NO. 546P06-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

Petitioners-Appellants,

v.

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

Respondents-Appellees.

From Wake County
05 CVS 8378
COA06-1258

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THE LOCAL DEFENDANTS' MOTION TO DISMISS THE NOTICE OF APPEAL UNDER G.S. 7A-30(1) AND RESPONSE TO THE PETITION FOR DISCRETIONARY REVIEW

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NO. 546P06-2 TENTH DISTRICT

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****

US2000 10457702.3

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Respondents-Appellees the City of Winston-Salem; Allen Joines, Mayor of Winston-Salem, in his official capacity; Forsyth County; Gloria D. Whisenhunt, Chairperson of the Board of Commissioners of Forsyth County, in her official capacity; The Millennium Fund; Winston-Salem Business, Inc.; and The Winston-Salem Alliance[1] hereby respectfully move to dismiss the notice of appeal filed by the petitioners-appellants Delma Blinson, *et al.* (collectively, "plaintiffs"), and respond to their petition for discretionary review.

In this case, plaintiffs seek to substitute their own particular views of economic policy for those of the duly elected representatives of the citizens of Winston-Salem and Forsyth County. Those representatives decided, after complete consideration of the pros and cons and full public hearings, that the presence of Dell's manufacturing facility in Winston-Salem and Forsyth County would benefit the residents of the City and County by more than the cost of the economic development incentives provided to Dell. As the Court of Appeals unanimously held, this Court previously affirmed the constitutionality of such

[1] All of these defendants are collectively referred to as the "Local Defendants." The "Local Government Defendants" are the City of Winston-Salem; Mayor Joines; Forsyth County; and Chairperson Whisenhunt. The "Non-Profit Defendants" are The Millennium Fund; Winston-Salem Business, Inc.; and The Winston-Salem Alliance. Finally, the "State Defendants" are the State of North Carolina and James T. Fain, III, Secretary of the North Carolina Department of Commerce, in his official capacity.

incentives in *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996). There is thus no basis in North Carolina law for the courts to overturn this considered policy decision of the democratically elected local government officials. Plaintiffs' contrary argument seeks to inject courts into the policy-making function properly the exclusive domain of the political branches, in a manner directly precluded by settled precedent. The State and numerous cities and counties have relied on *Maready* for over a decade to offer hundreds of economic development incentives worth millions of dollars. Departure from existing law would therefore be extremely disruptive and would violate core principles of *stare decisis*.

Therefore, for the reasons explained further below, this Court should dismiss plaintiffs' notice of appeal and deny their petition for discretionary review.[2]

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Plaintiffs attempt to void as unconstitutional two separate sets of economic development incentives. First, plaintiffs challenge legislation enacted by the General Assembly on 4 November 2004, *see* N.C. Sess. Laws 2004-204 (R pp. 76-86), that provides incentives to encourage major computer manufacturers,

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[2] The amended complaint does not assert uniformity of taxation or federal Commerce Clause claims against the Local Defendants. Plaintiffs' arguments regarding such claims, and the standing issue that relates to them, are therefore not addressed herein.

including defendant Dell, Inc. ("Dell"), to locate computer-manufacturing facilities in North Carolina. (R p. 44.)[3] Second, plaintiffs challenge the entirely separate package of economic development incentives, made available by the Local Government Defendants pursuant to N.C. Gen. Stat. § 158-7.1, that aided and encouraged Dell to locate its facility in Winston-Salem. (R p. 44.) Because of these State and local incentives, Dell built and is operating in Winston-Salem, Forsyth County, its largest manufacturing facility. The Dell facility has been fully operational for more than two years, employing over 1,100 people and having produced more than six million computers.[4]

The governing authorities of Forsyth County and the City of Winston-Salem each passed resolutions in December 2004 (later amended in July 2005), after proper notice and public comment, to provide the local incentives, subject to detailed conditions set forth therein. (R pp. 91-92, 111-13.) The County Resolution and City Resolution approved economic development incentives to Dell of up to $14,760,000 and $22,426,250, respectively, over a fifteen-year period. (R pp. 91-92, 111-13.) Those incentives are "contingent upon" Dell making capital

[3] Petitioner-Appellants' Notice of Appeal and Petition for Discretionary Review is cited as "Pls.' Br. at __." The record is cited as "R p. __."

[4] *See* Richard Craver, *One Year of Dell*, Winston-Salem J., Oct. 5, 2006, at A1; Richard Craver, *Two Years Later*, Winston-Salem J., Oct. 5, 2007, at A1.

investments in buildings and equipment of $100 million over five years and creating 1,700 new full-time jobs during that period. (*Id.*)

Pursuant to these Resolutions, the Local Government Defendants, the Non-Profit Defendants, and Dell entered into a written agreement (the "Agreement") on 26 July 2005. (R pp. 114-34.) In the Agreement, the City and County agreed to provide "Annual Incentive Grants" for a period of fifteen years beginning in July 2007, pursuant to a schedule set forth in an exhibit to the Agreement. (R p. 118.) Each annual payment to Dell is determined by the extent to which Dell meets its capital investment commitments and its job creation commitments as set forth in the Agreement. (R p. 119.) In all events, the payments Dell receives may not exceed the City and County property taxes that Dell paid for the previous year. (R p. 118.) To receive payments for all fifteen years, Dell must continue operating the facility over that period. (R p. 119-20.) Further, if Dell ceases operations at the facility within the first ten years, it must refund to the City and County some or all of the economic development incentives that it previously received. (R p. 123.)

In addition, the Agreement states that the Local Government Defendants will provide $14.5 million and the Non-Profit Defendants $2,625,000 for site preparation at the facility. (R p. 116.) Dell also agreed to purchase from the City the land on which the facility sits at its fair market value, $7 million. (R p. 115.)

Plaintiffs filed their initial complaint on 23 June 2005 and an amended complaint on 9 September 2005. (R pp. 3-34, 41-146). As relevant to the Local Defendants, and with respect to the claims that plaintiffs have not abandoned, plaintiffs asserted claims for violation of the Public Purpose Clause, N.C. Const. art. V, § 2(1), and the Exclusive Emoluments Clause, *id.* art. I, § 32. (R pp. 70-71.) All defendants moved to dismiss the amended complaint. (R pp. 147-72.) The case was assigned to Judge Robert Hobgood as an exceptional case under Rule 2.1 on 4 January 2006. (R pp. 174-75.) Judge Hobgood dismissed all claims in a comprehensive order entered on 10 May 2006. (R pp. 193-209.)

On 16 October 2007, the Court of Appeals, in a unanimous decision, affirmed. *Blinson v. State of North Carolina*, ___ N.C. App. ___, 651 S.E.2d 268 (2007). In an opinion by Judge Geer (joined by Judges Wynn and Elmore), the Court of Appeals held that "[w]hether these incentives are lawful under the North Carolina Constitution was settled by *Maready* and this Court's subsequent decision in *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed & disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000)." *See Blinson*, 651 S.E.2d at 271. First, with respect to the Public Purpose Clause claim, the Court of Appeals found "no meaningful distinction between the present case and *Maready*" and noted that "Plaintiffs have made no attempt to demonstrate how the incentives in this case are legally different from the 24 local economic incentive packages

offered in *Maready* . . . ." *Id.* at 276. The Court of Appeals also explained that "plaintiffs' arguments reflect a misunderstanding of the public purpose doctrine." *Id.* at 277. Under that doctrine, the Court of Appeals explained, a court does not "weigh the public benefit against the private benefit by making findings as to the projected monetary value of each." *Id.* at 288. Rather, the court inquires "whether the *aim* of the legislation is primarily public." *Id.* at 277-78 (emphasis in the original). As the Court of Appeals explained:

> In short, to put forth a claim for relief, plaintiffs were required to plead facts demonstrating that the motivation, aim, or intent of . . . the County and City Resolutions[] and the Agreement was not a public one. Plaintiffs' complaint contains no allegations suggesting that the legislative bodies were not acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress. Rather, their complaint focuses exclusively on the various purported benefits provided to Dell.

Id. at 278 (citation omitted). For this reason, the Court of Appeals held that the amended complaint failed to state a claim under the Public Purpose Clause.

Second, the Court of Appeals also held that the trial court correctly dismissed plaintiff's Exclusive Emoluments Clause claim. Applying the two-part standard adopted by this Court in *Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987), the Court of Appeals found that the incentives were not an exclusive emolument because plaintiffs failed to allege that the incentives were not "intended to promote the general welfare." *Blinson*, 651 S.E.2d at 278.

REASONS THE NOTICE OF APPEAL SHOULD BE DISMISSED AND DISCRETIONARY REVIEW DENIED

The Court of Appeals applied settled law to uphold the constitutionality of the very types of economic development incentives previously approved by this Court in *Maready*. Such a holding does not entitle plaintiffs to an appeal of right to this Court, nor does it satisfy the criteria for discretionary review. Accordingly, the notice of appeal should be dismissed and certification of the case for discretionary review denied.

I. THE MOTION TO DISMISS SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' APPLICATION OF SETTLED LEGAL PRINCIPLES DOES NOT IMPLICATE A "SUBSTANTIAL QUESTION" OF CONSTITUTIONAL LAW.

Pursuant to N.C. Gen. Stat. § 7A-30(1), "an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case: (1) Which directly involves a substantial question arising under the Constitution of the United States or of this State." This Court's decisions interpreting § 7A-30(1) require that "an appellant must either allege and show the existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination[,] or suffer dismissal." *Thompson v. Thompson*, 288 N.C. 120, 121, 215 S.E.2d 606, 607 (1975). "Mere mouthing of constitutional phrases . . . will not avoid dismissal." *State v. Colson*, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968). Where an appellant "has failed to show the existence of a

substantial constitutional question which has not already been the subject of a conclusive judicial determination," the proper remedy is to dismiss the appellant's notice of appeal. *Thompson*, 288 N.C. at 121, 215 S.E.2d at 607; *see also In re Jones*, 279 N.C. 616, 617-18, 184 S.E.2d 267, 268 (1971).

The constitutional questions presented in plaintiffs' notice of appeal have "already been the subject of conclusive judicial determination." The Court of Appeals simply applied this Court's previous decisions in *Maready* and *Emerald Isle*. Even assuming *arguendo* that the Court of Appeals erred in its analysis—and it did not, as explained *infra*, at 12-22—the application of settled legal principles to new but analogous facts does not represent a "substantial" constitutional question.

Plaintiffs assert that the Court of Appeals' application of those decisions is inconsistent with them. Virtually every appellant whose constitutional argument was rejected by the Court of Appeals claims the same thing, and N.C. Gen. Stat. § 7A-30(1) cannot entitle each one of them to an appeal of right to this Court. Moreover, plaintiffs are simply wrong. They assert that *Maready* involved only a facial challenge to N.C. Gen. Stat. § 158-7.1 (Pls.' Br. at 15), but we explain below that this is incorrect—indeed, *Maready* approved the very incentives at issue here. *See infra*, at 15-18. They claim that the Court of Appeals "eviscerated" the Public Purpose Clause by holding that "the mere recitation of an intent to benefit the public is sufficient" (Pls.' Br. at 7, 9), but we explain below that the opinion below

says no such thing. *See infra*, at 18. And they contend that the Court of Appeals has rendered the Exclusive Emoluments Clause "nothing more than surplusage" (Pls.' Br. at 10), which is plainly wrong, as we explain below. *See infra*, at 21.

In sum, because plaintiffs have not presented "a substantial question arising under the Constitution . . . of this State," their notice of appeal should be dismissed.

II. DISCRETIONARY REVIEW SHOULD BE DENIED.

If this Court dismisses the notice of appeal, it should also deny certification of the case for discretionary review. None of the statutory criteria in N.C. Gen. Stat. § 7A-31(c) is satisfied, and the Court of Appeals' holding that the local incentives did not violate the Public Purpose and Exclusive Emoluments Clauses was correct.

A. There Is No Basis for Certification of this Case for Discretionary Review.

Contrary to plaintiffs' argument, this case satisfies none of the statutory criteria for discretionary review. Indeed, a petitioner challenging the Court of Appeals' application of settled law to (slightly) different facts by definition is not entitled to discretionary review. Plaintiffs' specific arguments under N.C. Gen. Stat. § 7A-31(c) are specious. First, while the *policy debate* about the wisdom of economic development incentives has received public attention, plaintiffs present no basis for concluding that the public is focused on the *constitutionality* of those

incentives. That is not surprising, since this Court resolved that issue a decade ago. Similarly, neither business nor government has a "pressing interest" in the legal issues presented by plaintiffs since, again, they were resolved by *Maready*. Second, settled legal questions do not constitute "legal principles of major significance." Finally, as explained below, the Court of Appeals' decision is wholly consistent with, indeed is compelled by, *Maready*.

Moreover, *stare decisis* principles strongly counsel against reconsideration of the settled precedents of this Court in this case. State and local governments have relied heavily on *Maready* over the last decade in granting economic development incentives. For example, a study by the political organization that is counsel for plaintiffs in this case found that, from 2004 to 2006 alone, local governments provided over $400 million in such incentives through over 353 separate grants, and that at least 66 of the State's counties provided incentives.[5] In light of such reliance, even a determination by this Court that the lawfulness of individual incentives can be litigated beyond a motion to dismiss would be incredibly disruptive to government, business, and the citizenry alike. As this Court previously explained, "'*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal

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[5] *See* N.C. Inst. for Constitutional Law, *The Incentives Game: North Carolina Local Economic Incentives* 1, 7 (June 2007).

principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 852 (2001) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *see also Rabon v. Hosp.*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967) ("This Court has never overruled its decisions lightly. No Court has been more faithful to *stare decisis*."). These principles compel denial of review here.

B. The Court of Appeals Correctly Determined that the Local Incentives Were Consistent with the Public Purpose Clause.

The Public Purpose Clause of the North Carolina Constitution provides that "the power of taxation shall be exercised in a just and equitable manner, for public purposes only." N.C. Const. art. V, § 2(1). In count 18 of the amended complaint, plaintiffs alleged that the local incentives violate the Public Purpose Clause because those incentives "accrue to Dell's private financial benefit and to Dell's shareholders." (R p. 71.) The Court of Appeals correctly held that plaintiffs' public purpose claim was squarely foreclosed by *Maready*.

In *Maready*, this Court upheld the constitutionality of N.C. Gen. Stat. § 158-7.1 and affirmed the constitutionality of the economic development incentives granted by Winston-Salem and Forsyth County in that case. The plaintiff there alleged that $13.2 million in economic development incentive grants under N.C. Gen. Stat. § 158-7.1 to private enterprises to encourage the location or expansion of their businesses in Winston-Salem/Forsyth County were void because that

statute was unconstitutional on its face and as applied by virtue of the Public Purpose Clause. *Id.* at 713, 467 S.E.2d at 618-19. The incentives represented reimbursement for on-the-job training, site preparation, road construction, facility upgrading, parking, financing of land purchases, and spousal relocation expenses. *Id.*

The Supreme Court, in a five-to-two decision authored by Justice Willis P. Whichard, held that N.C. Gen. Stat. § 158-7.1 was constitutional and that the discretion granted by it to local governments to spend public funds for the economic incentive grants at issue did not violate the Public Purpose Clause. *Maready*, 342 N.C. at 727, 467 S.E.2d at 627. In rejecting the Public Purpose Clause claim, the Supreme Court first explained that "[r]easonable doubt must be resolved in favor of the validity of the act," because "[t]he initial responsibility for determining what constitutes a public purpose rests with the legislature. . . ." *Id.* at 714, 467 S.E.2d at 619. Indeed, as the Court noted, there was "no doubt that the General Assembly considers expenditures of public funds for the promotion of local economic development to serve a public purpose." *Id.* Moreover, after surveying previous Public Purpose Clause cases, the Court explained:

> "[T]wo guiding principles have been established for determining that a particular undertaking by a municipality is for a public purpose: (1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the

> activity benefits the public generally, as opposed to special interests or persons."

Id. at 722, 467 S.E.2d at 624 (quoting *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989)).

Applying the first prong of that standard, the Supreme Court explained that "[e]conomic development has long been recognized as a proper governmental function." *Id.* at 723, 467 S.E.2d at 624. Indeed, "the activities N.C.G.S. § 158-7.1 authorizes invoke traditional governmental powers and authorities in the service of economic development." 342 N.C. at 723-24, 467 S.E.2d at 625. With respect to the second prong, the Court categorically noted that "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. The Court found that the anticipated fruits of economic development incentives would constitute "a net public benefit" in that:

> The expenditures this statute authorizes should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy. . . .
>
> The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental. It results from the local

> government's efforts to better serve the interests of its people.

Id. at 724-25, 467 S.E.2d at 625-26.

The economic development incentives provided by the Resolutions and Agreement fall squarely within the parameters established in *Maready*. In that case, the Supreme Court categorically held that "[e]conomic development" is "within the appropriate scope of governmental involvement and is reasonably related to communal needs" because "stimulation of the economy involves a public purpose." *Id.* at 722-23, 467 S.E.2d at 624-25. The City and County here recognized that the Dell facility would "bring direct and indirect benefits to the City and the County, including job creation, economic diversification and stimulus and training in technology, computer assembly and manufacturing skills." (R p. 115.) Indeed, the Resolutions and Agreement condition receipt of the challenged economic development incentives on Dell's satisfying its capital investment and job-creation commitments. (R p. 119.) *Maready* held that, as a matter of law, obtaining those economic benefits represents a public purpose.

Plaintiffs argue that the Court of Appeals' decision is inconsistent with *Maready* in two distinct ways. First, they seek to rewrite the decision by arguing that "*Maready* addressed only the *facial* constitutionality of G.S. § 158-7.1." (Pls.' Br. at 18 (emphasis in the original).) This assertion is not borne out by a plain

reading of the opinion. In fact, *Maready* held that the specific incentives in that case were constitutional. 342 N.C. at 724-25, 467 S.E.2d at 625-26.

Contrary to the plaintiffs' argument, it is simply incorrect to assert that this Court decided *Maready* only on facial grounds. The complaint in *Maready* sought, in addition to a declaration that § 158-7.1 was unconstitutional on its face, an alternative declaration that "[e]ven if Section 158-7.1 is constitutional, it has not been complied with by the City and County" in connection with the specific incentives granted at issue in that case. (R p. 185.) Moreover, this Court's opinion itself indicated that Mr. Maready not only presented a facial attack on the statute, but also "challenge[d] *twenty-four economic development incentive projects* entered into by the City or County pursuant to N.C.G.S. § 158-7.1." *Maready*, 342 N.C. at 713, 467 S.E.2d at 618-19 (emphasis added). Further, the Court explained that the *Maready* plaintiff sought "a mandatory injunction to require the City and County to recover incentive grants from the recipients thereof," *id.* at 712, 467 S.E.2d at 618—a remedy wholly inconsistent with plaintiffs' assertion here that the case involved only a facial challenge. And whatever the State's intervenor's brief in this Court may have argued (*see* Pls.' Br. at 18-19), the local government defendants' brief in this Court included extensive discussion (more than a dozen pages) about *evidence*—including trial evidence about the specific incentives challenged by the plaintiff as well as the benefits to be achieved through the

incentives—that would not have been relevant in a facial challenge.[6] Indeed, the *plaintiff's* brief contains extensive discussion of evidence about the specific incentives.[7]

This understanding of the issues before the *Maready* Court is confirmed by the dissent in that case. The dissenting opinion by Justice Orr expressly opined that "N.C.G.S. § 158-7.1, as broadly interpreted and applied by the majority, is unconstitutional *on its face and as applied*." *Maready*, 342 N.C. at 742, 467 S.E.2d at 636 (Orr, J., dissenting) (emphasis added). Indeed, included in the dissenting opinion is a lengthy chart, incorporating the trial court's factual findings, that analyzes each of the twenty-four specific incentive grants challenged in the case. *Id.* at 736, 467 S.E.2d at 632. Among the economic incentives that Justice Orr criticized the majority for approving were "on-the-job training," "construction of a road," "site improvements," and "site grading and preparation," *id.*—among the very incentives challenged by plaintiffs here. This lengthy

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[6] *See* Defendant-Appellants the City of Winston-Salem, the Board of Alderman of the City of Winston-Salem, Forsyth County, the Board of County Commissioners of Forsyth County and Winston-Salem Business, Inc.'s Joint Brief at 2, 9-18, 47-52, *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996) (No. 422P95).

[7] *See* Plaintiff-Appellee's Brief at 3-4, 52-60, *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996) (No. 422P95).

discussion in Justice Orr's dissent would have been wholly superfluous if the only issue before the Court were a facial challenge to the constitutionality of the statute.

Second, plaintiffs assert that the Court of Appeals read *Maready* too broadly by holding that "the mere recitation of an intent to benefit the public is sufficient as a matter of law to comply with" the Public Purpose Clause. (Pls.' Br. at 7; *see also id.* at 8-9, 18.) Plaintiffs' argument, however, is a plain misreading of the Court of Appeals' decision. Indeed, the Court of Appeals *expressly* rejected the very argument that plaintiffs now contend it adopted. *See Blinson*, 651 S.E.2d at 275 ("although legislative determinations are accorded great weight, the ultimate responsibility for the determination of what constitutes a public purpose rests with the judiciary," citing *Maready*, 342 N.C. at 716, 467 S.E.2d at 620). What the Court of Appeals did hold is that, "to put forth a claim for relief" under the Public Purpose Clause, "plaintiffs were required to *plead facts demonstrating that the motivation, aim, or intent* of the . . . County and City Resolutions[] and the Agreement was not a public one." *Blinson*, 651 S.E.2d at 278 (emphasis added). The Court of Appeals thus found that the amended complaint failed to state a claim, not because the Resolutions and Agreement merely recited that they served a public purpose, but because plaintiffs failed to allege that the County and City "were *not* acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress." *Id.* (emphasis added).

Clearly, plaintiffs—who received numerous internal City and County documents pursuant to Public Records Act requests before filing their complaint—lack evidence to allege improper motivation by the Local Government Defendants. Plaintiffs thus want the courts to use the Public Purpose Clause to second-guess the good-faith policy judgments made by the elected officials in granting these incentives. Indeed, plaintiffs complain that the Court of Appeals' holding denies the courts the ability to examine "the actual, likely or even possible effects" of the incentives. (Pls. Br. at 7 (emphasis omitted).) Left unexplained is how the courts would undertake this analysis, and why the courts are better able to do so than the political branches. As the Supreme Court of the United States has explained, "the Court is institutionally unsuited to gather the facts upon which economic predications can be made, and professionally untrained to make them." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997); *see also id.* at 309 ("Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match"). In any event, as the Court of Appeals concluded, *see Blinson*, 651 S.E.2d at 278, there is nothing in *Maready* (or elsewhere in this Court's jurisprudence) that would sanction such a far-reaching judicial intrusion into the policy-making process. *See Powerex Corp. v. Reliant Energy Servs. Inc.*, 127 S. Ct. 2411, 2420 (2007) (explaining that "a policy debate . . . belongs in the halls of Congress, not in the hearing room of this Court").

C. The Court of Appeals Correctly Held that the Local Incentives did not Violate the Exclusive Emoluments Clause.

Article I, Section 32 of the North Carolina Constitution provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." Count 17 of the amended complaint alleges that the local economic development incentives provided to Dell violate this provision. (R pp. 70-71.) Specifically, plaintiffs claim that "the benefits, tax refunds, credits, grants and/or subsidies received by Dell . . . accrue to Dell's private financial benefit and to Dell's shareholders." (R p. 71.) They also claim that "the land, improvements thereon, roadwork, and other structural work and benefits, including property tax rebates will accrue to the ownership and control of Dell." (*Id.*) The Court of Appeals correctly ruled that the plaintiffs failed to state a claim under the Exclusive Emoluments Clause.

"'[N]ot every classification which favors a particular group of persons is an "exclusive or separate emolument or privilege" within the meaning of the constitutional prohibition.'" *Emerald Isle*, 320 N.C. at 652, 360 S.E.2d at 764 (quoting *Lowe v. Tarble*, 312 N.C. 467, 470, 323 S.E.2d 19, 21 (1984)). Rather, this Court has applied a two-part test to determine whether an exemption or benefit is an exclusive emolument: "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 that the granting of the exemption

or benefit serves the public interest." *Id.* at 654, 360 S.E.2d at 764. This is precisely the test applied by the Court of Appeals below (*see Blinson*, 651 S.E.2d at 278) and in other cases. *See, e.g.*, *Peacock*, 139 N.C. App. at 492-95, 533 S.E.2d at 846-48.

Relying on *Peacock*, the Court of Appeals explained that, whenever 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. Thus, it held that, because it already held that "the incentives and subsidies provided to Dell are intended to promote the general economic welfare of the communities involved, rather than to solely benefit Dell," they "accordingly, do not amount to exclusive emoluments." *Id.* Plaintiffs criticize this reasoning, claiming that it "renders the Exclusive Emoluments Clause superfluous." (Pls.' Br. at 9.) That assertion is simply wrong. As the Court of Appeals indicated (*see Blinson*, 651 S.E.2d at 278-79), the Exclusive Emoluments Clause does not prohibit *all* exclusive emoluments; rather, even an exclusive emolument may be constitutional if it is "in consideration of public services." *See Leete v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995); *Brumley v. Baxter*, 225 N.C. 691, 36 S.E.2d 281 (1945); *Hinton v. State Treasurer*, 193 N.C. 496, 137 S.E. 669 (1927).

In any event, the Court of Appeals' holding was clearly correct. This Court and the Court of Appeals have repeatedly rejected Exclusive Emoluments Clause claims, even in circumstances in which far greater benefits were given to private parties in exchange for fewer and more speculative public benefits. For example, in *Peacock*, the plaintiffs challenged under that clause a contract by which the City of Charlotte agreed to pay the owners of the Charlotte Hornets basketball team 50 percent of Charlotte Coliseum parking, food, and beverage profits for Hornets' home games; 20 percent of the first $2 million of Coliseum profits no matter the source; 80 percent of profits over $2 million, again from any source; and the right to retain the first $400,000 of annual naming rights revenue. 139 N.C. App. at 489-90, 533 S.E.2d at 844-45. The Court of Appeals rejected the Exclusive Emolument Clause claim, holding that "the purpose of the agreements, all provisions included, is to promote the public benefit by means of optimum use of the Coliseum," notwithstanding the fact that "a benefit resulted, as well, to the Shinn defendants." *Id.* at 496, 533 S.E.2d at 848; *see also Emerald Isle*, 320 N.C. at 652-55, 360 S.E.2d at 763-65 (rejecting an Exclusive Emolument Clause challenge to legislation that restricted vehicular access only to certain oceanfront property); *Lowe*, 312 N.C. at 470-72, 323 S.E.2d at 21-22 (rejecting an Exclusive Emolument Clause challenge to legislation that allowed recovery of prejudgment interest only with respect to claims for which the defendant has liability insurance).

RE-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Because the questions presented for review by plaintiffs are argumentative and inaccurately reflect the Court of Appeals' holding below, we restate those questions relevant to the Local Defendants as follows:

1. Whether the Court of Appeals, applying this Court's decision in *Maready*, correctly held that the amended complaint failed to state a claim that the local incentives provided to Dell violate the Public Purpose Clause.

2. Whether the Court of Appeals, applying this Court's decision in *Emerald Isle*, correctly held that the amended complaint failed to state a claim that the local incentives provided to Dell violate the Exclusive Emoluments Clause.

CONCLUSION

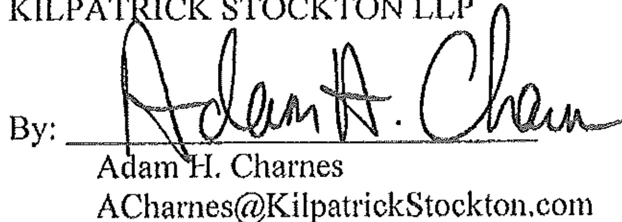
This Court has already recognized the vital importance of economic development incentives designed to encourage the development of local industries and thereby increase both the number of available jobs and the state and local tax base. *Maready*, 342 N.C. at 725-27, 467 S.E.2d at 626-27. All states and many localities offer such incentives to businesses seeking to establish or relocate their operations. *Id.*; *Blinson*, 651 S.E.2d at 271. Invalidation of North Carolina's participation in these efforts would represent unilateral disarmament in the interstate competition for jobs that would cause the State and its localities—and, of course, their residents—to "suffer economically." *Maready*, 342 N.C. at 726, 467

S.E.2d at 627. Moreover, it would represent a usurpation of the well-considered policy judgments of the elected representatives of the State, the City, and the County. At bottom, in light of the overwhelming precedent establishing their validity under the North Carolina Constitution, arguments against economic development incentives should be addressed to the political branches, not the courts.

For the foregoing reasons, plaintiffs' notice of appeal should be dismissed and their petition for discretionary review denied.

Respectfully submitted, this the 30th day of November, 2007.

KILPATRICK STOCKTON LLP



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **LOCAL DEFENDANTS' MOTION TO DISMISS THE NOTICE OF APPEAL UNDER G.S. 7A-30(1) AND RESPONSE TO THE PETITION FOR DISCRETIONARY REVIEW** has been served upon counsel of record by depositing a copy thereof in the United States mail, postage prepaid and addressed as follows:

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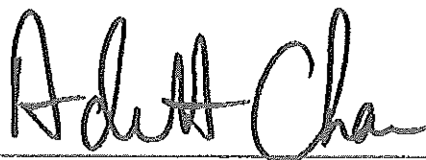
This the 3rd day of December, 2007.



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