NO. TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

SEAN HAUGH; AND J. RUSSELL CAPPS, Plaintiffs-Appellants, v. COUNTY OF DURHAM; ELLEN W. RECKHOW, Chairman of the Durham County Board of Commissioners, in her official capacity, MICHAEL D. PAGE, Vice-Chairman of the Durham County Board of Commissioners, in his official capacity; and LEWIS A. CHEEK, PHILIP R. COUSIN JR., and BECKY M. HERON, in their official capacities as members of the Durham County Board of Commissioners; MICHAEL M. RUFFIN, Durham County Manager in his official capacity; and NITRONEX CORPORATION, Defendants-Appellees.	From Durham County 07 CVS 6365 COA No. 09-167

****

PETITION FOR DISCRETIONARY REVIEW OF CONSTITUTIONAL ISSUES PURSUANT TO N.C. GEN. STAT § 7A-31 AND APPELLATE RULE 15

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners, Sean Haugh and J. Russell Capps, pursuant to the provisions of N.C. Gen. Stat. § 7A-31, the Appellate Rule of Procedure 15 and the Court's supervisory jurisdiction under Article IV, § 12 (1) of the North Carolina Constitution, HEREBY respectfully petition this Honorable Court to certify for discretionary review that decision.

I. NATURE AND STATUS OF CASE

A. Procedural History

This civil action for declaratory and injunctive relief challenges the constitutionality of the County of Durham's acts providing certain selective tax breaks to corporate giant Nitronex, Corporation ("Nitronex"). Petitioners Sean Haugh and J. Russell Capps, filed their Complaint and Petition for Declaratory Judgment on 22 December 2007. (R.p.p. 3-13) All Defendants filed Motions to Dismiss. Following a hearing on 3 April 2008, the Court dismissed the claims as to Defendants Ruffin and the members of the Durham County Commission. (R.p. 82) By Order dated 8 July 2008, the trial court granted summary judgment for the remaining Defendants-Appellees stating no genuine issues of material fact existed, that Plaintiffs lacked standing and that the political question doctrine deprived the court of subject matter jurisdiction. (R.p.p. 124-26)

Petitioners timely appealed the trial court's Order, and on 7 December 2010, the Court of Appeals reversed the decision of the trial court as to Petitioner Haugh's standing, but affirmed as to all other aspects of the trial court's decision.

B. Factual History

As alleged in the Complaint, Petitioner Sean Haugh is a citizen, resident and taxpayer in Durham County, North Carolina. Petitioner J. Russell Capps is a citizen, resident and taxpayer in Wake County, North Carolina. Each Petitioner pays local sales tax and other taxes within the county in which each resides. Petitioner Capps pays real estate tax to Wake County. (R.p. 4)

Appellee County of Durham is a political subdivision of the State of North Carolina and is organized and operating as a county government with the authority to sue and to be sued in its own name. (R.p. 4)

Appellee Nitronex Corporation is a corporation chartered in Delaware and licensed to do business in North Carolina. At the outset of this lawsuit in 2007, Nitronex operated its principal place of business in Raleigh, North Carolina. (R.p. 5) Earlier in 2007, Durham County agreed to pay Nitronex $100,000 in grants to relocate to Durham County. (R.p.p. 6-8) By that time, however, Nitronex had held the lease on the Durham County location for 5 years. In 2002, Nitronex acquired a lease of a business space in Durham County to run until 2014; the lease contained an option to extend the lease until 2029. The Durham location is less than 12.5

miles from the Wake County location. (R.p. 6) The Complaint alleged that that lease evidenced Nitronex's intent to relocate to Durham County prior to the incentives award in 2007. (R.p. 9)

Durham County does not own or operate Nitronex or the location in Durham leased by Nitronex. (R.p. 8) The Complaint alleged the Agreement between Durham County and Nitronex was not an inducement for Nitronex to relocate to Durham County from outside of North Carolina and indeed could not have been an inducement. (R.p. 8) The Agreement does not induce Nitronex to relocate to Durham County from Wake County. (R.p. 9) The Agreement provides direct benefits to Nitronex in that, pursuant to its terms, Durham County will pay Nitronex's expenses incurred when Nitronex does what it already intended to do, i.e. move to Durham County. The Agreement also provides that Durham County will pay Nitronex for certain worker training. (R.p. 9)

II. REASONS WHY CERTIFICATION FOR DISCRETIONARY REVIEW SHOULD OCCUR

Petitioners-Appellants respectfully petition the Supreme Court, pursuant to North Carolina Rule of Appellate Procedure 15, to certify for discretionary review the opinion of the North Carolina Court of Appeals. Petitioners maintain that the Court of Appeals incorrectly ruled that the political question doctrine deprives the courts of subject matter jurisdiction over Petitioners' claims that the grants by Durham County to Nitronex violate various provisions of the North Carolina

Constitution including Article I, Section 32 and Article V, Sections 2(1) and 2(7).

The Court of Appeals stated:

> Having reviewed the trial court's full conclusion, we understand the conclusion to mean that the propriety of tax incentives similar to those at issue already have been judicially established and that further review of the relative wisdom of Durham as to whether to offer the incentives or the amount thereof would be barred by the political question doctrine. Accordingly, viewed as a whole, we believe the trial court's conclusion to be a correct interpretation of the relevant rules of law.
>
> *Haugh v. County of Durham,* No. 09-167, slip op. at 14 (N.C. Ct. App. Dec. 7, 2010)

The trial court held:

> Defendant, County of Durham, has awarded economic incentives to Defendant, Nitronex Corporation, through a contract authorized and awarded pursuant to N.C. Gen. Stat. § 158-7.1, which statute has previously been held to be constitutional by the North Carolina Appellate Courts, and that the Court therefore lacks subject matter jurisdiction.
>
> (R.p. 125)

In support of this Petition for Discretionary Review, Petitioners-Appellants show the following:

A. Reasons Why Certification Should Issue

As explained below, all three grounds set forth in N.C.G.S. § 7A-31(c) for certification of a cause for review in the Supreme Court apply in this case:

(1) The subject matter of the appeal has significant public interest; or
(2) The cause involves legal principles of major significance to the jurisprudence of the State; or
(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

1. <u>This Case Involves a Matter of Significant Public Interest.</u>

This case presents matters of significant public interest which has been piqued during the ongoing state and local government budget crises and global recession. Significant public debate regarding the use of direct payments to private business as so-called economic development incentives has whirled around the creation of various controversial incentives packages. That debate has been heightened due to public concerns that private businesses are receiving public subsidies funded by tax revenues which should go toward funding essential government services like education and roadway construction. Additionally, recent national subsidies in the form of "bail-outs," coupled with related corporate scandals, have intensified the public's concern over government payments at the national, state and local level to private industry.

2. <u>This Case Involves Legal Principles of Major Significance to State Jurisprudence</u>

The decision by the Court of Appeals in this case effectively and conclusively eliminates the right of citizens to challenge the constitutionality of government actions after the courts have upheld "similar" actions in another case. This effectively means that every constitutional challenge is a one shot opportunity. If the Court of Appeals decision stands, then a court may never have the opportunity to reconsider the decisions of previous courts as applied to a new

set of facts. While subsequent courts seldom abandon precedent, the occasion to reconsider previous holdings provides the judicial branch the opportunity to correct not only erroneous decisions but also to clarify and refine the reasoning of precedent. If the Court of Appeals decision goes without review, stare decisis will have been elevated from a compelling juridical guide to a merciless jurisprudential mandate. Further, new litigants will not have the chance to articulate claims in light of their own circumstances and arguments. Today's potential plaintiffs will be struck with the consequences of yesterday's unsuccessful plaintiffs.

The decision by the Court of Appeals and the underlying Court of Appeals opinions relied on therein, primarily Peacock v. Shinn, 139 N.C. App. 487, 533 S.E.2d 842 (2000) and Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007), all rely on language contained in the seminal case by this Court, Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996). The holding in Maready specifically states that the state constitutional challenge under the Public Purpose Clause to N.C. Gen. Stat. § 158-7.1 fails in that public money spent on economic development is and has been for a public purpose. Petitioners concede that N.C. Gen. Stat. § 158-7.1 is facially constitutional.

The crux of Petitioner's argument to this court, however, rests upon the question of whether Maready constitutes a sweeping embrace of every conceivable factual scenario in which a governmental body spends public moneys in the form

of incentives for economic development. The Court of Appeals decision below and the Court of Appeals opinions relied on by the court appear to conclude that as long as the governmental body characterizes or denominates an expenditure as an economic development incentive pursuant to N.C. Gen. Stat § 158-7.1, then there can be no further judicial review under the political question doctrine.

It bears repeating, the issue is not whether Petitioners can successfully prove their contentions of unconstitutionality but whether the courts are allowed to even hear the claim. The Court of Appeals below held that the trial court correctly concluded that once the appellate courts had upheld the constitutionality of legislation authorizing incentives, the courts were deprived of jurisdiction to consider challenges to specific government acts pursuant to that legislation as in the case here. Moreover, that holding, perhaps unintentionally, risks shutting the door on efforts to overturn precedent not just in the series of constitutional challenges to incentives but also to a host of other issues. Without clarification, the holding below could be construed to apply to constitutional challenges to the application of other statutes, such as annexation or eminent domain acts which have survived facial constitutional attacks. North Carolina caselaw, like American jurisprudence as a whole, is riddled with decades-long struggles to overturn, narrow or refine faulty precedent. The Court of Appeals opinion here will end that legacy and lock the law in today's condition. Is the Court ready to say the law of

2011 is so perfect further review is unnecessary and will never be necessary? Even if the law of 2011 is fine for now, will it work in 2030? Unless this Court can answer those questions affirmatively, Petitioners respectfully submit discretionary review is essential.

The effect of the Court of Appeals decision in this case effectively writes out the constitutional limitations imposed on government in the taxation and expenditures resulting, so long as the governmental body has labeled the act as for economic development pursuant to N.C. Gen. Stat. § 158-7.1. Such a holding eviscerates the court's responsibility to review constitutional questions upon new or different facts from the precedent relied on. When the Constitution is compromised, each among us is entitled to make his case, to state his claims, to make his arguments. Although precedent may and inevitably will present insurmountable obstacles for some, the courts must still have the jurisdiction to consider the new cases and evaluate the weight to be afforded precedent. When fundamental constitutional guarantees of equality are violated, the People--each among them--are entitled to have their day in court.

3. The Court of Appeals Decision is in Conflict with this Court's Decisions

In reaching its decision to affirm the trial court, the Court of Appeals recited precedent upholding N.C. Gen. Stat. § 158-7.1 but ignored precedent more

generally applicable to the public purpose doctrine, particularly the Supreme Court test for analyzing whether an expenditure is constitutional. The Court of Appeals discussed Madison Cablevision v. City of Morganton, 325 N.C. 634, 386 S.E.2d 200 (1989) and Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996), but misstated and so misapplied the relevant test from those cases. The Court of Appeals then went on to rely on a series of Court of Appeals cases which likewise misstated and misapplied Madison Cablevision and Maready.

Consistently, beginning with the Peacock decision, Court of Appeals panels have incorrectly described and applied the second prong of Madison Cablevision, 325 N.C. at 646, 386 S.E.2d at 207. The first prong is that the governmental act must have a "reasonable connection with the convenience and necessity" of the government. Id. (citing Airport Auth. v. Johnson, 226 N.C. 1, 36 S.E.2d 803 (1946)). The second prong is a requirement that "the activity benefits the public generally, as opposed to special interests or persons." Id. (citing Martin v. Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970)). But, the Peacock court erroneously articulated the second prong of that test as asking only whether the act complained of promoted the welfare of a state or local government or their citizens, without actually applying the critical phrase "as opposed to special interests or persons" mandated by Madison Cablesivion. 139 N.C. App. at 493-95. This error was compounded by Blinson's holding that the test was satisfied where the "aim" or

motivation was to promote the general welfare. 186 N.C. App. at 340-41. These errors were carried forward by the Haugh court below. However, the Madison Cablevision test balances the expenditure of the public's money by requiring the benefits conferred primarily benefit the public and not a private entity. Under the misstated second prong used by the Court of Appeals, any expenditure by a governmental entity will promote the welfare of a state or local government or its citizens. But the Madison Cablevision test is just the opposite. The expenditure must primarily benefit the public with only incidental benefit to the private party if it is to satisfy constitutional requirements.

Beyond misapplying the relevant test mandated by this Court, the court below misinterpreted the broader constitutional framework for the inquiry. The Court of Appeals ignored this Court's oft-quoted decision from half a century ago, that "[a] slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions." Mitchell v. North Carolina Indus. Dev. Fin. Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968). This Court has repeatedly stated that what constitutes a public purpose evolves; that evolution will require judicial review to ensure that as the public purpose concept "expands," it does so consistent with the constitution. In Maready, the Supreme Court, applying Madison Cablevision stated, "whether an activity [challenged under the public purpose

clause] is within the appropriate scope of governmental involvement and is reasonably related to communal needs may be evaluated by determining how similar the activity is to others which the Court has held to be within the permissible realm of governmental action." 342 N.C. at 722. Thus, the Maready court viewed prior decisions as a yardstick against which subsequent government activity may be measured, rather than as a roadblock to review of other activity.

The Court of Appeals decision in this case misinterprets and misapplies this Court's test articulated in Madison Cablevision and later cited in Maready and Piedmont Triad Airport Auth. V. Urbine, 354 N.C. 336, 554 S.E.2d 331 (2001). Therefore, the decision below is in direct conflict with Madison Cablevision and the Supreme Court decisions in Maready and Piedmont Triad that articulated the test.

III. ISSUES TO BE BRIEFED

In the event that the Court allows Petitioners-Appellants' Petition for Discretionary Review, Petitioners-Appellants present the following issues for review:

(1) Whether the Court of Appeals erred in affirming the trial court's conclusion that the court lacks subject matter jurisdiction under the political question doctrine to hear Petitioner's claims?

(2) Whether the political question doctrine deprives a court of subject matter jurisdiction where a court has previously upheld the statute pursuant to which the government has acted but not the specific action challenged?

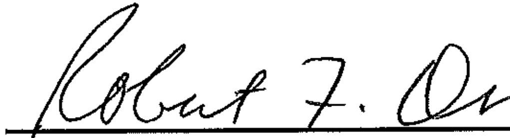
(3) Whether the Court of Appeals erred in affirming summary judgment for Defendants based on an incorrect interpretation and application of Supreme Court precedent in Madision Cablevision 325 N.C. 634, 386 S.E.2d 200 (1989) and its progeny?

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Honorable Court to certify for review the decision of the Court of Appeals.

This the 12th day of January, 2011.

Respectfully Submitted,



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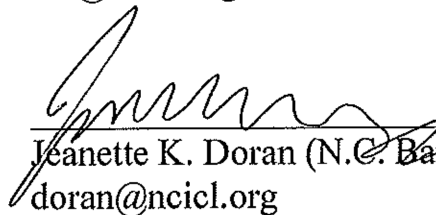

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Petition for Discretionary Review under § 7A-31 has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addresses as follows:

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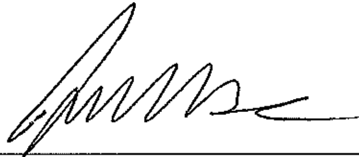
This the 17th of January, 2011.



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