
Coates' Canons Blog: Is Interstate Competition Required for Economic Development Incentives?

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Article: <https://canons.sog.unc.edu/is-interstate-competition-required-for-economic-development-incentives/>

This entry was posted on March 15, 2011 and is filed under Community & Economic Development, Economic Development

A company's sole facility has been located in North Carolina for the past decade, but the company recently decided to move its facility to a new location in order to expand its operations. It has three choices: (1) move to an available facility in the same county in which it is currently located, (2) move to an available facility in the county next door, which is another North Carolina county, or (3) move out of state. The company's executives determine that moving out of state is not advantageous for the company, so the search is narrowed to the two counties in North Carolina. The company approaches each of the two counties and requests incentives. With no out-of-state competitor in the picture, may the two North Carolina counties offer incentives to the company pursuant to **G.S. 158-7.1**?

This is essentially the situation that plaintiffs presented to the North Carolina Court of Appeals in a case decided at the end of 2010, **Haugh v. County of Durham**. In that case, a company was purportedly lured from Wake County to Durham with the promise of incentives. Plaintiffs asked the court whether it serves a public purpose for one North Carolina county to use incentives to induce a company to relocate from another county in North Carolina. Before we get to the court's answer, let's review what prior courts have said about the importance of interstate competition in determining whether local government incentives pursuant to G.S. 158-7.1 serve a public purpose.

Maready v. City of Winston-Salem

The seminal case dealing with North Carolina local government incentives is the 1996 North Carolina Supreme Court case, *Maready v. City of Winston-Salem*. In cases prior to *Maready*, aid to private corporations (including location inducements) had been determined to be unconstitutional. In *Maready*, however, the state supreme court opened up a narrow exception. After watching North Carolina lose manufacturing facilities to other states, the court decided that local government incentives for private companies serve a public purpose because they generate a "net public benefit" by creating jobs and increasing the tax base "which might otherwise be lost to other states." [2013 UPDATE: See subsequent blog post, *When May NC Local Governments Pay an Economic Development Incentive?*]

The issue of interstate competition figured prominently in the court's analysis of public purpose. The majority noted that "the pressure to induce responsible corporate citizens to relocate to or expand in North Carolina is not internal only, but results from the actions of other states as well." The majority was concerned that North Carolina was one of only a few states at the time that had not yet authorized economic development incentives and believed "it would be unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to N.C.G.S. § 158-7.1 are discontinued." With this context in mind, the majority explicitly referred to interstate competition in its public purpose analysis, stating that the "potential impetus to economic development [from new and expanded industries], *which might otherwise be lost to other states*, likewise serves the public interest" (emphasis added). The court never clarified, however, whether interstate competition was required in order for incentives to serve a public purpose.

Blinson v. State

About a decade later, a case challenging incentives offered to Dell Inc. made its way to the North Carolina Court of Appeals. The outcome of the case did not turn on interstate competition, but the court quoted some of the passages from *Maready* mentioned above and characterized *Maready's* holding in terms that highlight interstate competition: "the Supreme Court held in *Maready* that economic incentives to *recruit business to North Carolina* involve a proper public purpose...." The court was unable to find a "meaningful distinction" between the local government incentives at issue in *Maready* and those offered to Dell, so Dell's incentives were upheld. The point is not the disposition of this case, but the fact that the Court of Appeals appeared to understand the holding in *Maready* as being, in part, about interstate

competition.

Haugh v. County of Durham

With that background, we can return to *Haugh*, where the plaintiffs attempted to challenge “an incentive for a wholly intrastate relocation.” The fundamental question before the Court of Appeals was whether the absence of interstate competition undermined the public purpose of an economic development incentive. Given the case law described above, it seems that the court had sufficient precedent upon which to rely to make a determination—if it had wanted to do so—that the presence of interstate competition is required for an incentive to serve a public purpose. However, the court was unable to reach that question, because the facts didn’t cooperate. As it turns out, the company in *Haugh* was indeed considering an out-of-state location (California), so the case did in fact involve interstate competition.

As the court put it, plaintiffs attempted to frame this case as “a novel case of intrastate competition between adjacent counties.” However, the company’s exploration of a site in California undermined this framing and persuaded the court that the case was “not solely one of intrastate competition between Wake County and Durham.” With the factual scenario reframed, the court found that the incentives fit “squarely within the purview of holdings that we are not at liberty to revisit.” In other words, this incentive is just like all the others the courts have evaluated over the years, so the court was bound by precedent to uphold it.

However, it wouldn’t be fair to suggest that we learned nothing from *Haugh*. The Court of Appeals could have said, “Even if the case before us involved wholly intrastate competition between two North Carolina counties, our determination would be the same, because the presence of interstate competition is not required in order to find that an incentive serves a public purpose.” But the court didn’t say that. Rather, it reiterated the statements from prior case law about interstate competition without qualification, suggesting that the presence of interstate competition is—or remains—a factor in determining the public purpose of an economic development incentive.

Constitutional Public Purpose Analysis Trumps Statutory Authority

A final point must be made about statutory authority, because a potential contradiction can be found in North Carolina’s public records statutes. G.S. 132-6(d) specifically permits a local government to withhold records pertaining to a company’s recruitment when the company has not yet selected a city or county but has announced it will be coming to North Carolina. This implies that North Carolina statutes permit “wholly intrastate competition,” and it is difficult to argue with that assessment of the statutory authority. G.S. 158-7.1, after all, contains no interstate competition requirement. However, statutory authority will not cure a constitutional defect if, for example, a future court decides that local government incentives lose their public purpose in the absence of competition with other states.

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=158-7.1
- appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS0xNjctMS5wZGY=
- canons.sog.unc.edu/when-may-nc-local-governments-pay-an-economic-development-incentive/