

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07 CVS 11756

MICHAEL C. MUNGER, BARBARA HOWE,)
and MARK WHITELEY CARES,)
Plaintiffs)

v.)

STATE OF NORTH CAROLINA; JAMES T.)
FAIN, III, Secretary of the North Carolina)
Department of Commerce, in his official)
Capacity; REGINALD HINTON, Acting)
Secretary of the North Carolina Department)
Of Revenue, in his official capacity; DAVID T.)
MCCOY, State Budget Officer for the Office of the)
State Budget and Management, in his official)
Capacity; MICHAEL F. EASLEY, Governor of)
the State of North Carolina, in his official)
capacity; GOOGLE, INC.; and MADRAS)
INTEGRATION, LLC.)
Defendants)

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BY _____

**ORDER AND
MEMORANDUM
OF DECISION**

THIS MATTER arises from a complaint filed by the above-named Plaintiffs against the above-named Defendants wherein the Plaintiffs seek to have the Court invalidate, through declaratory and injunctive relief, economic incentive legislation enacted in 2006 as well as the initial approval of a job development incentive grant. Plaintiffs contend, among other things, that the incentive legislation was enacted solely to encourage Defendants Google, Inc. and Madras Integration, LLC (a subsidiary of Google, Inc.) to construct an internet data facility in Lenoir, Caldwell County, North Carolina. The Plaintiffs contend that the incentives, which they believe will total more than \$90 million dollars, are unconstitutional and unlawful.

The plaintiffs are three North Carolina citizens suing in their individual capacities as residents and taxpayers of the State. The Defendants fall into two groups: (1) the

State of North Carolina and its various executive officers and department heads in their official capacities, and (2) Google, Inc. and Madras Integration, LLC (hereinafter "Google"). Each of these groups of Defendants has filed motions to dismiss the Plaintiffs' complaint pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. The Court, having considered the memoranda of the parties, the arguments of counsel, and all matters of record, enters the following Order and Memorandum of Decision.

PROCEDURAL AND FACTUAL BACKGROUND

In the 2006 Current Operations Appropriation Act, the General Assembly approved the exemption from sales and use taxes of certain property used in connection with internet provider services or web search portals and of sales of electricity to be used at such properties. N.C. Sess. Laws 2006-66 § 24.17; N.C. Gen. Stat. § 105-164.3(8e), 105-164.13(55). The exemptions are limited to facilities which, among other requirements, are accompanied by investments of at least \$250,000,000 within five years after the construction of the facility begins, as certified by the Secretary of Commerce. N.C. Gen. Stat. § 105-164.3(8e)d. The exemptions are also limited to facilities located in counties that do not fall within one of the less distressed tiers for economic development, or the least distressed tier, according to rankings under the former and current statutory schemes. N.C. Gen. Stat. § 105-164.3(83)c (referencing former N.C. Gen. Stat. § 105-129.3 or current N.C. Gen. Stat. § 143.437.08). Plaintiffs challenge this legislation on a number of constitutional grounds, as discussed more fully below.

Plaintiffs also challenge on constitutional grounds a Job Development Investment Grant ("JDIG") which has been approved for Google, but never finalized. Through the

Job Development Investment Grant Program, N.C. Gen. Stat. § 143B-437.50 *et seq.*, the General Assembly has provided for annual investment grants to be awarded to investment projects in this State based on the recommendations of an Economic Investment Committee. The JDIG enabling legislation sets out the legislative intent that the grants be used to stimulate economic activity, create new jobs, enlarge the tax base, expand and diversify the industrial base, and create increased revenue for the State and its political subdivisions. N.C. Gen. Stat. § 143B-437.50.

At the time of the filing of the Complaint, the Economic Investment Committee had approved a JDIG to Google for its internet data center in Lenoir. Under the terms of the JDIG, Google would be entitled to an amount equal to 75% of its withholding taxes, the maximum allowed by law, based on eligible or new positions created by Google. N.C. Gen. Stat. § 143B-437.56(a)-(c); 143B-437.51(5). It is not alleged that any written agreement finalizing the Google JDIG has been executed.

Plaintiffs initiated this action by the filing of a Complaint and Petition for Declaratory Judgment on July 25, 2007. The Complaint was amended as a matter of right on August 15, 2007. Plaintiffs seek declaratory and injunctive relief invalidating the challenged tax benefits as well as any JDIG grant, prohibiting any payments or benefits under the challenged legislation or JDIG grant, requiring the State defendants to recoup any money paid out or not collected as a result of any grants or tax exemptions, along with other remedies such as costs and attorneys fees. All Defendants have filed motions to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On March 18, 2008, the Chief Justice of the North Carolina Supreme Court declared this an exceptional case under Rule 2.1 of the General Rules of

Practice of the Superior and District Courts and assigned the undersigned judge to preside over all further proceedings in this matter in Superior Court.

LEGAL ANALYSIS

I. Standard of Review

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court must accept all well-pleaded factual allegations of the Complaint as true and the Complaint must be construed in the light most favorable to the Plaintiffs. *Ford v. Peaches Entertainment Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986), *cert. denied*, 318 N.C. 694, 351 S.E.2d 746 (1987). Dismissal of the complaint is proper only when it is clear that the plaintiff could prove no set of facts which would entitle him or her to relief. *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997).

When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings. *Dept. of Transp. v. Blue.*, 147 N.C. App. 596, 603, 556 S.E.2d 609, 617 (2001), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

To the extent that Plaintiffs seek to have an act of the North Carolina General Assembly declared unconstitutional, the Plaintiffs must overcome the strong presumption favoring the validity of a statute. “A statute will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 300 N.C. 331, 334, 410 S.E.2d 887, 889 (1991). Our courts give acts of the General Assembly “great deference, and a statute will not be declared unconstitutional under our

Constitution unless the Constitution clearly prohibits that statute.” *In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997). This judicial deference is not merely a matter of comity or courtesy to a co-equal branch of government, but it is premised upon a fundamental tenet of our Constitution. “The Constitution restricts powers, and powers not surrendered inhere in the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision.” *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996). It is with this presumption in mind that the Court now turns to the Plaintiffs’ challenges to the legislative actions which have resulted in the incentives offered to Google and others similarly situated.

II. Claims Arising under the Public Purpose Clause

Plaintiffs, in Claims for Relief 4, 5, 6, 9 and 10 of their Complaint, allege violations of the Public Purpose Clause of the North Carolina Constitution. The Public Purpose Clause, Article V, Section 2(1), states that “[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only . . . “. Article V, Section 2(7) provides “[t]he 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.”

To determine whether a challenged governmental activity violates the Public Purpose Clause, a two-pronged test must be applied. First, the activity must be within the appropriate scope of governmental involvement and reasonably related to communal

needs and second, the activity must benefit the public generally as opposed to special interests or persons. *Maready*, 342 N.C. at 722, 467 S.E.2d at 624.

With respect to the first prong of the *Maready* test, our courts have repeatedly held that the stimulation of the economy is an essential public governmental purpose. *See Maready*, 723, 467 S.E.2d at 625, quoting *State ex rel. Util. Comm'n v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978). Plaintiffs suggest that such precedent merely holds that the legislative mechanism for awarding economic incentives is *facially* constitutional, but not necessarily constitutional on an “*as applied*” basis. Plaintiffs further point to distinctions that they believe exist between the legislation at issue and incentive legislation previously approved by our courts; distinctions such as that this legislation is “merely for [Google] operating its own private business” (Comp. §§ 62, 64, 66), that it is “contrary” to the achievement of a public purpose (Comp. § 73(h)), that it was awarded at a remote state level rather than at a local level (Comp. § 54), and that the legislation does not state that it is for a public purpose. (*Id.*) Plaintiffs argue that because *Maready* only considered facial constitutional validity, and the statute at issue in the instant matter differs from that which was considered in *Maready*, this Court must return to pre-*Maready* precedent and determine, by weighing economic merits, whether providing incentives to internet data facilities in Caldwell County is a proper role of government.

This argument fails at two levels. First, although the *Maready* Court did find the incentive legislation at issue in that case to be facially constitutional, the Court went further and found it to be constitutional *as applied* to twenty-four specific economic development projects challenged by the plaintiffs in that litigation. Moreover, it is the

view of this Court that *Maready* does not permit this lower Court to engage in inquiry of the relative economic merits of the incentives at issue. Rather, while the Public Purpose Clauses must be applied on a case-by case basis, this means on a *purpose-by-purpose* basis, not an *incentive-by-incentive* basis. *Maready* has already examined the *purposes* of stimulating the economy, promoting job creation, and increasing the tax base; the Court held that incentives dispensed directly to corporations for any of *those purposes* satisfy the Public Purpose Clauses as a matter of law because “they are directly aimed at furthering the general economic welfare of the people.” *Id.* at 724-25, 467 S.E.2d at 625-26. This lower Court is bound by *Maready*.

The Court further concludes that Plaintiffs’ argument fails at a second level as well. While there are factual distinctions between the legislation at issue and other incentive legislation previously considered by our appellate courts, Plaintiffs have not shown that these factual distinctions give rise to a legal distinction. For example, the *Blinson* court considered and approved as consistent with the Public Purpose Clause an economic incentive package providing tax-credit incentives offered by the State and utilized by Dell Corporation in the construction of a computer manufacturing and distribution center in Forsyth County. *Blinson v. State*, 186 N.C. App. 328, 651 S.E.2d 268 (2007), *appeal dismissed and disc. rev. denied*, 362 N.C. 355, 661 S.E.2d 241 (2008). These incentives are strikingly similar to those provided to Google and other similarly situated and any distinction, even in a light most favorable to the Plaintiffs, fails to overcome the presumption of validity of the General Assembly’s action.

As such, this Court concludes that the challenged governmental activity in this case, namely the incentives and JDIG award offered to Google and others similarly

situated, constitutes an economic development program fashioned for the purpose of encouraging the construction of internet provider service facilities and web portal facilities in economically distressed counties in North Carolina. This Court likewise concludes this purpose, namely economic development, is within the proper scope of governmental authority to stimulate the economy, promote job creation, and increase the tax base. Therefore, the Court concludes that the challenged governmental activity in this case meets the first prong of the *Maready* test.

With respect to the second prong of the *Maready* test, Plaintiffs argue that the incentives offered by the challenged legislation and JDIG award go directly to Google and inure to Google's sole benefit and bottom line and hence, do not benefit the public generally. However, it is well-settled law that an expenditure does not lose its public purpose merely because it involves a private actor. If the act will promote the welfare of a state or a local government and its citizens, it is for a public purpose. Expenditures of public monies for economic development are constitutional, even though such expenditures may yield financial gain for private participants, provided that the motivation for the expenditure is a public benefit. *Maready* at 724, 467 S.E.2d at 625. Using this analysis, our appellate courts have approved incentives benefiting the Charlotte Hornets basketball team and its owners (*Peacock v. Shinn*, 139 N.C. App. 487, 494, 533 S.E.2d 842, 847, *disc. rev. denied*, 353 N.C. 267, 546 S.E.2d 110 (2000)), the use of public monies for land acquisition activities related to the construction of a Federal Express facility (*Triad Airport Auth. v. Urbine*, 354 N.C. 336, 343, 554 S.E.2d 331, 335 (2001), *cert. denied*, 535 U.S. 971, 152 L.Ed.2d 381 (2002)), and, most recently, state and local incentives offered to Dell Corporation for the construction of a manufacturing

plant. (*Blinson, supra.*) As is clear from the aforementioned precedents, this Court is compelled to conclude that the incentives offered to Google and those similarly situated, as a matter of law, benefit the public generally and as such, meet the second prong of the *Maready* test.

It is not the role of the courts to engage in normative debates concerning whether the incentives offered to Google and other similarly situated are an effective, expedient or wise use of the public's money. "The task of the judiciary is to determine whether the aim of the legislation is primarily public and not to weigh the public benefit against private benefit. . . . We do not pass upon the wisdom or propriety of legislation in determining the primary motivation behind a statute, or engage in economic projections as to the potential monetary benefits resulting from the incentives offered. . . . The latter analyses are for the General Assembly and Executive Branch." *Blinson*, 651 S.E.2d at 277-78.

In summary, the North Carolina Supreme Court has established in *Maready* an unambiguous framework for reviewing the constitutionality of incentive legislation such as the legislation at issue. In applying that framework to other incentive packages, including incentives that this Court finds, from a legal point of view, to be virtually indistinguishable from those offered to Google, (*i.e.* the Dell incentives considered in *Blinson, supra.*) our courts have repeatedly concluded that such incentives do not violate the Public Purpose Clause of the N.C. Constitution. This Court reaches the same conclusion, and hence, the Plaintiff's claims for relief 4, 5, 6, 9 and 10 are DISMISSED for failing to state a claim upon which legal relief could be granted.

III. Claims Arising under the Exclusive Emoluments Clause

In Claims for Relief 1, 2 and 3 of the Complaint, Plaintiffs challenge the incentives offered to Google and other similarly situated under the Exclusive Emoluments Clause of the North Carolina Constitution. Article I, Section 32 says: “No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.”

The North Carolina Supreme Court has held that not every classification that favors a particular group of persons is an exclusive or separate emolument or privilege. *Town of Emerald Isle v. State*, 320 N.C. 640, 652, 360 S.E.2d 756, 764 (1987), cited by *Blinson*, 651 S.E.2d at 278. 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.*

Moreover, our Courts have held that where an incentive has been determined to “promote the public benefit” under the Public Purpose Clause, it necessarily is not an exclusive emolument. *Blinson*, 651 S.E.2d at 278, citing *Peacock v. Shimm*, 139 N.C. App. at 496, 533 S.E.2d at 878 (emphasis added). As discussed above, this Court has already concluded that the incentives offered to Google and others similarly situated do, as a matter of law, comport with the Public Purpose Clause. As such, this Court must necessarily conclude that the incentives do not violate the Exclusive Emoluments Clause of the N.C. Constitution. Plaintiffs’ Claims for Relief 1, 2 and 3 are DISMISSED for failing to state a claim upon which relief can be granted.

IV. Claims Asserting a Deprivation of Personal Rights and Discrimination Type Claims

In Claims for Relief 7, Plaintiffs allege that the incentives offered to Google and other similarly situated are contrary to Article V, Section 2(1) of the N.C. Constitution, which requires that the taxing power “be exercised in a just and equitable manner.” In Claim for Relief 8, Plaintiffs allege a violation of the uniformity of taxation clause of Article V, Section 2(2) of the Constitution. In Claim for Relief 11, Plaintiffs allege a violation of the “law of the land” clause of Article I, Section 19 of the Constitution. With respect to each of these causes of action, which each assert a deprivation of personal rights or discrimination-type claim, the Plaintiffs must first establish that they have standing to bring the claims.¹

Essential to a court’s jurisdiction over any claim, including one brought for a declaratory judgment, is “an actual or real existing controversy between parties having adverse interests in the matter in dispute.” *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984). The Plaintiffs have the burden of proving that standing exists. *American Woodland Indus. v. Tolson*, 155 N.C. App. 624, 627, 574 S.E.2d 55, 57 (2002), *disc. rev. denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). In this instance, the Plaintiffs, in order to prove standing to bring these personal rights and discrimination-type claims, must demonstrate that they suffered or will suffer and “injury in fact” specifically with regard to each of these claims. *Neuse River Found., Inc. v.*

¹ Defendants concede that Plaintiffs have standing to bring their claims under the Public Purpose and the Exclusive Emoluments Clauses of the N.C. Constitution in light of the recent decisions in *Goldston v. State*, 361 N.C. 26, 637 S.E.2d 876 (2006) and *Blinson v. State*, 186 N.C. App. 328, 651 S.E.2d 268 (2007), *app. dismissed and rev. den.*, 362 N.C. 355, 661 S.E.2d 241 (2008).

Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002), *disc. rev. den.* 356 N.C. 675, 577 S.E.2d 628 (2003). Standing depends upon whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete awareness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006).

“A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation.” *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969). The general 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. *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 484, 539 S.E.2d 380, 381 (2000); *In re Appeal of Barbour*, 112 N.C. App. 368, 373, 436 S.E.2d 169, 173 (1993) (holding that taxpayer-plaintiff “attacking [a] statute [as] discriminatory . . . has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.”) When the class which includes the party complaining is in no manner prejudiced, it is immaterial whether a law discriminates against other classes or denies to other persons equal protection of law. *State v. Trantham*, 230 N.C. 641, 644, 55 S.E.2d 198, 200-01 (1949). This same rationale applies equally to claims brought under the “just and equitable” clause of the N.C. Constitution (Article V, Section 2(1)) and the “law of the land” clause (Article I, Section 19) because, in each instance, just as in the discrimination-type claim, the Plaintiffs must be able to show that *their* group is being unfairly harmed or *their* due process has been violated.

In *Blinson*, in evaluating similar deprivation of personal rights and discrimination-type challenges to the Dell incentives, the Court reached the conclusion that the plaintiffs in that case could not point to any injury that they themselves would sustain. Rather, plaintiffs' claims pertained only to "a theoretical injury that might be suffered by other businesses that may attempt to compete with Dell." *Blinson*, 651 S.E.2d at 274. The plaintiffs lacked any "personal stake in the outcome of the controversy." *Id.*

In the instant matter, Plaintiffs allege that they are individual taxpayers, not manufacturers or businesses in competition with Google. Their complaint alleges no specific injury in fact that they themselves have suffered or will suffer, or any deprivations of rights guaranteed to them. The fact that the Plaintiffs, as citizens, may suffer an increased tax burden as a result of incentives obtained by Google, or that Plaintiffs pay sales tax or ad valorem taxes, is insufficient, as a matter of law, to create standing for these causes of action. *Blinson*, 651 S.E.2d at 273-74. As such, this Court is must conclude, as did the *Blinson* court, that Plaintiffs have not demonstrated that they belong to a class that is prejudiced by the operation of this incentive legislation and the award of the JDIG grant. Thus, the Plaintiffs lack standing to bring claims for relief under Article V, Section 2(1), Section 2(2) or Article I, Section 19 of the N.C. Constitution. Because the Plaintiffs lack standing, the Court lacks jurisdiction to hear these claims. Plaintiffs' claims for relief 7, 8 and 11 are therefore DISMISSED pursuant to North Carolina Rule of Civil Procedure 12(b)(1).

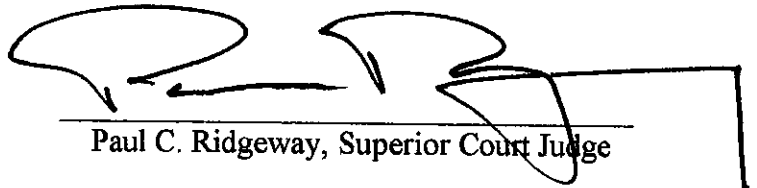
V. Claim for Declaratory Relief

Finally, Plaintiffs' 12th Claim for Relief seeks merely the remedy of a declaratory judgment. Because each of the bases for the judgment that Plaintiffs seek have been considered and dismissed above, this 12th Claim for Relief must also be DISMISSED.

CONCLUSION

For the reasons set forth above, each of the Plaintiffs' claims, namely the claims numbered 1 through 12 of the Complaint, are DISMISSED as to all Defendants pursuant to North Carolina Rule of Civil Procedure 12(b)(6) or, in the case of Claims for Relief 7, 8 and 11, Rule 12(b)(1).

Ordered this the 14th day of November, 2008.



Paul C. Ridgeway, Superior Court Judge

Certificate of Service

The undersigned certifies that on the date set forth below, the attached Order and Memorandum of Decision was served by depositing the same in the custody of the United States Postal Service, first class postage prepaid, address to all parties as follows:

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This the 14th day of November, 2008