

NORTH CAROLINA COURT OF APPEALS

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

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OF NORTH CAROLINA

BRIEF OF APPELLEE, COUNTY OF DURHAM

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in his official capacity; and)

NITRONEX CORPORATION,)
Defendants-Appellees.)

FROM: DURHAM COUNTY

BRIEF OF APPELLEE, COUNTY OF DURHAM

QUESTIONS PRESENTED

- I. WHETHER A TAXPAYER WHO PAYS SALES AND OTHER TAXES BUT NOT PROPERTY TAX HAS STANDING TO CHALLENGE THE ALLEGEDLY UNCONSTITUTIONAL EXPENDITURE OF PUBLIC FUNDS BY A COUNTY GOVERNMENT?
- II. WHETHER THE POLITICAL QUESTION DOCTRINE DEPRIVES THE COURTS OF JURISDICTION TO CONSIDER WHAT CONSTITUTE A PUBLIC PURPOSE OR EXCLUSIVE EMOLUMENT?
- III. WHETHER AN EXPENDITURE OF PUBLIC FUNDS TO REWARD A BUSINESS MOVING FROM ONE NORTH CAROLINA COUNTY TO AN ADJACENT COUNTY IS PERMITTED BY THE PUBLIC PURPOSE DOCTRINE AND EXCLUSIVE EMOLUMENTS PROVISION OF THE NORTH CAROLINA CONSTITUTION?
- IV. WHETHER AN EXPENDITURE THAT REWARDS A BUSINESS ACTING ON ITS PREEXISTING INTENTION TO RELOCATE IS PERMITTED BY THE PUBLIC PURPOSE DOCTRINE AND EXCLUSIVE EMOLUMENTS PROVISION OF THE NORTH CAROLINA CONSTITUTION?
- V. DID THE COURT ERR BY FAILING TO GRANT DURHAM'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ON THE ADDITIONAL GROUND THAT THE PLAINTIFFS FAILED TO ATTACK THE VALIDITY OF N.C. GEN. STAT. § 158-7.1 OR ALLEGE THAT DURHAM DID NOT ACT IN ACCORDANCE WITH THE STATUTE IN GRANTING THE INCENTIVE TO NITRONEX?

STATEMENT OF THE CASE

Plaintiffs filed a declaratory judgment action to challenge the constitutionality of certain economic incentives awarded to Defendant, Nitronex Corporation, by the County of Durham. The Plaintiffs further sought injunctive

relief. R.p. 3. The Defendants, Michael M. Ruffin, Ellen W. Reckhow, Michael D. Page, Lewis A. Cheek, Philip R. Cousin, Jr., Becky M. Heron, and County of Durham, moved to dismiss the Complaint of the Plaintiffs pursuant to Rules 12(b)(1), (2), and (6) and Rule 17(a) of the North Carolina Rules of Civil Procedure, and pursuant to N.C. Gen. Stat. § 1-57 on the grounds that the Court lacks subject matter jurisdiction due to the lack of standing of the Plaintiffs to bring this action, lacks personal jurisdiction as to the individual county commissioners due to legislative immunity, lacks subject matter jurisdiction due to the Political Question Doctrine, that the Plaintiffs are not taxpayers in the County of Durham, that the individual county commissioners and the County Manager are not the real parties in interest, that the Plaintiffs are not the real parties in interest, and that the Plaintiffs have failed to state a claim under existing North Carolina jurisprudence. (R.pp. 38, 40, 43). Defendant, Nitronex Corporation, filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. (R.p. 54). The Court granted the motions of the individual County Defendants and dismissed them by Order dated April 21, 2008. (R.p. 82).

By separate Order, the Court ordered depositions of officers of the County of Durham and Nitronex Corporation, and indicated that it would convert the Motions to Dismiss to Motions for Summary Judgment. (R.p. 80). Following a

hearing, the Court granted Summary Judgment for the remaining Defendants, County of Durham and Nitronex Corporation on June 9, 2008, which order was signed and entered on July 8, 2008. (R.p. 124). Plaintiffs filed a Notice of Appeal from the Summary Judgment order on August 5, 2008. (R.p. 127). Plaintiffs did not appeal from the order dismissing the individual County defendants.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

In addition to the assignments of error presented by the Plaintiffs-Appellants, the Defendant, County of Durham, has made cross-assignments of error pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure.

STATEMENT OF THE FACTS

Plaintiff, Sean Haugh, is a resident of Durham County. (R.p. 4). However, Mr. Haugh does not pay property taxes to Durham County. (R.p. 46). Plaintiff, Russell Capps, is a resident of Wake County. (R.p. 4). He also does not pay taxes to Durham County. (R.p. 46).

The Defendant, County of Durham, is a political subdivision of the State of North Carolina. (R.p. 4).

On March 12, 2007, the Durham County Board of Commissioners approved entering into an agreement with Nitronex providing \$100,000 from the Durham County Economic Development Investment Fund. (R.pp. 6-7, 118). The

agreement was authorized in part by N. C. Gen. Stat. § 158-7.1. (R.p. 20). The location of Nitronex in Durham County would generate an additional 210 employees with industry average of \$250,000 of revenue per employee. (R.p. 53). Eligible enterprises are not guaranteed Economic Development Investment Funds, but such appropriations are made in the discretion of the Durham County Board of Commissioners. (R.p. 8). All enterprises receiving a grant from Durham County must enter into a performance agreement with Durham County. (R.p. 8). The relocation of the facility to Durham County would produce tax revenues equal to or greater to the value of the incentives. (R.p. 20). It was anticipated that the location of Nitronex would produce new investment of \$24,000,000 and an additional \$5,000,000 in personal property tax listings. (R.p. 118). The offer of incentives was a very important factor in the decision of Nitronex to come to Durham County. (R.pp. 93-94). Additionally, the relocation of the company to Durham County will increase the population, increase taxable property, and increase business prospects in the County of Durham, as well as, result in a substantial number of jobs in the County that pay at or above the median average wage in the County. (R.p. 20). On March 22, 2007, Nitronex announced its intention to relocate its corporate and manufacturing operations to Durham County. (R.p. 7).

Prior to the announcement, Nitronex considered relocating to sites in both Wake County and Durham County in North Carolina. Wake County was eliminated relatively early in the consideration as it did not have “clean room” space available. (R.pp.. 94-95).

In addition to Durham and Wake counties, Nitronex was also considering moving to Silicone Valley in California. (R.p. 94). Northern California had space available for clean rooms, research and development space (R&D), and office space available. The primary economic incentive for Nitronex to move to California was the ready availability of existing facilities. (R.pp. 95-96). The offer of incentives by the County of Durham was to induce Nitronex to locate in Durham County instead of locating in California. (R.p. 49).

Nitronex had an existing lease on a building in Durham County which was physically complete in late 2005, but the clean rooms were not completed, and there was no equipment in the building. (R.p. 98). The Board of Directors for Nitronex were pursuing two different tracks of moving to California and staying in Durham. (R.p. 102). Nitronex hired a broker to sublease the building which was leased in Durham County. (R.p. 98). Nitronex was in negotiations with Memscap to sublet the building. The two companies were negotiating on the terms of the lease, and it was an attractive financial alternative for Nitronex. (R.pp. 99-100,

103).

ARGUMENT

I. A PERSON WHO PAYS SALES BUT NOT PROPERTY TAX DOES NOT HAVE STANDING TO CHALLENGE THE ALLEGEDLY UNCONSTITUTIONAL EXPENDITURE OF PUBLIC FUNDS BY A COUNTY GOVERNMENT.

A. Standard of Review.

The lack of standing implicates the subject matter jurisdiction of the Court. *Marriott v. Chatham County*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007), *disc. rev. denied*, 362 N.C. 472, 666 S.E.2d 122 (2008). Therefore, the standard of review is *de novo*. *Id.*

B. The Plaintiffs Lack Standing to Bring an Action as Neither is a Taxpayer in Durham County.

Neither of the Plaintiffs pay taxes to Durham County and therefore neither has standing to bring this action. (R.p. 46). “Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter.” *American Woodland Industries, Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002), *disc. rev. denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). The Plaintiffs have the burden of establishing that standing exists, and further, “[s]tanding is a necessary prerequisite to a court’s proper exercise of subject matter jurisdiction”. *Id.* *See*

also, *Blinson v. State*, 186 N.C. App. 328, 333, 651 S.E.2d 268, 271 (2007),
appeal dism'd and disc. rev. denied, 362 N.C. 355, 661 S.E.2d 240 (2008).

It is “well settled” in North Carolina that taxpayers may bring suit to enjoin the making of unauthorized appropriations of tax dollars. *Goldston v. State*, 361 N.C. 26, 32, 637 S.E.2d 876, 880 (2006). However, taxpayers do not have standing to “attack the constitutionality of any and all legislation”. *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969), *citing*, *Wynn v. Trustees*, 255 N.C. 594, 122 S.E.2d 404 (1961); *State ex. rel. Carrington v. Alverson*, 254 N.C. 204, 118 S.E.2d 408 (1961); *Fox v. Commissioners for County of Durham*, 244 N.C. 497, 94 S.E.2d 482 (1956); *Turner v. City of Reidsville*, 224 N.C. 42, 29 S.E.2d 211 (1944). A taxpayer may not bring such an action unless it can be shown by the individual that the action sought to be enjoined “will cause them to suffer personal, direct and irreparable injury”. *Fox v. Commissioners for County of Durham*, 244 N.C. 497, 500, 94 S.E.2d 482, 485 (1956). *See also*, *Wood v. City of Fayetteville*, 43 N.C. App. 410, 416, 259 S.E.2d 581, 586 (1979), *disc. rev. denied*, 299 N.C. 125, 261 S.E.2d 927 (1980) (broad reference to “economic injury” insufficient for standing). The Plaintiffs bringing the suit must show that they “belong [] to the class which is prejudiced ...” *Blinson, supra*, N.C. App. at 335, S.E.2d at 274. In this action,

neither of the Plaintiffs are taxpayers of Durham County. While Plaintiffs both allege they pay sales tax, but this does not confer standing since the amount of sales tax paid is set by statute, administered by the Secretary of Revenue, and not based on the amount of funds expended by the County. *See generally*, N.C. Gen Stat. § 105-469. Therefore, unlike property taxes, regardless of the use of the sales tax, the amount being paid by persons in North Carolina will not increase or decrease depending on the use of the funds. There will not be an increased tax burden on the Plaintiffs regardless of the use of the sales taxes which the County receives from the State. Therefore these plaintiffs differ from those in *Blinson* who could show an increased tax burden. *Blinson, supra*, N.C. App. at 334, S.E.2d at 273. Further, sales taxes are paid by everyone who buys goods in North Carolina, including nonresidents. If standing were conferred on the basis of paying sales tax, there would be no standing requirement since everyone who passes through North Carolina and makes a purchase could then have standing to challenge actions of any of the one hundred counties.

It should further be noted that Plaintiff, Capps, is not alleged to have ever paid sales tax in Durham County, or ever been to Durham County. Essentially, sales taxes are paid by all members of the public, and even if they are expended illegally, it would not cause personal and direct injury, nor cause an increased tax

burden regardless of how the taxes are expended by the County. Further, Plaintiff, Capps, alleges in the Complaint that the injury to him is that the relocation of Defendant, Nitronex. The relocation of Nitronex will injure him since it “will reduce the tax base of Wake County and accordingly deplete the funds of Wake County”. (R.p. 10). However, the evidence shows that Nitronex had decided relatively early in the process not to continue in Wake County since it did not have clean rooms available. (R.pp. 94-95). Therefore, Nitronex was not going to remain in Wake County regardless of the offer of incentives by Durham County, and the payment of incentives was not going to change or affect the loss of tax revenues. The only question was whether Durham was going to offer Nitronex incentives to help persuade the company to come to Durham instead of going to California. (R.p. 49). Either way, Wake County was going to lose the tax revenues from Nitronex. The payment of incentives by Durham County did not cause any injury to Plaintiff, Capps.

Neither of the Plaintiffs have any direct injury as they are not taxpayers in Durham County. The Supreme Court in *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 168 S.E.2d 401 (1969) was faced with a similar issue in which a taxpayer challenged the issuance of bonds by an authority. However, the bonds were not secured by the taxing power of the State. The Court there stated:

It is necessarily true that the plaintiff, as taxpayer, can suffer no injury from the issuance of the bonds of which he complains and has no interest therein, except his general interest as a member of the public in good government pursuant to the Constitution. . .

Thus, the plaintiff has not alleged facts showing, and the stipulated facts do not show, that any contemplated or threatened use of funds or other activity of the defendants will, if accomplished, result in any injury to the plaintiff, as a taxpayer or as a shareholder of any corporation. Consequently, the constitutional questions which he has sought to raise in this action are not before us and we express no opinion with reference thereto.

Id., N.C. at 451, S.E.2d at 409.

In the case at bar, the Plaintiffs can suffer no injury as neither are taxpayers of the County of Durham. Therefore, their only interest is a “general interest as a member of the public in good government”. This does not give either of the Plaintiffs standing to bring this action, and the trial court properly dismissed this action on the basis of lack of standing.

II. THE POLITICAL QUESTION DOCTRINE BARS THIS ACTION AS THE APPELLATE COURTS HAVE PREVIOUSLY UPHELD THE CONSTITUTIONALITY OF ECONOMIC INCENTIVES, AND THE QUESTION OF WHO SHOULD BE PAID INCENTIVES IS ONE PROPERLY VESTED IN THE LEGISLATIVE BODIES.

A. Standard of Review.

The Political Question Doctrine involves the Separation of Powers clause of

the North Carolina Constitution and implicates the subject matter jurisdiction of the Court. *News and Observer Publishing Company v. Easley*, 182 N.C. App. 14, 17-18, 641 S.E.2d 698, 701, *disc. rev. denied*, 361 N.C. 429, 648 S.E.2d 508 (2007). Therefore, the standard of review is *de novo*. *Marriott v. Chatham County*, 187 N.C. App. 491, 494, 654 S.E.2d 13, 16 (2007), *disc. rev. denied*, 362 N.C. 472, 666 S.E.2d 122 (2008).

B. This Action is Barred by the Political Question Doctrine.

The political question doctrine is “based on the distribution of powers among the branches of government, and it is as a function of the separation of powers that political questions are not determinable by the judiciary.” 16 C.J.S. Constitutional Law § 309. The doctrine has been adopted by the North Carolina courts, and its premise has been explained as follows:

The political question doctrine controls, essentially, when a question becomes “not justiciable ... because of the separation of powers provided by the Constitution.” *Powell v. McCormack*, 395 U.S. 486, 517, 89 S.Ct. 1944, 1961, 23 L.Ed.2d 491, 514 (1969). “The ... doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions ...” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166, 178 (1986). “It is well established that the ... courts will not adjudicate political questions.” *Powell*,

395 U.S. at 518, 89 S.Ct. at 1962, 23 L.Ed.2d at 515.

Bacon v. Lee, 353 N.C. 696, 717, 549 S.E.2d 840, 854, *cert. denied*, 533 U.S. 975, 122 S.Ct. 22, 150 L.Ed.2d 804 (2001).

Without specifically citing the political question doctrine, the Court of Appeals recently applied it in the context of a challenge to an economic incentive in *Blinson v. State*, 186 N.C. App. 328, 330, 651 S.E.2d 268, 271 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 355, 661 S.E.2d 240 (2008). The Court there stated:

Whether these incentives are lawful under the North Carolina Constitution was settled by *Maready [v. City of Winston-Salem]*, 342 N.C. 708, 467 S.E.2d 615 (1996)] and this Court's subsequent decision in *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). We are not free to revisit the reasoning or holdings of those opinions. 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. Once the Supreme Court held in *Maready* that economic incentives to recruit business to North Carolina involve a proper public purpose, it became the role of the General Assembly and the Executive Branch – and not the courts – to determine whether such incentives are sound public policy.

It should be noted that the same advocacy group is again challenging the constitutionality of economic incentives as it did in *Blinson*. Plaintiffs argue in their brief that this case is like eminent domain controversies which “frequently

end up in court”. Plaintiffs’ brief at p.14. However, this is not an eminent domain case. It is another in a series of cases challenging the constitutionality of paying economic incentives. The Supreme Court in *Maready* and this Court in *Peacock* and *Blinson* have answered that question repeatedly. Economic incentives are constitutional, and whether to award incentives in any particular case is up to the legislative or executive branch of the State or, as in this case, the local legislative body, the Board of Commissioners.

The issue of constitutionality is firmly established, and the issue of whether or not to award economic incentives in any particular case belongs to another branch of government, and not to the courts. It should be noted that the Plaintiffs have not challenged the County’s compliance with N.C. Gen. Stat. § 158-7.1. As such, the Court lacks subject matter jurisdiction under the political question doctrine.

III. AN EXPENDITURE OF PUBLIC FUNDS TO HELP PREVENT A BUSINESS MOVING TO ANOTHER STATE IS PERMITTED BY THE PUBLIC PURPOSE DOCTRINE OF THE NORTH CAROLINA CONSTITUTION.

A. Standard of Review.

The standard of review of the grant of a motion for summary judgment is well established. “Summary judgment is properly granted ‘if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007)”. *Sullivan v. Pender County*, ___ N.C. App. ___, No. COA08-1037, 2009 WL 1188750 (May 5, 2009).

B. The Incentives offered to Nitronex by Durham County did not violate the Public Purpose Clause of the Constitution.

The Plaintiffs challenge the award of incentives to Nitronex based on allegations that the award violated Article V, §§ 2(1) & (7) of the North Carolina Constitution. (R.pp. 11-12). The basis for this challenge are factual allegations by the Plaintiffs contained in their unverified complaint. Plaintiffs argue in their brief that “Here Durham County has provided an incentive to a private corporation for moving from one county to an adjacent county with the State of North Carolina, a move that Nitronex had already planned to make, as evidenced by its pre-existing lease in Durham County.” Appellants’ brief at p. 17. The Appellants further argue that the incentives offered to Nitronex “does not even retain a business threatening to leave the State”. Appellants’ brief at p. 22. However, Plaintiffs failed to produce any evidence for the truth of those assertions to the trial court. The only basis the Plaintiffs have for these assertions is their own unverified

complaint.

All the evidence produced shows that these assertions are false. The location of Nitronex prior to its expansion was Wake County. However, Wake County was eliminated from consideration for the location of manufacturing facilities as it did not have clean room space available. (R.p. 94-95). The two locations being considered for expansion were Durham County and Silicon Valley in California. (R.p. 94). Silicon Valley had readily available existing facilities consisting of clean rooms, research and development space, and office space. (R.p. 95-96). To induce Nitronex to remain in North Carolina instead of relocating to California, Durham County made an offer of incentives. (R.p. 49). While it is true that Nitronex had an existing lease in Durham, only the building itself was physically complete, and the clean rooms were not completed, and there was no equipment in the building. (R.p. 98). The Board of Directors for Nitronex were pursuing two different tracks of moving to California and staying in Durham. (R.p. 98). Nitronex hired a broker to sublease the building which was leased in Durham County, and was in negotiations with a company called Memscap to sublet the building. The sublease by Memscap was an attractive financial alternative for Nitronex. (R.pp. 98-100, 103). The offer of incentives was a very important factor in the final decision of Nitronex to come to Durham County and

stay in North Carolina instead of relocating to California. (R.pp. 93-94). As the purported facts argued by the Appellants had no basis in the evidence as shown by the Record on Appeal, the arguments of the Appellants based on their nonexistent facts are entirely feckless.

When a motion for summary judgment is made by the Defendants, or a motion to dismiss converted to one for summary judgment, as was done in this case, the Plaintiffs cannot rest upon the mere allegations made in their complaint, but must respond by affidavits or otherwise as provided in N.C. Gen. Stat. § 1A-1, Rule 56(c). Failure to respond, as was done in this case, subjects the plaintiffs to summary judgment being entered against them. *E-B Grain Company v. Denton*, 73 N.C. App. 14, 23, 325 S.E.2d 522, 528, *disc. rev. denied*, 313 N.C. 598, 330 S.E.2d 608 (1985).

This Court in *Blinson v. State*, 186 N.C. App. 328, 336-338, 651 S.E.2d 268, 275-276 (2007), *appeal dism'd and disc. rev. denied*, 362 N.C. 355, 661 S.E.2d 240 (2008) examined the challenge under the Public Purpose doctrine made to providing incentives to companies. There, this Court noted that the proper test is that set forth in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989). The Court further stated the two “guiding principles” for determining whether an undertaking was done 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.

Blinson, N.C. at 337, S.E.2d at 275.

This Court further stated in *Blinson* that the Supreme Court had answered the first prong of this test as it relates to economic incentives in that “[e]conomic development has long been recognized as a proper governmental function.” *Id.*, quoting, *Maready v. City of Winston-Salem*, 342 N.C. 708, 723, 467 S.E.2d 615, 624 (1996). As to the second prong of the test, this Court stated “*Generally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose.*” (Italics in original). *Id.*

The location of Nitronex in Durham County certainly promoted the welfare of Durham County and its citizens. The company would generate an additional 210 employees with an industry average of \$250,000 of revenue per employee. (R.p. 53). Further, the company was expected to produce new investment of \$24,000,000 and an additional \$5,000,000 in personal property tax listings. (R.p. 118). The investment of \$100,000 by the County to produce 210 new jobs and an investment of \$29,000,000 in new tax base clearly satisfies the test for a public purpose as it definitely promotes the welfare of Durham County.

IV. ECONOMIC DEVELOPMENT INCENTIVES AWARDED TO A BUSINESS TO INDUCE THE BUSINESS TO REMAIN IN NORTH CAROLINA AND NOT LOCATE IN CALIFORNIA IS PERMITTED BY EXCLUSIVE EMOLUMENTS PROVISION OF THE NORTH CAROLINA CONSTITUTION.

A. Standard of Review.

The standard of review of the grant of a motion for summary judgment is well established. “Summary judgment is properly granted ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007)”. *Sullivan v. Pender County*, ___ N.C. App. ___, No. COA08-1037, 2009 WL 1188750 (May 5, 2009).

B. The Incentives offered to Nitronex by Durham County did not violate the Exclusive Emoluments Clause of the Constitution.

Article I, § 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”. This Court has most recently explained the interplay of economic incentives to the Exclusive Emoluments Clause in *Blinson v. State*, 186 N.C. App. 328, 342, 651 S.E.2d 268, 278-279 (2007), *appeal dism’d and disc. rev. denied*, 362 N.C. 355, 661 S.E.2d

240 (2008). This Court stated:

In *Peacock [v. Shinn]*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000)], this Court held that when legislation is determined to “promote the public benefit” under the Public Purpose Clauses, it necessarily is not an exclusive emolument. 139 N.C. App. At 496, 533 S.E.2d at 848. As discussed above, the incentives and subsidies provided to [the company] are intended to promote the general economic welfare of the communities involved, rather than to solely benefit [the company], and, accordingly, do not amount to exclusive emoluments.

The Appellants argue that instead of accepting this ruling, the Court should determine whether the economic incentives offered to Nitronex were in consideration of public service. *See, Leete v. County of Warren*, 341 N.C. 116, 118, 462 S.E.2d 476, 478 (1995). However, this is the same argument that was made in *Blinson*, N.C. App. at 342, S.E.2d 278-279, by the counsel for the Appellants. There this Court rejected the argument and stated:

That issue only arises once a court has determined that an exemption or benefit constitutes an exclusive emolument. As we have concluded that the disputed incentives and subsidies were not exclusive emoluments, it is immaterial whether they were provided “in consideration of public services”.

Id., N.C. App. at 342, S.E.2d at 279.

As stated above, the relocation of Nitronex to Durham County, instead of California, would generate an additional 210 employees with an industry average

of \$250,000 of revenue per employee. (R.p. 53). Further, the company was expected to produce new investment of \$24,000,000 and an additional \$5,000,000 in personal property tax listings. (R.p. 118). As noted by the Board of Commissioners in its findings contained in the agreement with Nitronex, the relocation of Nitronex to Durham County produces tax revenues far in excess of the value of the economic incentives. (R.p. 20). The payment of economic incentives to Nitronex by Durham County was to “promote the public benefit”, and therefore did not and could not violate the Exclusive Emoluments Clause of the Constitution.

V. THE COURT ERRED BY FAILING TO GRANT DURHAM’S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ON THE ADDITIONAL GROUND THAT THE PLAINTIFFS FAILED TO ATTACK THE VALIDITY OF N.C. GEN. STAT. § 158-7.1 OR ALLEGE THAT DURHAM DID NOT ACT IN ACCORDANCE WITH THE STATUTE IN GRANTING THE INCENTIVE TO NITRONEX.

**CROSS-ASSIGNMENT OF ERROR NO. 2.
(R.p. 125)**

A. Standard of Review.

The standard of review of the grant of a motion for summary judgment is as stated above. “Summary judgment is properly granted ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that any party is entitled to a judgment as a matter of law.’ N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007)”. *Sullivan v. Pender County*, ___ N.C. App. ___, No. COA08-1037, 2009 WL 1188750 (May 5, 2009).

B. Plaintiffs Failed to Attack the Validity of N.C. Gen. Stat. § 158-7.1 or Allege that Durham County did not act in Accordance with the Statute.

The contract entered into between Defendants, County of Durham and Nitronex Corporation, was entered into pursuant to N.C. Gen. Stat. § 158-7.1. (R.p. 20). This is the statute under which incentives are paid by local government, and which been repeatedly held to be constitutional by the courts in *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996), *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000), and *Blinson v. State*, 186 N.C. App. 328, 342, 651 S.E.2d 268, 278-279 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 355, 661 S.E.2d 240 (2008). And, as stated in *Blinson*, “We are not free to revisit the reasoning or holdings of those opinions.” *Id.* at 271.

However, beyond the repeated holdings that economic incentives are constitutional, the Plaintiffs fail to allege in their Complaint that the County of Durham did not act in accordance with N.C. Gen. Stat. § 158-7.1. In fact, all their causes of action are based on the alleged unconstitutionality of the economic

incentives. (R.pp. 3-13). The failure to allege a violation of the statute is fatal to the Complaint. This matter was addressed by the Supreme Court in *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 168 S.E.2d 401 (1969). In that case, a citizen was attempting to have an injunction issued to bar the Authority from issuing bonds or expending monies in order to issue the bonds. While certain statutes were attacked as unconstitutional, the Plaintiff there also attacked the expenditure of money which was authorized by statutes which were not challenged as being unconstitutional. There the Court stated as to those expenditures the following:

It being alleged that the appropriation of funds from the “general tax revenues” of the State was for use by the Authority “in the performance of its lawful functions” and the Authority having been established by statute, not attacked by the plaintiff which statutes purport to confer upon it authority to perform certain functions, the appropriation, as such, is not subject to attack by the plaintiff in this action.

Id., N.C. at 452, S.E.2d at 409.

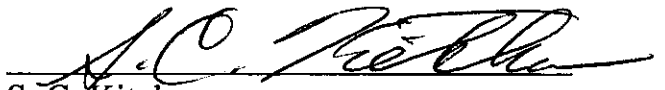
The Court then refused to hear the plaintiff’s arguments concerning his constitutional attacks on the appropriations by the defendant. This is exactly the same situation before the Court in this case. There has been no allegation that the County did not act pursuant to statute, and the validity of N.C. Gen. Stat. § 158-7.1 is not attacked by the Plaintiffs. The Plaintiffs may not therefore attack the

constitutionality of the appropriations of the County to Nitronex Corporation when the appropriations were made pursuant to a statute, the validity of which is not questioned.

CONCLUSION

Based on the foregoing arguments, the decision of the Trial Court should properly be affirmed.

Respectfully submitted, this the 20th day of May, 2009.


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CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Brief of Appellee, County of Durham, on the following persons by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office properly addressed as listed below, or by hand delivering a copy hereof as indicated below:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Appellee, County of Durham, complies with the type-volume limitation set forth in Rule 28(j)(2)(A)(2) of the North Carolina Rules of appellate procedure and contains no more than 8,750 words.

This brief contains 5,258 words.


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Rules Civ.Proc., G.S. § 1A-1, Rule 56

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 Chapter 1A. Rules of Civil Procedure (Refs & Annos)
 Article 7. Judgment

→ Rule 56. Summary judgment

(a) For claimant.--A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party.--A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. --The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case not fully adjudicated on motion.--If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) Form of affidavits; further testimony; defense required.--Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond,

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Rules Civ.Proc., G.S. § 1A-1, Rule 56

summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable.--Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith.--Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees.

CREDIT(S)

Added by Laws 1967, c. 954, § 1. Amended by S.L. 2000-127, § 6, eff. Oct. 1, 2000.

COMMENT

While it has long been urged in North Carolina, see Chadbourn, A Summary Judgment Procedure for North Carolina, 14 N.C.L. Rev., 211 (1936), and while, in one form or another, it has been adopted in a majority of the states, the procedure provided by this rule is wholly new to North Carolina. It adds a powerful new weapon for the just, swift and efficient disposition of claims or defenses patently without merit. The rule provides a device whereby it can expeditiously be determined whether or not there exists between the parties a genuine issue as to any material fact. It is not the purpose of the rule to resolve disputed material issues of fact but rather to determine if such issues exist.

Under prior procedure, if the pleadings disclosed an issue of fact, a trial was generally necessary even though there might in actuality be no genuine dispute at all as to the facts. It was enough if the issue was formally raised by the pleadings. Significantly, however, the code drafters were well aware that there might indeed be no issue of material fact present even though the pleadings appeared to present one. They thus provided that sham and irrelevant defenses could be stricken, former § 1-126, that irrelevant and redundant matter might be stricken, former § 1-153, and that a frivolous demurrer, answer or reply might be disregarded, former § 1-219. But, for reasons that need not be examined here, these devices have not proved equal to the task of identifying those claims or defenses in which there was no genuine dispute as to a material fact.

The great merit of the summary judgment is that it does provide a device for identifying the factually groundless claim or defense. It does so by enabling the parties to lay before the court materials extraneous to the pleadings. If these materials reveal any dispute as to a material fact, summary judgment is precluded. But as section (e) makes clear, a party cannot necessarily rely on the pleadings to show the existence of such a dispute.

The operation of the rule can be illustrated by supposing an action to recover damages for personal injuries. The sole defense offered is that the plaintiff's exclusive remedy is afforded by the Workmen's Compensation Act. The plaintiff moves for summary judgment, supporting his motion with affidavits which on their face show that the act is inapplicable to the defendant's enterprise. At the hearing on the motion, the defendant can forestall summary judgment simply by producing an affidavit, deposition or interrogatory or oral testimony tending to show that he does come under the act. If, on the other hand, he does nothing, entry of partial sum-

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Rules Civ.Proc., G.S. § 1A-1, Rule 56

mary judgment, leaving for later jury determination the amount of damages, can be entered against him. He has failed to show that there is a genuine issue as to any material fact except damages.

The defendant might also move for a summary judgment in the case supposed. If he shows, without any contrary showing by the plaintiff, that the act applies, then it would be appropriate to enter judgment for the defendant. Of course, section (f) permits the refusal of the motion when a party presents reasons for his inability to present affidavits opposing the motion.

It will be observed that section (e) requires that supporting and opposing affidavits "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence."

HISTORICAL AND STATUTORY NOTES

2000 Legislation

S.L. 2000-127, § 6, in subsec. (c), in the first paragraph, in the second sentence, substituted "may serve opposing affidavits at least two days before the hearing" for "prior to the day of the hearing may serve opposing affidavits" and added the third and fourth sentences.

S.L. 2000-127, § 7, provides:

"Section 7. This act becomes effective October 1, 2000, and applies to motions subject to this act and to briefs, memoranda, and affidavits subject to this act filed on or after that date."

Rules Civ. Proc., G.S. § 1A-1, Rule 56, NC ST RCP § 1A-1, Rule 56

Current through S.L. 2009-12 of the 2009 Regular Session.

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N.C.G.S.A. § 105-469

West's North Carolina General Statutes Annotated Currentness

Chapter 105. Taxation

Subchapter VIII. Local Government Sales and Use Tax

Article 39. First One-Cent (1¢) Local Government Sales and Use Tax (Refs & Annos)

→ § 105-469. Secretary to collect and administer local sales and use tax

(a) The Secretary shall collect and administer a tax levied by a county pursuant to this Article. As directed by G.S. 105-164.13B, taxes levied by a county on food are administered as if they were levied by the State under Article 5 of this Chapter. The Secretary must, on a monthly basis, distribute local taxes levied on food to the taxing counties as follows:

(1) The Secretary must allocate one-half of the net proceeds on a per capita basis according to the most recent annual population estimates certified to the Secretary by the State Budget Officer. The Secretary must then adjust the amount allocated to each county as provided in G.S. 105-486(b). The Secretary must include one-half of the amount allocated under this subdivision in the distribution made under Article 40 of this Chapter and must include the remaining one-half in the distribution made under Article 42 of this Chapter.

(2) The Secretary must allocate the remaining net proceeds proportionately to each taxing county based upon the amount of sales tax on food collected in the taxing county in the 1997-1998 fiscal year under Article 39 of this Chapter or under Chapter 1096 of the 1967 Session Laws relative to the total amount of sales tax on food collected in all taxing counties in the 1997-1998 fiscal year under Article 39 of this Chapter and under Chapter 1096 of the 1967 Session Laws. The Secretary must include the amount allocated under this subdivision in the distribution made under Article 39 of this Chapter.

(b) The Secretary shall require retailers who collect use tax on sales to North Carolina residents to ascertain the county of residence of each buyer and provide that information to the Secretary along with any other information necessary for the Secretary to allocate the use tax proceeds to the correct taxing county.

CREDIT(S)

Added by Laws 1971, c. 77, § 2. Amended by Laws 1973, c. 476, § 193; Laws 1993, c. 485, § 23, eff. July 23, 1993; Laws 1996 (2nd Ex. Sess.), c. 14, § 12, eff. Aug. 1, 1996; S.L. 2003-284, § 45.11.(a), eff. Oct. 1, 2003; S.L. 2003-416, § 27(a), eff. Oct. 1, 2003; S.L. 2004-170, § 32, eff. Aug. 2, 2004; S.L. 2005-435, § 41, eff. Sept. 27, 2005.

HISTORICAL AND STATUTORY NOTES

Laws 1996, 2 Ex.Sess., c. 14, § 26, provides:

"Sec. 26. This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal.

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Chapter 158. Local Development

Article 1. Local Development Act of 1925

→ § 158-7.1. Local development

(a) Each county and city in this State is authorized to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city or in the county; encouraging the building of railroads or other purposes which, in the discretion of the governing body of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of any city or county. These appropriations may be funded by the levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law.

(b) A county or city may undertake the following specific economic development activities. (This listing is not intended to limit by implication or otherwise the grant of authority set out in subsection (a) of this section). The activities listed in this subsection may be funded by the levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law.

- (1) A county or city may acquire and develop land for an industrial park, to be used for manufacturing, assembly, fabrication, processing, warehousing, research and development, office use, or similar industrial or commercial purposes. A county may acquire land anywhere in the county, including inside of cities, for an industrial park, while a city may acquire land anywhere in the county or counties in which it is located. A county or city may develop the land by installing utilities, drainage facilities, street and transportation facilities, street lighting, and similar facilities; may demolish or rehabilitate existing structures; and may prepare the site for industrial or commercial uses. A county or city may convey property located in an industrial park pursuant to subsection (d) of this section.
- (2) A county or city may acquire, assemble, and hold for resale property that is suitable for industrial or commercial use. A county may acquire such property anywhere in the county, including inside of cities, while a city may acquire such property inside the city or, if the property will be used by a business that will provide jobs to city residents, anywhere in the county or counties in which it is located. A county or city may convey property acquired or assembled under this subdivision pursuant to subsection (d) of this section.
- (3) A county or city may acquire options for the acquisition of property that is suitable for industrial or commercial use. The county or city may assign such an option, following such procedures, for such consideration, and subject to such terms and conditions as the county or city deems desirable.
- (4) A county or city may acquire, construct, convey, or lease a building suitable for industrial or commercial use.
- (5) A county or city may construct, extend or own utility facilities or may provide for or assist in the extension of utility services to be furnished to an industrial facility, whether the utility is publicly or privately owned.

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(6) A county or city may extend or may provide for or assist in the extension of water and sewer lines to industrial properties or facilities, whether the industrial property or facility is publicly or privately owned.

(7) A county or city may engage in site preparation for industrial properties or facilities, whether the industrial property or facility is publicly or privately owned.

(c) Any appropriation or expenditure pursuant to subsection (b) of this section must be approved by the county or city governing body after a public hearing. The county or city shall publish notice of the public hearing at least 10 days before the hearing is held. If the appropriation or expenditure is for the acquisition of an interest in real property, the notice shall describe the interest to be acquired, the proposed acquisition cost of such interest, the governing body's intention to approve the acquisition, the source of funding for the acquisition and such other information needed to reasonably describe the acquisition. If the appropriation or expenditure is for the improvement of privately owned property by site preparation or by the extension of water and sewer lines to the property, the notice shall describe the improvements to be made, the proposed cost of making the improvements, the source of funding for the improvements, the public benefit to be derived from making the improvements, and any other information needed to reasonably describe the improvements and their purpose.

(d) A county or city may lease or convey interests in real property held or acquired pursuant to subsection (b) of this section in accordance with the procedures of this subsection. A county or city may convey or lease interests in property by private negotiation and may subject the property to such covenants, conditions, and restrictions as the county or city deems to be in the public interest or necessary to carry out the purposes of this section. Any such conveyance or lease must be approved by the county or city governing body, after a public hearing. The county or city shall publish notice of the public hearing at least 10 days before the hearing is held; the notice shall describe the interest to be conveyed or leased, the value of the interest, the proposed consideration for the conveyance or lease, and the governing body's intention to approve the conveyance or lease. Before such an interest may be conveyed, the county or city governing body shall determine the probable average hourly wage to be paid to workers by the business to be located at the property to be conveyed and the fair market value of the interest, subject to whatever covenants, conditions, and restrictions the county or city proposes to subject it to. The consideration for the conveyance may not be less than the value so determined.

(d1) Repealed by Laws 1993, c. 497 § 22, eff. July 23, 1993; Laws 1993, c. 536, § 4, eff. Jan. 1, 1994.

(d2) In arriving at the amount of consideration that it receives, the Board may take into account prospective tax revenues from improvements to be constructed on the property, prospective sales tax revenues from improvements to be constructed on the property, prospective sales tax revenues to be generated in the area, as well as any other prospective tax revenues or income coming to the county or city over the next 10 years as a result of the conveyance or lease provided the following conditions are met:

(1) The governing board of the county or city shall determine that the conveyance of the property will stimulate the local economy, promote business, and result in the creation of a substantial number of jobs in the county or city that pay at or above the median average wage in the county or, for a city, in the county where the city is located. A city that spans more than one county is considered to be located in the county where the greatest population of the city resides. For the purpose of this subdivision, the median average wage in a county is the median average wage for all insured industries in the county as computed by the Employment Security Commission for the most recent period for which data is available.

(2) The governing board of the county or city shall contractually bind the purchaser of the property to con-

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struct, within a specified period of time not to exceed five years, improvements on the property that will generate the tax revenue taken into account in arriving at the consideration. Upon failure to construct the improvements specified in the contract, the purchaser shall reconvey the property back to the county or city.

(e) All appropriations and expenditures pursuant to subsections (b) and (c) of this section shall be subject to the provisions of the Local Government Budget and Fiscal Control Acts of the North Carolina General Statutes, respectively, for cities and counties and shall be listed in the annual financial report the county or city submits to the Local Government Commission. The budget format for each such governing body shall make such disclosures in such detail as the Local Government Commission may by rule and regulation direct.

(f) At the end of each fiscal year, the total of the following for each county and city may not exceed one-half of one percent (0.5%) of the outstanding assessed property tax valuation for the county or city as of January 1 preceding the beginning of the fiscal year:

- (1) The investment in property acquired at any time under subdivisions (b)(1) through (b)(4) of this section and owned at the end of the fiscal year.
- (2) The amount expended during the fiscal year under subdivisions (b)(5) and (b)(7) of this section.
- (3) The amount of tax revenue that was taken into account under subsection (d2) of this section and was expected to be received during the fiscal year.

The Local Government Commission shall review the annual financial reports filed by counties and cities to determine if any county or city has exceeded the limit set by this subsection. If the Commission finds that a county or city has exceeded this limit, it shall notify the county or city. A county or city that receives a notice from the Commission under this subsection must submit to the Commission for its review and approval any appropriation or expenditure the county or city proposes to make under this section during the next three fiscal years. The Commission shall not approve an appropriation or expenditure that would cause a county or city to exceed the limit set by this subsection.

(g) Repealed by Laws 1989, c. 374, § 1.

(h) Each economic development agreement entered into between a private enterprise and a city or county shall clearly state their respective responsibilities under the agreement. Each agreement shall contain provisions regarding remedies for a breach of those responsibilities on the part of the private enterprise. These provisions shall include a provision requiring the recapture of sums appropriated or expended by the city or county upon the occurrence of events specified in the agreement. Events that would require the city or county to recapture funds would include the creation of fewer jobs than specified in the agreement, a lower capital investment than specified in the agreement, and failing to maintain operations at a specified level for a period of time specified in the agreement.

CREDIT(S)

Added by Laws 1973, c. 803, § 37. Amended by Laws 1985, c. 639, § 1; Laws 1985 (Reg. Sess., 1986), c. 846, § 1; Laws 1985 (Reg. Sess., 1986), c. 848, § 1; Laws 1985 (Reg. Sess., 1986), c. 858, § 1; Laws 1985 (Reg. Sess., 1986), c. 911, § 1; Laws 1985 (Reg. Sess., 1986), c. 921, § 1; Laws 1987, c. 577, § 1.1; Laws 1989, c. 374, § 1;

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Laws 1991, c. 598, § 6; Laws 1991, c. 659, §§ 1, 2; Laws 1991 (Reg. Sess., 1992), c. 793, § 1; Laws 1991 (Reg. Sess., 1992), c. 799, § 1; Laws 1991 (Reg. Sess., 1992), c. 938, § 1; Laws 1993, c. 25, § 1, eff. April 19, 1993; Laws 1993, c. 31, § 1, eff. April 22, 1993; Laws 1993, c. 42, § 1, eff. May 12, 1993; Laws 1993, c. 246, § 1(a), (b), eff. June 30, 1993; Laws 1993, c. 275, § 2, eff. July 5, 1993; Laws 1993, c. 358, § 13; Laws 1993, c. 497, §§ 22 to 24, eff. July 23, 1993; Laws 1993, c. 536, §§ 1 to 4, eff. Jan. 1, 1994; S.L. 2003-181, § 4, eff. June 30, 2003; S.L. 2007-515, §§ 1, 7, eff. Aug. 30, 2007.

HISTORICAL AND STATUTORY NOTES

Laws 1993, c. 497, §§ 25 and 26, provide:

"Sec. 25. Liberal Construction. This act, being necessary for the prosperity and welfare of the State and its inhabitants, shall be liberally construed to effect these purposes.

"Sec. 26. Severability. If any clause or other portion of this act is held invalid, that decision shall not affect the validity of the remaining portions of this act, which are severable."

Laws 1993, c. 536, § 5, provides:

"The provisions of this act are severable. If any provision of this act is declared invalid by a court, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provision or application."

Local Modifications

Burke County: Laws 1987 (Reg. Sess., 1988), c. 1002, § 3.2.

Chatham County: Laws 1993, c. 358, §§ 10 to 12.

Clay County: Laws 1993, c. 520, § 3.

Davie County: Laws 1993, c. 536, § 2.

Duplin County: Laws 1991, c. 390.

Henderson County: Laws 1993, c. 520; § 3.

Lenoir County: Laws 1987 (Reg. Sess., 1988), c. 1002, §§ 1 to 3.

Mecklenburg County: Laws 1993, c. 174, § 1.

Rockingham County: Laws 1993, c. 536, § 2.

Transylvania County: Laws 1993, c. 520, § 3.

City of Brevard: Laws 1993, c. 520, § 3.

City of Kinston: Laws 1987 (Reg. Sess., 1988), c. 1002, §§ 1 to 3.

City of Morganton: Laws 1987 (Reg. Sess., 1988), c. 1002, § 3.1

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West's North Carolina General Statutes Annotated Currentness
North Carolina Rules of Court

☞ North Carolina Rules of Appellate Procedure

☞ Article II. Appeals from Judgments and Orders of Superior Courts and District Courts

→ Rule 10. Assigning Error on Appeal

(a) **Function in Limiting Scope of Review.** Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly making them the basis of assignments of error, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law.

(b) **Preserving Questions for Appellate Review.**

(1) *General.* In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(2) *Jury Instructions; Findings and Conclusions of Judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

(3) *Sufficiency of the Evidence.* A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sus-

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tained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) Assignments of Error.

(1) *Form; Record References.* A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references. Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

(2) *Jury Instructions.* Where a question concerns instructions given to the jury, the party shall identify the specific portion of the jury charge in question by setting it within brackets or by any other clear means of reference in the record on appeal. A question of the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance in the record on appeal immediately following the instructions given, or findings or conclusions made.

(3) *Sufficiency of Evidence.* In civil cases, questions that the evidence is legally or factually insufficient to support a particular issue or finding, and challenges directed against any conclusions of law of the trial court based upon such issues or findings, may be combined under a single assignment of error raising both contentions if the record references and the argument under the point sufficiently direct the court's attention to the nature of the question made regarding each such issue or finding or legal conclusion based thereon.

(4) *Assigning Plain Error.* In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule or law without any such action, nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error.

(d) Cross-Assignments of Error by Appellee. Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record or transcript of proceedings necessary to an understanding of such cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

CREDIT(S)

[Adopted: 13 June 1975. Amended: 10 June 1981--10(b)(2), applicable to every case the trial of which begins on or after 1 October 1981; 7 July 1983-- 10(b)(3); 27 November 1984--applicable to appeals in which the notice of appeal is filed on or after 1 February 1985; 8 December 1988--effective for all judgments of the trial tribunal entered on or after 1 July 1989.]

Rules App. Proc., App. R. 10, NC R RAP App. R. 10

West's North Carolina General Statutes Annotated Currentness
 Constitution of North Carolina
 Article V. Finance (Refs & Annos)

→ **Sec. 2. State and local taxation**

- (1) Power of taxation. The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.
- (2) Classification. 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 law uniformly applicable in every county, city and town, and other unit of local government.
- (3) Exemptions. Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes, and, to a value not exceeding \$300, any personal property. The General Assembly may exempt from taxation not exceeding \$1,000 in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.
- (4) Special tax areas. Subject to the limitations imposed by Section 4, the General Assembly may enact general laws authorizing the governing body of any county, city, or town to define territorial areas and to levy taxes within those areas, in addition to those levied throughout the county, city, or town, in order to finance, provide, or maintain services, facilities, and functions in addition to or to a greater extent than those financed, provided, or maintained for the entire county, city, or town.
- (5) Purposes of property tax. The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.
- (6) Income tax. The rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.
- (7) Contracts. The 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.

CREDIT(S)

Added by Laws 1969, c. 872, § 1. Amended by Laws 1969, c. 1200, § 1.

<Adoption of the Constitution of 1970>

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Corpus Juris Secundum
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Constitutional Law

by Francis Amendola, J.D.; John Bourdeau, J.D.; Paul M. Coltoff, J.D.; John Dvorske, J.D.; John Glenn, J.D.; Glenda K. Harnad, J.D., of the staff of the National Legal Research Group, Inc.; John Kennel, J. D., of the staff of the National Legal Research Group, Inc.; Sonja Larsen, J.D.; Stephen Lease, J.D.; Jack K. Levin, J.D.; Richard J. Link, J.D.; Lucas Martin, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D.; Kimberly Simmons, J.D.; Eric C. Surette, J.D.; Carmela Pellegrino, J.D.; Barbara Van Arsdale, J.D.; Elizabeth Williams, J. D.; Lisa Zakolski, J.D.

IV. Distribution of Governmental Powers and Functions
C. Judicial Powers And Functions
2. Political Questions
a. In General

Topic Summary References Correlation Table

§ 309. Generally

West's Key Number Digest

West's Key Number Digest, Constitutional Law ¶68(1)

Except to the extent that such power is conferred on the courts by constitutional or statutory provisions, it is not within the province of the judiciary to determine political questions.

Under the political-question doctrine,[FN1] it is not within the province of the judiciary to determine political questions,[FN2] except to the extent that power to deal with such questions has been conferred on the courts by express constitutional[FN3] or statutory[FN4] provisions. The political-question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative branch or the confines of the executive branch.[FN5] Whether a controversy so directly implicates the primary authority of the legislative or executive branch, such that a court is not a proper forum for its resolution, is a determination that must be made on a case-by-case inquiry.[FN6]

The doctrine is based on constitutional provisions relating to the distribution of powers among the branches of government,[FN7] and it is as a function of the separation of powers that political questions are not determinable by the judiciary.[FN8] Where the adjudication of the matter would tend to violate the doctrine of separation of powers, it is deemed political in nature and the court should abstain from its resolution.[FN9]

The courts cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an act or omission of the executive or legislative branch.[FN10] Thus, the limitations on judicial review imposed by the political-question doctrine apply only when the court is faced with a challenge to action by a coordinate branch of the

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government,[FN11] and not where the issue involved falls within the traditional role accorded courts to interpret the law or constitutional provisions.[FN12]

The political-question doctrine limits the exercise, not the existence, of judicial power; thus, even though a dispute may constitutionally be subject to judicial power, if a political question is present, a court should decline to reach the merits.[FN13] On the other hand, the simple fact that a conflict exists between the legislative and executive branches of government does not preclude judicial resolution under the political-question doctrine,[FN14] and the fact that a case is viewed as a political case, or involves political controversy, does not mean that it presents only political questions beyond the jurisdiction or proper role of the courts.[FN15]

As far as the political-question doctrine applies to the federal courts, whether a political question is present and the court lacks jurisdiction are issues committed to federal law.[FN16] The doctrine involves the relationship between the judiciary and the coordinate branches of the federal government and not the federal judiciary's relationship to the states,[FN17] and the doctrine has nothing to do with the power of the federal judiciary to review actions of the state legislature or any other branch of state government.[FN18]

Justiciability.

The political-question doctrine is a facet of the broader concept of justiciability,[FN19] and it is as a function of the separation of powers that political questions are nonjusticiable.[FN20] When a court concludes that an issue presents a nonjusticiable political question, it will decline to address the merits of that issue.[FN21] However, the mere fact that a suit seeks protection of a political right does not mean it presents a nonjusticiable political question,[FN22] and the fact that a case involves political issues is not determinative of the need for courts to defer to another branch of government on political question grounds.[FN23] Rather, a controversy is a nonjusticiable political question where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department, or where there is a lack of judicially discoverable and manageable standards for resolving the controversy.[FN24]

CUMULATIVE SUPPLEMENT

Cases:

District court's denial of defendant's motion to dismiss on political question grounds was not an immediately appealable collateral order; political question doctrine did not confer a "right not to stand trial" that could justify an immediate appeal. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), petition for cert. filed, 76 U.S.L.W. 3050 (U.S. July 20, 2007).

Prominent on the surface of any case held to involve a political question is found: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 1125, 166 L. Ed. 2d 892 (U.S. 2007).

Question of whether a vote by "a majority of each house" necessary for passage of a bill constitutionally required bill to pass each legislative house by majority of a quorum, rather than by a majority of votes cast in the presence of a quorum, was a nonjusticiable political question, properly left to legislative branch. *Birmingham-Jef-*

erson Civic Center Authority v. City of Birmingham, 912 So. 2d 204 (Ala. 2005).

Because the judicial branch "shall never exercise the legislative and executive powers, or either of them," Supreme Court will not decide "political questions," even if submitted to it. Birmingham-Jefferson Civic Center Authority v. City of Birmingham, 912 So. 2d 204 (Ala. 2005).

[END OF SUPPLEMENT]

[FN1] U.S.—Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 4 Fed. R. Evid. Serv. 1042 (10th Cir. 1979).

[FN2] U.S.—Powell v. McCormack, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969); Callas' Estate v. U.S., 682 F.2d 613 (7th Cir. 1982).

Pa.—Com. v. Bucks County, 8 Pa. Commw. 295, 302 A.2d 897 (1973).

Characteristic of political question

(1) The features characterizing a case raising a nonjusticiable political question are: a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable or manageable standards for resolving it; the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; the impossibility of a court's undertaking an independent resolution without expressing a lack of the respect due to coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

U.S.—U.S. v. Munoz-Flores, 495 U.S. 385, 110 S. Ct. 1964, 109 L. Ed. 2d 384 (1990).

(2) The fundamental characteristic of a political question which may not be addressed by the courts is that its adjudication would place the court in conflict with a coequal branch of government, in violation of the primary authority of the coordinate branch.

Conn.—Nielsen v. Kezer, 232 Conn. 65, 652 A.2d 1013 (1995).

[FN3] Ga.—Thompson v. Talmadge, 201 Ga. 867, 41 S.E.2d 883 (1947).

[FN4] N.D.—State v. McLean, 35 N.D. 203, 159 N.W. 847 (1916).

[FN5] U.S.—Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986).

[FN6] Conn.—Nielsen v. Kezer, 232 Conn. 65, 652 A.2d 1013 (1995).

[FN7] U.S.—Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis, 577 F.2d 1196 (5th Cir. 1978); U.S. v. Berrigan, 283 F. Supp. 336 (D. Md. 1968).

[FN8] U.S.—Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975); Metzzenbaum v. Federal Energy Regulatory

Commission, 675 F.2d 1282 (D.C. Cir. 1982); *Rappenecker v. U.S.*, 509 F. Supp. 1024 (N.D. Cal. 1980).

As to the separation-of-powers doctrine, generally, see § 215.

As to the effect of the separation-of-powers doctrine in determining the nature and scope of the powers of governmental departments, see § 303.

[FN9] Conn.—*Board of Educ. of Town and Borough of Naugatuck v. Town and Borough of Naugatuck*, 257 Conn. 409, 778 A.2d 862, 156 Ed. Law Rep. 1110 (2001).

[FN10] Mich.—*Straus v. Governor*, 459 Mich. 526, 592 N.W.2d 53 (1999).

[FN11] U.S.—*Gewertz v. Jackman*, 467 F. Supp. 1047, 4 Fed. R. Evid. Serv. 816 (D.N.J. 1979).

Nonenforcement of statute

Any problems resulting from pervasive nonenforcement of a statute are political questions for solution by the legislative or executive branch.

N.Y.—*Benson Realty Corp. v. Beame*, 50 N.Y.2d 994, 431 N.Y.S.2d 475, 409 N.E.2d 948 (1980).

[FN12] U.S.—*Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976); *Sioux Val. Empire Elec. Ass'n, Inc. v. Butz*, 367 F. Supp. 686 (D.S.D. 1973), judgment aff'd, 504 F.2d 168 (8th Cir. 1974).

Claim under Origination Clause

A claim that a statute which requires the courts to impose a monetary "special assessment" on any person convicted of a federal crime was passed in violation of the Origination Clause of the United States Constitution did not present a nonjusticiable political question, on the theory that invalidation of the statute on origination-clause grounds would evince a lack of respect for a determination of the House of Representatives.

U.S.—*U.S. v. Munoz-Flores*, 495 U.S. 385, 110 S. Ct. 1964, 109 L. Ed. 2d 384 (1990) (referring to U.S. Const. art. I, § 7, cl. 1).

Declaratory judgment

A declaratory judgment in an action involving the interpretation of a state constitution and statutes does not fall within the bar against confiding political questions to the courts.

N.M.—*O'Neil v. Thomson*, 114 N.H. 155, 316 A.2d 168 (1974).

[FN13] U.S.—*Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), judgment aff'd, 411 U.S. 911, 93 S. Ct. 1545, 36 L. Ed. 2d 304 (1973).

Questions involving perceived conflict

Questions involving perceived conflict between the legislative and executive branches are, by and large, political questions which do not present issues with which the court can, or should, concern itself.

W.Va.—State ex rel. League of Women Voters of West Virginia v. Tomblin, 209 W. Va. 565, 550 S.E.2d 355 (2001).

[FN14] U.S.—Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425 (D.C. Cir. 1982), judgment aff'd, 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 77 L. Ed. 2d 1403, 77 L. Ed. 2d 1413 (1983); U. S. v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

[FN15] U.S.—U. S. v. American Tel. & Tel. Co., 567 F.2d 121 (D.C. Cir. 1977).

[FN16] U.S.—Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis, 577 F.2d 1196 (5th Cir. 1978).

[FN17] U.S.—Blount v. Mandel, 400 F. Supp. 1190 (D. Md. 1975); White v. Snear, 313 F. Supp. 1100 (E.D. Pa. 1970); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), judgment aff'd, 394 U.S. 322, 89 S. Ct. 1197, 22 L. Ed. 2d 308 (1969).

[FN18] U.S.—Blount v. Mandel, 400 F. Supp. 1190 (D. Md. 1975).

[FN19] U.S.—Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977).

Requirements for justiciability

Justiciability requires, first, that there be an actual controversy between or among the parties to the dispute, second, that the interests of the parties be adverse, third, that the matter in controversy be capable of being adjudicated by the exercise of judicial, as opposed to legislative or executive, power, and fourth, that the determination of the controversy will result in practical relief to the complainant.

Conn.—Nielsen v. State, 236 Conn. 1, 670 A.2d 1288 (1996).

Related doctrines comprising justiciability

Justiciability comprises several related doctrines, namely, standing, ripeness, mootness, and the political-question doctrine, that implicate a court's subject-matter jurisdiction and its competency to adjudicate a particular matter.

Conn.—Office of Governor v. Select Committee of Inquiry, 271 Conn. 540, 858 A.2d 709 (2004).

[FN20] U.S.—Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975); Rappenecker v. U.S., 509 F. Supp. 1024 (N.D. Cal. 1980); Carey v. Klutznick, 508 F. Supp. 404 (S.D. N.Y. 1980).

Case or controversy lacking

Political questions are nonjusticiable and, therefore, do not involve a case or controversy.

U.S.—Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker

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Dauntless Colocotronis, 577 F.2d 1196 (5th Cir. 1978).

As to the necessity of case or controversy to the jurisdiction of the federal courts, see § 307.

[FN21] U.S.—U.S. Dept. of Commerce v. Montana, 503 U.S. 442, 112 S. Ct. 1415, 118 L. Ed. 2d 87 (1992).

[FN22] Conn.—Nielsen v. Kezer, 232 Conn. 65, 652 A.2d 1013 (1995).

[FN23] Mich.—House Speaker v. Governor, 443 Mich. 560, 506 N.W.2d 190 (1993).

[FN24] U.S.—Nixon v. U.S., 506 U.S. 224, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

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