

SUPREME COURT OF NORTH CAROLINA

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

v.)

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

From: Wake County
No. COA06-1258

SUPREME COURT OF
NORTH CAROLINA

DEC 8 2007

FILED

C-

STATE DEFENDANTS' MOTION TO DISMISS APPEAL
PURSUANT TO N.C.G.S. § 7A-30(1) AND APPELLATE RULES 14 AND 15
AND RESPONSE IN OPPOSITION TO
PETITION FOR DISCRETIONARY REVIEW
PURSUANT TO N.C.G.S. § 7A-31(c) AND APPELLATE RULE 15

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

MOTION TO DISMISS APPEAL 2

RESPONSE IN OPPOSITION TO PETITION
FOR DISCRETIONARY REVIEW 3

FACTS 3

 Procedural Facts 3

 Historical Facts 5

REASONS WHY DISCRETIONARY REVIEW
SHOULD NOT BE GRANTED 9

 A. THE COURT OF APPEALS CORRECTLY
 CONCLUDED THAT PLAINTIFFS' PUBLIC
 PURPOSE CLAIMS ARE GOVERNED BY
 MAREADY V. CITY OF WINSTON-SALEM, AND
 PLAINTIFFS HAVE FAILED TO OFFER ANY
 SUSTAINABLE LEGAL BASIS FOR THIS COURT
 TO GRANT DISCRETIONARY REVIEW 10

 B. PLAINTIFFS HAVE RAISED NO SIGNIFICANT
 CLAIMS OF VIOLATION OF ARTICLE I, SECTION
 32 OF THE CONSTITUTION OF NORTH
 CAROLINA PROHIBITING EXCLUSIVE
 EMOLUMENTS, AND THE COURT OF APPEALS
 CORRECTLY REJECTED PLAINTIFFS'
 EXCLUSIVE EMOLUMENT'S CLAIMS 17

C. PLAINTIFFS HAVE NO STANDING TO RAISE THEIR UNIFORMITY OF TAXATION AND COMMERCE CLAUSE CHALLENGES, AND PLAINTIFFS HAVE ADVANCED NO VIABLE BASIS FOR THIS COURT TO GRANT DISCRETIONARY REVIEW OF THE COURT OF APPEALS RULING	20
CONCLUSION	25
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES

Appeal of Martin, 286 N.C. 66,
209 S.E.2d 766 (1974) 22, 23

Blinson v. State, 651 S.E.2d 268,
2007 N.C. App. LEXIS 2191
(N.C. Ct. App. October 16, 2007) passim

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332,
164 L. Ed. 2d 589 (2006) 24

Flast v. Cohen, 392 U.S. 83, 20 L. Ed. 2d 947 (1968) 21

GMC v. Tracy, 519 U.S. 278, 136 L. Ed. 2d 761 (1997) ... 24

Goldston v. State, 361 N.C. 26,
637 S.E.2d 876 (2006) 20, 21, 23

Leete v. County of Warren, 341 N.C. 116,
462 S.E.2d 476 (1995) 19

Madison Cablevision, Inc. v. Morganton, 325 N.C. 634,
386 S.E.2d 200 (1989) 15, 19

Maready v. City of Winston-Salem, 342 N.C. 708,
467 S.E.2d 615 (1996) 11, 12, 13
16, 17

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) 18

Piedmont Canteen Serv. v. Johnson, 256 N.C. 155,
123 S.E.2d 582 (1962) 23

Piedmont Triad Airport Auth. v. Urbine, 354 N.C. 336,
554 S.E.2d 331 (2001), *cert. denied*,
535 U.S. 971, 152 L. Ed. 2d 381 (2002) 15, 16

Stanley v. Dep't of Conservation & Dev., 284 N.C. 15,
199 S.E.2d 641 (1973) 21

State v. Trantham, 230 N.C. 641, 55 S.E.2d 198 (1949) . . . 25

Town of Emerald Isle v. State, 320 N.C. 640,
360 S.E.2d 756 (1987) 18, 19

**CONSTITUTIONAL AND
STATUTORY AUTHORITY**

N.C. CONST. art. I, § 32 18, 19

N.C. CONST. art. V, § 2(1) 10

N.C.G.S. § 7A-31(c) (2007) 9

N.C.G.S. § 105-129.60 (2007) 6

N.C.G.S. § 105-129.60(6) (2007) 6

SUPREME COURT OF NORTH CAROLINA

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

v.)

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

From: Wake County
No. COA06-1258

STATE DEFENDANTS' MOTION TO DISMISS APPEAL
PURSUANT TO N.C.G.S. § 7A-30(1) AND APPELLATE RULES 14 AND 15
AND RESPONSE IN OPPOSITION
TO PETITION FOR DISCRETIONARY REVIEW
PURSUANT TO N.C. G.S. § 7A-31(c) AND APPELLATE RULE 15

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME Respondent-Appellees State of North Carolina and James T. Fain, III, Secretary of the North Carolina Department of Commerce, in his official capacity (hereafter the "State defendants"), by and through their undersigned counsel, and hereby file STATE DEFENDANTS' MOTION TO DISMISS APPEAL PURSUANT TO N.C.G.S. § 7A-30(1) AND APPELLATE RULES 14 AND 15 AND RESPONSE IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW PURSUANT TO N.C.G.S. § 7A-31(C) AND APPELLATE RULE 15 in response to the plaintiff-petitioners' (hereafter "Plaintiffs") NOTICE OF APPEAL OF RIGHT PURSUANT TO G.S. § 7-30(1) AND APPELLATE RULES 14 AND 15 AND IN THE ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW PURSUANT TO G.S. 7A-31(C) AND APPELLATE RULE 15. The State defendants urge the Court to dismiss the attempted appeal on the grounds that plaintiffs have not presented a substantial constitutional question sufficient to support an appeal under N.C.G.S. § 7A-30(1). The State defendants further urge the Court to deny plaintiffs' petition for discretionary review on the grounds that the case does not meet any of the criteria for discretionary review under N.C.G.S. § 7A-31(c).

MOTION TO DISMISS APPEAL

Plaintiffs' arguments in support of their attempted appeal supposedly based on a substantial constitutional question overlap substantially with their arguments in support of their petition for discretionary review. Consequently, the State defendants

will discuss the specific constitutional issues in responding to the petition. However, the State defendants submit that plaintiffs have failed to show that the case presents a substantial question arising under the North Carolina Constitution. The Court of Appeals fully addressed the questions raised by plaintiffs below, and the constitutional questions were correctly determined by the Court of Appeals, leaving no substantial constitutional question for this Court to resolve. Accordingly, this Court should dismiss plaintiffs' notice of appeal under N.C.G.S. § 7A-30(1).

**RESPONSE IN OPPOSITION TO PETITION
FOR DISCRETIONARY REVIEW**

FACTS

PROCEDURAL FACTS:

Plaintiffs seek review of the Court of Appeals decision which affirmed the decision of the Wake County Superior Court, the Honorable Robert H. Hobgood, Superior Court Judge presiding, dismissing plaintiffs' action on the grounds of lack of standing and failure to state a claim upon which relief may be granted. Plaintiffs brought this action initially as seven individual taxpayers, two of whom are residents of Forsyth County; the remaining plaintiffs are from various other counties. (Compl. ¶¶ 4-10, R pp. 44-46) The original complaint was filed on 23 June 2005 challenging on federal and state constitutional grounds the enactment by the North Carolina General Assembly of Session Law 2004-204 Extra Session (hereafter "Chapter 204"),

relating to tax incentives for major computer manufacturing businesses. Plaintiffs' complaint also challenged, under federal and state constitutional provisions as well as N.C.G.S. § 158-7.1, local incentives granted by Forsyth County and the City of Winston-Salem to Dell computer manufacturing company. (R pp. 2, 3-34) The defendants include the State defendants, Dell, Inc., Forsyth County, the City of Winston-Salem, and local non-profit organizations. (Compl. ¶¶ 11-12, 14-21, R pp. 47-49)

The initial pleading filed on 23 June 2005 was supplanted by an "Amended Complaint and Petition for Declaratory Judgment" (hereafter referred to as the "Complaint") filed on 9 September 2005. (R pp. 41-146) Each of the named defendants filed a motion to dismiss the Complaint pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. (R pp. 147-53, 154-58, 159-72) The matter was designated by the Chief Justice of North Carolina as an "exceptional" case pursuant to Rule 2.1 of the General Rules of Practice and assigned to the Honorable Robert H. Hobgood, Superior Court Judge. (R pp. 173-75) The trial court filed its order on 12 May 2006 dismissing all of plaintiffs' claims as to all the defendants. (R pp. 1, 194-209) Each of the twenty-two claims was dismissed based on N.C.G.S. § 1A-1, Rule 12(b)(1) of the Rules of Civil Procedure because plaintiffs lacked standing or based on N.C.G.S. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure

for failure to state a claim upon which relief may be granted or, in most instances, on both grounds.

On 23 May 2006 plaintiffs filed their Notice of Appeal. (R pp. 210-13) Plaintiffs obtained from the Superior Court an extension of time until 27 July 2006 to serve the proposed record on appeal. (R p. 218) The proposed record on appeal was served on 27 July 2006. The record was settled by stipulation and was filed in the Court of Appeals on 19 September 2006. It was docketed in the Court of Appeals on 29 September 2006. (R p. 1)

The case was heard in the Court of Appeals on 25 April 2007. In a unanimous opinion filed 16 October 2007, the Court of Appeals affirmed the decision of the trial court. *Blinson v. State*, 651 S.E.2d 268, 2007 N.C. App. LEXIS 2191 (N.C. Ct. App. October 16, 2007) (hereafter cited as "*Blinson*," with all citations to the slip opinion as "slip op. at ___").

Plaintiffs timely filed their NOTICE OF APPEAL OF RIGHT PURSUANT TO G.S. § 7-30(1) AND APPELLATE RULES 14 AND 15 AND IN THE ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW PURSUANT TO G.S. 7A-31(C) AND APPELLATE RULE 15 on 19 November 2007.

HISTORICAL FACTS:

Plaintiffs brought this action in order to make various constitutional challenges to the economic incentives and tax credits granted to major computer manufacturing

facilities as provided in Chapter 204. Additionally, actions by the City of Winston-Salem and Forsyth County to provide economic development incentives and tax benefits to encourage Dell to locate, construct and operate a computer manufacturing facility in Winston-Salem were challenged as violative of the North Carolina Constitution. (R pp. 43-75)

The reasons for creating the "Tax Incentives for Major Computer Manufacturing Facilities" established in Chapter 204 are delineated in N.C.G.S. § 105-129.60, where the General Assembly found that it is the policy of the State to stimulate economic activity and to create and maintain sustainable jobs for citizens of the State in strategically important industries. The General Assembly noted that manufacturing employment has been disproportionately affected by national trade policies and global economic trends, resulting in the loss of many jobs in the State's industrial workforce, and that the computer manufacturing and distribution industry will remain a vital part of the future national, world, and State economy as society becomes more dependent on advanced technology. The General Assembly declared that "it is the intent of the State to encourage the sustainability of this industry cluster in this State and to encourage the maintenance and growth of computer manufacturing and distribution employment in the State through tax policies, investments in training capacity, and other policies and programs." N.C.G.S. § 105-129.60(6) (2007).

Plaintiffs alleged that their action arose from the General Assembly's enactment of Chapter 204. (Compl. ¶ 2, R p. 44) Section 1 of that legislation added a new Article 3G to Chapter 105 of the General Statutes entitled "Tax Incentives for Major Computer Manufacturing Facilities." (Compl. Ex. A at § 1, R p. 76) The legislation allowed tax credits against corporate franchise taxes and corporate income taxes for an eligible taxpayer that is found by the Secretary of Commerce to expect to invest at least \$100,000,000 to construct a computer manufacturing and distribution facility over a five-year period and that expects to have an increased employment level at such facility of at least 1,200 within five years after the facility is first put into use. (Compl. Ex. A p. 3, § 105-129.62(a), R p. 78)

Section 2 of Chapter 204 provided that a taxpayer eligible for the tax credits established in Section 1 is also eligible under the "Bill Lee Act" for specific "major computer facility enhancements." (Compl. Ex. A pp. 8-9, § 105-129.4(b7), R pp. 83-84) These "major computer facility enhancements" include the inapplicability of the wage standard requirement, an increased credit for creating jobs, and preferred credits for investment in machinery, equipment, worker training and substantial investment in other property. (*Id.*)

Section 3 of Chapter 204 amended the eligibility for sales and use tax refunds to include computer manufacturing facilities at which the manufacture or assembly of peripheral equipment [such as storage devices, printers, monitors and terminals]

occurs at “a facility or campus at which the taxpayer also manufactures or assembles electronic computers.” (Compl. Ex. A p. 10, § 105-164.14(j)(3)(d.), R p. 85)

Plaintiffs further alleged that their action arose from the decisions of the City of Winston-Salem and Forsyth County to provide economic development incentives and other assistance to “entice” Dell to locate a computer manufacturing facility in Winston-Salem. (Compl. ¶ 3, R p. 44) Specifically, Forsyth County and the City of Winston-Salem each adopted resolutions authorizing economic development incentives to Dell contingent on the expected capital investments and job creation by Dell. (Compl. Ex’s D & E, R pp. 90-110) Additionally, the City and County, along with the defendant non-profit corporations, entered into an Agreement by which Dell agreed to locate a computer manufacturing and distribution facility on a specified industrial park site to be purchased from the City for \$7,000,000 while the local defendants agreed to site preparation work, roadway infrastructure improvements, and annual cash incentive grants. (Compl. Ex. H pp. 1-9, R pp. 114-22) The resolutions of the local governments recited the goals and purposes of the incentives offered to Dell as being to “stimulate the local economy, promote business, create new full-time jobs in the County, increase the property tax base and revenues and increase business prospects.” (Compl. Ex G. R p. 112; *see also* Ex’s F, R p. 90 & H (Recitals A-E), R pp. 114-15)

**REASONS WHY DISCRETIONARY REVIEW
SHOULD NOT BE GRANTED**

This Court should deny the petition for discretionary review because plaintiffs cannot show that certification is justified under any of the criteria set out in N.C.G.S. § 7A-31(c). In particular, given the well-reasoned decision of the Court of Appeals, all significant legal issues have been properly addressed and the correct result reached. Consequently, at this time, none of the issues raised by plaintiffs has significant public interest, and the cause does not involve legal principles of major significance to the jurisprudence of the State. Further, the Court of Appeals' decision is in no way in conflict with any decision of this Court. *See* N.C.G.S. § 7A-31(c) (2007). Nor, contrary to plaintiffs' arguments, are there any substantial constitutional questions that are as yet unresolved.

Regardless of plaintiffs' contention that the case involves a matter of significant public interest, certification of a matter on the grounds of significant public interest is appropriate only when there are unresolved legal issues worthy of this Court's attention. While the state legislation and local incentives that led to Dell's building its facility in Forsyth County may have sparked public attention, there remains no legal matter of substance here. Similarly, while plaintiffs and others may object politically or philosophically to the practice of governmental entities offering incentives to encourage economic development, those objections do not elevate the

legal questions raised by this case to the jurisprudential level warranting this Court's review. Precedents from this Court, properly applied by the Court of Appeals in *Blinson*, sufficiently govern the issues raised by plaintiffs so that those issues, in reality, do not involve legal principles of major significance to the jurisprudence of this State. While plaintiffs contend that various individuals and entities need to know whether economic incentives, and these particular incentives, meet constitutional muster, they ignore the fact that the issues they want the Court to address have been fully determined by prior cases. Plaintiffs' desire to re-litigate established issues does not convert this case to one meriting discretionary review.

Plaintiffs also attempt to characterize the Court of Appeals' opinion as being in conflict with decisions of this Court. As demonstrated below, rather than conflicting with the decisions of this Court, the Court of Appeals opinion properly applied the decisions of this Court to the questions before it.

A. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PLAINTIFFS' PUBLIC PURPOSE CLAIMS ARE GOVERNED BY *MAREADY V. CITY OF WINSTON-SALEM*, AND PLAINTIFFS HAVE FAILED TO OFFER ANY SUSTAINABLE LEGAL BASIS FOR THIS COURT TO GRANT DISCRETIONARY REVIEW.

At the heart of plaintiffs' case is their contention that Chapter 204 and the local incentives violate the "public purpose" restriction of Article V, Section 2(1) of the Constitution of North Carolina. That section, in relevant part, directs that "[t]he power of taxation shall be exercised in a just and equitable manner, for public

purposes only.” Despite plaintiffs’ protestations, the actions of the defendants in this case, and Chapter 204, fall well within the range of public purposes under Article V, Section 2(1), as the Court of Appeals determined. As this Court noted in *Maready*, “[e]conomic development has long been recognized as a proper governmental function.” *Maready v. City of Winston-Salem*, 342 N.C. 708, 723, 467 S.E.2d 615, 624 (1996); *see also Blinson*, slip op. at 13. In fact, even before *Maready*, the Court had previously “declared that stimulation of the economy involves a public purpose.” *Maready*, 342 N.C. at 723, 467 S.E.2d at 625 (citations omitted). Additionally the *Maready* Court stated that its cases

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

Id. at 722, 467 S.E.2d at 624. There can be no doubt that the purposes for which Chapter 204 was enacted, and the local resolutions and agreement were effected, constitute public purposes under existing constitutional analysis.

The Court of Appeals recognized the significance and scope of *Maready* in its application to this case, observing that the Court in *Maready* “concluded: ‘We

therefore hold that N.C.G.S. § 158-7.1, *which permits the expenditure of public moneys for economic development incentive programs*, does not violate the public purpose clause of the North Carolina Constitution.” *Blinson*, slip op. at 14 (quoting *Maready*, 342 N.C. at 727, 467 S.E.2d at 67 (emphasis added)). Furthermore, as the Court of Appeals correctly determined, there is “no meaningful distinction between the present case and *Maready*.” *Blinson*, slip op. at 14.

Plaintiffs seek to avoid the effect of *Maready* by advocating a revisionist interpretation of that decision. They contend that *Maready* addressed only a facial challenge to N.C.G.S. § 158-7.1, ignoring the fact that *Maready* specifically noted that twenty-four economic development incentive projects were challenged in that case. *Maready*, 342 N.C. at 712, 467 S.E.2d at 618. Thus, this Court did not uphold § 158-7.1 in a vacuum when it approved the expenditures authorized by that section. *Id.* at 723-24, 467 S.E.2d at 625. Indeed, in dissenting from the majority opinion, one of plaintiffs’ own counsel, then a member of the Supreme Court, commented on particular aspects of the incentives at issue:

[i]f it is an acceptable public purpose to spend tax dollars specifically for relocation expenses to benefit the spouses of corporate executives moving to the community in finding new jobs or for parking decks that benefit only the employees of the favored company, then what can a government not do if the end result will entice a company to produce new jobs and raise the tax base?

Id. at 741-42, 467 S.E.2d at 635-36 (Orr, J., dissenting). As a result, the dissenting opinion authored by then Justice Orr concluded that “N.C.G.S. § 158-7.1, as broadly interpreted and applied by the majority, is unconstitutional on its face and *as applied.*” *Id.* at 742, 467 S.E.2d at 636 (Orr, J., dissenting) (emphasis added). Clearly, while the holding in *Maready* was that N.C.G.S. § 158-7.1 is constitutional, both the majority and the dissenters addressed that question in the context of particular incentives offered pursuant to specific economic development projects challenged by the plaintiffs in that litigation.

Besides contending that *Maready* involved only a determination of the facial validity of N.C.G.S. § 158-7.1, plaintiffs object to the Court of Appeals’ decision because it acknowledged and relied on the legislature’s statements of the public purposes for which Chapter 204 was enacted. The Court of Appeals noted the extensive statements of public purpose findings set out in Chapter 204, as well as the unequivocal public purpose statements of the local Agreement. *Blinson*, slip op. at 3-4, 5-6. As it noted, *Maready* recognized that “[i]t would be anomalous to now hold that a government which expends large sums to alleviate the problems of its citizens through multiple humanitarian and social programs is proscribed from promoting the provision of jobs for the unemployed, an increase in the tax base, and the prevention of economic stagnation.” *Blinson*, slip op. at 16 (quoting *Maready*, 342 N.C. at 722, 467 S.E.2d at 624). Thus, under *Maready*, the need to offer economic incentive

programs to attract industry that will replace lost jobs is necessarily a public purpose. The Court of Appeals was following *Maready*, as properly interpreted and applied, in concluding that the legislative findings of Chapter 204 “fall squarely within the public purposes identified in *Maready*.” *Blinson*, slip op at 16. Indeed, as the Court of Appeals acknowledged, it was “bound by *Maready* and, therefore, may not now hold that the concerns that formed a basis for the Computer Legislation do not constitute a public purpose.” *Blinson*, slip op at 16, 17.

Plaintiffs object that *Maready* involved only a specific statute and that a case-by-case, or statute by statute, analysis is required. What plaintiffs ignore is that the Court of Appeals made a specific determination as to Chapter 204. Given the nature of the legislation and the legislative findings, Chapter 204 falls squarely within the scope of the *Maready* reasoning, which is precisely what the Court of Appeals held.

Plaintiffs seek further to muddy the waters by insisting that the Court of Appeals erroneously interpreted *Maready* as “stand[ing] for the proposition that as long as the legislature claims that action is for a public purpose, then the ‘public purpose’ test has been met.” (Petition p. 18) Yet, it is plaintiffs’ own counsel who described the *Maready* holding in terms strikingly similar to the interpretation of which he now accuses the Court of Appeals. Indeed, as a dissenting member of the Court, he asserted that

[t]he logic upon which the majority opinion rests its conclusion that the expenditure of these funds was for a public purpose can be stated as follows: The creation of new jobs and an increase in the tax base *ipso facto* benefits the general public. Therefore, local government expenditure of tax dollars to a private business for its private benefit in order to induce the business to either expand or locate in the community is for a public purpose if it creates new jobs and increases the tax base.

Id. at 734, 467 S.E.2d at 631 (Orr, J., dissenting). The interpretation of *Maready* by the Court of Appeals is much more restrained than the characterization of *Maready* by plaintiffs' own counsel.

Plaintiffs argue that the Court must assess each specific expenditure to determine whether the incentives involved in this case run afoul of the public purpose clause. To advance their argument, plaintiffs urge the indisputable principle that "[a] slide-rule definition to determine public purpose for all time cannot be formulated" and point out that the Court has previously relied on the case of *Madison Cablevision, Inc. v. Morganton*, 325 N.C. 634, 645, 386 S.E.2d 200, 207 (1989), in addressing the standards for determining when the "public purpose" requirement has been violated. (Petition p. 20 (quoting *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 339, 554 S.E.2d 331, 333 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002))) Significantly, the *Piedmont Triad* case adopted a broad view of the "public purpose" concept in upholding a condemnation of land by an airport authority as being for public use against a challenge based on the contention that the land would be used for

the construction by Federal Express of a facility that it would then rent from the airport. The Court explained that

[t]he arrangement advances the primary goal of giving effect to the people's general desire for better seaports and airports. As such, the greater benefits flow to the people, as they have constitutionally directed, with their understanding that there will be incidental benefits to private companies involved. Under these facts, the legislative declarations of public purpose, and the constitutional directives of the people, we are persuaded that both prongs of our analysis are satisfied.

Piedmont Triad Airport Auth., 354 N.C. at 343, 554 S.E.2d at 335. In other words, this Court has in recent years taken a broad view of the public purpose requirement, directly contrary to the narrow interpretation embraced by plaintiffs. The incentives offered by the State in Chapter 204 and the local governments in their resolutions and agreement, for the purposes of stimulating the economy and similar reasons, fall squarely within the teachings of *Maready* that "even the most innovative activities" permitted under N.C.G.S. § 158-7.1, or in this case under Chapter 204 or the local incentives, are constitutional because "they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental." *Maready*, 342 N.C. at 724-25, 467 S.E.2d at 625.

Clearly, the Court of Appeals correctly applied *Maready*, following its teachings that the courts "do not 'pass upon the wisdom or propriety of legislation in

determining the *primary motivation* behind a statute” *Blinson*, slip op. at 19 (quoting *Maready*, 342 N.C. at 725, 467 S.E.2d at 626 (emphasis added)). The courts “look instead to whether the purpose of ‘an act will promote the welfare of a state or a local government and its citizens.’” *Blinson*, slip op. at 19 (quoting *Maready*, 342 N.C. at 724, 467 S.E.2d at 625). The Court of Appeals’ careful application of *Maready* to this case refutes plaintiffs’ contention that this Court should grant discretionary review of the Court of Appeals’ decision as it relates to plaintiffs’ public purpose claims. Accordingly, this Court should deny plaintiffs’ petition and dismiss their appeal with regard to their public purpose claims.

B. PLAINTIFFS HAVE RAISED NO SIGNIFICANT CLAIMS OF VIOLATION OF ARTICLE I, SECTION 32 OF THE CONSTITUTION OF NORTH CAROLINA PROHIBITING EXCLUSIVE EMOLUMENTS, AND THE COURT OF APPEALS CORRECTLY REJECTED PLAINTIFFS’ EXCLUSIVE EMOLUMENTS CLAIMS.

Plaintiffs argue that incentives provided under Chapter 204 and the local agreements and resolutions constitute exclusive emoluments in violation of Article I, Section 32 of the Constitution of North Carolina. According to them, this Court should grant discretionary review of the Court of Appeals’ conclusion that they failed to state a claim for violation of the exclusive emoluments clause. *See Blinson*, slip op. at 20-22. In reality, the Court of Appeals reached the correct conclusion, and plaintiffs can offer no justification for this Court to grant discretionary review with regard to their exclusive emoluments claims.

Article I, Section 32 of the Constitution provides: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.” As this Court has explained,

a statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, section 32, if: (1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.

Town of Emerald Isle v. State, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987); accord *Blinson*, slip op. at 20-21. Plaintiffs contend the Court of Appeals erred by failing to apply the proper test to its exclusive emoluments challenge and by equating public purpose analysis with exclusive emoluments. To the contrary, the Court of Appeals was not merely following its own precedent in concluding that a challenged incentive which met the public purpose test would also meet the exclusive emoluments test. See *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). Rather, the Court of Appeals was also applying precedents of this Court, such as *Town of Emerald Isle*, in determining that an incentive which satisfied the public purpose test for Article V, Section 2(1) would equally satisfy the “general welfare” and “public interest” criteria of the exclusive emoluments exemption. See *Blinson*, slip op. at 20-21.

According to plaintiffs, however, the test to be applied is found in cases such as *Madison Cablevision*, 325 N.C. at 654-55, 386 S.E.2d at 212, and *Leete v. County of Warren*, 341 N.C. 116, 122, 462 S.E.2d 476, 480 (1995), which focus on whether any grant at issue was in consideration for “public services.” The problem with plaintiffs’ approach is that it ignores the fact that Article I, Section 32 requires a multi-part test. An exclusive emolument violates the Constitution if it is not “in consideration of public services.” However, if the incentives are not exclusive emoluments in the first place, there is no need to determine whether they are for “public services.” Where, as here, “the purpose of the [incentives] is the promotion of the general welfare, as distinguished from the benefit of the individual, and . . . there is a reasonable basis for the Legislature to conclude that the granting of the [incentives] would be in the public interest,” there is no violation of the prohibition on exclusive emoluments. *Town of Emerald Isle*, 320 N.C. at 653, 360 S.E.2d at 764 (citation omitted). The Court of Appeals thus properly ruled that the “public services” question arises in connection with Article I, Section 32 only if a court concludes that a benefit in fact is an exclusive emolument. Because the incentives at issue in this case were for public purposes and thus in the public interest, they were not exclusive emoluments and “it is immaterial whether they were provided ‘in consideration of public services.’” *Blinson*, slip op. at 22.

The Court of Appeals correctly decided plaintiffs' exclusive emoluments claims, consistently with the decisions of this Court, and plaintiffs have shown no reason for this Court to grant discretionary review of the Court of Appeals' decision relating to their Article I, Section 32 claims. Accordingly, this Court should deny plaintiffs' petition and dismiss their appeal on this issue.

C. PLAINTIFFS HAVE NO STANDING TO RAISE THEIR UNIFORMITY OF TAXATION AND COMMERCE CLAUSE CHALLENGES, AND PLAINTIFFS HAVE ADVANCED NO VIABLE BASIS FOR THIS COURT TO GRANT DISCRETIONARY REVIEW OF THE COURT OF APPEALS RULING.

Plaintiffs contend that the Court of Appeals erred in holding that they lack standing to assert their challenges under the dormant or negative Commerce Clause of the United States Constitution and under Article V, Section 2(2) of the Constitution of North Carolina for what is referred to as "uniformity in taxation." *See Blinson*, slip op. at 8-10. In particular, plaintiffs assert that the Court of Appeals failed to apply the teachings of this Court in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006). Plaintiffs are wrong; the Court of Appeals did not err in reaching its conclusion that they lack standing to raise the Commerce Clause and uniformity of taxation claims. Instead, it correctly interpreted and applied *Goldston* and other cases of this Court concerned with standing. Consequently, plaintiffs cannot show any justification for this Court to accept plaintiffs' petition for discretionary review

with regard to their standing to raise the Commerce Clause and uniformity of taxation claims.¹

Contrary to plaintiffs' argument, *Goldston* does not provide them with a vehicle to bring discrimination-type claims merely by labeling their challenges as taxpayer claims. *Goldston* recognized a broad concept of taxpayer standing to challenge, as taxpayers, "the alleged misuse or misappropriation of public funds." 361 N.C. at 33, 637 S.E.2d at 881. However, *Goldston* also explained that standing depends on

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

Id. at 30, 637 S.E.2d at 879 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968) (citation omitted))) (internal quotation marks omitted).

¹ To the extent plaintiffs attempt to present their arguments as to the merits of their dormant or negative Commerce Clause and uniformity of taxation claims, *see* Petition, pp. 23-27, those issues are not before this Court. Since the Court of Appeals addressed the dormant Commerce Clause and uniformity of taxation claims only to determine that plaintiffs lacked standing to present them, plaintiffs have no adverse decision on the merits for this Court to review under N.C.G.S. § 7A-30 or § 7A-31 with regard to those issues. Should the Court accept review of this case and agree with plaintiffs' contention that they have standing to raise these issues, then the matter should be remanded to the Court of Appeals to determine these claims on the merits.

Accord Blinson, slip op. at 9. That “sharpness of presentation” must be examined based on the particular issue before the court.

When it comes to discrimination-type claims, including uniformity of taxation and the negative Commerce Clause, the action challenged by plaintiffs is constitutionally flawed only by reference to the differential treatment of groups of taxpayers or citizens that are alleged to be similarly situated to each other. Discrimination-type claims are not concerned with the alleged “misappropriation or misuse of public funds” that was addressed in *Goldston*. Instead, a discrimination claim asserts that a constitutional defect flows from the disparity of one person or entity being treated inequitably in comparison to a second person or entity. Such claims are those of individual persons or entities not to be treated differently, in an unconstitutionally unfair manner, from persons similarly situated. Plaintiffs are not manufacturers in competition with Dell or any other company that benefits from the incentives at issue here. Their status as taxpayers does not entitle them under any theory of standing to assert the rights or claims of hypothetical manufacturers who might or might not be disadvantaged in comparison to Dell or any other entity availing itself of the benefits of Chapter 204.

Importantly, the longstanding rule is that “a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.” *Appeal of Martin*,

286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974). *See also Blinson*, slip op. at 10. Significantly, the *Goldston* Court quoted with approval its earlier statement that “[o]nly those persons may call into question the validity of a statute [sic] who have been injuriously affected thereby in their persons, property or constitutional rights.” *Goldston*, 361 N.C. at 35, 637 S.E.2d at 882 (quoting *Piedmont Canteen Serv. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962)). None of the plaintiffs is a business suffering from the alleged lack of uniformity in taxation between businesses able to take advantage of the tax incentives under Chapter 204 and those not in a position to do so. (*See Compl. Count 12*, R p. 68.) Because no plaintiff is “a member of the class subject to the alleged discrimination,” the plaintiffs are “precluded from challenging” the actions they wish to contest in this litigation. *Appeal of Martin*, 286 N.C. at 75, 209 S.E.2d at 772 (holding that county did not have standing to challenge statutory provisions under Article V, Section 2 uniformity rule) (citation omitted).

Plaintiffs’ negative or dormant Commerce Clause claims (*Compl. Counts 1-3*, R pp. 60-63) under the United States Constitution are similarly barred by lack of standing to raise those claims.² “The negative or dormant implication of the

² Although the negative or dormant Commerce Clause issue arises from the United States Constitution, standing to bring this claim in state court is nevertheless a question of state law. It is interesting to note, however, that the United States Supreme Court has determined that taxpayers who are not personally

Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby imped[es] free private trade in the national marketplace.” *GMC v. Tracy*, 519 U.S. 278, 287, 136 L. Ed. 2d 761, 773 (1997) (citations and internal quotations omitted). *See also Blinson*, slip op. at 10. In other words, plaintiffs are attempting to assert claims of Commerce Clause discrimination on behalf of hypothetical or imaginary corporations whose interests may well be very different from theirs. Indeed, it is highly likely that any such manufacturers claiming discrimination under Chapter 204 would seek to have the benefits of those tax incentives extended to them rather than have them invalidated altogether, as plaintiffs wish to do. Plaintiffs, who are all individual taxpayers, have no standing to raise this issue.

disadvantaged by the alleged Commerce Clause discrimination lack standing to bring such suits in federal courts. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 164 L. Ed. 2d 589 (2006). In that case, the Supreme Court concluded that the taxpayers could not establish a “concrete and particularized” injury to them as taxpayers. 164 L. Ed. 2d at 603. Nor could they establish standing on the grounds that the tax incentives increased their tax burdens: (1) the point of the incentives was to increase revenues overall and thus it was not at all clear that the economic incentives in that case increased the tax burden on plaintiffs and other taxpayers in view of the expected overall increase in tax revenues; and (2) even if the incentives were invalidated or terminated, there was no assurance whatsoever that the result would be to reduce taxes for plaintiffs because the State could simply spend the money elsewhere or choose to provide such incentives for a much broader range of manufacturers. *Id.* at 603-05.

Plaintiffs lack standing to bring both their uniformity of taxation and dormant Commerce Clause claims because North Carolina law does not permit a litigant to raise a discrimination claim unless he is a member of the class that is the subject of the discrimination or at least has suffered direct harm from the discriminatory classification. *See State v. Trantham*, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949) (“He who seeks to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is discriminated against.”). The Court of Appeals correctly determined that plaintiffs lacked the necessary “personal stake in the outcome of the controversy” and utterly failed to show they were prejudiced by Chapter 204. *Blinson*, slip op. at 9, 10 (citation omitted). Plaintiffs have failed to demonstrate any basis for this Court to grant discretionary review with regard to their negative or dormant Commerce Clause and uniformity of taxation claims, and this Court should deny plaintiffs’ petition and dismiss their appeal on these issues.

CONCLUSION

For the reasons discussed above, plaintiffs have failed to show any justification or basis for this Court to grant their petition for discretionary review. Therefore, the petition should be denied, and their appeal should be dismissed.

Respectfully submitted this the 3rd day of December, 2007.

ROY COOPER
Attorney General

Electronically submitted
Grayson G. Kelley
Chief Deputy Attorney General
N.C. State Bar No. 8349
gkelley@ncdoj.gov

N.C. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed.

Electronically submitted
Norma S. Harrell
Special Deputy Attorney General
N.C. State Bar No. 6654
nharrell@ncdoj.gov

Electronically submitted
John F. Maddrey
Assistant Solicitor General
State Bar No. 8890
jmaddrey@ncdoj.gov

N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763

Attorneys for Defendants State of North Carolina and James T. Fain, III, Secretary of the North Carolina Department of Commerce

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the STATE DEFENDANTS' MOTION TO DISMISS APPEAL PURSUANT TO N.C.G.S. § 7A-30(1) AND APPELLATE RULES 14 AND 15 AND RESPONSE IN OPPOSITION TO PETITION FOR DISCRETIONARY REVIEW PURSUANT TO N.C.G.S. § 7A-31(C) AND APPELLATE RULE 15 in the above titled action upon all other parties to this cause by depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Jeanette Doran Brooks
N.C. Institute for Constitutional Law
225 Hillsborough Street, Suite 245
Raleigh, NC 27603

Robert F. Orr
Kelly & Rowe, P.A.
225 Hillsborough Street, Suite 100
Raleigh, NC 27603

Attorneys for Plaintiffs

Adam H. Charnes
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101-2400
Attorneys for Local Defendants

Ronald G. Seeber
Winston-Salem City Attorney
Post Office Box 2511
Winston-Salem, NC 27102
Attorney for the City of Winston-Salem and Allen Joines, Mayor of Winston-Salem

Burley B. Mitchell, Jr.
Pressly M. Millen
Sean E. Andrussier
Melody C. Ray-Welborn
WOMBLE CARLYLE SANDRIDGE & RICE
Post Office Box 831
Raleigh, NC 27602
Attorneys for Defendant Dell, Inc.

Davida W. Martin
Forsyth County Attorney
201 North Chestnut Street
Government Center, 5th Floor
Winston-Salem, NC 27101
Attorney for Forsyth County and Gloria D. Whisenhunt, Chairperson of Forsyth County Board of Commissioners

This the 3rd day of December, 2007.

Electronically submitted
Norma S. Harrell
Special Deputy Attorney General