

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 her 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,)

From Durham County
No. 07 CVS 6365

Defendants-Appellees.)

2009 JUN -1 P 4: 26
COURT OF APPEALS
OF NORTH CAROLINA

BRIEF OF DEFENDANT-APPELLEE

NITRONEX CORPORATION

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NITRONEX CORPORATION,)

From Durham County
No. 07 CVS 6365

Defendants-Appellees.)

QUESTIONS PRESENTED

- I. WHETHER THE TRIAL COURT PROPERLY RULED PLAINTIFFS HAD NO STANDING TO BRING THIS SUIT.
- II. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR DEFENDANTS UNDER THE PUBLIC PURPOSE DOCTRINE.
- III. WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR DEFENDANTS UNDER THE EXCLUSIVE EMOLUMENTS CLAUSE OF THE NORTH CAROLINA CONSTITUTION.

STATEMENT OF THE FACTS

In late 2005 and early 2006, Nitronex Corporation ("Nitronex") began looking at options for expanding its semiconductor manufacturing facilities. (R. at 95). Nitronex initially considered three locations for expansion: Wake County, NC, Durham County, NC, and the Silicon Valley region of California, specifically the San Francisco Bay Area. (R. at 94). Early on in Nitronex's search, the company concluded Wake County would not have the facilities Nitronex was looking for compared to the Durham County and Northern California locations. (R. at 94-95). Charles Shalvoy, C.E.O. of Nitronex, testified:

We looked at different sites in Wake County, but what we found is that there are very few facilities, not just in Wake County, but in the Research Triangle area in general, that are clean room facilities. It's not a common facility to be built here in the Raleigh/Durham area. So that restricted our ability to find a suitable space.

(R. at 94). Mr. Shalvoy also testified why Silicon Valley was an attractive option for Nitronex:

And in Northern California that - there are a large number of clean room facilities that have - were first constructed in the 1960s. So there's over 50 years of - semiconductor development work that's occurred in Silicon Valley. Hence, the same Silicon Valley. And the particular period of time when we were considering where to expand, late '05, '06, was a particularly soft market in Silicon Valley. The high tech bubble had burst, of course, in 2001.

There had been a lot of expansion of facilities that occurred during the bubble, 1999 to 2001. In late 2005, early 2006 vacancy rates were running about 30 percent. There were a large number of facilities, some older, some newer, that were vacant.

So the other thing about the - the facilities in Northern California is there was not only clean room space available, but there was also R&D space readily available, and there was office space. So all three of our needs could have been met in Northern California.

(R. at 95). "As part of our evaluation of the facility here in Durham we estimated that we would need to invest approximately \$7,000,000 in capital in 2006 and 2007, and some or all of those expenses could have been avoided if we moved to California."

(R. at 96).

In 2002, Nitronex had leased space in Durham County for 5 years, with an option for expansion. However, as of 2005, the Durham facility was just the physical structure. There was no semiconductor manufacturing equipment and the clean rooms had not been finalized. There was no lab equipment and the office space was a "big open empty space." (R. at 98). Nitronex was in negotiations to sublease the space should the company have decided to move to California. (R. at 98-99).

On 2 February 2007, the County of Durham (the "County") offered up to \$100,000 in economic development investment funds, subject to approval by the County Commissioners, to encourage Nitronex to select Durham County for the expansion. (R. at 118).

The offer was contingent on Nitronex newly investing \$24 million dollars, hiring 210 new employees, and adding a minimum of \$5 million dollars in additional business personal property tax listings. On 6 March 2007, the County Commissioners approved the funds. (R. at 6-7). On 22 March 2007, Nitronex announced its intention to locate its facility in Durham County. (R. at 7). While there was no single determinative factor in Nitronex's decision to locate its facility in Durham County, the incentives and overall support from the County were a very important factor in the decision. (R. at 94).

On 28 March 2007, Nitronex and the County entered into an agreement in which in exchange for Nitronex agreeing to locate its facility in Durham County, the County would provide up to \$100,000 over a five year period, including: \$25,000 by 1 January 2008 or when Nitronex began operations in the Durham County facility; \$25,000 by 1 January 2009, or when Nitronex achieved an additional new business personal property tax value in the facility of \$2,500,000; and, \$1,000 per Durham County resident hired by the Company during the five year period, up to \$50,000. (R. at 21).

ARGUMENT

I. THE TRIAL COURT PROPERLY DETERMINED PLAINTIFFS LACKED STANDING TO BRING THIS LAWSUIT.

"As the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." Blinson v. State, 186 N.C. App. 328, 333, 651 S.E.2d 268, 273 (2007) (citing Coker v. Daimler-Chrysler Corp., 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005), aff'd, 360 N.C. 398, 627 S.E.2d 461 (2006) (per curiam). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." Id. (quoting Estate of Apple v. Commercial Courier Express, Inc., 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005)).

Moreover: "At the summary judgment stage, plaintiffs cannot rely on the allegations of the complaint; rather, plaintiffs need to present specific facts to support their claim." Haynes v. B & B Realty Group, LLC, 179 N.C. App. 104, 109, 633 S.E.2d 691, 694 (2006) (citing Lowe v. Bradford, 305 N.C. 366, 370-71, 289 S.E.2d 363, 366-67 (1982)). In this case, Plaintiffs have not pointed to any specific facts in the record to support the allegations in their unverified pleading, and instead simply direct this Court to their Complaint. Consequently, summary

judgment was proper on the issue of standing on this basis alone.¹

Nevertheless, "It is well-established that 'a taxpayer [may] bring a taxpayer's action on behalf of a public agency or political subdivision for the protection or recovery of the money or property of the agency or subdivision in instances where the proper authorities neglect or refuse to act.'" Peacock v. Shinn, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845 (2000) (quoting Guilford County Bd. of Comrs. v. Trogdon, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996)).

In order to bring such an action, a taxpayer must show that he is a taxpayer of the particular public agency or political subdivision, and either, "(1) there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the agency or subdivision; or (2) a demand on the proper authorities would be useless."

Id.

In this case, it is undisputed Plaintiff Capps is a resident of Wake County and there is no allegation he has ever paid taxes to Durham County. (R. at 4). Thus, Mr. Capps is not a "taxpayer of the particular public agency or political subdivision" whose actions are at issue in this case. Id.

¹ Plaintiffs seem to indicate the trial court dismissed this case under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). It is clear from the Record, however, the trial court ruled on this issue as a summary judgment motion under N.C. Gen. Stat. § 1A-1, Rule 56.

Accordingly, Mr. Capps had no standing to bring this suit against the County and Nitronex and the trial court properly entered summary judgment against him.

In addition, Plaintiff Haugh, while, allegedly, a resident of Durham County, admittedly does not pay property taxes to Durham County. He only alleged he paid sales tax in Durham County.² (R. at 4). The allegation by Plaintiffs in this case they pay sales tax does not, however, provide Plaintiffs standing to pursue this claim. Instead, the burden is on Plaintiffs, as alleged taxpayers, to show the improper use of tax dollars "will cause them to suffer personal, direct and irreparable injury." Fox v. Board of Com'rs of Durham County, 244 N.C. 497, 500, 94 S.E.2d 482, 485 (1956). Thus, where a taxpayer can show he will suffer an increased tax burden based on the alleged improper use of tax dollars, standing is appropriate. Blinson, 186 N.C. App. at 334, 651 S.E.2d at 273-274 (2007) (citing Goldston v. State, 361 N.C. 26, 637 S.E.2d 876 (2006)). In this case, Plaintiffs have offered no such showing and instead rely on the allegations in their pleading. See Haynes, supra.

In this case, the state sales tax is set by the General Assembly, and neither Plaintiff alleged or demonstrated any

² Plaintiff Capps did not allege any taxes paid either in or to Durham County. (R. at 4).

increase to their tax burden or otherwise cause injury to them based on the incentives granted to Nitronex. See e.g. N.C. Gen. Stat. §§ 105-164.4, 105-464 -466, 105-469. The same is true of any local sales tax administered by the State. Id.

Moreover, to allow taxpayer standing in a suit against a county based on an allegation a Plaintiff has paid a state or local sales tax in the county (in a case not directly affecting state sales tax) would open the door to allow any number of claims by residents and non-residents against counties challenging various county actions based on the fact they had bought something in the county to which the sales tax was applied. Thus, in this case, where the Plaintiffs have not made any evidentiary showing they will suffer personal, direct, and irreparable injury based on the incentives, the trial court's order ruling neither had standing to pursue their claims and entering summary judgment, should be affirmed.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR DEFENDANTS UNDER THE PUBLIC PURPOSE DOCTRINE.

Rather than present any evidence of their own, Plaintiffs instead rest on their bare allegations and ignore the uncontroverted evidence in the record. The undisputed evidence shows, while Nitronex did initially consider Wake County as an option for expansion, it quickly determined Wake County was not a viable option due to the lack of facilities available in Wake

County, particularly given the availability of facilities in Northern California. Thus, at the time the County offered incentives, Nitronex was attempting to decide between locating in Northern California and sublease out the Durham building or to expend the resources to finish the Durham County building. Thus, to frame this case as the County using economic incentives to "recruit" a business from Wake County to Durham County simply ignores the evidence in this case. Nevertheless, this Court has repeatedly held the economic incentives offered by the County in this case under N.C. Gen. Stat. § 158-7.1 do not violate the Public Purpose Clause of the North Carolina Constitution. N.C. Const. art. V, § 2(1).

"Today, every state provides tax and other economic incentives as an inducement to local industrial location and expansion.'" Blinson, 186 N.C. App. at 329, 651 S.E.2d at 271 (quoting Walter Hellerstein & Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 Cornell L. Rev. 789, 790 (1996)).

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]. 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. We are bound by Maready and Peacock and, therefore, affirm the trial court's decision dismissing plaintiffs' complaint.

Id. at 330, 651 S.E.2d at 271.

The North Carolina Supreme Court has recognized "two guiding principles" for determining whether a municipal act is for a public purpose: "(1) it involves a reasonable connection with the convenience and necessity of the particular municipality; and (2) the activity benefits the public generally, as opposed to special interests or persons." Maready v. City of Winston-Salem, 342 N.C. 708, 722, 467 S.E.2d 615, 624 (1996) (quoting Madison Cablevision Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989). "The determination of whether a particular function or activity constitutes a public purpose is a legal issue to be decided by the court.'" Peacock, 139 N.C. App. at 492, 533 S.E.2d at 846 (quoting Madison Cablevision Inc., 325 N.C. at 653, 386 S.E.2d at 211). "Whether an activity involves a reasonable connection to community needs may be evaluated 'by determining how similar the activity is to others which this Court has held to be within the permissible realm of governmental action.'" Id. at 493, 533

S.E.2d at 846-47 (quoting Maready, 342 N.C. at 722, 467 S.E.2d at 624).

In this case, the County's offer of up to \$100,000 in incentives was contingent on Nitronex adding a new \$2.5 million dollars to business personal property tax value of the facility and providing jobs to Durham County residents. Based on the fact our appellate courts have previously held incentives similar to the ones *sub judice* are proper and involve a reasonable connection to the community in Blinson, Peacock, and Maready, the trial court reached the correct legal conclusion these business incentives do not violate the Public Purpose Clause.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR DEFENDANTS UNDER THE EXCLUSIVE EMOLUMENTS CLAUSE OF THE NORTH CAROLINA CONSTITUTION.

Plaintiffs also claim the trial court erred by concluding summary judgment was proper for Defendants under the Exclusive Emoluments Clause of the North Carolina Constitution. This argument has also been addressed by our appellate courts. The Exclusive Emoluments Clause provides, "[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." N.C. Const. art. I, § 32. "An emolument is defined as '[t]he profit arising from office, employment, or labor; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and

perquisites.'" Crump v. Snead, 134 N.C. App. 353, 356, 517 S.E.2d 384, 387 (quoting Black's Law Dictionary 524 (6th ed.1990)) (1999).

"In Peacock, 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. Blinson, 186 N.C. App. at 342, 651 S.E.2d at 278. In this case, like Blinson, the incentives offered by the County are intended to promote the general economic welfare of the community involved, rather than to solely benefit Nitronex, and, accordingly, do not amount to exclusive emoluments. Id.

More specifically, Blinson recognized:

Our Supreme Court has held that not every classification that favors a particular group of persons is an "'exclusive or separate emolument[] or privilege[]'" within the meaning of the constitutional prohibition. Town of Emerald Isle v. State, 320 N.C. 640, 652, 360 S.E.2d 756, 764 (1987) (quoting N.C. Const. art. I, § 32). Exemptions in favor of a specific group of persons are not an exclusive emolument or privilege if: "(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest." Id. at 654, 360 S.E.2d at 764. Although the Supreme Court's language in Emerald Isle refers only to "exemptions," this Court has applied Emerald Isle with equal force to affirmative "benefits." See Crump, 134 N.C. App. at 357,

517 S.E.2d at 387 (inserting phrase "[or benefit]" into *Emerald Isle* test and applying *Emerald Isle* to hold that legislatively conferred longer terms and additional pay for city council members were not exclusive emoluments).

Id. at 341-42, 651 S.E.2d at 278.

Thus, the incentives offered to Nitronex by the County do not constitute emoluments as they are intended to promote the general welfare of residents of Durham County and this Court has previously determined the legislature has a reasonable basis for creating such an exemption for business incentives. Id. Therefore, the incentives do not violate the Exclusive Emoluments Clause of the North Carolina Constitution. Accordingly, the trial court's order allowing Defendants summary judgment was proper. Consequently, this Court should affirm the trial court's 9 July 2008 Order Granting Summary Judgment for Defendants.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant-Appellee Nitronex Corporation respectfully requests this Court AFFIRM the trial court's 9 July 2008 Order Granting Summary Judgment for Defendants.

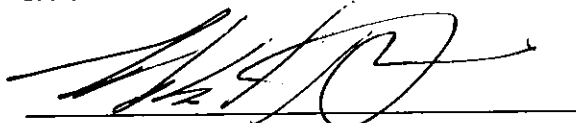
Respectfully submitted, this the 1st day of June 2009.

WYRICK ROBBINS YATES & PONTON LLP

By:



K. Edward Greene
N.C. Bar 1749



Tobias S. Hampson
N.C. Bar 28557
Post Office Drawer 17803
Raleigh, North Carolina 27619
Telephone: (919) 781-4000
Facsimile: (919) 781-4865
egreene@wyrick.com
thampson@wyrick.com

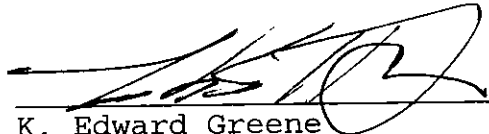
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing Appellee's Brief was served on Plaintiff-Appellant by mail enclosed in a postage-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed to:

TO: Robert F. Orr
Jeannette K. Doran
North Carolina Institute for
Constitutional Law
33 Six Forks Road, Suite 180
Raleigh, NC 27609
Counsel for Plaintiffs-Appellants

S.C. Kitchen
Durham County Attorney
P.O. Box 3508
Durham, NC 27702
Counsel for County of Durham

This the 1st day of June, 2009.


K. Edward Greene
Tobias S. Hampson