N.C.G.S. § 158-7.1, were for public purposes despite the fact that “private actors will necessarily benefit from the expenditures authorized.” 342 N.C. at 725, 467 S.E.2d at 625. The Court pointed out that, even before its decision in that case, “[e]conomic development has long been recognized as a proper governmental function.” *Id.* at 723, 467 S.E.2d at 624. In fact, “[s]timulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision.” *Id.* at 723, 467 S.E.2d at 625 (quoting *State ex rel. Util. Comm’n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978)). Indeed, economic incentives are increasingly necessary in light of the changing economic climate in this State, with the decreased roles of traditional foundations of the State’s economy such as agriculture and manufacturing. *Maready*, 342 N.C. at 725, 467 S.E.2d at 625-26. Under contemporary circumstances, the State is compelled to provide and facilitate economic incentives in light of the competition with other States to attract the same investments. In fact, the Court pointed out that economic development incentives had been upheld in forty-six other states, and “it would be unrealistic to assume that the State will not 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 this case, it would be equally unrealistic to assume that the State would not suffer economically if the internet data center tax exemption legislation and grants like those at issue here cannot survive plaintiffs’ broadside challenge.

Plaintiffs’ repeated declarations in their complaint that the internet data center tax exemption and the potential JDIG grant benefit only Google and its shareholders reflect their skewed approach to determining who benefits from the increased investment, tax collections, and jobs produced by economic incentives. Plaintiffs presumably hope to tie the allegations of their complaint to the standard often used in evaluating public purpose claims. The two questions that must be answered for a public purpose issue are (1) “whether an activity is within the appropriate scope of governmental involvement and is reasonably related to communal needs,” and (2) whether “the activity benefits the public generally, as opposed to special interests or persons.” *Maready*, 342 N.C. at 722, 467 S.E.2d at 624 (citing *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989)). The Court in *Maready* made it very clear that economic incentives meet the first prong and, despite plaintiffs’ conclusory allegations to the contrary, they meet the second prong as well.

The fact that an incentive benefits a private company does not mean that it fails the public purpose test. Rather, “under the expanded understanding of public purpose, even the most innovative activities . . . are constitutional so long as they primarily benefit the public and not a private party.” *Maready*, 342 N.C. at 724, 467 S.E.2d at 625. “Moreover, an expenditure does not lose its public purpose merely because it involves a private actor. Generally, if an act will promote

the welfare of a state or a local government and its citizens, it is for a public purpose.” *Id.* As the Court pointed out,

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. In other words, providing incentives benefits the State, local governments, and the citizens. Plaintiffs’ blanket assertions that the internet data center tax exemption and the potential JDIG grant to Google benefit only Google and its shareholders flies in the face of the General Assembly’s policy judgments and of the Supreme Court’s recognition that economic incentives resulting in new and increased investments and jobs do benefit the State and its citizens.

Maready, in effect, interprets the public purpose test, and especially the public versus private benefit prong, at a different angle from that employed in many older cases. Older cases seemingly focused more on the benefit to private individuals or entities, as plaintiffs wish to do. In contrast, *Maready* and more recent cases concentrate on the public motive and expected benefit to determine whether a particular action was for a public purpose for purposes of constitutional restrictions. Where the public benefit is the motivation for the enactment, the benefit to private individuals is incidental, even though substantial. Thus, “an expenditure does not lose its public purpose merely

because it involves a private actor. Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.” *Id.* at 724, 467 S.E.2d at 625.

Applying the principles set down in *Maready*, our appellate courts have continued to reject public purpose challenges despite what might be viewed as benefits to private entities. Thus, 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 then-Charlotte Hornets of the National Basketball Association. 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. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). In upholding the dismissal of the complaint under N.C.G.S. § 1A-1, Rule 12(b)(6), 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 495, 533 S.E.2d at 848.

Following the same mode of analysis, the Supreme Court upheld a condemnation of land by an airport authority as being for public use against a challenge based on the contention that the land would be used for the construction by Federal Express of a facility that it would then rent from the airport. The Court noted the distinction that condemnation must be judged by the “public use” standard rather than the “public purpose” standard, but the Court nevertheless evaluated the taking under the same two-part *Madison Cablevision* test used in *Maready* and other cases to analyze public purpose claims. Despite the argument that the condemnation was for the private benefit of Federal Express, the Court concluded that

[t]he arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports. As such, 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 both prongs of our analysis are satisfied.

Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002).

Lest anyone doubt the message communicated by the *Maready*, *Peacock*, and *Piedmont Triad* decisions, the Court of Appeals recently upheld once again economic incentives challenged as being for the benefit of private parties rather than for a public purpose. *Blinson v. State*, 651 S.E.2d 268 (N.C. Ct. App. October 16, 2007), *appeal dismissed and disc. review denied*, No. 546P06-2 (April 10, 2008) (attached). *Blinson* involved challenges both to economic incentives enacted by state statute to promote computer manufacturing plants and to local incentives offered to Dell Corporation by the City of Winston-Salem and Forsyth County pursuant to N.C.G.S. § 158-7.1. The Court of Appeals concluded that, “under *Maready*, the need to offer economic incentive programs to attract

industry that will replace lost jobs is necessarily a public purpose.” *Blinson*, 651 S.E.2d at 276. The Court of Appeals also rejected plaintiffs’ arguments that the fact that challenged benefits went to a specific company (Dell), assuming that they did, prevented the legislation and incentives from being for a public purpose. The *Blinson* court observed that the “challenged benefits in *Maready* also went to specific companies”; the court further relied on its decision in *Peacock* for the principle “that the mere fact that the agreements benefitted private parties was not dispositive” and did not prevent the challenged actions from being for a public purpose. *Id.* at 277. More fundamentally, the *Blinson* court explained that

plaintiffs’ arguments reflect a misunderstanding of the public purpose doctrine. The task of the judiciary is to determine whether the aim of the legislation is primarily public and not to weigh the public benefit against the private benefit by making findings as to the projected monetary value of each. Indeed, the approach urged by plaintiffs was the approach of the dissent in *Maready*. See *Maready*, 342 N.C. at 736, 467 S.E.2d at 632. We do not “pass upon the wisdom or propriety of legislation in determining the primary motivation behind a statute” *Id.* at 725, 467 S.E.2d at 626 (emphasis added). We look instead to whether the purpose of “an act will promote the welfare of a state or a local government and its citizens,” *id.* at 724, 467 S.E.2d at 625, and do not engage in economic projections as to the potential monetary benefits resulting from the legislation. The latter analyses are for the General Assembly and the Executive Branch, which can also take into account non-monetary benefits.

Blinson, 651 S.E.2d at 277-78.

In sum, our appellate courts have established without any doubt that economic incentives do serve a public purpose. Simply alleging that they benefit private businesses is not sufficient to override the established principle that economic incentives for investments expanding the tax basis and creating new jobs are in fact for a public purpose regardless of whether some private entities may

benefit. Plaintiffs' attempts to re-litigate *Maready* and *Blinson* cannot eradicate the precedents that demonstrate the fallacies in their claims.

B. PLAINTIFFS HAVE MADE NO ALLEGATIONS THAT WOULD ALLOW THEIR CLAIMS TO ESCAPE THE PRECEDENTS OF *MAREADY*, *BLINSON*, AND *PEACOCK*.

Plaintiffs have attempted in their complaint to create a distinction between these claims and the ones in the controlling public purpose law cases, especially *Maready*. They have not done so.

The complaint in this case is replete with allegations that the internet data center exemption and the JDIG grants benefit only Google, its stockholders, and even its proprietors. *E.g.*, Compl. ¶ 73. Plaintiffs have attempted to allege essentially the same thing in many different ways. Yet, when their complaint is examined carefully, it is clear plaintiffs 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)). Plaintiffs cannot use conclusory allegations to avoid dismissal. *See Meyer v. Walls*, 347 N.C. 97, 114, 489 S.E.2d 880, 889 (1997); *Jordan v. Crew*, 125 N.C. App. 712, 718, 482 S.E.2d 735, 738, *disc. review denied*, 346 N.C. 279, 487 S.E.2d 548 (1997). "Although well-pleaded factual allegations of the complaint are treated as true for purposes of a 12(b)(6) motion, 'conclusions of law or unwarranted deductions of facts are not admitted.' *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E.2d 843, 851 (1979) (citations omitted)." *Dalenko v. Wake County Dep't of Human Services*, 157 N.C. App. 49, 56, 578 S.E.2d 599, 604, *cert. denied*, 357 N.C. 457, 585 S.E.2d 383 (2003). Plaintiffs' repeated allegations of their conclusions that the internet

data center tax exemption and proposed JDIG agreement benefit Google and not the public cannot substitute for the missing *factual* allegations that would support their claims.

More basically, plaintiffs' allegations demonstrate that their claims are legally flawed. "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." *Jackson*, 318 N.C. 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) (citation omitted). Where the complaint shows an "insurmountable bar to recovery [] on its face," including the "absence of law to support a claim," dismissal is proper. *Peacock*, 139 N.C. App. at 492, 533 S.E.2d at 846. Because plaintiffs' factual allegations are insufficient as a matter of law, their claims cannot succeed.

Plaintiffs attempt to distinguish *Maready* in particular by noting that *Maready* involved local government actions pursuant to N.C.G.S. § 158-7.1 while the case here involves actions "at the remote 'State of North Carolina' level." (Compl. ¶ 74) Plaintiffs have tried to suggest by their allegations that the State is interfering in an area of activity in which it should not be involved and doing so inequitably by promoting and preferring certain businesses over others. (Compl. ¶ 73) According to plaintiffs the State has neither the "justification" nor "competence to micromanage the business affairs" of the local governments or communities. (Compl. ¶ 74) The State, however, has

not attempted to micromanage the affairs of localities. Rather, it has enacted state laws that provide for exemptions and grants that fall well within the scope of the public purpose requirements of the Constitution, as interpreted repeatedly by our appellate courts. Plaintiffs' view of *Maready* is too narrow. Indeed, N.C.G.S. § 158-7.1, which supported the local governments' granting of incentives in *Maready*, was of course a state statute enacted by the General Assembly. The Court in *Maready* clearly recognized the authority of the State and the General Assembly, not just local governments, to act in these areas when it pointed out the following:

The General Assembly may provide for, inter alia, roads, schools, housing, health care, transportation, and occupational training. It would be anomalous to now hold that a government which expends large sums to alleviate the problems of its citizens through multiple humanitarian and social programs is proscribed from promoting the provision of jobs for the unemployed, an increase in the tax base, and the prevention of economic stagnation.

Maready, 342 N.C. at 722, 467 S.E.2d at 624.

Even more harmful to plaintiffs' theory is *Blinson*, which dealt with state legislation granting tax incentives to computer manufacturing companies, legislation which the plaintiffs in that case consistently referred to as the "Dell legislation." Nevertheless, the Court of Appeals in *Blinson* had no problem with the actions of the General Assembly in enacting the challenged laws, holding that they did not run afoul of the public purpose requirements of the Constitution. The court pointed out that "[t]oday, every *state* provides tax and other economic incentives as an inducement to *local* industrial location and expansion." *Blinson*, 651 S.E.2d at 271 (quoting Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789, 790 (1996)) (emphasis added). Plaintiffs' theory that somehow this case is different because they have challenged only state legislation is utterly unsupported in precedent.

Plaintiffs allege repeatedly that the internet data center tax exemption was enacted with Google in mind and without any plan for any other internet data center to receive such benefits. (Compl. ¶¶ 36, 50-51, 58) To read the complaint, one would assume that the only reason the internet data center tax exemption was enacted was for Google's benefit, not for the public's. Plaintiffs attempt to further that impression by noting that the internet data center tax exemption legislation contains no express recitation of public purposes underlying the enactment of the exemption. (Compl. ¶61; 2006 N.C. SESS. LAWS 66 § 24.17)

While it is true that the internet data center exemption was enacted without a detailed statement of the public purposes or motivations underlying the exemption, such a recitation would be superfluous at this stage. The exemption applies only to an internet data center facility located at a single or contiguous locations for which the Secretary of Commerce makes a written determination that at least two hundred fifty million dollars (\$250,000,000.00) has been or will be invested in the land or eligible business property within five years after construction of the facility begins. N.C.G.S. §§ 105-164.3(8e), 105-164.13 (55). Failure to make the investment in a timely manner or otherwise to comply with the conditions of the exemption results in forfeiture of the exemption and an obligation to pay any taxes avoided by the exemption. N.C.G.S. § 105-164.13 (55). Clearly, the whole purpose of the exemption is to hold out the promise of a reward for substantial new investment, and thereby encourage and stimulate investment in new facilities of this type, with the resulting boost to the tax base, economy, and jobs that normally follows. As the Court noted in *Maready*, “[s]timulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision.” *Maready*, 342 N.C. at 723, 467 S.E.2d at 625. “Thus, under

Maready, the need to offer economic incentive programs to attract industry that will replace lost jobs is necessarily a public purpose.” *Blinson*, 651 S.E.2d at 276. Put another way, “[w]hether these incentives are lawful under the North Carolina Constitution was settled by *Maready*” and *Peacock*. *Id.*, 651 S.E.2d at 271. The validity of such incentives, as well as their purpose and effect, is now so well-established that the General Assembly need not reiterate in each legislative act the purposes and goals of economic incentives. Those purposes and goals are self-evident and firmly established as well within the legitimate purposes and goals of the public purpose clauses of Article V, Section 2(1) and Article V, Section 2(7).²

Plaintiffs’ efforts to portray the internet data center tax exemption as having been enacted solely for Google are insufficient to support any of their claims for relief. First, regardless of plaintiffs’ characterization of the legislation, it is not limited to Google but is available to any internet data center that meets the requirements. The Court of Appeals rejected a similar argument with regard to what the plaintiffs referred to as the “Dell legislation” in *Blinson*. “While we do not read the legislation as narrowly as plaintiffs, we note nonetheless that the challenged benefits in *Maready* also went to specific companies.” *Blinson*, 651 S.E.2d at 277. Moreover, plaintiffs have not presented any *factual* allegations that would undermine the obvious economic incentive purposes for the internet data center tax exemption or the JDIG grant. *See Blinson*, 651 S.E.2d at 278. What they are trying to do is to persuade this Court to revisit the reasoning and holdings of *Maready*, *Peacock*, and *Blinson* because plaintiffs disagree with the premises underlying the granting of

² The JDIG statute does have extensive language setting out the reasons and purposes that establish the public purpose behind the program. N.C.G.S. § 143B-437.50. Further, the Committee must make particular findings that reflect the public purposes before it can make a grant award. N.C.G.S. § 143B-437.52(a).

economic incentives. This Court cannot revisit those cases or substitute its judgment for that of the General Assembly in making the policy decisions underlying the acts challenged in this lawsuit. *Blinson*, 651 S.E.2d at 271. Accordingly, the total “absence of law to support” plaintiffs’ public purpose claims requires their dismissal as a matter of law. *Peacock*, 139 N.C. App. at 492, 533 S.E.2d at 846.

II. PLAINTIFFS’ EXCLUSIVE EMOLUMENTS CLAIMS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

In Counts 1, 2, and 3 of their complaint, plaintiffs have alleged that the internet data center tax exemption and the potential JDIG award to Google violate the exclusive emoluments clause of Article I, Section 32 of the Constitution. Article I, Section 32 reads as follows: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” The incentives provided by the internet data center tax exemption or any potential JDIG agreement are not exclusive or separate emoluments, and this Court should dismiss plaintiffs’ Counts 1 through 3.

As our Supreme Court has explained, 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) (quoting *State v. Knight*, 269 N.C. 100, 108, 152 S.E.2d 179, 184 (1967)). 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 at 764. *Accord Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848 (concluding that agreement providing for percentage of Charlotte Coliseum Authority profits to go to Hornets owners “was intended to promote the public benefit and plaintiff’s second claim must fail on its face, even though a benefit resulted, as well, to the Shinn defendants”). Thus, for the same reasons that the challenged actions do not violate the public purpose provisions of the Constitution, the incentives at issue fall well within the permissible limits of Article I, Section 32. As the Court of Appeals held in rejecting a similar claim, “when legislation is determined to ‘promote the public benefit’ under the Public Purpose Clauses, it necessarily is not an exclusive emolument.” *Blinson*, 651 S.E.2d at 278 (quoting *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848). Regardless of any benefits that redound to Google or any other manufacturer, “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, *disc. review denied*, 359 N.C. 75, 605 S.E.2d 149 (2004).

Plaintiffs, however, further allege that the internet data center tax exemption and the possible JDIG award are not for “public services.” (Compl. ¶¶ 61, 62, 64, 66) Because Article I, Section 32 forbids “exclusive or separate emoluments or privileges from the community but in consideration of public services,” the constitutional prohibition is violated only if the Court can determine first that there is an “exclusive or separate emolument [] or privilege [] from the community” and, second, that that emolument or privilege was not “in consideration of public services. Here, as in *Town of*

Emerald Isle, Peacock, Town of Highlands and Blinson, there was no exclusive emolument. Consequently, the Court need not reach the second portion of the Article I, Section 32 test. Once the Court has “concluded that the disputed incentives and subsidies were not exclusive emoluments, it is immaterial whether they were provided ‘in consideration of public services.’” *Blinson*, 651 S.E.2d at 279. Therefore, plaintiffs’ exclusive emoluments claims must be dismissed for failure to state a claim upon which relief may be granted.

III. PLAINTIFFS’ DISCRIMINATION-BASED CLAIMS MUST BE DISMISSED BECAUSE PLAINTIFFS LACK STANDING AND BECAUSE THEY FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Plaintiffs alleged in Counts 7, 8, and 11 of the complaint that the internet data center tax exemption and the proposed JDIG agreement for Google violate what they refer to as the “fair and equitable” clause of Article V, Section 2(1) (actually requiring that the taxing power “be exercised in a just and equitable manner”), the uniformity of taxation clause of Article V, Section 2(2), and the “law of the land” clause of Article I, Section 19 of the Constitution, respectively. These counts are all based on personal rights and discrimination-type claims for which plaintiffs have completely failed to provide any supporting factual allegations. Nor have plaintiffs provided any factual allegations that even suggest that plaintiffs have standing to bring these claims. Consequently, all three should be dismissed pursuant to N.C.G.S. §§ 12(b)(1) and (6).

A. PLAINTIFFS LACK STANDING TO BRING THE DISCRIMINATION-TYPE CLAIMS.

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). Significantly, “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. review denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). See also *Blinson*, 651 S.E.2d at 273 (“As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing.”) (citing *Coker v. Daimler Chrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005), *aff’d per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006)). Thus, in order to survive defendants’ motions to dismiss their uniformity, “law of the land,” and “fair and equitable” taxation claims, plaintiffs must demonstrate that they suffered (or will suffer) an “injury in fact” in light of the applicable statutes or caselaw” specifically with regard to each of those claims. *Neuse River Found., Inc., v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citations omitted), *disc. review denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). This they cannot do.

Plaintiffs are in no jeopardy from the internet data center tax exemption or JDIG grant. Insofar as their complaint alleges, they are individual taxpayers, not manufacturers or businesses in competition with Google or excluded from the exemptions or JDIG grants. (Compl. ¶¶ 4-6) Their complaint alleges no specific way in which they themselves have suffered insofar as their “fair and equitable” taxation claim is concerned. See Compl. Count 7, ¶¶ 75-76. For Count 8, the uniformity of taxation claim, plaintiffs’ allegations in part track the uniformity portion of Article V, Section 2(2), and otherwise suggest that enactment of the internet data center tax exemption was solely for the benefit of Google, that the legislation and tax benefits lack a rational basis and that they are unfair “relative to other similarly situated taxpayers.” (Compl. ¶ 78) Since nothing in the complaint suggests that plaintiffs are similarly situated to Google or any other internet data center or even any other manufacturer, plaintiffs cannot avail themselves of their own allegations. Finally, as to their “law of the land” claim in Count 11, plaintiffs repeatedly allege that Google receives “unearned and

undeserved” “state governmental favoritism” from the tax benefits and exemptions it may receive, “relative to other persons and entities (including plaintiffs) who contribute mightily to the economic well-being of this State but who do not receive such tax breaks and exemptions and do not qualify to be among the Eligible.” (Compl. ¶¶ 85-87) Plaintiffs also allege that what they consider tax benefits for Google do not promote the State’s well-being, are not sufficiently related to the accomplishment of compelling state objectives, and that the burdens and costs of these tax benefits outweigh the likely good to be derived from them. (Compl. ¶¶ 88-91) Nothing in those allegations suggests any meaningful way in which plaintiffs have suffered a deprivation of their rights as guaranteed by Article I, Section 19’s “law of the land” clause.

As the North Carolina Supreme Court has explained, standing depends on

whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.

Goldston v. State, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (citation omitted). That “sharpness of presentation” is necessarily tied to the particular issue before the court. Standing to raise one question does not establish standing in a plaintiff to raise any and all questions a plaintiff might wish, regardless of his lack of harm or relationship to such questions.

In *Goldston*, the Court concluded that taxpayers could sue to obtain a declaratory judgment as to the validity of past transfers of funds from the Highway Trust Fund to the General Fund on the grounds that “a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds.” *Id.* at 33, 637 S.E.2d at 881. The Court further concluded that “taxpayers have standing to seek equitable relief and a declaratory judgment

when alleging government officials violated statutory or constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another.” *Id.* at 34, 637 S.E.2d at 881.

While *Goldston* may provide plaintiffs with standing to bring their public purpose and exclusive emoluments claims, *Goldston* does not confer on plaintiffs standing for all other types of claims, particularly those concerned with forms of discrimination and individual rights. The *Goldston* Court quoted with approval its earlier statement that “[o]nly those persons may call into question the validity of a statute [sic] who have been injuriously affected thereby in their persons, property or constitutional rights.” *Goldston*, 361 N.C. at 35, 637 S.E.2d at 882 (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962)). When it comes to discrimination-type claims, such as “fair and equitable” taxation, “law of the land,” and uniformity of taxation, the action challenged by plaintiffs is constitutionally flawed only by reference to the differential treatment of groups of taxpayers or citizens that are alleged to be similarly situated to each other. Plaintiffs’ status as general taxpayers does not entitle them under any theory of standing to assert the rights of other groups of taxpayers or to present claims based on unfairness to other businesses or entities that might pay the sales and use tax for their businesses or that might not be eligible for JDIG grants.

Importantly for this case, “[t]he 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 v. Weyerhaeuser Co.*, 141 N.C. App. 482, 484, 539 S.E.2d 380, 381 (2000) (quoting *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974)) (addressing equal protection challenge), *disc. review denied*, 353 N.C. 525, 549 S.E.2d 858 (2001). 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) (denying defendant's standing to raise due process and equal protection claims with regard to Sunday closing laws since he sold no items that were exempt from the Sunday closing prohibitions when sold by other types of businesses). *Accord In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993).

Barbour is noteworthy in that the plaintiff in that case raised challenges to certain property tax provisions on equal protection and uniformity grounds claiming discrimination against individual residential property holders and also against certain types of homes for the aged, sick and infirm. The Court, in an opinion written by then Judge Orr, considered only the challenges based on discrimination against general taxpayers like Barbour, while holding that he lacked standing to raise the same types of discrimination claims with regard to certain types of homes for the aged, sick, and infirm, a group to which he did not belong. *Barbour*, 112 N.C. App. 368, 436 S.E.2d 169. Not even the right to raise equal protection and uniformity claims as to one group entitled him to raise such claims with regard to the same provisions as to a different group to which he did not belong.

Just as the plaintiff in *Barbour* was barred from raising uniformity claims with regard to any group to which he did not belong, plaintiffs here are equally barred from raising their uniformity claims as to "similarly situated taxpayers" (Compl. ¶ 78), whoever they may be. Because no plaintiff is "a member of the class subject to the alleged discrimination," the plaintiffs are "precluded from challenging" the actions they wish to contest in this litigation. *Appeal of Martin*, 286 N.C. 66, 75,

209 S.E.2d 766, 772 (1974) (holding that county did not have standing to challenge statutory provisions under Article V, Section 2 uniformity rule) (citation omitted). Although there is very little litigation concerning “fair and equitable” (or “just and equitable”) taxation under Article V, Section 2(1), it, too, must follow the rule that plaintiffs cannot challenge the internet data center tax exemption (or JDIG grants) under a “fair and equitable” taxation theory because they cannot show they belong to any group unfairly treated or harmed by the legislation or acts in question.

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.

In *Blinson*, the Court of Appeals concluded that plaintiffs challenging economic incentive legislation and local acts lacked standing to bring discrimination-type claims relating to those incentives. Their status as taxpayers did not permit them to challenge tax incentives and credits provided to major computer manufacturing companies under the uniformity of taxation or other discrimination-based theories of relief. Because “[p]laintiffs have not demonstrated that they belong to a class that is prejudiced by the operation of the” internet data center tax exemption or JDIG grant, because they “lack any ‘personal stake in the outcome of the controversy’ with respect to their challenges,” plaintiffs have no standing to bring their discrimination-based claims. *Blinson*, 651 S.E.2d at 274. Accordingly, these claims should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction over the subject matter.

B. PLAINTIFFS' UNIFORMITY OF TAXATION CLAIM MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Count 8 of plaintiffs' complaint alleges that the internet data center tax exemption violates the uniformity of taxation clause of Article V, Section 2(2) of the Constitution. 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 the internet data center tax exemption was "not enacted by general law" and is not "uniformly applicable to all businesses in every county, city and town and other unit of local government." (Compl. ¶ 78) In addition, plaintiffs complain that the legislation was "specifically enacted for the benefit of Google" and "treat[s] Google in a massively preferential way relative to other similarly situated taxpayers, and do[es] so without a rational basis." (Compl. ¶ 78)³ Plaintiffs' allegations cannot support their uniformity of taxation claim as a matter of law, and this claim must be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

Despite plaintiffs' allegations, the internet data center tax exemption 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

³ To the extent plaintiffs may appear to be suggesting in Count 8 that the JDIG agreements violate the uniformity of taxation clause or the "just and equitable" taxation clause of Article V, Section 2(1) in Count 7, their allegations miss the mark. Those provisions on their face relate only to tax classifications, not to other governmental actions, and the JDIG agreement or statutes authorizing it cannot come within the scope of either clause.

provisions generally applicable to a class of taxpayers. See N.C.G.S. §§ 105-164.3(8e), 105-164.13(55). Note that the constitutional prohibition does not require that a tax be “uniformly applicable to all businesses,” 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. “A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class.” *Town of 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, 690-91, 249 S.E.2d 402, 407 (1978)). The internet data center tax exemption is applicable to the specified class of taxpayers throughout the State. While no other internet data center seeking the credit has currently been identified, the law would equally be available to others who wanted to make similar investments in North Carolina. Thus, plaintiffs’ implications that Google has been granted some exclusive benefit are founded on an assumption that does not withstand scrutiny – that other internet data centers could not receive the same benefit.

If plaintiffs are suggesting that providing tax exemptions to internet data centers, including Google, is unfair vis-a-vis other businesses, then plaintiffs are simply disagreeing with the classification employed. Under the rule of uniformity, a classification need only 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. “A tax is uniform when it imposes an equal tax burden upon all members of a particular class. As long as a classification is not arbitrary or capricious, but rather founded upon a rational basis, the

distinction will be upheld by the Court.” *Broadwell Realty Corp. v. Coble*, 291 N.C. 608, 617, 231 S.E.2d 656, 662 (1977) (citations omitted)

It is for the General Assembly to determine the classifications, and the General Assembly may make fine distinctions and tax different industries under different standards.

“The Legislature is sole judge of what subjects it shall select for taxation . . . , and the exercise of its discretion is not subject to the approval of the judicial department of the State.” *Lacy v. Armour Packing Co.*, 134 N.C. 567, 573, 47 S.E. 53, 55 (1904), *aff’d*, 200 U.S. 226, 50 L. Ed. 451, 26 S. Ct. 232 (1906). 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. v. N.C. Dep’t of Revenue, 356 N.C. 407, 410, 572 S.E.2d 103, 105 (2002) (upholding the taxation of live entertainment differently from “moving picture shows”) (quoting *Leonard v. Maxwell*, 216 N.C. 89, 96, 3 S.E.2d 316, 322 (1939)). The Court “has sustained numerous tax classifications which rested on subtle distinctions.” *Id.* at 414, 572 S.E.2d at 107 (listing various examples).

[T]his constitutional provision does not prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation. “*The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products.* It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.” *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 3 L. Ed. 2d 480, 79 S. Ct. 437 (1959) (resident-nonresident classifications in tax statute). While the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation. *Ohio Oil Co. v. Conway*, 281 U.S. 146, 74 L. Ed. 775, 50 S. Ct. 310 (1930); *cf. State ex rel. Bernhard Stern & Sons v. Boddin*, 165 Wis. 75, 160 N.W. 1077 (1917) (public warehouse-private warehouse classifications in tax statute).

Appeal of Martin, 286 N.C. at 75-76, 209 S.E.2d at 773 (emphasis added).

There can be no doubt that the General Assembly has fully exercised its authority to make distinctions in tax laws and especially in exemptions from the sales and use taxes. North Carolina General Statute § 105-164.13 contains fifty-five (55) subsections setting out various exemptions from retail sales and use taxes. The exemption for internet data centers is only one of those fifty-five. Plaintiffs' allegations do not spell out any sustainable reason why the internet data center tax exemption under N.C.G.S. § 105-164.13 is unreasonable or irrational or impermissibly preferential in relation to any other exemption.

Our appellate courts have acknowledged that the business of government now includes competing with other states to attract industry by offering inducements to that industry.

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.

Maready, 342 N.C. 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)); *see also Blinson*, 651 S.E.2d at 275-76. When the General Assembly determines that a particular type of inducement is appropriate based on current economic factors and the nature of a particular industry, plaintiffs cannot establish a violation of the uniformity of taxation policy simply by saying other unidentified persons or entities that are supposedly similarly situated do not get the same benefits. The General Assembly's obvious purposes of stimulating the economy, increasing the tax basis, and promoting the creation of new jobs are important to the State. Providing tax exemptions to promote investment

and the creation of job through an economic activity of a type that did not exist until recently – *i.e.*, in the internet age – is rationally related to the frequently-recognized goals of economic development incentives.

What plaintiffs are really expressing is their disagreement with the entire economic incentive approach to encouraging industry. The fact that plaintiffs dislike the incentives in no way establishes that those incentives violate the uniformity provision. To the contrary, just as our public purpose jurisprudence recognizes the changing times, the need for economic incentives, and the broadening of the definition of what constitutes a public purpose, so, too, our uniformity jurisprudence must recognize that differences in timing, the nature of the industry, and economic circumstances, including competitors, create real differences that may validly underlie the classifications made for legislation such as the internet data center tax exemption. Because plaintiffs have made no showing that the internet data center tax exemption, or any related provision, violates Article V, Section 2(2), this Court should reject plaintiffs’ uniformity of taxation challenge and dismiss Count 8 of the complaint.

C. PLAINTIFFS’ “FAIR AND EQUITABLE” TAXATION CLAIM MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Count 7 of plaintiffs’ complaint is captioned “Violations of the ‘Taxation Must Be Fair and Equitable’ Clause.” In that Count, plaintiffs alleged that what plaintiffs view as tax benefits for Google “constitute an unfair, unjust, inequitable, arbitrary, and capricious exercise of the power of taxation, and accordingly violate Article V, Section 2(1) of the North Carolina Constitution, which states ‘The power of taxation shall be exercised in a just and equitable manner. . . .’” (Compl. ¶ 76) These allegations suggest no specific harm to plaintiffs or factual basis for any alleged constitutional

violation. Because they are inadequate as a matter of law to state a claim for relief, Count 7 must be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

Although few cases have addressed the “just and equitable” taxation clause of Article V, Section 2(1) of the Constitution, those that have have concluded that “a classification does not violate this provision if it is founded upon a reasonable distinction and bears a substantial relation to the object of the legislation.” *In re Matter of Assessment of Additional North Carolina & Orange County Use Taxes*, 312 N.C. 211, 223, 322 S.E.2d 155, 163 (1984). In addressing such an issue, the Courts observe the rule that “the power to classify subjects of taxation carries with it the discretion to select them, and . . . a wide latitude is accorded taxing authorities.” *Matter of Appeal of Champion Int’l Corp.*, 74 N.C. App. 639, 645, 329 S.E.2d 691, 694 (1985) (quoting *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 309, 59 S.E.2d 819, 821 (1950)). It is constitutionally sufficient “if it appears that the classification has been made upon some reasonable ground -- something that bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.” *Matter of Appeal of Champion Internat’l Corp.*, 74 N.C. App. at 645, 329 S.E.2d at 694 (quoting *Caldwell Land & Lumber Co. v. Smith*, 151 N.C. 70, 75, 65 S.E. 641, 643-44 (1909)).

In this case, plaintiffs have alleged no specific disagreement with the classification except apparently to express opposition to any economic incentives through tax exemptions or other tax breaks or to any incentives that, in this case, might benefit Google or indeed any other specific company. In other words, plaintiffs have not only failed to make any allegations to show how they are directly harmed by such classifications, but they have failed to make any allegations to highlight specific flaws in the classification or specific harm to anyone or anything as a result of the

classification. Their allegations reflecting their disagreement generally with such incentives do not in any way address the validity of this specific classification, judged within the broad discretion accorded taxing authorities. Given the broad approval by our legislative and judicial branches of government for economic development incentives as an appropriate action by our government, it is difficult to argue that the classification is not designed to foster a legitimate goal of promoting economic development. Nor, as a matter of law, can it be denied that the internet data center tax exemption is reasonably related to that goal. For these reasons, and for the reasons in the uniformity of taxation discussion above, plaintiffs' claims for relief based on the "just and equitable" taxation clause of Article V, Section 2(1) must be dismissed for failure to state a claim upon which relief may be granted.

D. PLAINTIFFS' "LAW OF THE LAND" CLAIM MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Count 11 of the complaint alleges that the internet data center tax exemption violates the "law of the land" clause of Article I, Section 19 of the Constitution. That section reads, in relevant part, as follows: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." Plaintiffs have alleged that this provision has somehow been violated under a theory that the internet data center tax exemptions (and possibly the JDIG program) favor Google in contrast to others who contribute to the State's well-being. They further allege that the tax benefits, which plaintiffs claim are exclusively for Google, are unreasonable and arbitrary state action that detract from rather than promote the State's well-being, are not sufficiently related to any "compelling state objectives," and are more burdensome than beneficial. (Compl. ¶¶ 85-91)

Because plaintiffs have failed to make any factual allegations that would support a claim under the “law of the land” clause, their Count 11 must be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

The fatal flaw in plaintiffs’ “law of the land” allegations is that they do not allege that any specific persons’ or entities’ individual rights have been violated. Article I, Section 19 is part of the Constitution’s Declaration of Rights dealing with individual rights, not general prescriptions for good government. Nowhere in plaintiffs’ Count 11 have plaintiffs identified anyone whose individual rights have supposedly been violated by the internet data center tax exemption or the proposed JDIG agreement.

Plaintiffs have not come close to alleging any violation of 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. State*, 330 N.C. 390, 395, 410 S.E.2d 490, 494 (1991), *vacated on other grounds*, 509 U.S. 916, 125 L. Ed. 2d 713 (1993), *on remand*, 335 N.C. 674, 441 S.E.2d 537, *cert. denied*, 513 U.S. 1056, 130 L. Ed. 2d 598 (1994). As in equal protection rational-basis analysis, under the “law of the land” clause a legislative body’s actions “pass[] constitutional muster” if the challenged provisions are “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, the legislative actions to which plaintiffs object are 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 has 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)). Just as plaintiffs have utterly failed to allege adequately the lack of a rational basis for the internet data center tax exemption (and any potential JDIG agreement) for uniformity of taxation purposes, they have equally failed to allege the lack of a rational basis for “law of the land” purposes.

Moreover, to the extent plaintiffs try to attack the effectiveness of the economic incentives, their efforts are misplaced. “[T]he rational basis test is the lowest tier of review, requiring a connection between the statute and ‘a conceivable,’ or ‘any,’ legitimate governmental interest.” *Rhyne*, 358 N.C. at 181, 594 S.E.2d at 16. It is not for plaintiffs or the courts to determine whether the conceivable or legitimate governmental interest in fact is furthered by the legislative actions. Those questions are for the General Assembly to determine.

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.

In re Consolidated Appeals of Certain Timber Cos., 98 N.C. App. 412, 421-22, 391 S.E.2d 503, 508-09 (1990) (addressing equal protection claim under same rational basis test applicable to “law of the land” claims). “To the extent plaintiffs question the wisdom of the incentives and whether they will in fact provide the public benefit promised, they have sought relief in the wrong forum.” *Blinson*, 651 S.E.2d at 271.

In sum, plaintiffs have failed to allege any valid “law of the land” claim under Article I, Section 19. Accordingly, Count 11 of their complaint should be dismissed for failure to state a claim upon which relief may be granted.

IV. PLAINTIFF’ DECLARATORY JUDGMENT CLAIM MUST BE DISMISSED.

For the reasons discussed above, plaintiffs’ declaratory judgment act claim in Count 12 of the complaint must be dismissed on the grounds that each claim outlined in the complaint is without merit as a matter of law and therefore should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Further, Counts 7, 8, and 11 are also subject to dismissal under N.C.G.S. § 1A-1, Rule 12(b)(1) because plaintiffs lack standing to raise each of them. Consequently, Count 12 of plaintiffs’ Complaint must be dismissed.

V. PLAINTIFFS’ “MISCELLANEOUS” ALLEGATIONS.

Plaintiffs’ “Miscellaneous” allegations, following Count 12 of their complaint, appear to be designed in part to support a claim which is not in fact made. Plaintiffs indicate that there could be a further basis for their claims of unconstitutionality if the Google project would have gone forward without the State’s providing incentives or with lesser incentives. (Compl. ¶ 98) As to that suggestion, plaintiffs indicate they reserve the right to conduct discovery on the issue. However, plaintiffs have cited no constitutional provisions and have not numbered or captioned the section. Consequently, it is hard to see how plaintiffs have made any additional claims or bolstered any of their other claims without stating any specific constitutional theory and without the alleged potential discovery that might support this theory.

Plaintiffs include in the “Miscellaneous” section also allegations which appear to be designed to establish that the action is ripe and the defendants are proper defendants. (Compl. ¶¶ 99-103)

Except to disagree to the extent these allegations conflict with the State defendants' arguments that plaintiffs lack standing as to certain issues, or to the extent that these allegations might be deemed to imply that the JDIG award has been finalized, the State defendants have no comment on these allegations.

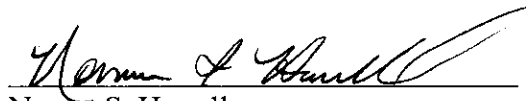
CONCLUSION

For all the reasons discussed above, the State defendants submit that all of plaintiffs' claims should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Further, Counts 7, 8, and 11 of the complaint should be dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of jurisdiction based on plaintiffs' lack of standing to bring these claims. The State defendants accordingly request that the Court grant its motion to dismiss, enter judgment for defendants, and tax costs to plaintiffs.

Respectfully submitted, this the 30th day of April, 2008.

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CERTIFICATE OF SERVICE

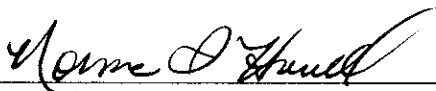
This is to certify that the undersigned has this day served the foregoing STATE DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS in the above titled action upon all other parties to this cause by:

- 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/or
- Depositing a copy hereof, first-class postage pre-paid in the United States mail, properly addressed to:

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This the 30th day of April, 2008.



Norma S. Harrell
Special Deputy Attorney General