Coates' Canons Blog: Did the NC Supreme Court put cash economic development incentives in jeopardy?

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Cash economic development incentives are widely used by local governments to induce companies to locate in their jurisdictions. A 2006 survey indicated that more than 40% of North Carolina local governments employ cash incentives for business recruitment. And yet, no statute contains language specifically authorizing cash incentive payments. G.S. 158-7.1 (b) contains a rather comprehensive list of activities in which local governments may engage for economic development, but cash incentives are not found on that list. Rather, authority for cash incentives is derived from a general grant of authority for making appropriations for economic development found in G.S. 158-7.1(a). In other words, the authority to offer cash incentives is *implied* from a general grant of authority. But what happens when the North Carolina Supreme Court becomes reluctant to find implied authority?

That is what happened in the North Carolina Supreme Court's decision in Lanvale Properties v. County of Cabarrus, 731 S.E.2d 800 (2012), which has been discussed in prior posts here and here. In the *Lanvale* case, Cabarrus County enacted an adequate public facilities ordinance (APFO) to address the provision of schools in the county. Although no statute contains language specifically authorizing such an APFO, the county argued that zoning statutes (G.S. 153A-340 and G.S. 153A-341) convey "implied authority" to the county for an APFO; indeed, G.S. 153A-341 describes broad public purposes to be addressed by county zoning, to include "the efficient and adequate provision of transportation, water, sewerage, schools … and other public requirements." The county urged the court to apply G.S. 153A-4, which provides (1) that statutes in G.S. Chapter 153A "shall be broadly construed" and (2) that "grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power." [Note: municipalities have a similar statute, G.S. 160A-4; together G.S. 153A-4 and G.S. 160A-4 will be referred to in this post as the "broad construction statutes"].

The majority of justices in *Lanvale*, however, declined to apply G.S. 153A-4's rule of broad construction. They viewed G.S. 153A-4 as "a rule of statutory construction rather than a general directive to give our general zoning statutes the broadest construction possible." According to the majority opinion, G.S. 153A-4's rule of broad construction should be applied only when "statutes are ambiguous." The majority determined that the zoning statutes in question were not ambiguous, therefore obviating the need to apply G.S. 153A-4.

The majority then proceeded to analyze the plain meaning of the zoning statutes (without applying G.S. 153A-4), but in doing so, the majority never directly addressed the sweeping language in G.S. 153A-341 regarding the "provision of … schools … and other public requirements." The court ultimately concluded there was no implied authority for the county's APFO.

This case has three possible implications for cash economic development incentives:

First, just as county zoning statutes contain no specific language authorizing an APFO, likewise there is no statutory language that specifically authorizes the payment of cash incentives for business recruitment. *Lanvale* found no authority for an APFO. Could the same thing happen to cash incentives?

Second, the county in *Lanvale* argued (unsuccessfully) that authority for its APFO was implied from the general zoning power granted by G.S. 153A-340 and the sweeping purpose language of G.S. 153A-341. This is similar to the argument for cash incentives that authority is implied from G.S. 158-7.1(a)'s general grant of authority, which itself contains sweeping language about the purposes to be achieved by economic development. *Lanvale* ignored the sweeping purpose language in the zoning statutes. Could a court likewise ignore the sweeping purpose language in G.S. 158-7.1?

Third, the seminal North Carolina case on economic development, *Maready v. City of Winston-Salem*, 342 N.C. 708 (1996), took a completely different approach in applying the broad construction statutes to cash incentives. The *Maready* court determined that G.S. 158-7.1 was not unconstitutionally "ambiguous," but it nevertheless applied the broad construction statutes. Indeed, the court read G.S. 158-7.1 *together* with the broad construction statutes to conclude that "[t]hese provisions evince an evident legislative purpose to give local governments considerable flexibility and discretion to execute the perceived public purpose of economic development…." In stark contrast, the court in *Lanvale* has suggested that it will decline to apply the rule of broad construction to a statute that is not ambiguous. Could a court therefore decline to apply the broad construction statutes in the economic development context?

The three points above call into question whether the 2012 *Lanvale* court would have upheld incentives as the 1996 *Maready* court did. While the similarities between economic development incentives and the APFO in *Lanvale* could be cause for concern, there are several reasons to think that the court's pronouncements in *Lanvale* will not undermine the authority of local governments to offer cash economic development incentives pursuant to G.S. 158-7.1.

First and foremost, *Maready* remains good law. The majority in *Lanvale* acknowledged that its application of the broad construction statutes in the zoning context has been "inconsistent," but it did not discuss economic development and it did not overrule *Maready*. Indeed, *Maready* was not mentioned by the majority at all.

Second, as my colleague David Owens suggests in his post here, an important point in *Lanvale* is that "For a tax or fee … specific statutory authority is necessary." Cash economic development incentives do not involve the imposition of a tax or fee. While it is typical for local governments to require a cash incentive recipient to create jobs and make a capital investment, those requirements are imposed through a contractual arrangement, not as a tax or fee. This difference offers a way to distinguish the holding in *Lanvale* from the typical situation for cash incentives, thereby suggesting that *Lanvale* might not apply in the cash incentive context.

Third, while the majority in *Lanvale* did suggest at one point that the call for broad construction "is a rule of statutory construction" to be applied "only when statutes are ambiguous," the majority opinion also appeared to leave an opening for an important distinction between two parts of the broad construction statutes: one part pertaining to construction of unclear statutory provisions and a *separate* part pertaining to implied authority. That is, the *Lanvale* majority stated that the broad construction rule applies in two circumstances: one, "when our zoning statutes are ambiguous," and two, "when its application is necessary to give effect to 'any powers that are reasonably expedient to [a local government's] exercise of the power.'" In making this distinction, perhaps the court is recognizing that *ambiguity,* which requires a court to apply rules of statutory construction, is different from a broad or *general grant of authority*. A general grant of authority can have a plain meaning that is fairly straightforward and unambiguous—as the *Maready* court found in the case of G.S. 158-7.1—but packed within that general grant of authority may be a host of implied powers. My colleague Frayda Bluestein makes a similar argument in her blog post here. Perhaps this distinction can help us square *Maready*'s treatment of the broad construction statutes with the treatment of them in *Lanvale.*

This last point may be particularly important in the case of cash economic development incentives. G.S. 158-7.1 is a general grant of authority that is packed with implied powers, one of which is the authority to offer cash incentives. G.S. 158-7.1 doesn't mention cash incentives specifically, but it shouldn't have to. The broad construction statutes take care of that by unambiguously stating that whenever a general grant of authority is made, the legislature has explicitly granted—through the broad construction statutes—all of the implied powers as well.

[This post originally appeared on the School of Government Community Economic Development Blog]

Links

- sogpubs.unc.edu/electronicversions/pdfs/rolelocalgoved09.pdf?
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=158-7.1
- canons.sog.unc.edu/?p=6882#more-6882
- canons.sog.unc.edu/?p=6894

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-4
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