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Economic Development Incentives and North Carolina Local Governments: A Framework for Analysis

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ECONOMIC DEVELOPMENT INCENTIVES AND NORTH CAROLINA LOCAL GOVERNMENTS: A FRAMEWORK FOR ANALYSIS*

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INTRODUCTION

In pursuit of jobs and new tax revenue, it has become commonplace for North Carolina local governments to make incentive payments to private companies.[1] The incentive payments are meant to induce companies to locate facilities and operations—with their accompanying jobs and capital investment—in the granting government's jurisdiction. One survey "indicated that more than 40% of North Carolina local governments employ cash incentives for

1. *See* Jonathan Q. Morgan, *Using Economic Development Incentives: For Better or for Worse*, POPULAR GOV'T, Winter 2009, at 17–20.

business recruitment."[2] Nationwide, state and local governments pour upwards of $80 billion annually into this effort.[3] North Carolina is estimated to spend $660 million on incentives per year.[4]

In the typical local government cash incentive arrangement, a grantor local government offers a cash grant or series of annual cash grants to a company.[5] In exchange, the company agrees to create jobs and make a capital investment (usually by constructing a building or other facility and installing machinery and equipment) that increases the local government's tax base.[6] The total amount of the cash grants is usually less than the property taxes to be paid by the company over the term of the agreement, thus ensuring that the local government realizes some net gain in tax revenue.[7] No grants are paid until the local government verifies that the company has fulfilled its job creation and capital investment obligations under the agreement.[8]

These incentive grants are commonly paid directly to a private company and, therefore, are distinct from more general expenditures related to economic development, such as investing in public

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2. Tyler Mulligan, *Did the NC Supreme Court Put Cash Economic Development Incentives in Jeopardy?*, COMMUNITY & ECON. DEV. IN N.C. & BEYOND (Dec. 18, 2012), http://ced.sog.unc.edu/?p=4358; *see generally* JONATHAN Q. MORGAN, THE ROLE OF LOCAL GOVERNMENT IN ECONOMIC DEVELOPMENT: SURVEY FINDINGS FROM NORTH CAROLINA 5 (2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/rolelocalgoved09.pdf (providing survey data from North Carolina local governments and detailing staff capacity and economic development targets within jurisdictions).

3. *See* Louise Story, *The Empty Promise of Tax Incentives*, N.Y. TIMES, Dec. 2, 2012, at A1; *see also* Marcia Clemmitt, *Attracting Jobs: Do Tax Breaks for Businesses Spur Employment?*, 22 CQ RESEARCHER 205, 205 (2012) (describing and estimating the amount of economic development incentives paid by state and local governments nationwide).

4. *See How Do North Carolina Tax Incentives Stack Up Nationally?*, UNDER THE DOME BLOG (Dec. 4, 2012, 10:10 AM), http://projects.newsobserver.com/node/26488.

5. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 619 (1996).

6. *See id.*; *see also* DAVID M. LAWRENCE, ECONOMIC DEVELOPMENT LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS 14 (2000) (explaining that some local governments offer incentive grants to companies that agree to invest in "a new facility or the expansion of an existing facility").

7. *See Maready*, 342 N.C. at 713, 467 S.E.2d at 619; *see also* LAWRENCE, *supra* note 6, at 14 (describing local government incentive policies that "approach tax abatements in effect" by tying "the amount of the cash grant specifically to the amount of property taxes paid by the company").

8. *See Maready*, 342 N.C. at 713, 467 S.E.2d at 619; *see also* LAWRENCE, *supra* note 6, at 14 ("These policies do not entitle companies to these grants. Rather they set out the minimum criteria for receiving grants . . . with factors other than investment playing a role in whether a grant is made and how large it is. These factors include the number of jobs created by the investment, the types of jobs created, the potential for further investment by the company, the demands the company will place on public infrastructure, and so on.").

infrastructure, providing supportive services to local entrepreneurs and startup companies, marketing the assets of a particular jurisdiction, and hiring professional staff to coordinate economic development activities.[9] The fact that incentives are, by design, payments to a single private company, rather than expenditures for projects of general benefit,[10] has been the subject of legal challenges claiming that incentives primarily benefit the private recipient and, therefore, fail to serve a public purpose.[11]

Starting in 1996, North Carolina courts have turned back challenges to local government incentives, beginning with the landmark case of *Maready v. City of Winston-Salem*.[12] In *Maready*, the Supreme Court of North Carolina considered a challenge to "twenty-four economic development incentive projects" involving payments by Forsyth County or the City of Winston-Salem to private companies to induce those companies to locate facilities and jobs in those jurisdictions.[13] The "projected investment by the City and County in these projects totaled approximately $13,200,000" in exchange for an estimated "increase in the local tax base of $238,593,000 and a projected creation of over 5,500 new jobs."[14] Plaintiffs challenged the incentives on the basis that the General Statutes of North Carolina ("G.S.") § 158-7.1, "which authorizes local governments to make economic development incentive grants to private corporations, is unconstitutional because it violates the public purpose clause of the North Carolina Constitution."[15] In analysis that will be reviewed in greater detail later in this Article, the majority held that G.S. 158-7.1 "does not violate the public purpose clause of the North Carolina Constitution."[16]

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9. *See* LAWRENCE, *supra* note 6, at 39–50.

10. Advertising the benefits of locating in a jurisdiction to prospective companies is an example of an economic development expenditure for general benefit. *See, e.g.*, Dennis v. City of Raleigh, 253 N.C. 400, 405, 116 S.E.2d 923, 927 (1960) ("The appropriation authorized by the charter provision is for advertising to promote the public interest and general welfare of the City. The resolution of the Raleigh City Council contains no suggestion that the fund will be expended for any other purpose. There is no allegation that the contemplated advertising is for the purpose of promoting private business or property interests. Absent an attack on such ground, it must be assumed that no expenditure will be approved by the Raleigh City Council unless it be within the authority granted by the charter provision. The court below held the appropriation was for a public purpose. We agree.").

11. *See infra* Part II.B.

12. 342 N.C. 708, 467 S.E.2d 615 (1996).

13. *Id.* at 713, 467 S.E.2d at 618–19.

14. *Id.* at 713, 467 S.E.2d at 619.

15. *Id.* at 712, 467 S.E.2d at 618.

16. *Id.* at 727, 467 S.E.2d at 627; *see infra* Part II.B.

Since *Maready*, two North Carolina Court of Appeals cases, *Blinson v. State*[17] and *Haugh v. County of Durham*,[18] have upheld local government cash inducements and other incentives for industrial recruitment under G.S. 158-7.1 that were deemed "parallel" to the incentives approved in *Maready*.[19] However, these cases dealt only with incentives that were indistinguishable from the incentives at issue in *Maready*[20]—what this Article refers to as the "classic" incentive scenario: inducements for major facilities in which the public benefit consists of significant capital investment by the company and the creation of a substantial number of jobs. *Maready* settled the matter on cash incentives in this "classic" context, stating they were permissible.[21] But what about other incentive requests from business entities that do not fit this classic mold? The classic industrial employer is not the only private actor clamoring for incentives today; local governments now occasionally field incentives requests from real estate developers and retail operations.[22] The task of evaluating vastly different incentive requests is further complicated by the existence of several unconnected sources of statutory authority for development incentives—such as economic development,[23] community development,[24] urban redevelopment,[25] and municipal service districts for downtown revitalization and urban revitalization[26]—each with its own set of purposes and limitations.

To help local governments determine which incentives rest on a solid legal foundation and which are questionable, this Article takes stock of the statutory amendments and case law since *Maready* in

17. 186 N.C. App. 328, 651 S.E.2d 268 (2007).

18. 208 N.C. App. 304, 702 S.E.2d 814 (2010).

19. *See id.* at 319, 702 S.E.2d at 824 ("Incentives parallel to those at issue already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent.").

20. *See Blinson*, 186 N.C. App. at 338, 651 S.E.2d at 276 ("In the absence of a showing of some distinction between the incentives in this case and the incentives in the *Maready* case, we hold that the trial court properly concluded that the County and City Resolutions and the Agreement did not violate the Public Purpose Clauses.").

21. *Maready*, 342 N.C. at 727, 729–30, 467 S.E.2d at 627–28.

22. For hypothetical scenarios derived from the author's experience, see Tyler Mulligan, *Local Government Assistance for a Real Estate Development Project—Without Making a Grant*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Sept. 18, 2012, 11:17 AM), http://canons.sog.unc.edu/?p=6848 [hereinafter Mulligan, *Local Government Assistance*]; Tyler Mulligan, *Cash Economic Development Incentives for Capital Investment Alone? Think Twice.*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Sept. 21, 2010, 2:09 PM), http://canons.sog.unc.edu/?p=3198.

23. N.C. GEN. STAT. § 158-7.1 (2011).

24. *Id.* §§ 153A-376 (counties), 160A-456 (cities).

25. *Id.* §§ 160A-500 to 534.

26. *Id.* § 160A-536.

order to develop a consistent framework for analyzing incentive requests by private companies.[27] The framework will be evaluated and constructed along three dimensions: allowable means for incentives, required consideration for incentives, and procedural requirements for approval of incentives.

In building and explaining the framework, this Article proceeds in four parts. Part I describes the most commonly used statutory authority for cash incentives, G.S. 158-7.1, and categorizes the key statutory provisions along the three dimensions of the framework—means, consideration, and procedural requirements. Part II then examines the public purpose analysis found in *Maready* to determine the outer bounds of permissible economic development incentives under G.S. 158-7.1 along the same three dimensions. Part III combines the analyses of the previous two sections into a single framework for analyzing economic development incentives under G.S. 158-7.1. Part IV applies the developed framework to two hypothetical, but common incentive scenarios. This application reveals that G.S. 158-7.1 is constrained and cannot be used by local governments to offer cash incentives in every economic development scenario. However, other sources of statutory authority can be employed, and two alternatives are described in Part IV's conclusion. This Article provides a clearer understanding of local government authority to offer development incentives to private entities in a wide variety of contexts using several different sources of statutory authority.

Before proceeding further, it must be acknowledged that the practice of offering incentives remains highly controversial in law and policy circles. It has been almost two decades since the Supreme Court of North Carolina affirmed the legality of incentives in *Maready*, but, today, incentives continue to be the subject of litigation,[28] analysis,[29] and controversy[30] in the state. This Article

27. Professor David Lawrence wrote the most comprehensive text on North Carolina economic development law since *Maready*. *See* LAWRENCE, *supra* note 6. It predates the addition of subsection (h) to G.S. 158-7.1. *See* Act of Aug. 30, 2007, ch. 515, § 7, 2007 N.C. Sess. Laws 1657, 1660 (codified as amended at N.C. GEN. STAT. § 158-7.1(h) (2011)). His text also predates *Blinson* and *Haugh*.

28. *See, e.g.*, Haugh v. Cnty. of Durham, 208 N.C. App. 304, 702 S.E.2d 814 (2010); Blinson v. State, 186 N.C. App. 328, 651 S.E.2d 268 (2007); Rochelle Moore, *Sanderson Farms Nixes Nash County Poultry Plant*, KINSTON.COM (Nov. 14, 2012, 8:44 PM), http://www.kinston.com/news/local/sanderson-farms-nixes-nash-county-poultry-plant-1.49812.

29. *See, e.g.*, Jeanette K. Doran, *The People Versus Corporate Welfare: North Carolina's Forsaken Opportunity to Reverse Perversion of the Commerce Clause and to Reinvigorate the Public Purpose Doctrine*, 33 CAMPBELL L. REV. 381, 383 (2011) ("[T]his

places the ongoing debate about incentives to the side in order to provide useful analysis to local governments that choose to engage in the practice of offering economic development incentives.

I. EXPLORING THE LIMITS OF SECTION 158-7.1

Our exploration of economic development incentives begins with the authorizing statute, G.S. 158-7.1, which was the focus of *Maready*. Section A of this Part describes the central importance of the statutory grants of authority to North Carolina local governments in determining what activities those governments may undertake. Section B then narrows the focus to G.S. 158-7.1, breaking that particular statutory grant of authority down into its component parts and describing each major element. Section C concludes Part I by organizing the major components of G.S. 158-7.1 along the three dimensions of this Article's proposed framework for analyzing economic development incentives: means, consideration, and procedural requirements.

A. *The Importance of Statutory Grants of Authority for North Carolina Local Governments*

Local governments in North Carolina derive all their powers from delegation by the State.[31] The North Carolina Constitution

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Article is calculated to recognize the efforts of taxpayers who have resorted to the very constitutional rights afforded to them as citizens and taxpayers to challenge governmental acts which are repugnant to the very foundations of our society and to encourage the judiciary to fulfill its duty to reject legislation which is contrary to the state or federal constitution."); Sherry L. Jarrell et al., *Economic Development Incentives and the Legal and Economic Issues of Open Versus Sealed Bids*, 7 S.C. J. INT'L L. & BUS. 227, 227 (2011); Jason Jolley, Patrick McHugh & Dianne Reid, *Incentives 2.0*, 10 ECON. DEV. J. 28, 28–35 (2011); Anne C. Choe, Recent Development, Blinson v. State *and the Continued Erosion of the Public Purpose Doctrine in North Carolina*, 87 N.C. L. REV. 644, 645 (2009) ("Robert F. Orr, a former Justice of the Supreme Court of North Carolina, representing the North Carolina Institute for Constitutional Law, challenged the incentives given to Dell to build a manufacturing plant near Winston-Salem.").

30. *See, e.g.*, Richard Craver, *Incentives: Beneficial or Bluffs?*, WINSTON-SALEM J., July 1, 2012, at A1; T. William Lester, Nichola J. Lowe & Allan M. Freyer, *Mediated Incentives: Making North Carolina's Economic Development Incentive Programs Work Better Through Strategic Investments*, 18 BTC REP. 1, 2 (Oct. 2012), *available at* http://www.ncjustice.org/sites/default/files/BTC%20Reports%20-%20Mediated%20Incentives_0.pdf; Story, *supra* note 3; *How Do North Carolina Tax Incentives Stack Up Nationally?*, *supra* note 4.

31. For a discussion of municipal authority and its evolution in North Carolina, see Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1989–90 (2006); *see also* David Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform and the Current*

states: "The General Assembly . . . may give such powers and duties to counties, cities, and towns, and other governmental subdivisions as it may deem advisable."[32] Thus, North Carolina local governments are "creatures of legislative benevolence—not constitutional mandate."[33] It is therefore necessary to identify a grant of statutory authority for all activities undertaken by North Carolina local governments.

A grant of authority can be general in nature and need not delineate every permissible activity. Every statutory grant of power to local governments also includes a parallel grant of implied powers "to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect."[34] This grant of implied powers is stated explicitly in G.S. 153A-4, pertaining to counties, and G.S. 160A-4, pertaining to municipalities. Due to the relationship between G.S. 153A-4 and G.S. 160A-4 (the "broad construction statutes") and local government authority under G.S. 158-7.1, described immediately below, the broad construction statutes warrant further explanation.

Each of the broad construction statutes contains two elements: (1) an explicit grant of implied powers just described in the previous paragraph,[35] and (2) a rule of statutory construction to be applied by courts when interpreting provisions of charters and statutes.[36] In

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State of Affairs in North Carolina, 35 WAKE FOREST L. REV. 671, 680–700 (2000) (describing the evolution of municipal authority in North Carolina).

32. N.C. CONST. art. VII, § 1.

33. Graham Cnty. Bd. of Elections v. Graham Cnty. Bd. of Comm'rs, 212 N.C. App. 313, 317, 712 S.E.2d 372, 376 (2011) (internal quotation marks omitted); *see also* A. Fleming Bell, II, *Article 4: The Police Power*, *in* COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA 1, 2 (2007), *available at* www.sog.unc.edu/pubs/cmg/cmg04.pdf ("North Carolina is not a 'home rule' state, as that term is commonly understood. Its local governments exist by legislative benevolence, not by constitutional mandate."); Tyler Mulligan, *Toward a Comprehensive Program for Regulating Vacant or Abandoned Dwellings in North Carolina: The General Police Power, Minimum Housing Standards, and Vacant Property Registration*, 32 CAMPBELL L. REV. 1, 12 (2009) ("In North Carolina, local governments are creatures of legislative benevolence—not constitutional mandate.").

34. N.C. GEN. STAT. § 160A-4 (2011); *see also id.* § 153A-4 ("To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power.").

35. *Id.* § 153A-4 ("[G]rants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power."); *id.* § 160A-4 ("[G]rants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect . . . .").

36. *Id.* § 153A-4 ("[T]he provisions of this Chapter and of local acts shall be broadly construed . . . ."); *id.* § 160A-4 ("[T]he provisions of this Chapter and of city charters shall be broadly construed . . . .").

Homebuilders Ass'n of Charlotte v. City of Charlotte,[37] the Supreme Court of North Carolina relied on the broad construction statutes to uphold the city's authority to impose user fees for a variety of city services, even though the city had no express statutory authority to impose them.[38]

In *Maready*, the Supreme Court of North Carolina likewise referred to the broad construction statutes when it identified in G.S. 158-7.1 a "legislative purpose to give local governments considerable flexibility and discretion to execute the perceived public purpose of economic development."[39] This determination in *Maready* has not been overruled, but recent court decisions have created uncertainty about the role of the broad construction statutes and, therefore, merit brief mention here.[40]

Lanvale Properties, LLC v. County of Cabarrus,[41] a 2012 Supreme Court of North Carolina case, involved a dispute over local government authority to enact an adequate public facilities ordinance ("APFO").[42] An APFO uses local government zoning and land use powers to tie approval of a particular development to the existence of public facilities that are necessary to service the proposed development.[43] In *Lanvale,* the court declined to find implied authority for an APFO within a county's general grant of authority for zoning.[44] The county urged the court to find authority by applying the applicable broad construction statute, but the majority declined to do so, describing G.S. 153A-4 as "a rule of statutory construction rather than a general directive to give our general zoning statutes the

37. 336 N.C. 37, 442 S.E.2d 45 (1994).

38. *Id.* at 42, 442 S.E.2d at 49 ("The generally accepted rule today seems to be that the municipal power to regulate an activity implies the power to impose a fee in an amount sufficient to cover the cost of regulation."); *see also* Maready v. City of Winston-Salem, 342 N.C. 708, 729, 467 S.E.2d 615, 628 (1996) ("In *Homebuilders Ass'n of Charlotte v. City of Charlotte*, this Court applied the broad rule of construction in [G.S.] 160A-4 in holding that the City of Charlotte possessed the authority and discretion to charge user fees for regulatory services *even though there was no express statutory authority therefor.*" (emphasis added) (citations omitted)).

39. *Maready*, 342 N.C. at 729, 467 S.E.2d at 628–29.

40. For further analysis of the uncertainty surrounding the broad construction statutes, see Mulligan, *supra* note 2.

41. 336 N.C. 142, 731 S.E.2d 800 (2012).

42. *Id.* at 143, 731 S.E.2d at 803.

43. *See* David Owens, *If We Can't Collect a Fee, Can We Just Say No? Use of Impact Fees and Adequate Public Facility Regulatory Requirements*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Oct. 12, 2010, 3:58 PM), http://canons.sog.unc.edu/?p=3340 ("Development is not permitted at a particular site unless and until a defined level of public services is available.").

44. *Lanvale*, 336 N.C. at 155, 731 S.E.2d at 810.

broadest construction possible."[45] According to the majority opinion, G.S. 153A-4's rule of broad construction should be applied only when "statutes are ambiguous."[46] The dissent, siding with the county, argued that the zoning statutes in question were indeed ambiguous regarding the limits of the county's zoning authority.[47] The majority disagreed, holding that the zoning statutes in question were not ambiguous, therefore obviating the need to apply G.S. 153A-4.[48] Having determined that the broad construction statutes were not applicable, the court then concluded there was no implied authority for the county's APFO.[49]

The court's reluctance to apply the broad construction statutes, upon which *Maready* relied, raises the following question: Does *Lanvale* undercut the authority of local governments to offer cash economic development incentives pursuant to G.S. 158-7.1? There are several reasons to think not. First and foremost, *Maready* remains good law. The *Lanvale* court acknowledged that its application of the broad construction statutes in *zoning cases* had been "inconsistent,"[50] but it did not discuss economic development and it did not overrule *Maready*—in fact, the court did not mention *Maready* at all.

Second, while the majority in *Lanvale* did suggest 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 recognize the important distinction between the two

45. *Id.* at 154, 731 S.E.2d at 809.

46. *Id.* at 155, 731 S.E.2d at 810.

47. *See id.* at 173, 731 S.E.2d at 821 (Hudson, J., dissenting) (arguing that the language in the zoning statutes, G.S. 153A-340(a) and G.S. 153A-341, "is not plain"). *See* N.C. GEN. STAT. § 153A-340 (2011) ("A zoning ordinance may regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lots that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes."); *id.* § 153A-341 ("Zoning regulations shall be designed to promote the public health, safety, and general welfare. To that end, the regulations may address, among other things, the following public purposes: to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen congestion in the streets; to secure safety from fire, panic, and dangers; and to facilitate the efficient and adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development.").

48. *Lanvale*, 336 N.C. at 155, 731 S.E.2d at 810.

49. *Id.*

50. *Id.* at 153, 731 S.E.2d at 809.

parts of the broad construction statutes: one part pertaining to construction of ambiguous statutory provisions and a *separate* part pertaining to implied powers.[51] That is, the *Lanvale* majority stated that the broad construction rule applies in two circumstances: (1) "when our zoning statutes are ambiguous" and (2) "when its application is necessary to give effect to 'any powers that are reasonably expedient to [a local government's] exercise of [a general grant of] power.' "[52]

In making this distinction, the court may be recognizing that *ambiguity* in a statute, which requires a court to apply rules of statutory construction, may be different from finding implied powers that are reasonably expedient to the exercise of a general grant of authority. A general grant of authority can be quite clear with respect to its plain meaning, but packed within that general grant of authority may be a host of implied powers that are not immediately evident.[53] In this context, perhaps the meaning of G.S. 153A-4 and G.S. 160A-4 is that, whenever such a general grant of authority is made, the legislature has explicitly granted all of the implied powers as well.[54]

This distinction makes it possible to square the holding in *Lanvale* with *Maready* because G.S. 158-7.1 is one of those general grants of authority packed with implied powers—powers that permit each local government to design a wide variety of economic development activities to suit its particular needs, whether or not the activity is explicitly listed in the statute.[55] Properly understood, G.S. 153A-4 and G.S. 160A-4 combine with G.S. 158-7.1 to provide a general grant of authority and all of the implied powers associated with that general grant. Accordingly, there is no need for G.S. 158-7.1

51. *See id.* at 154–55, 731 S.E.2d at 809–10.

52. *Id.* at 155, 731 S.E.2d at 810.

53. *See, e.g.*, Homebuilders Ass'n of Charlotte v. City of Charlotte, 336 N.C. 37, 45, 442 S.E.2d 45, 50 (1994) (relying on the implied powers portion of G.S. 160A-4 to uphold the city's imposition of fees for regulatory services); *cf.* King v. Town of Chapel Hill, __ N.C. App. __, __, 743 S.E.2d 666, 673 (2013) (concluding that the general police power statute, G.S. 160A-174, is ambiguous and employing the broad construction statute to authorize the town's towing and mobile phone ordinances).

54. Professor Frayda Bluestein discussed the plain meaning of the broad construction statutes in a recent blog post. *See* Frayda Bluestein, *Is North Carolina a Dillon's Rule State?*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Oct. 24, 2012, 12:26 PM), http://canons.sog.unc.edu/?p=6894.

55. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 729, 467 S.E.2d 615, 628 (1996) ("The statute leaves it to the duly elected governing bodies of the cities and counties to exercise discretion as to the manner and extent to which the authority will be used.").

to suffer from ambiguity for a court to find its implied powers.[56] Even in *Lanvale*, the Supreme Court of North Carolina recognized that G.S. 153A-4 and G.S. 160A-4 apply when "necessary to give effect" to implied powers that are "reasonably expedient" to exercising a general grant of authority.[57]

In summary, G.S. 158-7.1 provides a general grant of authority to local governments for undertaking economic development activities. Although this general grant of authority does not list every activity permitted, such an explicit listing is not necessary. The broad construction statutes, G.S. 153A-4 and G.S. 160A-4, contain an explicit grant of all implied authorities associated with that general grant of authority. Case law, from *Maready* to *Lanvale*, provides additional support for concluding that implied powers are granted as part of a general grant of authority. Given that G.S. 158-7.1 is, in essence, a general grant of authority, the preceding analysis of implied powers supplies the necessary context for further exploration of the powers granted by G.S. 158-7.1.

B. Analysis of Section 158-7.1

As noted, the primary statutory authority for economic development incentive expenditures is G.S. 158-7.1. That statute, which in its original form was enacted as part of the Local Development Act of 1925,[58] at first glance appears breathtakingly broad in scope. The authorized powers and associated procedural requirements can be broken down by each subsection of the statute.

1. Catch-all Provision: Section 158-7.1(a)

G.S. 158-7.1 opens with a catch-all provision that authorizes local governments to make appropriations for a seemingly unlimited set of economic development activities. Specifically, subsection (a) authorizes counties and cities

> to make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city or in the county; encouraging the building

56. Perhaps general grants of authority are inherently ambiguous as well. In a North Carolina Court of Appeals case decided in the wake of *Lanvale*, the court determined that a general grant of authority with "far-reaching meanings" is ambiguous. *See* King v. Town of Chapel Hill, __ N.C. App. __, __, 743 S.E.2d 666, 673 (2013).

57. *See Lanvale*, 336 N.C. at 155, 731 S.E.2d at 810.

58. Act of Feb. 19, 1925, ch. 33, 1925 N.C. Sess. Laws 20 (codified as amended in N.C. GEN. STAT. §§ 158-1 to -7.4 (2011)).

> of railroads or *other purposes which, in the discretion of the governing body* of the city or of the county commissioners of the county, will increase the population, taxable property, agricultural industries and business prospects of *any* city or county.[59]

By the bare terms of the statute—particularly the italicized language above—it is difficult to say what appropriations are *not* permitted under the catch-all provision. The first half of the provision appears somewhat constrained, being limited to what might be considered conventional economic development recruitment activities ("encouraging the location of manufacturing enterprises" and locating facilities in or near the jurisdiction). The second half of the provision, however, appears to grant unbridled discretion to governing boards, explicitly authorizing boards to use public funds for "*other purposes*" at the "*discretion of the governing body.*" The list of desired ends to be achieved—increasing the population, taxable property, agricultural industries, and business prospects—might seem a challenging threshold to overcome at first blush, except that the language is diluted at the end of the clause. The listed ends can be achieved in "any" city or county—not merely in the city or county making the appropriation.[60] Perhaps the rather unbounded nature of this catch-all language is the reason that the *Maready* court was rather dismissive of this particular clause, describing it as a "self-proclaimed end" of the statute rather than imbuing it with significant meaning.[61]

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59. N.C. GEN. STAT. § 158-7.1(a) (2011) (emphasis added).

60. The "any city" language has always been part of the statute, appearing even in the original version enacted in 1925. *See* Act of Feb. 19, 1925, ch. 33, §§ 1, 3, 6, 1925 N.C. Sess. Laws 20, 20–23 (codified as amended at N.C. GEN. STAT. § 158-7.1(a) (2011)); *cf.* Horner v. Chamber of Commerce of Burlington, Inc., 235 N.C. 77, 80–81, 68 S.E.2d 660, 662 (1952) (describing—not directly quoting—the language in the statute less ambitiously as "for the purpose of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near the city; encouraging the building of railroads thereto, and for such other purposes as will, in the discretion of the governing body of the city, increase the population, taxable property, agricultural industries, and business prospects of *the city*" (emphasis added)).

61. Maready v. City of Winston-Salem, 342 N.C. 708, 724, 467 S.E.2d 615, 625 (1996). The *Maready* court downplayed the significance of this clause, stating that the public benefit of an incentive is obtained by a different set of factors, devised entirely by the court: "providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy." *Id.* ("[G.S. 158-7.1's] self-proclaimed end is to increase the population, taxable property, agricultural industries and business prospects of any city or county. However, it is the natural consequences flowing therefrom that ensure a net public benefit. The expenditures this statute authorizes should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better

Most of the language we currently see in the catch-all provision survives from the original version of the statute.[62] The original enactment, however, contained two components: a grant of authority to appropriate funds for economic development, and a requirement that those appropriations be "used and expended under the direction and control" of the governing board.[63] The second component regarding "direction and control" was apparently rewritten and moved to G.S. 158-7.2, which requires that expenditures of funds appropriated pursuant to the Local Development Act by "any agency or organization *other than* the county or city" must be approved by the governing board and "shall be accounted for by the agency or organization at the end of the fiscal year for which they were appropriated."[64] Thus, G.S. 158-7.2 does not constrain a local government's creativity in designing its economic development expenditures; it simply requires oversight of any funds turned over to

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paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy." (interal quotation marks omitted)).

62. *See* Act of Feb. 19, 1925, ch, 33, § 1, 1925 N.C. Sess. Laws 20, 20–21 (codified as amended in N.C. GEN. STAT. § 158-1 to -7.4 (2011)) ("That the mayor and board of aldermen, or other governing body ... may annually set apart and appropriate from the funds derived annually from the general taxes levied and collected ... which funds shall be used and expended under the direction and control of the ... governing body ... under such rules and regulations or through such agencies as they shall prescribe, for the purpose of aiding and encouraging the location of manufacturing enterprises, making industrial surveys and locating industrial and commercial plants in or near such city ... or in such county; encouraging the building of railroads thereto, and for such other purposes as will, in the discretion of the ... governing body of any city ... or the county commissioners of any county, increase the population, taxable property, agricultural industries and business prospects of any city, incorporated town, or any county.").

63. *Id.* at 20; *see also Horner*, 235 N.C. at 80–81, 68 S.E.2d at 662–63 (holding there was evidentiary support for the trial judge's finding that a $2,000 appropriation to a city's chamber of commerce was unlawful under G.S. 158-1 (the predecessor to G.S. 158-7.1 and 158-7.2), because the governing board did not exercise sufficient control over how the chamber spent the funds).

64. N.C. GEN. STAT. § 158-7.2 (2011) (emphasis added). The original "direction and control" requirement of § 158-1 appeared to be rewritten and moved to § 158-7.2 following a 1973 recodification of the General Statutes of North Carolina. *See* Act of May 24, 1973, ch. 803, §§ 37, 38, 1973 N.C. Sess. Laws 1188, 1199 (codified at N.C. GEN. STAT. § 158-7.2 (2011)); N.C. GEN. STAT. § 158-7.1 (1973 Supp.) (inserting new sections 158-7.1 and 158-7.2 rather than replacing sections 158-1 and 158-2 as directed by the session law). The new language reads:

> In the event funds appropriated for the purposes of this Article are turned over to any agency or organization other than the county or city for expenditure, no such expenditure shall be made until the county or city has approved the same, and all such expenditures shall be accounted for by the agency or organization at the end of the fiscal year for which they were appropriated.

N.C. GEN. STAT. § 158-7.2 (2011).

another entity.[65] When a local government appropriates funds to a private business as part of an economic development incentive grant under G.S. 158-7.1, the recipient business is an "organization other than the county or city,"[66] and the expenditure is arguably subject to the approval and accounting provisions of G.S. 158-7.2.

Outside of G.S. 158-7.2's approval and oversight mandate, there are no procedural requirements explicitly imposed on appropriations made pursuant to subsection (a)'s catch-all provision. No notice to the public is required. No public meeting or hearing is mandated. No findings of fact must be made. This absence of requirements for expenditures under subsection (a) lies in stark contrast to those falling within the scope of subsection (b), described below, which are subject to several procedural requirements for approval.[67]

2. Enumerated Powers Related to Land and Facilities: Section 158-7.1(b)

Subsection (b) provides specific authority for the acquisition, improvement, and conveyance of real property. The listing of powers in this subsection "is not intended to limit by implication or otherwise the grant of authority set out in subsection (a)."[68] The authority to acquire, improve, and convey property under subsection (b) pertains to the following activities:

1. Development of an industrial park designed for purposes ranging from manufacturing to warehousing to office use or "similar industrial or commercial purposes."[69]

65. Professor David Lawrence suggests that compliance with G.S. 158-7.2 can be accomplished by giving approval to the specific programmatic design of programs undertaken by a nongovernmental entity such as "developing an economic development plan, undertaking a program to visit and support existing businesses, undertaking a program of general business recruitment, or operating a microloan pool for small businesses." LAWRENCE, *supra* note 6, at 157. However, when a "nongovernmental entity proposes to offer an incentive to a specific company or to engage in any of the projects listed in G.S. 158-7.1(b) and to use county or city money to do so, [G.S. 158-7.2] probably requires a discrete approval by the county or city of such a significant use of its funds." *Id.*; *see also infra* Part I.B.2 (describing the projects listed in G.S. 158-7.1). Lawrence goes on to say that such "approval might best be given after a public hearing that follows the procedures of G.S. 158-7.1(c)." LAWRENCE, *supra* note 6, at 157; *see also infra* Part I.B.3 (explaining the procedures required by G.S. 158-7.1(c)).

66. § 158-7.2.

67. *See infra* Parts I.B.2, I.B.3, II.B.2.b.

68. § 158-7.1(b).

69. *Id.* § 158-7.1(b)(1).

2. Acquisition, improvement, and conveyance of property and buildings "suitable for industrial or commercial use."[70] In our first hint of the importance of jobs, a city is permitted to acquire property outside of city limits within counties in which it is located, but only if the property will be used by a business that will provide *jobs to city residents.*[71]

3. Extension of utilities for industrial facilities.[72]

4. Site preparation for industrial facilities.[73]

Appropriations, expenditures, and conveyances made under the authority of subsection (b) are subject to procedures set forth in subsections (c) and (d),[74] discussed in the next section.

3. Procedural Requirements for Appropriations Authorized by Subsection (b) and for Unsubsidized Conveyances of Property: Sections 158-7.1(c) and (d)

Subsection (c) provides that any appropriations or expenditures pursuant to subsection (b) must be approved by the governing body after notice and a public hearing.[75] The procedures of subsection (c), which are imposed only on activities undertaken under subsection (b), and not subsection (a), draw attention to a curious incongruity in the statute.

To illustrate this incongruity, imagine two companies. The first company intends to construct an industrial facility and requests that a city provide utility extensions—a subsection (b) activity when provided for an "industrial facility"—as an incentive.[76] The second company intends to construct a commercial facility that is not classified as an "industrial facility," such as an office building that will serve as the company's headquarters,[77] and it too requests utility extensions from the local government. The first company's utility extensions clearly fall within the purview of subsection (b) and are

70. *Id.* § 158-7.1(b)(2)–(4).
71 *See id.* § 158-7.1(b)(2).
72. *Id.* § 158-7.1(b)(5)–(6).
73. *Id.* § 158-7.1(b)(7).
74. *Id.* § 158-7.1(c)–(d).
75. *Id.* § 158-7.1(c); *see also* Tyler Mulligan, *Notice of Hearing for Cash Economic Development Incentives*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Sept. 23, 2009, 7:04 AM), http://canons.sog.unc.edu/?p=810 (describing the notice requirements of G.S. 158-7.1 as applied to cash incentives).
76. *See* § 158-7.1(b)(5)–(6).
77. *See id.*

therefore subject to subsection (c)'s strict notice and public hearing procedures,[78] whereas the second company's utility extensions for its non-industrial facility fall outside of the subsection (b) list—but are nonetheless authorized by subsection (a)[79]—and, curiously, are subject to no procedural requirements at all.

A related question arises when a local government offers a cash grant as an incentive: Is a cash incentive payment approved pursuant to subsection (a) or subsection (b)? As explained later, *Maready* suggests that cash grants paid to induce a company to perform subsection (b) activities are approved pursuant to subsection (b) and are therefore subject to procedural requirements associated with subsection (b).[80]

Subsection (d) imposes procedural requirements on conveyances of property. It authorizes local governments to "convey or lease interests in property" provided the consideration received is no less than the fair market value of the interest.[81] Conveyance by "private negotiation" is authorized,[82] which means that the local government may contract with a purchaser of its choice without following normal competitive bidding procedures.[83] The benefit to the purchaser in such a transaction is the avoidance of a bidding competition that could raise the price of the property or result in the prospective purchaser being outbid altogether. The trade-off for this benefit to the purchaser is the imposition of additional procedural requirements for approval of the conveyance: notice to the public, a public hearing prior to approval of the sale, and a determination of the fair market value of the interest to be conveyed.[84] Subsection (d) plainly assumes that jobs will be part of any such transaction: A conveyance for fair market value may proceed only after the governing board determines the "probable average hourly wage to be paid to workers by the business to be located at the property to be conveyed."[85]

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78. *See id.* § 158-7.1(c).

79. *See id.* § 158-7.1(a); *see also supra* Part I.B.1 (describing subsection(a)).

80. *See infra* Part II.B.2.b.

81. § 158-7.1(d).

82. *Id.*

83. *See id.* § 160A-267 (enumerating procedures for private negotiations and sale). Competitive procedures available to municipalities include sealed bid, *see id.* § 160A-268, upset bid, *see id.* § 160A-279, and public auction, *see id.* § 160A-270. Counties may avail themselves of these procedures as well. *See id.* § 153A-176.

84. *See id.* § 158-7.1(d).

85. *Id.* This provision is yet another example of job creation being an assumed component of an activity authorized pursuant to G.S. 158-7.1. *Cf. supra* note 71 and accompanying text (noting that G.S. 158-7.1(b)(2)–(4) authorizes extraterritorial

4. Special Accounting Procedures for Subsidized Conveyances of Property: Section 158-7.1(d2)

Subsection (d) allows a local government to convey or lease an interest in property, provided the consideration received is "not . . . less than the [fair market] value" of the interest.[86] Subsection (d2) states, however, that "[i]n arriving at the amount of consideration that it receives, [a governing board] may take into account . . . prospective tax revenues or income coming to the county or city over the next 10 years as a result of the conveyance or lease."[87] This permits local governments to convey property without receiving full monetary consideration—in essence, granting a subsidy to the purchaser—provided the local government recoups the subsidy over time through other revenues. This enhancement of private benefit, which takes the form of a direct and quantifiable monetary subsidy to the purchaser, is in addition to the private benefit obtained by the purchaser through the avoidance of competitive bidding procedures under subsection (d).[88] As a result, the procedural requirements for approval of a subsidized conveyance under subsection (d2) are more substantial than the requirements imposed by subsection (d).

Local governments making a subsidized conveyance under subsection (d2) must comply with two additional procedural requirements, and here again, the statute emphasizes job creation. First, the governing body must determine "that the conveyance of the property will stimulate the local economy, promote business, and result in the creation of *a substantial number of jobs* in the county or city *that pay at or above the median average wage* in the county."[89] Second, the governing body "shall contractually bind the purchaser of the property to construct, within . . . five years, improvements on the property" that will generate the promised tax revenue.[90] A recapture mechanism must be incorporated such that, "[u]pon failure to construct the improvements specified in the contract, the purchaser

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acquisitions of industrial or commercial properties by municipalities only if the acquisition results in the property providing jobs to city residents).

86. § 158-7.1(d); *see also supra* notes 81–85 and accompanying text (describing the procedural requirements for conveyances of property pursuant to subsection (d)).

87. § 158-7.1(d2).

88. *See supra* notes 82–84 and accompanying text (describing the private benefit obtained under subsection (d) by employing private sale procedures rather than competitive bidding).

89. § 158-7.1(d2)(1) (emphasis added). Customarily, local governments use the county's average wage as provided by the North Carolina Employment Security Commission. *See* LAWRENCE, *supra* note 6, at 109–10.

90. § 158-7.1(d2)(2).

shall reconvey the property back to the county or city."[91] Recapture of the property can be enforced through one or more mechanisms, including deed restrictions, a deed of trust, and by contract, though the last option is considerably weaker than the first two.[92]

5. Fiscal Requirements and Local Government Commission Reporting: Sections 158-7.1(e) and (f)

Subsection (e) subjects certain expenditures to fiscal control measures.[93] Subsection (f) imposes a maximum allowable amount of expenditures by local governments for certain economic development activities, such as real property expenditures authorized under subsection (b). The maximum allowable amount is 0.5% of the jurisdiction's outstanding assessed property tax valuation, and reports on the listed expenditures must be provided to and reviewed by the North Carolina Local Government Commission annually.[94]

6. Recapture Provisions Required in Incentive Agreements: Section 158-7.1(h)

Subsection (h), the most recent addition to G.S. 158-7.1,[95] imposes requirements on "[e]ach economic development agreement entered into between a private enterprise and a city or county,"[96] and its odd wording merits some analysis. To start, it is helpful to understand that most economic development incentives are offered to companies under terms set forth in a written contract or incentive agreement.[97] Indeed, a written contract was standard procedure for the incentives at issue in *Maready*.[98] Local governments enter into

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91. *Id.*

92. *See* LAWRENCE, *supra* note 6, at 70–71.

93. *See* § 158-7.1(e).

94. *See id.* § 158-7.1(f). A description of the reporting procedures can be found in Professor Lawrence's text. *See* LAWRENCE, *supra* note 6, at 73–76.

95. Act of Aug. 30, 2007, ch. 515, § 7, 2007 N.C. Sess. Laws 1657, 1660 (codified at N.C. GEN. STAT. § 158-7.1(h) (2011)).

96. § 158-7.1(h). While the term "economic development agreement" is not further defined, presumably it includes all agreements made pursuant to G.S. 158-7.1, including the contractual agreement required by G.S. 158-7.1(d2). *See supra* notes 89–92 and accompanying text.

97. *See* MORGAN, *supra* note 2, at 8 (reporting that a 2006 survey of North Carolina local governments—conducted prior to the enactment of subsection (h)—indicated that 51.2% of respondent local governments always require a written agreement for incentive transactions and another 14.3% sometimes do).

98. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 619 (1996). In describing the "typical procedures" observed for the incentives at issue, the court in *Maready* stated that formally approved incentives are "administered pursuant to a written contract." *Id.*

incentive agreements for several reasons. First, contractual agreements are required when local governments use the special accounting provisions of subsection (d2) for subsidized conveyances of property.[99] Second, when an incentive is paid to a company, the appropriated funds are arguably "turned over to any agency or organization other than the county or city for expenditure," and thereby are subject to G.S. 158-7.2.[100] A contractual agreement helps demonstrate compliance with G.S. 158-7.2's mandate for local governments to approve and account for the funds turned over.[101] Third, all contracts entered into by municipalities, whether related to economic development or not, "shall be in writing."[102] Fourth—perhaps the most obvious reason—agreements provide a means of monitoring a company's performance and enforcing remedies for failure to perform.

G.S. 158-7.1(h) requires that "[e]ach economic development agreement entered into between a private enterprise and a city or county . . . clearly state their respective responsibilities under the agreement."[103] Additionally, "[e]ach agreement shall contain provisions regarding remedies for a breach . . . on the part of the private enterprise."[104] These remedies "shall include a provision requiring the recapture of sums appropriated . . . by the city or county upon the occurrence of events specified in the agreement."[105] This is fairly straightforward language that explicitly requires recapture provisions for events specified in the agreement. This begs the question: What "events" are to be "specified" for recapture in each agreement? The answer is found in a sentence that lists three events using the conjunction "and":

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99. *See* § 158-7.1(d2)(2) ("The governing board of the county or city shall contractually bind the purchaser of the property . . . .").

100. *Id.* § 158-7.2; *see also supra* notes 63–65 and accompanying text (detailing the history and requirements of G.S. 158-7.2).

101. *See* § 158-7.2.

102. *Id.* § 160A-16. The North Carolina Court of Appeals has interpreted the pre-audit certificate requirement of G.S. 159-28(a) as implicitly mandating that all contracts by local governments—counties included—must be in writing in order to be valid. *See, e.g.*, Howard v. Cnty. of Durham, No. COA12-1484, 2013 WL 1878933, at *6 (N.C. Ct. App. May 7, 2013); Exec. Med. Transp., Inc. v. Jones Cnty. Dep't of Soc. Serv., __ N.C. App. __, __, 735 S.E.2d 352, 353 (2012), *disc. rev. denied*, __ N.C. __, 737 S.E.2d 378 (2013); *see also* Kara Millonzi, *Court of Appeals Reaffirms New Interpretation of Pre-Audit Requirement*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (May 23, 2013, 5:39 PM), http://canons.sog.unc.edu/?p=7136 (discussing the implications of the preaudit requirement).

103. § 158-7.1(h).

104. *Id.*

105. *Id.*

> Events that *would require* the city or county to recapture funds *would include* [1] the creation of fewer jobs than specified in the agreement, [2] a lower capital investment than specified in the agreement, and [3] failing to maintain operations at a specified level for a period of time specified in the agreement.[106]

Note that the listed events "would require" recapture of funds. The use of the word "would," the primary definition of which is the past tense of "will,"[107] in "would require . . . would include"[108] is most plausibly read as indicating futurity—that is, if the listed events occur in the future, the agreement will require recapture. At first glance, one might be tempted to suggest that the use of "would" indicates that the three listed events are offered merely as helpful suggestions to be included in an agreement at a local government's option. Such a formulation can be reduced to this: If the listed recapture events are inserted in the agreement, then the agreement will require recapture upon the occurrence of those events. Upon closer examination, however, it becomes clear that this formulation is absurd. It is tautological to state that recapture events listed in an agreement will require recapture when those events occur—that is the very definition of recapture events.[109] Under this interpretation, the North Carolina General Assembly could have omitted the final sentence of G.S. 158-7.1(h) entirely and the statute's meaning would remain the same. Furthermore, subsection (h) would be reduced to irrelevance, consisting of little more than advice that (1) economic development agreements should "clearly state [the parties'] respective responsibilities under the agreement" and provide for "remedies for a breach of those responsibilities"[110] (tautological statements that are applicable to all agreements), and (2) should an agreement happen to list recapture events, the occurrence of the events will lead to recapture.[111] Such an interpretation is not only tautological but also

106. *Id.* (emphasis added).

107. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1640 (2d ed. 1980) (defining "would" primarily as the past tense of "will" and secondarily as "an auxiliary used: (a) to express condition ... [and] (b) in indirect discourse to express futurity").

108. § 158-7.1(h).

109. *See* BLACK'S LAW DICTIONARY 1382 (9th ed. 2009) (defining recapture as "[t]he lawful taking by the government of earnings or profits exceeding a specified amount; esp., the government's recovery of a tax benefit (such as a deduction or credit) by taxing income or property that no longer qualifies for the benefit").

110. § 158-7.1(h).

111. *See supra* note 108 and accompanying text.

violates principles of statutory construction.[112] Specifically, a "cardinal principle of statutory construction"[113] is that each word in a statute must be given meaning.[114] Adoption of the tautological interpretation, which arguably renders subsection (h) virtually meaningless, would violate that "cardinal principle,"[115] particularly since the North Carolina General Assembly knows how to create illustrative, non-binding lists.[116] Accordingly, the most plausible interpretation of this clause, consistent with principles of statutory construction, is that the three recapture events listed in subsection (h)—the creation of fewer jobs than promised, lower capital investment than promised, and failing to maintain operations as promised—are to appear in every incentive agreement such that *if those events occur*, the agreement will provide for recapture.

The three "events" that trigger recapture—job creation, capital investment, and maintaining operations—can be boiled down to two essential elements: creating jobs and making a capital investment that increases the tax base. The recapture provision regarding "failing to

112. *See* Lanvale Props., LLC v. Cnty. of Cabarrus, 336 N.C. 142, 154, 731 S.E.2d 800, 809–10 (2012) (noting that "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning" (internal quotation marks omitted)). If a court were to assume, *in arguendo*, that a possible interpretation of the oddly worded sentence in subsection (h) is the tautological interpretation described above, then there would be at least two possible interpretations of subsection (h): one in which all three listed events are required in each incentive agreement, and another in which the three listed events are merely suggested as options (the tautological result). With two possible meanings, the plain meaning rule espoused in *Lanvale* is clearly inapplicable for interpreting G.S. 158-7.1(h), and rules of statutory construction must be employed.

113. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. . . . We are reluctant to treat statutory terms as surplusage in any setting." (internal quotation marks omitted)).

114. *See* Montclair Twp. v. Ramsdell, 107 U.S. 147, 152 (1883) ("[Courts should] give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."). Courts will avoid interpretations that render words irrelevant or superfluous. *See TRW Inc.*, 534 U.S. at 31; Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) ("It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.").

115. *See TRW Inc.*, 534 U.S. at 31.

116. *See, e.g.*, N.C. GEN. STAT. § 160A-458.3(a) (2011) ("By way of illustration but not limitation, such a project might include a single building comprising a publicly owned parking structure and publicly owned convention center and a privately owned hotel or office building."); *id.* § 158-7.1(b) ("This listing is not intended to limit by implication or otherwise the grant of authority set out in subsection (a) of this section.").

maintain operations at a specified level for a period of time"[117] is better understood as complementing the provisions regarding job creation and capital investment. After all, without a recapture provision specifying how long a company must maintain its operations, a company could make a capital investment and create jobs to obtain an incentive, but thereafter fire its employees, remove its equipment, and shutter its facility. Thus, subsection (h) ensures that all economic development agreements specify how long a company must retain jobs and capital investment to avoid recapture.[118]

C. *Summary of Section 158-7.1 Requirements for Economic Development Incentives*

The key provisions of G.S. 158-7.1 can be reorganized along the three dimensions of this Article's proposed framework for analyzing incentives: means, consideration, and procedural requirements. Each dimension is addressed in turn.

1. Allowable Means for Incentives in the Statute

G.S. 158-7.1 places almost no limitations on the means for undertaking economic development incentives. Subsection (b) contains a listing of permissible means involving land and facilities, but that listing is "not intended to limit by implication or otherwise the grant of authority set out in [S]ubsection (a),"[119] which is a virtually boundless catch-all provision.[120] Perhaps the only statutory limitation on allowable means is that a city may acquire property for resale outside of city limits, but only within counties in which the city is located, provided the property will be used by a business that will provide jobs to city residents.[121]

Although G.S. 158-7.1 does not impose significant limitations on means, there are a few restrictions found elsewhere in the law. For example, it is not permissible for a local government to reduce or

117. *Id.* § 158-7.1(h).

118. *See id.*

119. *Id.* § 158-7.1(b).

120. *See supra* Part I.B.1 (discussing the catch-all provision of G.S. 158-7.1(a)).

121. *See* § 158-7.1(b)(2). This particular limitation does not appear to apply to acquisitions under subsections (b)(1), (b)(3), and (b)(4), but a conservative approach would respect the limitation in all instances. Even this limitation can ultimately be overcome, as a cooperative arrangement with another local government could be used to acquire property outside of city limits. *See id.* § 158-7.4(a).

modify the property tax rate for an individual company.[122] Additionally, tax refunds and rebates are prohibited by statute.[123] Utility law imposes limitations as well: Local governments cannot offer reduced utility rates to a company as part of an economic development incentive package because comparable customers receiving comparable services cannot be placed in different rate classes.[124] However, as a practical matter, these various prohibitions are not difficult to work around. While explicitly providing individual utility and tax rate adjustments is not permitted, the broad authority to make appropriations for economic development under subsection (a) allows a local government to accomplish the same ends by paying reimbursements out of its general fund to offset a company's property tax payments[125] or utility costs.[126]

Accordingly, most of the limitations found in G.S. 158-7.1 pertain not to the *means* of undertaking economic development activities, but rather to the *consideration* expected in return for an incentive and the *procedural requirements* related to approval of incentives. Those limitations are discussed in greater detail below.

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122. *See* N.C. CONST. art. V, § 2(2)–(3) (providing that only the North Carolina General Assembly may classify or exempt property for property tax purposes, and such classification must apply on a statewide basis). Another means prohibited by the North Carolina Constitution is a loan guarantee. *See id.* § 4(3) (prohibiting any local government from "giv[ing] or lend[ing] its credit in aid of any person, association, or corporation," except for public purposes and with the approval of the voters). A loan of credit occurs whenever a local government guarantees the debts of another. *See id.* § 4(5).

123. *See* N.C. GEN. STAT. § 105-380(a) (2011).

124. *See, e.g., In re* Lower Cape Fear Water & Sewer Auth., 329 N.C. 675, 677, 407 S.E.2d 155, 157 (1991) (noting that the Lower Cape Fear Water and Sewer Authority "is subject to the common law rule that it cannot charge rates that would constitute an unwarranted discrimination among the parties it was formed to serve"); *see also* Kara A. Millonzi, *Using Utility Rates as an Economic Development Incentive Tool*, COMMUNITY & ECON. DEV. IN N.C. & BEYOND (Aug. 31, 2010), http://ced.sog.unc.edu/?p=2042 [hereinafter Millonzi, *Using Utility Rates*] (describing limitations on using utility rates as an economic development incentive); Kara A. Millonzi, *Lawful Discrimination in Utility Ratemaking*, 33 LOC. FIN. BULL., Oct. 2006, at 3, *available at* http://sogpubs.unc.edu//electronicversions/pdfs/lfb33.pdf ("Cities must charge rates, rents, fees, and charges that are (1) reasonably related to the value of the services either actually consumed or readily available for consumption (the reasonableness principle) and (2) roughly equal for similarly situated groups of consumers (the nondiscrimination principle).").

125. *See* LAWRENCE, *supra* note 6, at 14 (explaining how some local government incentive policies "approach tax abatements in effect").

126. *See* Millonzi, *Using Utility Rates*, *supra* note 124. Indeed, *Maready* involved, in part, reimbursements for utility connections. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 736, 467 S.E.2d 615, 632 (1996). Also, the incentives paid in *Haugh* and *Blinson* were calculated to offset a portion of property taxes to be paid by the companies. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 306, 702 S.E.2d 814, 816 (2010); Blinson v. State, 186 N.C. App. 328, 332, 651 S.E.2d 268, 273 (2007).

2. Consideration Required by Statute in Exchange for Incentives

While G.S. 158-7.1 has little to say regarding allowable means for incentives, it offers a fair amount of guidance about the consideration to be received from a company in exchange for an incentive, particularly when the incentive involves conveyance of land and facilities or a written economic development agreement.[127]

In the case of the conveyance of land and facilities, the statute assumes that jobs will result from such transactions, even when a company receives no direct monetary subsidy. For example, when a local government uses its grant of power under G.S. 158-7.1 to sell property to a business for fair market value at a private sale—the benefit to the business being the avoidance of competitive bidding processes that might bid up the price or allow another entity to outbid the business entirely—the statute assumes that jobs will be created as a result.[128] As part of approving such a sale, the governing board must "determine the probable average hourly wage to be paid to workers by the business to be located at the property."[129]

When the conveyance of property involves providing a subsidy to a business through a conveyance for less than fair market value, the consideration required is considerably more substantial. Jobs and tax base are among the required forms of consideration. First, the property conveyance must "result in the creation of a substantial number of jobs" that pay a wage matching or exceeding the average wage in the county.[130] Second, the governing board must "contractually bind" the business to construct improvements that will generate tax revenue to allow the local government to recoup its subsidy within ten years.[131]

Jobs and increased tax base are also the expected forms of consideration whenever a local government enters into an economic development agreement with a private enterprise. Each such agreement "shall include a provision requiring the recapture of sums appropriated" for "the creation of fewer jobs than specified in the

127. *See* § 158-7.1(d) (2011) ("The consideration for the conveyance may not be less than the [fair market] value . . . ."); *id.* § 158-7.1(d2); *id.* § 158-7.1(h). Additionally, the statute allows for the governing board to account for prospective tax revenues when determining the total consideration to be paid. *See id.* § 158-7.1(d2).

128. *See id.* § 158-7.1(d); *see also supra* note 85 and accompanying text (noting an instance where the statute appears to assume that conveyance will result in job creation).

129. § 158-7.1(d).

130. *Id.* § 158-7.1(d2)(1).

131. *Id.* § 158-7.1(d2)(2); *see also supra* Part I.B.4 (discussing special accounting procedures used by local governments to convey property without receiving full consideration).

agreement."[132] Additionally, appropriated funds shall be recaptured in the event a business makes "a lower capital investment than specified."[133] The company must also promise to maintain its operations for a specified period of time, in essence ensuring that its promise of job creation and increasing the tax base will be sustained over time.[134]

3. Procedural Requirements by Statute for Approval of Incentives

As mentioned, there are no procedural requirements associated with the general grant of authority provided in the catch-all provision, subsection (a).[135] However, for activities involving land and facilities under subsection (b), the statute imposes a series of procedural requirements set forth in subsections (c) and (d)—even when no subsidy is provided to a business—including mandatory notice provisions, public hearings, and, in the case of a conveyance of property, findings regarding the fair market value of the property and the probable wage to be paid to workers at the property.[136]

When a conveyance of property involves providing a subsidy to a business based upon the expectation of future local government revenues under subsection (d2), the procedural requirements are more demanding. In addition to the subsection (d) notice and public hearing required for the conveyance, the governing board must also make a formal determination that the conveyance will "stimulate the local economy, promote business, and result in the creation of a substantial number of jobs" paying at or above the average county wage.[137] Additionally, the local government must enter into an

132. § 158-7.1(h); *see also supra* Part I.B.6 (explaining the recapture provisions required in incentive agreements and proposing the most plausible construction for the statute).

133. § 158-7.1(h); *see also supra* Part I.B.6 (examining statutorily-required recapture provisions pertaining to capital investment).

134. *See* § 158-7.1(h); *see also supra* Part I.B.6 (examining statutorily-required recapture provisions to be applied in the event a business fails to maintain its operations over time).

135. *See supra* Part I.B.1. Appropriations made pursuant to subsection (a) are subject to no explicit procedural requirements other than the oversight requirements of G.S. 158-7.2. *See supra* notes 64–67 and accompanying text.

136. *See* § 158-7.1(b)–(d); *see also supra* Part I.B.3 (discussing the procedural requirements for appropriations authorized by G.S. 158-7.1(b) and unsubsidized conveyances of property under G.S. 158-7.1(c) and (d)).

137. § 158-7.1(d2)(1); *see also supra* Part I.B.4 (considering the procedural requirements for subsidized conveyances of property by local governments).

agreement that contractually binds the purchaser to construct improvements that will recoup the up-front subsidy.[138]

Outside of the subsidized conveyance scenario just described, G.S. 158-7.1 does not require a local government to enter into an economic development incentive agreement. However, memorializing incentives in a written agreement is a common practice[139] that is probably necessary in order to comply with other statutes—e.g., G.S. 158-7.2, which requires local governments to exercise oversight of appropriations to other entities,[140] G.S. 160A-16, which requires municipal contracts to be in writing,[141] and G.S. 159-28(a), which requires a pre-audit certificate for contracts.[142]

II. *MAREADY* AND ITS PROGENY ON THE CONSTITUTIONALITY OF INCENTIVES UNDER SECTION 158-7.1

An understanding of the authority conferred by G.S. 158-7.1 to local governments and the requirements imposed by the statute on incentive transactions is merely the starting point of our inquiry. Even when a statute appears to grant broad authority, courts have the final say on whether the activities undertaken pursuant to the statute are constitutional.[143] As an example of a constitutional—rather than statutory—limitation in the economic development area, a threshold question posed to courts for decades was whether the public purpose doctrine of the North Carolina Constitution[144] allowed disbursement of funds to a private entity as a constitutional *means* of undertaking

138. *See* § 158-7.1(d2)(1); *see also supra* Part I.B.4 (noting how local governments must recoup the upfront subsidy within ten years).

139. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 619 (1996) (stating that the "typical procedures" observed for the incentives at issue include administering the incentives "pursuant to a written contract"); *see also supra* note 97 (describing survey results indicating that a majority of respondent local governments require a written agreement for incentive transactions).

140. *See* § 158-7.2; *see also supra* notes 64–66 and accompanying text (describing the oversight requirements of G.S. 158-7.2 for economic development expenditures).

141. *See* § 160A-16.

142. *See id.* § 159-28(a); *see also supra* note 102 and accompanying text (describing requirements for contracts to be made in writing).

143. *See, e.g.*, *Maready*, 342 N.C. at 716, 467 S.E.2d at 620 ("[U]ltimate responsibility for the [constitutional] public purpose determination rests with this Court.").

144. *See* N.C. CONST. art. V, § 2(1) ("The power of taxation shall be exercised in a just and equitable manner, for *public purposes only* . . . ." (emphasis added)); *id.* § 2(7) ("[T]he 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*." (emphasis added)).

economic development.[145] Enacted in 1967, the Industrial Development Financing Act authorized the issuance of industrial revenue bonds to equip private facilities;[146] however, at the time those means were prohibited under the public purpose doctrine.[147] The means question was ultimately settled in 1973 by the addition of Article V, § 2(7) to the North Carolina Constitution,[148] specifically allowing direct appropriation to private entities for public purposes.[149] Today, incentives often take the form of direct cash disbursements to companies,[150] and the form of incentive (or the means used) is no longer a controversial issue.[151]

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145. *See Maready*, 342 N.C. at 720, 467 S.E.2d at 623 (noting that the "focal concern" in earlier cases had been "the means used to achieve economic growth"); *see also* LAWRENCE, *supra* note 6, at 3–5 (discussing the public purpose limitation, generally, against the background leading to *Maready*).

146. *See* North Carolina Industrial Development Financing Act, ch. 535, § 14, 1967 N.C. Sess. Laws 567, 576 (codified at N.C. GEN. STAT. § 123A (1967) and repealed by Act of July 11, 1983, ch. 717, § 39, 1983 N.C. Sess. Laws 735, 738) ("The [North Carolina Industrial Development Financing Authority] is hereby authorized to provide for the issuance, at one time or from time to time, of industrial revenue bonds of the authority for the purpose of paying all or any part of the cost of any project or projects.").

147. *See* Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 159, 159 S.E.2d 745, 760 (1968) ("If public purpose is now to include State or municipal ownership and operation of the means of production—even on an interim basis . . . the people themselves must so declare."); *see also Maready*, 342 N.C. at 719, 467 S.E.2d at 622 ("As in *Mitchell*, the [*Stanley*] Court repeatedly asserted that direct assistance to a private concern by the use of tax-exempt revenue-bond financing could not be the means used to effect a public purpose."); Stanley v. Dep't of Conservation & Dev., 284 N.C. 15, 41, 199 S.E.2d 641, 658 (1973) ("Since the State may not directly aid a private industry by the exemption of its bonds for plant construction from taxation, it may not indirectly accomplish the same purpose by authorizing the creation of an authority to issue its tax-exempt revenue bonds for that same purpose.").

148. *See* N.C. CONST. art. V, § 2(7) ("The 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."); *Maready*, 342 N.C. at 720, 467 S.E.2d at 623 ("Moreover, the Court's focal concern in *Mitchell* and *Stanley*, the means used to achieve economic growth, has also been removed by constitutional amendment. In 1973 Article V, § 2(7) was added to the North Carolina Constitution, specifically allowing direct appropriation to private entities for public purposes. . . . [U]nder subsection (7) *direct disbursement* of public funds to private entities is a constitutionally permissible *means* of accomplishing a public purpose provided there is statutory authority to make such appropriation." (emphasis in original) (citations and internal quotation marks omitted)).

149. *See* Act of July 1, 1973, ch. 1200, § 1, 1969 N.C. Sess. Laws 1385, 1385.

150. *See* MORGAN, *supra* note 2, at 5 (reporting that a 2006 survey of North Carolina local governments indicated that 41.5% of respondent local governments used cash grant incentives for business recruitment and 29% used them for business retention and expansion).

151. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (opining that "even the most innovative activities" permitted by G.S. 158-7.1 are constitutional "so long as they primarily benefit the public and not a private party").

With the means question now largely settled, this Article simply assumes that incentives take the form of direct cash payments to a company. A local government certainly is not required to make cash payments to induce a company to locate or expand in its jurisdiction—the government could just as well provide in-kind assistance, provide training to company employees, or come up with some other incentive. The form of the incentive granted from the local government to the company is not important—the important issue is *what public benefit the local government extracts in return.*[152] Thus, the inquiry now turns to whether economic development incentives, by inducing corporations to locate in North Carolina, regardless of their form, serve a public purpose. This was the focus of the *Maready* decision and its appellate court progeny, *Blinson* and *Haugh.* The controversy in those cases addressed two related constitutional concepts: exclusive emoluments and public purpose.

A. Exclusive Emoluments Clause and Consideration for Incentives

The Exclusive Emoluments Clause of the North Carolina Constitution establishes that "[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.*"[153] Consideration, as that term is used in contract law, is something of value given by each party to a contract that makes the contract enforceable.[154] Thus, no emolument, or payment, may be made unless proper consideration in the form of public services is provided in return. Past performance is not sufficient consideration.[155] Gifts of public money or assets are constitutionally prohibited.[156]

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152. *See id.*

153. N.C. CONST. art. I, § 32 (emphasis added).

154. *See* Stonestreet v. S. Oil Co., 226 N.C. 261, 262–63, 37 S.E.2d 676, 677 (1946) ("It may be stated as a general rule that 'consideration' in the sense the term is used in legal parlance, as affecting the enforceability of simple contracts, consists of some benefit or advantage to the promisor, or of some loss or detriment to the promisee. It has been held that 'there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.' On the other hand, a mere promise, without more, lacks a consideration and is unenforceable." (citations omitted)).

155. *See* Critcher v. Watson, 146 N.C. 150, 151, 59 S.E. 544, 545 (1907) ("[A]n executed or past consideration is no consideration to support an express promise . . . ."); *see also* Estate of Graham v. Morrison, 168 N.C. App. 63, 70, 607 S.E.2d 295, 300 (2005) ("Past consideration or moral obligation is not adequate consideration to support a contract."). Past consideration has been held insufficient under the Exclusive Emoluments Clause in the context of severance payments to public employees that were not negotiated at the outset of the employment relationship. *See* Leete v. Cnty. of Warren, 341 N.C. 116, 122–

Applying these concepts to economic development incentives, a business may be provided an incentive only when valid consideration is received in exchange.[157] An example where consideration would be absent is a company seeking incentives to locate in a local government's jurisdiction after the company has already committed to locate there. Following such a commitment, the local government cannot accept the company's promise to locate in the jurisdiction as valid consideration for an incentive payment, because the company has already committed to locate in the jurisdiction. Such an incentive would amount to a constitutionally impermissible gift: the constitution does not allow the government to pay an entity to do something that the entity has already committed to do.[158]

23, 462 S.E.2d 476, 480 (1995) ("At the time Mr. Worth was appointed to his position, the Board entered no agreement with Mr. Worth for severance pay in the event he voluntarily relinquished his position. In fact, Mr. Worth had no written employment contract with Warren County. Because there was no written contract providing for severance pay or additional compensation beyond his salary for services rendered, the 'severance pay' which Mr. Worth seeks is no more than a request for a gratuity, which the Board had no authority to pay. Any additional compensation to Mr. Worth would be without consideration and represents a claim which Mr. Worth could not enforce either in law or in equity.... Thus, for the reasons set forth in this opinion, we hold that the proposed payment of $5,073.12 to Mr. Worth upon his resignation does violate Article I, Section 32 of the North Carolina Constitution."). The generally accepted rule in contract law is that past consideration is insufficient to support a promise. *See, e.g.*, Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1012 (10th Cir. 2002) (applying Utah law, which says, "[g]enerally, past services cannot serve as consideration for a subsequent promise"); Smith v. Recrion Corp., 541 P.2d 663, 665 (Nev. 1975) ("Past consideration is the legal equivalent to no consideration."); *see also* 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 9.1, at 239 (Joseph M. Perillo ed., 1996) ("Happenings of the past, not bargained for by a promisor, are far less likely to be held to make an informal promise enforceable than are those for which the promisor bargains. Not infrequently, however, such happenings induce the making of subsequent promises. In such cases they are commonly described as 'past consideration' for the promise.").

156. N.C. CONST. art. I, § 32; *see also* DAVID M. LAWRENCE, LOCAL GOVERNMENT PROPERTY TRANSACTIONS IN NORTH CAROLINA 89 (2d ed. 2000) ("[The] Privileges and Emoluments Clause prohibits the state or any local government from making a gift of money or other public assets." (citing Redevelopment Comm'n v. Sec. Nat'l Bank, 252 N.C. 595, 114 S.E.2d 688 (1960))).

157. *See, e.g.*, *In re* Okla. Dev. Fin. Auth., 89 P.3d 1075, 1082–83 (Okla. 2004) (finding that "the benefits to be derived from economic development constitute adequate consideration to defeat assertions that economic incentives are in the nature of a 'gift,' " provided the government obtains "adequate consideration and accountability from [the] private actor in exchange for the expenditure of public funds").

158. *See* LAWRENCE, *supra* note 6, at 55–56 ("Thus the promise from the company is the *consideration* that supports the incentive, both constitutionally and contractually. If the company cannot offer the local government some consideration of [jobs and tax base], the incentive becomes a mere gift of public assets, with the public receiving nothing in return for its expenditure.").

The need for a local government to receive valid consideration from a company in exchange for an incentive is sometimes expressed through a necessity or "but-for" determination: That is, "but for" the incentive payment to a company, the company would not locate its facility and jobs in the jurisdiction.[159] Indeed, the incentives approved in *Maready* contained a "but-for" or necessity determination as part of the local government's approval process. As the court noted, prior to approval, "[a] determination is made that participation by local government is necessary to cause a project to go forward in the community."[160]

Even when an incentive passes the "but-for" test, it still may be challenged as being an "exclusive emolument" benefiting a specific person or group of persons rather than the public generally.[161] However, case law has established that activities that serve a public purpose are necessarily "not an exclusive emolument."[162] Thus, for an incentive that satisfies the "but-for" requirement, the exclusive emoluments question may be resolved by determining whether the incentive serves a public purpose.

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159. The term "but for" is most commonly used in tort law. *See* Ratliff v. Duke Power Co., 268 N.C. 605, 614, 151 S.E.2d 641, 648 (1966) (explaining that "[a]n event which is a 'but for' cause of another event [is] a cause without which the second event would not have taken place").

160. Maready v. City of Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 619 (1996). These "but-for" or necessity determinations also appear in the discretionary economic development incentive programs administered by the State. *See, e.g.*, N.C. GEN. STAT. § 143B-437.52(a)(4) (2011) (requiring that any grant issued through the Job Development Investment Grant program be "necessary for the completion of the project in this State"); *id.* § 143B-437.02(h)(5)(F) (requiring that site development performed using funds from the Site Infrastructure Development Fund be "necessary for the completion of the project in this State"). Likewise, "but-for" determinations appear in guidelines established by executive agencies of the State. *See, e.g.*, N.C. DEPT. OF COMMERCE, GUIDELINES AND PROCEDURES FOR COMMITMENT OF FUNDS FROM THE ONE NORTH CAROLINA FUND § 6.1 (2004), *available at* http://www.thrivenc.com/node/985/one-north-carolina-fund-guidelines (establishing the "Threshold Statutory Criteria for Awarding Funds" in Section 6.1 as being "used in connection with projects for which participation by the state government is needed for the project to go forward or be undertaken in the state").

161. Classifications or exemptions in favor of a specific group of persons will survive a challenge under the exclusive emoluments clause 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." Blinson v. State, 186 N.C. App. 328, 342, 651 S.E.2d 268, 278 (2007) (quoting Town of Emerald Isle v. State, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987)).

162. *Id.* ("[W]hen legislation is determined to 'promote the public benefit' under the Public Purpose Clauses, it necessarily is not an exclusive emolument.").

B. Public Purpose

The North Carolina Constitution provides that the "power of taxation shall be exercised in a just and equitable manner, for *public purposes only.*"[163] A public purpose is required not only for the original levy of taxes, but also for the expenditure of collected funds.[164] Furthermore, Article V, § 2(7) provides that governments may, pursuant to statute, "contract with and appropriate money to any person, association, or corporation for the accomplishment of *public purposes only.*"[165]

The Supreme Court of North Carolina has articulated a two-prong test for public purpose. In *Madison Cablevision v. City of Morganton*,[166] the court stated:

> Two guiding principles have been established for determining that a particular undertaking by a municipality 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.[167]

The *Maready* court applied the two-pronged *Madison Cablevision* test in evaluating the public purpose of economic development incentives pursuant to G.S. 158-7.1.[168] The court dispensed with the first prong by making two points. First, the court recited Supreme Court of North Carolina precedent in support of the proposition that economic development has "long been recognized as a proper governmental function."[169] Second, the court observed that activities authorized by G.S. 158-7.1 "invoke traditional governmental powers and authorities in the service of economic development."[170] The court declared that activities authorized by subsection (b) of G.S.

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163. N.C. CONST. art. V, § 2(1) (emphasis added).

164. *See* Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 143, 159 S.E.2d 745, 749–50 (1968) ("The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. Both powers are subject to the constitutional proscription that tax revenues may not be used for private individuals or corporations, no matter how benevolent.").

165. N.C. CONST. art. V, § 2(7) (emphasis added); *see also supra* notes 143–50 and accompanying text (discussing constitutionally permissible means used to achieve economic growth).

166. 325 N.C. 634, 386 S.E.2d 200 (1989).

167. *Id.* at 646, 386 S.E.2d at 207.

168. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 722–24, 467 S.E.2d 615, 624–25 (1996).

169. *Id.* at 723, 467 S.E.2d at 624.

170. *Id.* at 723–24, 467 S.E.2d at 624.

158-7.1, such as the improvement and conveyance of land in industrial parks and the provision of utility extensions, were analogous to activities such as land acquisition, slum clearance, and sale of land to private developers, authorized by the Urban Redevelopment Law.[171] Note that the court referred to the activities authorized by subsection (b) of G.S. 158-7.1. This is one indication, among others, that the specific activities described in subsection (b) (and the associated procedural requirements) figured heavily in the *Maready* opinion, a point that will be revisited later in this Part.[172]

With the first prong resolved in favor of economic development incentives, the court turned to the second prong: whether "the activity benefits the public generally, as opposed to special interests or persons."[173] In assessing G.S. 158-7.1, the court found that the statute serves a public purpose as a general matter and stated that "[g]enerally, if an act will promote the welfare of a state or a local government and its citizens, it is for a public purpose. Viewed in this light, G.S. 158-7.1 clearly serves a public purpose."[174]

Although the court established that G.S. 158-7.1 serves a public purpose as a general matter,[175] that does not mean that all activities permitted by G.S. 158-7.1 are constitutional. The *Maready* court found that "even the most innovative activities" permitted by G.S. 158-7.1 are constitutional "*so long as they primarily benefit the public and not a private party*."[176] In other words, incentives are constitutional provided they obtain a net public benefit. The court explained that, to ensure this "net public benefit," incentive expenditures "should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy."[177] This is the

171. *See id.* at 724, 467 S.E.2d at 625.

172. *See infra* Part II.B.2.b.

173. Madison Cablevision, Inc. v. City of Morganton, 325 N.C. 634, 646, 386 S.E.2d 200, 207 (1989).

174. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

175. *See id.*

176. *Id.* (emphasis added).

177. *Id.* The court of appeals reiterated this test in *Haugh*: "With respect to the second prong of the *Madison Cablevision* test, as noted in *Maready*, expenditures 'should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy.' " Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) (citing *Maready*, 342 N.C. at 724, 467 S.E.2d at 625); *see also* Saine v. State, 210 N.C. App. 594, 604, 709 S.E.2d 379, 387 (2011) ("In *Maready*, our Supreme Court held that, '[t]he expenditures [the statute at issue] authorizes should create a more

clearest articulation of the factors that contribute to a net public benefit—jobs, increasing the tax base, and diversifying the economy—so these factors will be explored further in Part II.B.1.

Beyond the aforementioned factors, the incentives approved in *Maready* serve as concrete examples of incentives that contain the necessary net public benefit and now set the standard by which other incentives are judged.[178] All local government incentives litigated to date at the appellate level have been indistinguishable from those at issue in *Maready*, leaving the reviewing court bound by precedent to uphold them.[179] The incentives at issue in *Maready* will therefore be studied in Part II.B.2 to determine their key characteristics—characteristics that, when emulated, will be upheld as "parallel" to the *Maready* incentives.[180]

Accordingly, the remainder of this Part II.B will be devoted to exploring the two strands of analysis described above: (1) the factors contributing to a net public benefit, and (2) the distinctive characteristics of the incentives in *Maready* that can be emulated in order to remain safely within the confines of *Maready*'s public purpose analysis. The factors thus identified will be incorporated into this Article's proposed framework for analyzing economic development incentives.

1. *Maready*'s Net Public Benefit Factors

In explaining the second prong of the *Madison Cablevision* test, the *Maready* court stated that "even the most innovative activities" permitted by G.S. 158-7.1 are constitutional "*so long as they primarily benefit the public and not a private party*."[181] Thus, while a local

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stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy.' "(citing *Maready*, 342 N.C. at 724, 467 S.E.2d at 625)).

178. The analysis in *Maready*, however, may not be the last word regarding the public purpose of incentives. The Supreme Court of North Carolina has explicitly declined to establish a permanent "slide-rule" definition of public purpose "for all time." *See Maready*, 342 N.C. at 716, 467 S.E.2d at 620 (citing Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968)).

179. *See, e.g.*, *Haugh*, 208 N.C. App. at 319, 702 S.E.2d at 824 ("Incentives parallel to those at issue already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent."); Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007) ("In the absence of a showing of some distinction between the incentives in this case and the incentives in the *Maready* case, we hold that the trial court properly concluded that the County and City Resolutions and the Agreement did not violate the Public Purpose Clauses.").

180. *See* Haugh, 208 N.C. App. at 319, 702 S.E.2d at 825.

181. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (emphasis added).

government is permitted to experiment with various *means* of promoting economic development, each incentive must nonetheless primarily benefit the public. How should local governments assess whether an incentive provides sufficient public benefit?

One might attempt to use the language of the catch-all provision, subsection (a), as a statutory public purpose test. Subsection (a) authorizes local governments to make appropriations that "increase the population, taxable property, agricultural industries and business prospects of any city or county."[182] However, the *Maready* court dismissed this language as merely aspirational—the statute's "self-proclaimed end"—and instead articulated a different set of "consequences" or factors that "ensure a net public benefit."[183] The court stated that economic development expenditures "should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy."[184]

Those four factors contributing to a net public benefit—providing displaced workers with employment opportunities, attracting better paying jobs, enlarging the tax base, and diversifying the economy—are more commonly boiled down to two: jobs and tax base. The *Maready* majority engaged in this reduction when explaining that "[G.S.] 158-7.1, which is intended to *alleviate conditions of unemployment and fiscal distress and to increase the local tax base*, serves the public interest."[185] The majority also emphasized the importance of jobs and tax base in a different way:

> New and expanded industries in communities within North Carolina *provide work and economic opportunity for those who otherwise might not have it.* This, in turn, creates a *broader tax base* from which the State and its local governments can draw funding for other programs that benefit the general health, safety, and welfare of their citizens.[186]

Interestingly, it is the dissent in *Maready* that offered the most succinct articulation of these factors, characterizing the majority's holding—no less than eight times without any rebuttal from the

182. N.C. GEN. STAT. § 158-7.1(a) (2011).

183. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

184. *Id.*

185. *Id.* at 727, 467 S.E.2d at 627 (emphasis added).

186. *Id.* (emphasis added); *see also* Blinson v. State, 186 N.C. App. 328, 337, 651 S.E.2d 268, 276 (2007) (quoting this language from *Maready*).

majority—as standing for the proposition that "simply creating new jobs and increasing the tax base is a public purpose."[187]

The emphasis on jobs and tax base can even be seen in the way the court described the facts of the case. In describing the incentives at issue, the court noted that "officials estimate an *increase in the local tax base* of $238,593,000 and a projected *creation of over 5,500 new jobs* as a result of these economic development incentive programs."[188] The North Carolina Court of Appeals likewise felt it necessary to describe the jobs and tax base to be generated by the incentives before it. In describing the public benefits expected from the contested incentives in *Blinson*, the court recounted benefits such as "*substantial number of jobs* at competitive wages," capital investment with "*aggregate taxable value* of at least $100 million," and creation of "*at least 1,700 local Qualified jobs.*"[189] Indeed, the court in *Blinson* went so far as to suggest that the plaintiffs would have needed to raise a question about job creation and increasing the tax base in order to state a proper claim for relief.[190] In *Haugh*, the incentives were paid in exchange for "a *new investment* of Twenty-Four Million Dollars ($24,000,000.00), *hiring two hundred ten (210) new employees* and adding a minimum of Five Million Dollars ($5,000,000.00) in *additional business personal property tax listings.*"[191] Thus, job creation and increasing the tax base remain at the forefront in determining the public benefit of incentives.[192]

187. *Maready*, 342 N.C. at 734–37, 742, 467 S.E.2d at 631–33, 636 (Orr, J., dissenting). The Supreme Court of North Carolina will not shrink from addressing a mischaracterization or flaw in a dissenting opinion. *See, e.g.*, Lanvale Props., LLC v. Cnty. of Cabarrus, 336 N.C. 142, 155–56, 731 S.E.2d 800, 810 (2012). However, the majority in *Maready* made no attempt to correct or modify the dissent's characterization of its holding.

188. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619 (emphasis added).

189. *Blinson*, 186 N.C. App. at 332, 651 S.E.2d at 272–73 (emphasis added).

190. *Id.* at 341, 651 S.E.2d at 278 ("Plaintiffs' complaint contains no allegations suggesting that the legislative bodies were not acting with a motivation to increase the tax base or alleviate unemployment and fiscal distress.").

191. Haugh v. Cnty. of Durham, 208 N.C. App. 304, 306, 702 S.E.2d 814, 816 (2010) (emphasis added).

192. In evaluating the public purpose of *legislation*, courts will not "engage in economic projections as to the potential monetary benefits resulting from the *legislation*. The latter analyses are for the General Assembly and the Executive Branch, which can also take into account non-monetary benefits." *Blinson*, 186 N.C. App. at 341, 651 S.E.2d at 278 (emphasis added). While the courts will not engage in such an evaluation of legislation, they are not prevented from evaluating the public benefits generated by an incentive in a particular case, as they have done in G.S. 158-7.1 incentive cases since *Maready*. *See, e.g.*, *Haugh*, 208 N.C. App. at 318–19, 702 S.E.2d at 824.

"Diversifying the economy," the last of the four factors listed as ensuring a net public benefit, complements the two essential factors, jobs and tax base.[193] This final factor suggests that not all jobs and not all capital investment qualify as creating a public benefit; rather, the jobs and investment must improve and diversify the economic base of the community. Without more explanation from North Carolina courts, it is difficult to sketch the boundaries of this last factor. Some clues can be gleaned from cases in other states that were cited in *Maready* to support the opinion's public purpose analysis.[194] Among those cases that specify how diversification of the economy results from an economic development expenditure, most refer to attracting industrial facilities or to improving the health of entire industrial sectors, such as: "development of new kinds of products, technologies, and projects, which ordinarily do not attract conventional forms of financing;"[195] "direct and indirect benefits to the state aviation system;"[196] "a highly sophisticated automobile manufacturing complex";[197] and "operations ... requir[ing] many employees; and ... facilities for ship repair [making the city] more attractive to seaborne commerce."[198] We can, therefore, speculate that an altogether new industry, such as a manufacturing facility for a product that was not already produced locally, would be viewed as diversifying the local economy; arguably, so would the addition of a new facility that contributed to an existing and growing industry cluster.[199] Types of development that do not fit comfortably with the

193. *See Maready*, 342 N.C. at 724, 467 S.E.2d at 625; *see also Blinson*, 186 N.C. App. at 332, 651 S.E.2d at 273 (listing "*economic diversification* and stimulus and training in technology, computer assembly and manufacturing skills" among the benefits accruing from the incentives at issue (emphasis added)).

194. *Maready*, 342 N.C. at 725 & n.1, 467 S.E.2d at 626 & n.1.

195. Wilson v. Conn. Prod. Dev. Corp., 355 A.2d 72, 76 (Conn. 1974).

196. *In re* Interrogatory Propounded by Gov. Roy Romer on House Bill 91S-1005, 814 P.2d 875, 884 (Colo. 1991) (en banc).

197. Hayes v. State Prop. & Bldgs. Comm'n, 731 S.W.2d 797, 803–04 (Ky. 1987).

198. Common Cause v. State, 455 A.2d 1, 26 (Me. 1983).

199. *See* Jonathan Q. Morgan, *Clusters and Competitive Advantage: Finding a Niche in the New Economy*, 69 POPULAR GOV'T 43, 46 (2004) ("The location of a critical mass of firms close together can generate certain advantages. By clustering, businesses can enjoy cost savings and efficiencies arising from economies of scale. For example, firms in a cluster can increase their profitability by doing business with nearby firms and customers, thereby reducing transaction costs. A cluster of firms in a certain industry tends to have a snowball effect by attracting similar firms, specialized resources, and support activities. In this way, clusters facilitate increased access not only to suppliers and customers but also to industry-specific inputs like a skilled workforce, technology, financing, support services, and infrastructure."); *see also* C. Tyler Mulligan & Lisa Stifler, *Building Assets for the Rural Future: Identify Rural Industry Clusters*, UNIV. OF N.C. SCH. OF GOV'T, http://www.sog.unc.edu/node/1855 (last visited May 6, 2013) (describing a marine trades

examples above, and therefore might not be considered as diversifying, are residential developments, which do not themselves generate economic activity beyond a short period of construction.[200] Likewise, the construction of speculative office space may result in a new structure but adds no diversification to an economy—only the company that actually occupies the space and employs new workers can claim to offer such a benefit to the community.[201] Even the addition of new retail operations, such as shops, restaurants, and personal services, is just as likely to destabilize and weaken existing retail[202] as it is to generate new economic growth and diversification.[203]

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cluster comprised of "boat builders, suppliers, haulers and distributors, as well as end-users of the boats such as boat rental companies and dealers").

200. *See* LAWRENCE, *supra* note 6, at 57 (noting, in the context of residential development, that construction jobs are temporary in nature and are, therefore, fundamentally different from the permanent jobs resulting from industrial and commercial projects and concluding that likely "there is no statutory authority for offering incentives—beyond public infrastructure—to residential developments"); Jonathan Q. Morgan, *Analyzing the Benefits and Costs of Economic Development Projects*, 7 COMMUNITY & ECON. DEV. BULL. 1, 12 (2010), *available at* http://sogpubs.unc.edu//electronicversions/pdfs/cedb7.pdf ("[A Cost of Community Service ("COCS") study] can provide insight into the net fiscal impact of broad categories of land uses—agricultural, residential, commercial, and industrial.... COCS studies conducted throughout the United States consistently show that industrial, commercial, and agricultural land uses have revenue-expenditure ratios above 1.0," which indicates that tax revenues exceed the costs of government services required. "[T]hese studies find that residential land uses have ratios that are almost always less than 1.0, meaning that fiscally they are a net drain.").

201. It should be noted that a local government is free to construct office space or contract for the construction of office space pursuant to subsection (b). *See* N.C. GEN. STAT. § 158-7.1(b) (2011). However, to the extent that the local government wishes to subsidize the eventual occupant of that space by conveying the space to the occupant at a discounted rate, the conveyance must be conducted pursuant to subsection (d2). *See id.* § 158-7.1(d2). A subsidized conveyance under subsection (d2) is permitted only when the recipient company creates a substantial number of new jobs and generates the tax revenue that allows the local government to recoup its subsidy over time. *See id.*

202. *See* EAST-WEST GATEWAY COUNCIL OF GOV'TS, AN ASSESSMENT OF THE EFFECTIVENESS AND FISCAL IMPACTS OF THE USE OF LOCAL DEVELOPMENT INCENTIVES IN THE ST. LOUIS REGION: INTERIM REPORT, at iv (2009), http://www.ewgateway.org/pdffiles/library/regdev/tifrpt-012609.pdf ("While distribution effects might yield broader economic benefits when used to redevelop economically distressed communities, when incentives are used in healthy and prosperous communities the regional effect may be to destabilize the fiscal health of neighboring areas. *This conclusion particularly applies to retail development.* While there is ample justification for tax expenditures on retail development in underserved areas, overall there seems little economic basis to support public expenditures for private retail development." (emphasis added)). The drain on existing local retail is most acute when the new retail operation is part of a large retail chain. *See* STACY MITCHELL, BIG-BOX SWINDLE: THE TRUE COST OF MEGA-RETAILERS AND THE FIGHT FOR AMERICA'S INDEPENDENT BUSINESSES 33–39 (2006) (describing studies that found the opening of a Wal-Mart reduced a county's retail employment by an average of 180 jobs, or 3.2%, and reduced county-wide retail

After looking at the public purpose analysis of incentives in case law, jobs and tax base rise to the top as the main contributors to net public benefit. "Diversifying the economy" is less helpful as a factor in evaluating the net public benefit of an incentive because, in the absence of further explanation by the courts, we are left to speculate as to its meaning.[204]

2. Characteristics of Incentives That Are "Parallel to" *Maready* Incentives

Another way to evaluate the sufficiency of an incentive is to compare it against the defining characteristics of the incentives approved in *Maready*. Indeed, *Maready*'s progeny, *Blinson* and *Haugh*, used the *Maready* incentives as their standard. In *Blinson*, the North Carolina Court of Appeals stated that the "[p]laintiffs have made no attempt to demonstrate how the incentives in this case are legally different from the 24 local economic incentive packages offered in *Maready*," and the absence of such a showing led the panel

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earnings by an average of $2 million, or 2.8%, and noting instances of smaller retailers being forced to shut down as a result of a large retail chain store locating in the area). A local government could of course argue that some unique retail establishments provide such unusual or specialized retail experiences that new retail customers from outside the immediate area would be attracted and would indeed impart a diversifying effect in the economy. However, case law casts doubt on this argument. *See supra* notes 194–97 and accompanying text (indicating that courts describe diversification of the economy in terms of industrial projects and enhancements to the viability of broad industrial sectors, such as aviation or seaborne commerce).

203. PEW CTR. ON THE STATES, EVIDENCE COUNTS: EVALUATING STATE TAX INCENTIVES FOR JOBS AND GROWTH 22 (2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/015_12_RI%20Tax%20Incentives%20Report_web.pdf ("In 2010, Louisiana's economic development agency attempted to determine whether its Enterprise Zone program was creating some jobs at the expense of others. The agency estimated that 90 percent of the Enterprise Zone jobs in the hotel, restaurant, retail, and health-care industries were merely replacing existing jobs. This estimate relied on academic literature that showed the market for these industries tends to be local. The report pointed out the tax incentive program might be less effective than those of neighboring states, such as Texas and Arkansas, which prohibit retailers from qualifying for their equivalent tax credits."). *See also* ARIZ. REV. STAT. ANN. § 42-6010 (West Supp. 2012) (prohibiting a municipality from offering an incentive "as an inducement or in exchange for locating or relocating a retail business facility in the city or town"). *But see* State *ex rel.* Brown v. City of Warr Acres, 946 P.2d 1140, 1143–44 (Okla. 1997) (describing a $400,000 grant of incentives to a county's largest retailer as satisfying a public purpose under the Oklahoma Constitution); George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427, 449–50 (2011) (arguing that retail, at times, needs financing support through public finance tools, such as Tax Increment Financing, "to meet fresh demand based on increases in population and wealth, or to achieve planning objectives other than the enhancement of the tax base within the project area, often to resuscitate a moribund downtown commercial center").

204. *See supra* notes 194–98 and accompanying text.

to follow *Maready*'s precedent.[205] The court in *Haugh* was equally direct, stating that "[i]ncentives *parallel to those at issue* already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent."[206]

In order to give meaning to the comparison being made by the North Carolina Court of Appeals to the incentives approved in *Maready*, the defining characteristics of those incentives must first be identified. Once identified, those defining characteristics can be incorporated into this Article's larger framework for analyzing incentives and used as a basis for evaluating the sufficiency of incentive proposals. To that end, three categories of incentive characteristics can be identified in *Maready*: (1) the key terms agreed upon for the *Maready* incentives, (2) the procedures used to approve the *Maready* incentives, and (3) the presence of interstate competition. Each will be analyzed in turn.

a. Key Terms Agreed Upon for the Maready *Incentives*

In setting forth the facts of the case, the *Maready* majority described the incentives at issue:

> This action challenges twenty-four economic development incentive projects entered into by the City or County pursuant to [G.S.] 158-7.1. The projected investment by the City and County in these projects totals approximately $13,200,000. The primary source of these funds has been taxes levied by the City and County on property owners in Winston-Salem and Forsyth County. City and County officials estimate an increase in the local tax base of $238,593,000 and a projected creation of over 5,500 new jobs as a result of these economic development incentive programs. They expect to recoup the full amount of their investment within three to seven years. The source of the return will be revenues generated by the additional property taxes paid by participating corporations. To date, all but one project has met or exceeded its goal.[207]

There are two key terms to draw from this description of the incentives approved in *Maready*. First, the incentives were designed to result in "an increase in the local tax base," with the local

205. Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007).

206. Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) (emphasis added).

207. Maready v. City of Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 618–19 (1996).

governments expected "to recoup the full amount of their investment within three to seven years" based upon "revenues generated by the additional property taxes paid by participating corporations."[208] Note that the time period of three to seven years for recoupment is shorter—and therefore more favorable to the local government—than the ten-year period allowed in subsection (d2) for subsidized property conveyances.[209] Second, the "creation" of "new jobs" was promised in exchange for every incentive.[210]

The incentives at issue in *Blinson* and *Haugh* clearly conformed to the key terms—job creation and increasing the tax base—of the *Maready* incentives. *Blinson* involved a company's promise to create 1,700 new jobs with a capital investment exceeding $100 million,[211] and the incentives in *Haugh* brought in 210 jobs and a $24 million investment.[212]

b. *"Typical" Procedural Requirements for Approval of Incentives*

After describing the incentives at issue, the *Maready* court went on to describe its understanding of the "typical" procedures used to approve those incentives:

> The typical procedures the City and County observe in deciding to make an economic development incentive expenditure are as follows: A determination is made that participation by local government is necessary to cause a project to go forward in the community. Officials then apply a formula set out in written guidelines to determine the maximum amount of assistance that

208. *Id.* at 713, 467 S.E.2d at 619. In their joint brief, the city and the county stated that "[i]n *every* instance, the investment was calculated to guarantee recoupment of the investment through property tax revenues within three to seven years." Defendant-Appellants' Joint Brief at 19, Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (No. 422PA95) (emphasis added). Note, however, that the dissenting opinion provides a table outlining the capital investment of each incentive as understood by the dissent, to include one incentive for which the dissent believed—apparently incorrectly—that no tax base increase was projected. *See Maready*, 342 N.C. at 736–37, 467 S.E.2d at 632–33 (Orr, J., dissenting).

209. *See* N.C. GEN. STAT. § 158-7.1(d2) (2011); *see also supra* Part I.B.4 (describing the procedural requirements associated with subsidized conveyances of property under subsection (d2)).

210. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619; *see also id.* at 736–37, 467 S.E.2d at 632–33 (Orr, J., dissenting) (providing a table listing the number of jobs promised in exchange for each incentive); Defendant-Appellants' Joint Brief at 14, 19, *Maready*, 342 N.C. 708, 467 S.E.2d 615 (No. 422PA95) (indicating that every incentive involved the creation of new jobs).

211. Blinson v. State, 186 N.C. App. 328, 332, 651 S.E.2d 268, 273 (2007).

212. Haugh v. Cnty. of Durham, 208 N.C. App. 304, 306, 702 S.E.2d 814, 816 (2010).

> can be given to the receiving corporation. The amounts actually committed are usually much less than the maximum. The expenditures are in the form of reimbursement to the recipient for purposes such as on-the-job training, site preparation, facility upgrading, and parking. If a proposal satisfies the guidelines as well as community needs, it is submitted to the appropriate governing body for final approval at a regularly scheduled public meeting. If a project is formally approved, it is administered pursuant to a written contract and to the applicable provisions and limitations of [G.S.] 158-7.1.[213]

Note that the contemplated incentives were made in the form of *reimbursements* for specified activities, some of which appear in subsection (b), such as site preparation,[214] and some which do not, such as on-the-job training.[215] As noted in Part I.B.1, reimbursements that do not implicate subsection (b) are authorized pursuant to the subsection (a) catch-all provision, which imposes no explicit procedural requirements.[216] If the court agreed that subsection (a) imposes no procedural requirements, it never noted that fact. To the contrary, the court took pains to describe a rather robust set of "typical procedures" for approval of the incentives at issue:

1. An initial "but-for" or necessity determination is made.[217]
2. A written guideline or policy is applied to determine the maximum amount of incentive that can be given to the receiving corporation.[218]
3. Expenditures take the form of reimbursements, not unrestricted cash payments.[219]

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213. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619.

214. § 158-7.1(b)(1), (b)(7).

215. *See Maready*, 342 N.C. at 713, 467 S.E.2d at 619 (referring to reimbursements for "on-the-job training"); *cf.* § 158-7.1(b) (omitting on-the-job training from the enumerated activities but noting that the "listing is not intended to limit [permitted activities] by implication").

216. Appropriations made pursuant to subsection (a) are subject to no explicit procedural requirements other than the oversight requirements of G.S. 158-7.2. *See supra* notes 64–67 and accompanying text; *see also supra* Part I.B.1 (explaining the catch-all provision, G.S. 158-7.1(a)).

217. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619 ("[P]articipation by local government is necessary to cause a project to go forward in the community."); *see also supra* Part II.A (discussing the Emoluments Clause of the North Carolina Constitution and the "but-for" determination).

218. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619.

219. *Id.* The use of reimbursements—as opposed to appropriations "turned over to any agency or organization other than the county or city for expenditure"—is helpful in

4. Final approval is made at a public meeting, properly noticed, with the agenda and materials being made available to the general public "at least four (4) days prior to said public meetings."[220]
5. A written agreement governs implementation.[221]

Furthermore, the court's recitation of these "typical" procedures gained added emphasis from a statement by the majority—made in the same paragraph explaining how incentives obtain a net public benefit—that the "strict procedural requirements the statute imposes" will prevent abuse.[222] The court never attempted to distinguish between incentives that are subject to strict procedural requirements and those that are not, suggesting that the court assumed that all incentives were subject to strict procedural requirements.[223]

Furthermore, the court implicitly acknowledged that cash payments made to induce a company to engage in subsection (b) activities trigger the same procedures as when a local government engages in those activities directly. Recall that *Maready* involved twenty-four economic development incentives paid "in the form of [cash] reimbursement to the recipient."[224] Many of the reimbursements went toward activities that properly fell within the purview of subsection (b), such as land purchases and construction of improvements on land,[225] but the local governments did not engage in those activities directly; rather, they *subsidized* companies in support

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complying with G.S. 158-7.2. § 158-7.2; *see also supra* notes 63–64 and accompanying text (discussing the local government oversight requirements of G.S. 158-7.2).

220. *Maready*, 342 N.C. at 713, 731, 467 S.E.2d at 619, 629. Specifically, the court noted that final approval occurred "at a regularly scheduled public meeting." *Id.* at 713, 467 S.E.2d at 619. G.S. 158-7.1 imposes no requirement for approvals to occur at "regularly scheduled" meetings. However, approval at a regular meeting is required for approvals of certain conveyances of real property under G.S. chapter 160A, article 12. *See, e.g.*, § 160A-267 (requiring approval at a "regular council meeting" to convey property by private sale); *id.* § 160A-271 (requiring approval at a "regular meeting" to exchange property); *id.* § 160A-272 (requiring approval at a "regular council meeting" to lease or rent property).

221. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619. A written agreement is helpful in complying with G.S. 158-7.2. *See supra* notes 143–44 and accompanying text.

222. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625. *See also* LAWRENCE, *supra* note 6, at 97–98 (advising local governments to hold a public hearing prior to approval of economic development incentives based upon the *Maready* court's emphasis on the "strict procedural requirements" of G.S. 158-7.1).

223. The implications of the court's assumption are addressed later in this Article. *See infra* notes 230–34 and accompanying text.

224. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619.

225. *Id.* at 736–37, 467 S.E.2d at 632–33 (Orr, J., dissenting).

of those activities through reimbursements.[226] The local governments did not try to avoid the procedural requirements associated with subsection (b) by suggesting that the use of cash reimbursements somehow placed the incentives under the purview of procedure-free subsection (a);[227] rather, the local governments followed the procedural requirements applicable to subsection (b) activities. The court took note, citing the trial court's finding that incentives "made pursuant to the provisions of [G.S.] 158-7.1(b) through (f) were approved . . . following publication of a notice of a public hearing . . . as provided in said statute."[228] This statement would make little sense if the court believed that reimbursements are authorized solely under procedure-free subsection (a); that would have meant that none of the *Maready* reimbursements would have triggered the procedural requirements imposed on subsection (b) activities.[229] Arguably, the *Maready* court cut through the form of these transactions to get at their substance—implicitly recognizing that subsidies for activities enumerated in subsection (b) were essentially equivalent to engaging in the activities directly and therefore trigger all of the requirements of subsections (c), (d), and (d2), such as notice, a public hearing, substantial job creation, and a contract for investing in property improvements.[230]

Two consequences flow from this conclusion and must be incorporated into the framework. The first is that every incentive that subsidizes a subsection (b) activity should be approved following a public hearing as required by subsection (c).[231] Notice to the public

226. *Id.* at 713, 467 S.E.2d at 619.

227. *See supra* Part I.B.1 (describing subsection (a) and explaining that appropriations made pursuant to subsection (a) are subject to no explicit procedural requirements other than the oversight requirements of G.S. 158-7.2).

228. *Maready*, 342 N.C. at 731, 467 S.E.2d at 629.

229. *See supra* Part I.B.1 (describing subsection (a) and explaining that appropriations made pursuant to subsection (a) are subject to no explicit procedural requirements other than the oversight requirements of G.S. 158-7.2).

230. *See supra* Parts I.B.3–4. Note also that this interpretation accords with the direct approval and close oversight of expenditures by "any agency or organization other than the county or city," as mandated by G.S. 158-7.2. N.C. GEN. STAT. § 158-7.2 (2011). *See supra* notes 64–65 and accompanying text.

231. *See supra* note 227 and accompanying text. *Cf.* LAWRENCE, *supra* note 6, at 157 (suggesting when a "nongovernmental entity proposes to offer an incentive to a specific company or to engage in any of the projects listed in G.S. 158-7.1(b) and to use county or city money to do so, [G.S. 158-7.2] probably requires a discrete approval by the county or city of such a significant use of its funds" and such "approval might best be given after a public hearing that follows the procedures of G.S. 158-7.1(c)"); *supra* notes 64–65 and accompanying text (describing the oversight required by G.S. 158-7.2 when funds appropriated by a county or city pursuant to G.S. 158-7.1 are turned over to another agency or organization for expenditure); LAWRENCE, *supra* note 6, at 97–98 (suggesting

must be made at least ten days in advance of the hearing, and the contents of the notice must follow the form prescribed in the statute.[232] The second consequence relates more to consideration than procedure. Subsidies paid in support of property-related activities listed in subsection (b), such as purchases of property and construction of improvements on property, invoke not only the hearing requirements of subsection (c), but also the performance requirements of subsection (d2) applicable to subsidized conveyances, which require the creation of a substantial number of jobs and binding the recipient to construct improvements to generate property tax revenue.[233] For example, when a local government reimburses a company for site improvements on a company-owned site, it may be true that the local government is not directly purchasing land, constructing site improvements, and conveying the improved land to the company for less than fair market value, but it is engaged in the economic equivalent.[234] Therefore, subsection (d2)'s requirements, pertaining to job creation and contractually binding the incentive recipient to construct improvements to recoup the subsidy apply.[235]

One related question must be addressed. The local governments in *Maready* reimbursed companies for specific, named activities—for example, construction of "site improvements."[236] It is more common today, however, for cash incentive grants to be paid to companies in exchange for job creation and capital investment that increases the tax base, without further specifying how funds are to be spent.[237] The difference is irrelevant. It should be obvious that today's cash grants subsidize subsection (b) activities whether or not those activities are

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that the *Maready* court identified a requirement for a public hearing prior to making expenditures pursuant to G.S. 158-7.1).

232. *See* § 158-7.1(c); *see also supra* Part I.B.3 (describing procedural requirements associated with property conveyances). For more detail on the form of notice, see Mulligan, *supra* note 75.

233. *See* § 158-7.1(d2); *supra* Part I.B.4.

234. Professor Lawrence makes a nearly identical point in his text on economic development law when he states: "Even though [the local government] has not purchased and then conveyed property to a company, the local government is doing the economic equivalent, and the policy of [G.S. 158-7.1] demands that the amount [of the subsidy or incentive] be returned to the government through taxes and other revenues [pursuant to Subsection (d2)]." LAWRENCE, *supra* note 6, at 107.

235. *See* § 158-7.1(d2); *supra* Part I.B.4. Subsection (h), enacted after *Maready*, now imposes a separate requirement for incentive recipients to meet job creation and capital investment targets regardless of whether a subsection (b) activity is being undertaken. *See* § 158-7.1(h); *see also supra* Part I.B.6 (describing recapture provisions required in incentive agreements).

236. Maready v. City of Winston-Salem, 342 N.C. 708, 736, 467 S.E.2d 615, 632 (1996).

237. *See* LAWRENCE, *supra* note 6, at 14.

specifically named. Practically every conceivable manner in which a company can increase the tax base—purchasing property and constructing facilities and other improvements on that property—involves subsection (b) activities and therefore implicates the procedures imposed thereby. To hold otherwise—to suggest that a local government can avoid the "strict procedural requirements" of G.S. 158-7.1 by cleverly omitting any reference to the activities that must occur in pursuit of increasing the tax base—would strain logic and elevate form over substance.[238]

c. The Presence of Interstate Competition

The role of interstate competition is treated separately because the concept is explained in *Maready* not with respect to the incentives at issue—that is, it was not discussed as a key component of each incentive—but rather, the court mentioned it in the context of explaining how G.S. 158-7.1 serves a public purpose generally.[239]

Leading up to its discussion of interstate competition, the *Maready* court took note of the "circumstances surrounding [G.S. 158-7.1's] enactment."[240] Although the original statute was enacted in 1925[241] and the last substantial revision occurred in 1973,[242] the court repeatedly expressed concern about recent and ongoing competition between North Carolina and other states. The court first cited a 1989 Legislative Research Commission's conclusion that "[l]ow wages and low taxes are no longer sufficient incentives *to entice new industry to*

238. Courts often resist results that elevate form over substance. *See* Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 156 (1981) (citing Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511(5th Cir. 1976) ("There the court had held under similar facts that it would be elevating form over substance to characterize a party such as FMCC . . . as anything but a creditor"); Parker v. Flook, 437 U.S. 584, 590 (1978) ("The notion that post-solution activity, no matter how conventional or obvious in itself, can transform an unpatentable principle into a patentable process exalts form over substance."); Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 345 (1977) ("Under the circumstances presented here, it would exalt form over substance to differentiate between the Washington Commission and a traditional trade association representing the individual growers and dealers who collectively form its constituency."); Mangum v. Raleigh Bd. of Adjustment, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008) (citing Pyco Supply Co. v. Am. Centennial Ins. Co., 321 N.C. 435, 443, 364 S.E.2d 380, 385 (1988) for the notion that denying "a party his day in court because of his 'imprecision with the pen' would 'elevate form over substance' and run contrary to notions of fundamental fairness").

239. *See Maready*, 342 N.C. at 725, 467 S.E.2d at 625–26.

240. *Id.* at 725, 467 S.E.2d at 626.

241. Act of Feb. 19, 1925, ch. 33, 1925 N.C. Sess. Laws 20 (codified as amended in N.C. GEN. STAT. § 158-1 to -7.4 (2011)).

242. *See supra* note 64.

our State, especially to our most remote, most distressed areas."[243] The court observed 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."[244] The court thought it "unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to [G.S.] 158-7.1 are discontinued," given that the state is "competing with *inducements to industry offered through legislative enactments in other jurisdictions.*"[245] The court was concerned about capturing economic development "which might otherwise be *lost to other states.*"[246] From this, it is clear that interstate competition weighed heavily on the *Maready* majority's analysis.

The importance of interstate competition was almost tested in *Haugh*. There, the challenged incentive induced a company to move just across the county line from Wake County to Durham County.[247] The plaintiffs attempted to present the facts "as a novel case of intrastate competition between adjacent counties."[248] The North Carolina Court of Appeals was asked to invalidate the incentive as inducing a "wholly intrastate relocation" that did not serve a public purpose.[249] However, after a close examination of the facts, the court determined that the company was also considering a move to California, so the case was "not solely one of intrastate competition between Wake County and Durham."[250] With interstate competition present, the facts were "materially indistinguishable" from prior court of appeals holdings and from *Maready*.[251] This analysis is noteworthy because the court took the time to examine *Maready*'s statements regarding interstate competition and attracting development that "might otherwise be lost to other states."[252] Rather than dismissing

243. *Maready*, 342 N.C. at 725, 467 S.E.2d at 626 (emphasis added).

244. *Id.* (emphasis added).

245. *Id.* at 726–27, 467 S.E.2d at 627 (emphasis added).

246. *Id.* at 727, 467 S.E.2d at 627 (emphasis added).

247. Haugh v. Cnty. of Durham, 208 N.C. App. 304, 306–07, 702 S.E.2d 814, 816–17 (2010).

248. *Id.* at 317, 702 S.E.2d at 823.

249. *Id.* at 314, 702 S.E.2d at 821.

250. *Id.* at 318, 702 S.E.2d at 823.

251. *See id.*; *see also supra* note 205 and accompanying text (quoting the statement in *Haugh* that the court was bound by precedent to hold that incentives parallel to those approved in *Maready* serve a public purpose).

252. *Haugh*, 208 N.C. App. at 318, 702 S.E.2d at 823 ("The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest." (citing Maready v. City of Winston-Salem, 342 N.C. 708, 727, 467 S.E.2d 615, 627 (1996))); *see also* Blinson v. State, 186 N.C. App. 328, 337, 651 S.E.2d 268, 276 (2007) (quoting the same language from *Maready* regarding other states).

the plaintiff's argument out of hand, the court took interstate competition seriously and thereby raised the possibility that a future court might consider invalidating a wholly intrastate incentive as failing to achieve a public purpose—thus necessitating its inclusion in this Article's framework for analyzing incentives.[253]

C. *Summary of Constitutional Analysis*

The key points from the above discussion on the constitutional issues to consider when evaluating incentives can be reorganized along the three dimensions of this Article's proposed framework for analyzing incentives: means, consideration, and procedural requirements. Each dimension will be addressed in turn.

1. Allowable Means for Incentives Under Case Law

The *Maready* decision is quite clear in stating that the North Carolina Constitution places no restrictions on the allowable means of providing incentives. As the opinion notes, G.S. 158-7.1, read in conjunction with the broad construction statutes, suggests "an evident legislative purpose to give local governments considerable flexibility and discretion to execute the perceived public purpose of economic development in communities within their jurisdictions."[254] As noted previously, the *Maready* court opined that even the most "innovative activities" were permissible, provided that they serve a public purpose.[255] Therefore, the *means* used by local governments is not the

253. Because the *Haugh* court treated interstate competition as a factual determination—it is either present or it is not—it will be inserted into the framework as a characteristic of the incentives approved in *Maready*. *See Haugh*, 208 N.C. App at 317, 702 S.E.2d at 823 ("Plaintiffs appear to attempt to distinguish the case *sub judice* from our holdings in *Peacock* and *Blinson* and our Supreme Court's holding in *Maready* by framing this as a novel case of intrastate competition between adjacent counties. . . . We are not persuaded, and hold that Shalvoy's undisputed deposition testimony contradicts plaintiff's position and places the remaining issues squarely within the purview of holdings that we are not at liberty to revisit.").

254. Maready v. City of Winston-Salem, 342 N.C. 708, 729, 467 S.E.2d 615, 628 (1996).

255. *Id.* at 724, 467 S.E.2d at 615; *accord Haugh*, 208 N.C. App. at 316–19, 702 S.E.2d at 822–23; *Blinson*, 186 N.C. App. at 338, 651 S.E.2d at 276; Peacock v. Shinn, 139 N.C. App. 487, 495, 533 S.E.2d 842, 848 (2000) (holding that an operating agreement for a coliseum serves a public purpose where "a private party ultimately conducts activities which, while providing incidental private benefit, serve a primary public goal"); *cf.* Wood v. Comm'rs of Oxford, 97 N.C. 227, 232, 2 S.E. 653, 655–56 (1887) ("It may be conceded that a municipality could not have power to donate its revenues or credits to individuals or corporations in aid of a merely private enterprise or industry, because in that case the object is simply private gain. It does not, in its nature and purpose, tend to afford public advantage. But it is otherwise when the enterprise or industry is public in its nature and purpose, and intended to confer public benefit, as well as secure private gain to its owners, as in case of a projected railroad. Although the road may belong to a private corporation,

focal concern of the court's public purpose analysis;[256] rather, it is the consideration—the public benefit received in exchange for the incentive[257]—and the procedures for approving incentives[258] that are paramount.[259]

2. Consideration Required in Exchange for Incentives Under Case Law

Our earlier examination of the Exclusive Emoluments Clause led to the conclusion that a local government must make a "but-for" or necessity determination as a threshold test of adequate consideration.[260] That is, an incentive for a company under G.S. 158-7.1 is permitted only where the company's performance (typically in terms of job creation and increasing the tax base) would not occur "but for" the incentive.[261] It would be impermissible, for example, for a local government to pay a business to do something that the business would have done anyway without the incentive.[262] Our earlier analysis of public purpose further supports the use of a "but-for" determination when approving an incentive. As noted, the *Maready* court lauded the "strict procedural requirements" associated with economic development incentives,[263] and, in that case, the local government's "typical procedures," as described by the court, included a necessity determination as part of the incentive approval process.[264] Thus, it is not difficult to conclude that a "but-for" or necessity determination is a necessary component of any incentive approval process.

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still its purpose is directly for the public benefit and advantage. A chief purpose of counties, cities, and towns is to secure public advantage and convenience, and thus public prosperity, by means of public works and enterprise, set on foot and prosecuted by themselves, or through individuals or corporations, and it can make no difference whether such works are encouraged by the county or town by taking the capital stock of a corporation, or by a donation of money or credit to it. In either case the public benefit, or supposed benefit, is in substance paid for.").

256. *See Maready*, 342 N.C. at 720, 467 S.E.2d at 623 ("Moreover, the Court's focal concern in [prior cases], the means used to achieve economic growth, has also been removed by constitutional amendment.").

257. *See supra* Part II.B.1.

258. *See supra* Part II.B.2.b.

259. Compare this conclusion with the conclusion in Part I.C.1: "[M]ost of the limitations found in G.S. 158-7.1 pertain not to the *means* of undertaking economic development activities, but rather to the *consideration* expected in return for an incentive and *procedural requirements* related to approval of incentives."

260. *See supra* Part II.A.

261. *See supra* Parts I.C.2, II.A, II.B.1, II.B.2.

262. *See supra* notes 157–58 and accompanying text.

263. *See supra* Part II.B.2.b.

264. *See* Maready v. Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 619 (1996).

Beyond the "but-for" determination, each incentive should obtain adequate consideration in terms of public benefit.[265] The question is what criteria to apply in order to determine whether an incentive provides sufficient public benefit. As established, the criteria can be drawn from two aspects of *Maready*: (1) the four factors ensuring a net public benefit[266] and (2) the defining characteristics of the approved incentives.[267] By merging the four net public benefit factors with the characteristics of the *Maready* incentives, four forms of consideration emerge: job creation, increasing the tax base, economic diversification, and interstate competition. Those four forms of consideration, with supporting statements from *Maready*, are summarized in the table below.

Factor	*Support in* Maready
Job creation	*Maready* net public benefit obtained by "providing displaced workers with continuing *employment opportunities*."[268]
	Maready net public benefit obtained by "attracting better paying and more highly skilled *jobs*."[269]
	Maready: "[G.S.] 158-7.1, which is intended to *alleviate conditions of unemployment* and . . . increase the local tax base, serves the public interest."[270]
	Maready dissent's repeated characterization: "simply creating *new jobs* and increasing the tax base is a public purpose . . . ."[271]
	Key term of *Maready* incentives: "creation" of "*new jobs*" was promised in exchange for every incentive[272] (plaintiffs in *Haugh* and *Blinson* were unable to distinguish the incentives at issue from *Maready* incentives[273]).

265. *See id.* at 724, 467 S.E.2d at 625 (holding that economic development incentives serve a public purpose "so long as they primarily benefit the public and not a private party").

266. *See supra* Part II.B.1.

267. *See supra* Part II.B.2.

268. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (emphasis added).

269. *Id.* (emphasis added).

270. *Id.* at 727, 467 S.E.2d at 627 (emphasis added).

271. *Id.* at 737, 467 S.E.2d at 633 (Orr, J., dissenting) (emphasis added).

272. *Id.* at 713, 467 S.E.2d at 619 (emphasis added).

273. *See* Haugh v. City of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010);

	Subsidy of subsection (b) property-related activities treated as engaging in activities directly, therefore triggering related requirements, including *substantial job creation* under subsection (d2), consistent with *Maready*'s emphasis on the statute's "strict procedural requirements."[274]
Increasing the tax base	*Maready* net public benefit obtained by "*enlarging the tax base.*"[275]
	Maready: "[G.S.] 158-7.1, which is intended to alleviate conditions of unemployment and . . . *increase the local tax base*, serves the public interest."[276]
	Maready dissent's repeated characterization: "simply creating new jobs and *increasing the tax base* is a public purpose."[277]
	Key term of *Maready* incentive: incentives resulted in "*increase in the local tax base*," with local governments expecting "to recoup the full amount of their investment within three to seven years" based upon "revenues generated by the additional property taxes paid by participating corporations"[278] (plaintiffs in *Haugh* and *Blinson* were unable to distinguish the incentives at issue from *Maready* incentives[279]).
	Subsidy of subsection (b) property-related activities treated as engaging in activities directly, therefore triggering related requirements, including *constructing improvements to generate tax revenue* under subsection (d2), consistent with *Maready*'s emphasis on the statute's "strict procedural requirements."[280]

Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007).

274. *See supra* notes 232–34 and accompanying text; Part II.B.2.b.

275. *Maready*, 342 N.C. at 724, 467 S.E.2d at 615 (emphasis added).

276. *Id.* at 727, 467 S.E.2d at 627 (emphasis added).

277. *Id.* at 737, 467 S.E.2d at 619 (Orr, J., dissenting) (emphasis added).

278. *Id.* at 713, 467 S.E.2d at 619 (emphasis added).

279. *See* Haugh v. City of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010); Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007).

280. *See supra* notes 232–34 and accompanying text; Part II.B.2.b.

Economic diversification	*Maready* net public benefit obtained by "diversifying the economy."[281]
Interstate competition	"The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest."[282]

All four forms of consideration will be added as factors for analysis in this Article's proposed framework, but it should be obvious from the table above that two forms of consideration have considerably more support: job creation and increasing the tax base. This suggests that the other two forms of consideration—diversifying the economy and interstate competition—may carry less weight when a court determines whether an incentive serves a public purpose. This difference in weighting will be addressed in this Article's final framework for analysis.

3. Procedural Requirements for Approval of Incentives Under Case Law

The *Maready* court, in its public purpose analysis, looked favorably upon the "strict procedural requirements" of G.S. 158-7.1.[283] There are two possible sources of "strict procedural requirements" to which the court may have been referring: (1) the "typical procedures" used by the local governments in *Maready* and described in the opinion,[284] and (2) the implicit assumption in *Maready* that subsidizing a subsection (b) activity triggers the same procedural requirements as engaging in the activity directly.[285] By taking a conservative approach, in which these two sources of procedural requirements are compared and the stricter of each is taken, three additional factors for this Article's proposed framework emerge that were not already identified:[286] notice and hearing prior to approval,[287] written agreement governing implementation,[288] and

281. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (emphasis added).

282. *Id.* at 727, 467 S.E.2d at 627.

283. *Id.* at 724, 467 S.E.2d at 625. *See supra* notes 222–23 and accompanying text.

284. *See supra* notes 213–21 and accompanying text.

285. *See supra* notes 224–30 and accompanying text.

286. Some requirements pertain to job creation, increasing the tax base, and the "but-for" determination already discussed above, so they are not repeated here. *See supra* Part II.C.2.

287. The typical approval procedures described for the *Maready* incentives included notice and approval at a "regularly scheduled public meeting." *Maready*, 342 N.C. at 713, 467 S.E.2d at 619; *see also supra* Part II.B.2.b (describing the typical procedures for

written incentive guidelines or policy.[289] These additional factors will be described in greater detail when the framework's procedural components are assembled in Part III.D.

III. ASSEMBLING THE FRAMEWORK FOR ANALYSIS

During the course of incentive negotiations, at some point a local government will need to determine the statutory and constitutional validity of the incentive transaction. The essential components of a framework for analyzing incentives have already been discussed: Parts I and II analyzed two general sources of law—statutes and case law—and merged them with the three dimensions—means, consideration, and procedural requirements—of this Article's proposed framework for analyzing incentives. This Part arranges the various components already discussed into a single comprehensive framework. The three dimensions of the framework—means, consideration, and procedural requirements—will continue to serve as the conceptual scaffold for the discussion.

A. Allowable Means for Incentives

Most of the limitations imposed by G.S. 158-7.1 pertain not to the *means* of undertaking economic development activities, but rather to the *consideration* expected in return for an incentive and the *procedural requirements* related to approval of incentives.[290]

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approval of the incentives in *Maready*). Expenditures for subsection (b) activities trigger a requirement for notice and a public hearing under subsection (c). *See* N.C. GEN. STAT. § 158-7.1(c) (2011). For this Article's framework, these two procedural requirements are compared and the stricter is taken. In this case, a public *hearing*, properly *noticed*, is a stricter procedure than approval at a "regularly scheduled public meeting" without notice requirements or an opportunity for the public to be heard. Accordingly, the strict procedural requirement described in the framework is notice and public hearing.

288. The typical procedures described by *Maready* included administering the incentives pursuant to a "written contract." *Maready*, 342 N.C. at 713, 467 S.E.2d at 619; *see also supra* Part II.B.2.b (describing the typical approval procedures for the incentives in *Maready*). When a local government subsidizes subsection (b) activities, "the governing board . . . shall contractually bind the purchaser" pursuant to subsection (d2). *See* § 158-7.1(d2). The two requirements are essentially identical and are represented in this Article's framework as a single procedural factor: written agreement required.

289. The typical approval procedures described by *Maready* included applying "written guidelines to determine the maximum amount of assistance that can be given to the receiving corporation." *Maready*, 342 N.C. at 713, 467 S.E.2d at 619; *see also supra* Part II.B.2.b (describing the typical approval procedures for the incentives in *Maready*). There is no equivalent requirement in the statutes. Taking a conservative approach, this procedural requirement is inserted into the Article's framework as written guidelines or policy applied.

290. *See supra* Part I.C.

Additionally, analysis of the North Carolina Constitution concluded that the constitution places essentially no restrictions on the allowable means of providing incentives.[291] There are a few limitations in the law pertaining to utility and property tax rates, but the broad authority to make appropriations for economic development under subsection (a) of G.S. 158-7.1 easily overcomes that minor barrier as a practical matter.[292]

It must, therefore, be concluded that North Carolina law allows local governments broad discretion in the means used to effectuate economic development under G.S. 158-7.1. Accordingly, as means is not a determinative factor in evaluating the validity of an incentive, it will not be emphasized in the final version of this Article's framework. A local government is free to be creative in crafting the means used to induce a company to locate within its borders, ranging from offering a subsidized loan (containing features such as lower-than-market interest rates,[293] favorable payment terms,[294] or inadequate security[295]) to paying for relocation services to site

291. *See supra* Part II.C.

292. *See supra* notes 123–27 and accompanying text.

293. A lower-than-market interest rate is, in effect, a grant to the borrower. The grant simply sits alongside the loan and is properly viewed as either buying down the interest rate or subsidizing the interest payments of the borrower. Such favorable loans amount to an incentive or grant payment to the borrower. *See* Mulligan, *Local Government Assistance*, *supra* note 22. As an aside, it should be noted that offering favorable loan terms to a business as an incentive makes little business sense from a local government perspective. Any loan made by a local government to a business should be *less favorable* to the business than a conventional loan for two reasons. First, if a business has turned to the local government for a loan, then it suggests that the business was unable to obtain a loan from a conventional lender. This means the local government's capital is more valuable and justifies a higher rate of interest. Second, the local government wants to create an incentive for the business to refinance the loan with a private commercial lender as soon as possible. If the local government offers overly favorable terms, then the borrower will be unwilling to refinance, thus preventing the local government from freeing its capital for other public purposes. Note, also, that using less favorable loan terms helps determine the necessity for the loan; that is, a business would not take a less favorable loan from a local government if it could have obtained cheaper financing from a conventional lender.

294. Examples of favorable payment terms include a longer-than-usual term to maturity or, as requested by one developer in the author's experience, a loan to be paid back only as a project's profits allowed, transferring nearly all of the risk associated with the project from the developer to the public. *See, e.g.*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT TO CONGRESS ON RISK RETENTION 77–82 (2010), *available at* http://federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf (discussing several types of federally-subsidized loans as part of the Dodd-Frank Act of 2010, including Federal Housing Authority loans to borrowers with poor credit or inadequate securitization, as well as small business loans with favorable term lengths).

295. Inadequate security would be collateral or other forms of security that are less substantial than what would be required by a conventional lender. *See id.*

preparation to straight cash grants.[296] The limiting factors are not the means used, but rather the consideration received in exchange for an incentive and the procedure followed for its approval.

B. *Primary Forms of Consideration Required in Exchange for Incentives*

North Carolina's statutes and case law provide ample guidance with respect to the consideration required in exchange for economic development incentives.[297] However, this Article's analysis revealed that some forms of consideration carry more weight than others. Specifically, jobs and tax base were the forms of consideration emphasized above all others. The distinction between those two forms of consideration and the rest is so stark that it necessitates dividing the various forms of consideration into two categories: primary and secondary. The primary factors will be described in this Section, and secondary factors will follow in Section C of this Part.

Before discussing the primary factors, however, it is worth mentioning again that a threshold "but-for" or necessity determination should be made for every incentive as discussed above in Part II.C.2. Due to the procedural nature of this particular determination, coupled with the fact that it was listed as one of the "typical procedures" used in approving the incentives at issue in *Maready*, the "but-for" determination will be included later in the portion of the framework devoted to procedural requirements.

1. Job Creation

If there is one essential factor in ensuring a net public benefit from an incentive, it is job creation. Of the four factors the *Maready* court listed as contributing to the net public benefit of incentives, half pertain to job creation: "providing displaced workers with continuing *employment* opportunities" and "attracting better paying and more highly skilled *jobs*."[298] The *Maready* majority also stated that G.S. 158-7.1 serves a public interest because it was "intended to alleviate conditions of *unemployment*."[299] Jobs were half of the *Maready*

296. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 736, 467 S.E.2d 615, 632 (1996).

297. *See supra* Parts I.C.2, II.C.2.

298. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (emphasis added); *supra* Part II.C.2.

299. *Maready*, 342 N.C. at 727, 467 S.E.2d at 625 (emphasis added).

dissent's oft-repeated, never-rebutted refrain, "simply creating new *jobs* and increasing the tax base is a public purpose."[300]

The North Carolina Court of Appeals has consistently refused to invalidate incentives that are *parallel* to those approved in *Maready*.[301] Every economic development incentive offered pursuant to G.S. 158-7.1 and reviewed by North Carolina appellate courts—in *Maready* and thereafter—has obtained a promise of job creation from each recipient company.[302]

The statute serves to reinforce the importance of job creation. First, every economic development agreement "shall" contain provisions to recapture appropriated funds from companies that fail to live up to their job creation promises.[303] Second, any conveyance of property authorized under G.S. 158-7.1—subsidized or not—is subject to the statute's explicit assumption that jobs will result from the transaction.[304] That is, even when a local government receives fair market value for a conveyance of property to a company, the governing board must nonetheless determine the probable "wage to be paid to workers" on the property.[305] Third, when a property conveyance is subsidized, that conveyance must result in the creation

300. *Id.* at 734–42, 467 S.E.2d at 631–36 (Orr, J., dissenting) (emphasis added); *see supra* Part II.C.2.

301. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) ("Incentives *parallel to those at issue* already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent." (emphasis added)); Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007) ("Plaintiffs have made no attempt to demonstrate how the incentives in this case are legally different from the 24 local economic incentive packages offered in *Maready* . . . . *In the absence of a showing of some distinction between the incentives in this case and the incentives in the* Maready *case*, we hold that . . . the [challenged incentives] did not violate the Public Purpose Clauses." (emphasis added)).

302. *See supra* Parts II.B.2.a, II.C.2. The incentives at issue in *Blinson* garnered a promise of 1,700 new jobs. *Blinson*, 186 N.C. App. at 332, 651 S.E.2d at 268. The incentives in *Haugh* brought in 210 jobs. *Haugh*, 208 N.C. App. at 306, 702 S.E.2d at 816. It should be noted that construction jobs—jobs in the construction trades that are temporarily used during the construction of a facility but are not permanently employed at the facility upon completion—are not mentioned in *Maready* and therefore could not be said to be parallel to the job creation described in *Maready*. *See* LAWRENCE, *supra* note 6, at 57 (noting, in the context of residential development, that construction jobs are temporary in nature and are, therefore, fundamentally different from the permanent jobs resulting from industrial and commercial projects).

303. *See supra* Parts I.B.6, I.C.2.

304. N.C. GEN. STAT. § 158-7.1(d) (2011); *see also supra* Part I.B.3 (discussing the procedural requirements for appropriations authorized by G.S. 158-7.1(b) and for unsubsidized conveyances of property); Part I.C.2 (discussing the consideration required by statute in exchange for incentives).

305. § 158-7.1(d).

of a "substantial number of jobs" paying at least the county's average wage.[306] It was concluded that these requirements pertaining to subsidized property conveyances probably apply whenever incentives are paid with the expectation that property-related activities, such as purchases of property and construction of improvements on property, will result.[307]

A review of cases from outside of North Carolina, upon which the *Maready* court explicitly relied,[308] demonstrates that job creation is the most frequently mentioned factor in assessing the public benefit of economic development expenditures that involve private benefit. Of the forty-six states with cases cited in *Maready*, thirty-three states explicitly cited job creation (and another seven used a broad "economic welfare" factor that arguably encompasses job creation) as a factor to hold that economic development expenditures were for a public purpose.[309]

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306. *Id.* § 158-7.1(d2); *see also supra* Part I.B.4 (discussing the special accounting procedures for subsidized conveyances of property); Part I.C.2 (discussing the consideration required in exchange for incentives).

307. *See supra* notes 230–34 and accompanying text; *supra* Parts II.B.2.b, II.C.2.

308. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 725–27, 467 S.E.2d 615, 625–27 (1996). The Supreme Court of North Carolina noted the external pressures resulting from the fact that economic development incentives were being offered in other states:

> In the economic climate thus depicted, 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. To date, courts in forty-six states have upheld the constitutionality of governmental expenditures and related assistance for economic development incentives.

Id. at 725, 467 S.E.2d at 626.

309. *See, e.g.*, *In re* Opinion of the Justices, 177 A.2d 205, 213 (Del. 1962) (per curiam) (describing the legislative findings of the statute to continue the "steady employment of its citizens" and defining unemployment as "an evil properly the subject of state action for remedy"); Potter v. Judge, 444 N.E.2d 821, 824–25 (Ill. App. Ct. 1983) (noting the legislative purpose of "reducing unemployment, expanding commerce, and enlarging municipal tax bases" and upholding the statute as having a proper public purpose); Hayes v. State Prop. & Bldgs. Comm'n, 731 S.W.2d 797, 801 (Ky. 1987) ("[T]he relief of unemployment is a public purpose within the purview of the case law and the constitution."); Williams v. Anne Arundel Cnty., 638 A.2d 74, 79–80 (Md. 1994) (upholding use of public funds for a "privately owned lingerie factory [that] promoted employment and thereby served [a] public purpose" (citing City of Frostburg v. Jenkins, 136 A.2d 852, 855–56 (Md. 1957))); State *ex rel.* Wagner v. St. Louis Cnty. Port Auth., 604 S.W.2d 592, 597 (Mo. 1980) (en banc) ("The Court [in an earlier opinion] held that the issuance of revenue bonds for ... facilities did serve the essential public purposes of improving employment and stimulating the economy."); Fickes v. Missoula Cnty., 470 P.2d 287, 292 (Mont. 1970) ("The county commissioners expressly find the project will be of value as a source of employment and county revenue .... Thus, a valid public purpose appears."); State *ex rel.* Brennan v. Bowman, 512 P.2d 1321, 1322 (Nev. 1973) (upholding a statute "designed to encourage industry to locate or remain in this State in order to relieve

Accordingly, it is not difficult to conclude that job creation is the most important factor in evaluating an incentive transaction.[310] However, this does not put an end to the inquiry into the role of job creation. Two related considerations arise in this context.

The first consideration pertains to the difference between job retention and job creation.[311] Under the right circumstances, they are equivalent. To give an example, say that a company owns two manufacturing facilities—one in North Carolina and another outside of the state. The company believes it has too much manufacturing capacity and intends to shut down one of those two facilities on January 1 of the coming year and upgrade the other with new equipment. The company goes to each jurisdiction and requests incentives, indicating that incentives from the local government will factor into its decision about which facility will be closed and which will remain in operation. Can a local government in North Carolina offer incentives to the company? Probably so. After all, should the company elect to shutter the North Carolina facility, the number of jobs maintained there by the company as of January 1 will be zero. Jobs retained after January 1 can reasonably be viewed as new jobs—or at least as jobs that otherwise would not have existed in North Carolina. In this specific context, the public benefit of job retention is,

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unemployment and to secure and maintain a stable economy"); Stark Cnty. v. Ferguson, 440 N.E.2d 816, 819–21 (Ohio 1981) ("To create or preserve jobs and employment opportunities [or] to improve the economic welfare of the people of the state . . . is hereby determined to be in the public interest and a proper public purpose . . . ." (quoting OHIO CONST. art. VIII, § 13)); Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212, 217–18 (Pa. 1968) (noting that "[a]ll parties are agreed that unemployment is a problem which falls within the police power of the state" and that the projects at bar would "be effective means of combating unemployment since they will create jobs directly"); West v. Indus. Dev. Bd., 332 S.W.2d 201, 202 (Tenn. 1960) ("The stated and obvious purpose of the act in question is to promote industry and develop trade to provide against low wages and unemployment. Such a purpose is public in nature . . . ."). A complete listing of cases referring to job creation is provided in Appendix A.

310. A similar emphasis on job creation is seen in the grant requirements for state incentive programs. *See, e.g.*, § 143B-437.72(b)(1) (requiring "grantee businesses" under the One North Carolina Fund to enter into agreements with local governments containing "[a] commitment to create or retain a specified number of jobs within a specified salary range at a specific location and commitments regarding the time period in which the jobs will be created or retained and the minimum time period for which the jobs must be maintained").

311. *See, e.g.*, Act of Sept. 11, 2007, ch. 552, § 1, 2007 N.C. Sess. Laws 1899, 1899-1904 (codified as amended at N.C. GEN. STAT. § 143B-437.012 (2011)) (enacting state incentives for a tire company in order to persuade the company to retain jobs in North Carolina).

for all practical purposes, nearly identical to the public benefit of job creation.[312]

The second consideration pertains to wages. The *Maready* court stated that one factor contributing to the net public benefit of an incentive is "attracting *better paying* and more highly skilled jobs."[313] The public benefit obtained by jobs is, therefore, enhanced when those jobs are "better paying." Additionally, the *Maready* court expressed confidence that the "strict procedural requirements" of G.S. 158-7.1 would prevent abuse of incentives.[314] Looking at those strict procedural requirements, we see that wages are mentioned twice in the context of property conveyances: once regarding unsubsidized conveyances and another time regarding subsidized conveyances.[315] Prior to an *unsubsidized* conveyance of property to a company, a local government must determine the "probable average hourly wage to be paid to workers by the business to be located at the property to be conveyed."[316] For a *subsidized* conveyance of property, the conveyance must "result in the creation of a substantial number of jobs . . . that pay *at or above the median average wage*."[317]

Taking all of this together, the wages to be paid to workers should be weighed in determining the public benefit of an incentive, but wages alone are not decisive. Out of the two net public benefit factors in *Maready* pertaining to jobs, only one mentioned "better paying" jobs, while the other noted the public benefit of providing employment to "displaced workers" irrespective of the wage.[318] Furthermore, the *Maready* court never described the wages to be paid by companies receiving the challenged incentives,[319] so no judicial

312. The issue of whether job retention serves a public purpose was the subject of a lawsuit following the enactment of state incentives to induce large manufacturers to retain jobs rather than create new jobs. Complaint and Petition for Declaratory Judgment at 11–12, Richards v. State, No. 07-CVS-20487 (N.C. Super. Ct. Dec. 20, 2007). Plaintiff's complaint was dismissed at the trial level and not appealed. Order Granting Defendants' Motion to Dismiss at 1–2, Richards v. State, No. 07-CVS-20487 (N.C. Super. Ct. Dec. 23, 2011).

313. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625 (emphasis added); *see also* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) ("[A]s noted in *Maready*, expenditures 'should ... attract[] better paying and more highly skilled jobs....' " (quoting *Maready*, 342 N.C. at 724, 467 S.E.2d at 625)).

314. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625; *see supra* notes 221–22 and accompanying text.

315. § 158-7.1(d), (d2) (2011).

316. *Id.* § 158-7.1(d); *see supra* Part I.B.3.

317. § 158-7.1(d2) (emphasis added); *see supra* Part I.B.4.

318. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625; *see supra* Part II.B.1.

319. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619.

standard was established.[320] Accordingly, high wages may enhance the public benefit of jobs obtained through incentives, but high wages are probably not required in every instance.

2. Increasing the Tax Base

Close behind job creation in importance is increasing the tax base. The *Maready* court included "enlarging the tax base" as one of the four factors contributing to the net public benefit of incentives authorized under G.S. 158-7.1.[321] The court also explained that the statute, "which is intended to alleviate conditions of unemployment and ... increase the local tax base, serves the public interest."[322] Moreover, "increasing the tax base" is the other half of the *Maready* dissent's unchallenged refrain, "simply creating new jobs and increasing the tax base is a public purpose."[323]

The North Carolina Court of Appeals has declined to invalidate incentives that are indistinguishable from those approved in *Maready*.[324] Recall that the incentives in *Maready* were designed to increase the tax base on a specific timetable. Specifically, the local governments in *Maready* expected "to recoup the full amount of their investment [or incentive] within three to seven years" based upon "revenues generated by the additional property taxes paid by participating corporations."[325] The incentives in *Blinson* and *Haugh* were no different; each case involved a substantial capital investment by the company involved. The company in *Blinson* promised to make a capital investment in "taxable buildings and equipment having an initial aggregate taxable value of at least $100 million,"[326] and the company in *Haugh* agreed to invest a minimum of $24 million.[327] North Carolina appellate courts have, therefore, never evaluated a

320. Among the cases testing G.S. 158-7.1, the only specific description of wages appears in *Blinson*, in which the economic development agreement at issue characterized the wages to be paid, averaging $28,000, as "competitive." Blinson v. State, 186 N.C. App. 328, 332, 651 S.E.2d 268, 272–73 (2007).

321. *See Maready*, 342 N.C. at 724, 467 S.E.2d at 625; *supra* Part II.B.1.

322. *Maready*, 342 N.C. at 727, 467 S.E.2d at 627; *see supra* Part II.B.1.

323. *Maready*, 342 N.C. at 737, 467 S.E.2d at 633 (Orr, J., dissenting); *see supra* Part II.B.1.

324. *See supra* note 300 and accompanying text.

325. *Maready*, 342 N.C. at 713, 467 S.E.2d at 625; *see also supra* Part II.B.2.a (discussing the key terms agreed upon for the incentive in *Maready*).

326. Blinson v. State, 186 N.C. App. 328, 332, 651 S.E.2d 268, 273 (2007).

327. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 306, 702 S.E.2d 814, 816 (2010).

local government incentive in which the recipient was unable or unwilling to increase the tax base.[328]

A close look at the statutory requirements further supports the notion that increasing the tax base is an important factor in determining the public benefit of an incentive. Every economic development agreement "shall" contain provisions to recapture appropriated funds from companies that make a "lower capital investment" than promised.[329] In the case of a subsidized property conveyance—that is, when the conveyance amounts to an incentive—the purchaser must construct improvements "that will generate the tax revenue" to recoup the subsidy.[330] Earlier, this Article concluded that this requirement pertaining to generating tax revenue probably applies whenever incentives are paid with the expectation that property-related activities, such as purchases of property and construction of improvements on property, will result.[331]

Additionally, increasing the tax base was a recurring factor in the public benefit assessment described in cases outside of North Carolina that the *Maready* court cited,[332] confirming that, after job creation, increasing the tax base is the most important factor for assessing the public benefit of an incentive. Thirteen states with cases cited in *Maready* directly or indirectly mention enhancing tax revenues as a valid public purpose or uphold legislation that cites increasing tax revenues as a valid public purpose.[333]

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328. *See supra* notes 207, 210–11 and accompanying text.

329. N.C. GEN. STAT. § 158-7.1(h) (2011); *see also supra* Part I.B.6 (explaining the recapture provisions required in incentive agreements and proposing the most plausible construction for the statute).

330. § 158-7.1(d2)(2); *see also* Part I.B.4 (detailing the special accounting procedures for subsidized conveyances of property).

331. *See supra* Part II.B.2.b.

332. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 725 & n.1, 467 S.E.2d 615, 626 & n.1 (1996).

333. *See, e.g.*, Common Cause v. State, 455 A.2d 1, 20 (Me. 1983) (noting that the project would "improve commerce and create jobs, generating sufficient tax revenues to repay the state's investment"); Minn. Energy & Econ. Dev. Auth. v. Printy, 351 N.W.2d 319, 323 (Minn. 1984) (en banc) (noting that "the State of Minnesota will benefit in the form of . . . expanded state or local tax bases"); Burkhardt v. City of Enid, 771 P.2d 608, 611 (Okla. 1989) (noting that Enid's purchase of a failing university would benefit the city's economy by ensuring "the continued presence of students who spend in Enid," and conceivably increase tax revenues through such spending); Mayor & Members of City Council v. Indus. Dev. Auth., 275 S.E.2d 888, 890 (Va. 1981) ("The Act was designed to stimulate the economy of Virginia, thereby providing jobs, increasing business activity, and *broadening the state's tax base.*" (emphasis added)); State *ex rel.* Ohio Cnty. Comm'n v. Samol, 275 S.E.2d 2, 4 (W. Va. 1980) ("It does not require any lengthy discussion to realize that the renovation, expansion or creation of existing or new commercial projects gives much the same economic benefit to a community as would comparable activities in

There is, therefore, ample support for identifying "increasing the tax base" as a primary form of consideration to be received in exchange for an economic development incentive, second only to job creation.

3. Are Both Job Creation and Increasing the Tax Base Essential?

Is it possible for an incentive transaction to fail to obtain a promise either of job creation or increasing the tax base and still serve a net public benefit?[334] To date, no economic development incentive offered pursuant to G.S. 158-7.1 and evaluated by an appellate court has been deficient in either form of consideration, but certainly a transaction without both would no longer be "parallel" to the incentives in *Maready*, taking it outside of the protective umbrella of *Maready*'s holding.[335] Furthermore, the enactment of subsection (h) of G.S. 158-7.1—more than a decade after *Maready*[336]—cemented the importance of these two primary factors by requiring incentive agreements to contain provisions allowing the local government to recapture funds in the event that promised jobs and capital

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the industrial area. Each serves to create or maintain employment and *enhance tax revenues*, and thereby operates to benefit the community and public in general." (emphasis added)); State *ex rel.* Hammermill Paper Co. v. La Plante, 205 N.W.2d 784, 794–95 (Wis. 1973) (deferring to legislative determination that "security against unemployment and the preservation and enhancement of the tax base can best be provided by the promotion, attraction, stimulation, rehabilitation and revitalization of commerce, industry and manufacturing"). A complete listing of cases referring to tax base is provided in Appendix B.

334. The dual requirement of jobs and tax base is sometimes used for the award of state economic development incentives. *See, e.g.*, § 143B-437.52 (requiring the committee that approves such grants to find that "[t]he project will benefit the people of this State by increasing opportunities for employment and by strengthening this State's economy by, for example, providing worker training opportunities, constructing and enhancing critical infrastructure, increasing development in strategically important industries, or increasing the State and local tax base").

335. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) ("Incentives *parallel to those at issue* already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent." (emphasis added)); Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007) ("Plaintiffs have made no attempt to demonstrate how the incentives in this case are legally different from the 24 local economic incentive packages offered in *Maready* . . . . *In the absence of a showing of some distinction between the incentives in this case and the incentives in the* Maready *case*, we hold that . . . the [challenged incentives] did not violate the Public Purpose Clauses." (emphasis added)).

336. *See* Act of Aug. 30, 2007, ch. 515, § 7, 2007 N.C. Sess. Laws 1657, 1660 (codified at N.C. GEN. STAT. § 158-7.1(h) (2011)).

investment do not materialize.[337] Even if subsection (h) were disregarded, job creation and increasing the tax base would remain crucial forms of consideration, as the rationale for elevating these two factors is firmly grounded in constitutional analysis found in North Carolina case law.[338] This means that local acts and other legislative tinkering with G.S. 158-7.1 are unlikely to alter the preeminence of these factors in evaluating the public benefit of an incentive.

Because job creation is the most important public purpose factor, it seems inconceivable that an incentive to a private company could stand without a promise of job creation or retention in return.[339] Therefore, the next question is whether a company could receive an incentive on the promise of job creation or retention alone, without a promise to increase the tax base. Addressing this issue requires discussion of additional nuances related to increasing the tax base.

There are at least two ways to increase the tax base: one is direct, by making a capital investment in real and personal property that increases property tax revenue;[340] the other is indirect, by creating jobs that permanently increase the incomes of local workers, thereby leading to consumption that increases the tax base. The *Maready* court acknowledged the latter when it reasoned that "[n]ew and expanded industries . . . provide work and economic opportunity for those who otherwise might not have it," and this, "in turn, creates a broader tax base."[341] From this reasoning, assuming workers reside and spend their money in the jurisdiction providing the incentive, one might conclude that a company's promise to create jobs alone is sufficient to accomplish both primary factors of job creation and increasing the tax base. However, subsection (h) now appears to require companies to promise the more direct method of increasing the tax base—that is, by making a "capital investment."[342] In conclusion, while it might have been permissible under the right

337. *See* § 158-7.1(h); *see also supra* Part I.B.6 (explaining the recapture provisions required in incentive agreements).

338. *See supra* Part II.

339. *See supra* Part III.B.1.

340. *See, e.g.*, *Blinson*, 186 N.C. App. at 332, 651 S.E.2d at 273 ("[T]he Project will include taxable buildings and equipment having an initial aggregate taxable value of at least $100 million.").

341. Maready v. City of Winston-Salem, 342 N.C. 708, 727, 467 S.E.2d 615, 627 (1996); *see also* Burkhardt v. City of Enid, 771 P.2d 608, 611 (Okla. 1989) (noting that Enid's purchase of a failing university would benefit the city's economy by ensuring "the continued presence of students who spend in Enid," and conceivably increase tax revenues through such spending).

342. *See* § 158-7.1(h); *see also supra* Part I.B.6 (explaining how the statute requires recapture provisions in incentive agreements related to capital investment).

conditions to offer an incentive for job creation alone prior to the enactment of subsection (h), it now appears that both job creation and capital investment are required by statute.

C. *Secondary Forms of Consideration*

At this stage of analysis, it should be apparent that jobs and tax base are the most important factors in determining the public benefit of incentives authorized under G.S. 158-7.1. But, there are additional factors that are secondary in precedence because they either modify or qualify the primary factors. That is, after concluding that the primary public benefit factors are present, courts may also evaluate the presence or absence of secondary factors—economic diversification and interstate competition—that shed additional light on the net public benefit obtained through incentives. A conservative approach to ensuring the validity of incentives offered pursuant to G.S. 158-7.1 would seek to include all forms of consideration, primary and secondary, in every incentive transaction. However, in the absence of additional case law clarifying the role and importance of these secondary factors, they will remain subordinate to the primary factors.

1. Diversifying the Economy

The *Maready* court listed four factors that "ensure a net public benefit."[343] The first three pertain to jobs and tax base, and the fourth is "diversifying the economy."[344] Diversifying the economy is categorized as a secondary form of consideration in this Article's framework because it serves as a modifier to the primary forms, jobs and tax base. This factor suggests that it may not be enough for a company to provide jobs and tax-base-generating investment; rather, the jobs and investment must improve and diversify the economic base of the community. Part II explored the types of companies that diversify an economy and concluded that a company that brings a new type of industry into the area would surely diversify a local economy; arguably, so would the addition of a new company within

343. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

344. *See id.* The North Carolina Court of Appeals reiterated this test in *Haugh*: "With respect to the second prong of the *Madison Cablevision* test, as noted in *Maready*, expenditures 'should create a more stable local economy by providing displaced workers with continuing employment opportunities, attracting better paying and more highly skilled jobs, enlarging the tax base, and diversifying the economy.' " Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) (quoting *Maready*, 342 N.C. at 724, 467 S.E.2d at 625).

an existing and growing industry cluster.[345] However, construction of buildings alone—such as residential, retail, and office space—ordinarily could not be said to diversify the economy.[346]

2. Interstate Competition

The *Maready* court explained that "we [in North Carolina] are competing with *inducements to industry offered through legislative enactments in other jurisdictions*."[347] The public interest is, therefore, served by using incentives to attract companies "which might otherwise be *lost to other states*."[348] From these and other statements in *Maready*, Part II concluded that interstate competition weighed heavily on the *Maready* majority's analysis.[349] Later, the North Carolina Court of Appeals took these pronouncements seriously in *Haugh*. Although the discussion in *Haugh* regarding interstate competition remains dicta, the court's treatment of the issue necessitates its inclusion in the framework as a secondary factor. Furthermore, the *Maready* court cited[350] several cases outside of North Carolina that considered some aspect of interstate competition in evaluating the public purpose of economic development expenditures.[351]

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345. *See supra* notes 193–98 and accompanying text.

346. *See supra* notes 198–203 and accompanying text.347.*Maready*, 342 N.C. at 727, 467 S.E.2d at 627 (emphasis added) (quoting Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 164, 159 S.E.2d 745, 764 (1968) (Parker, C.J., dissenting)).

347. *Maready*, 342 N.C. at 727, 467 S.E.2d at 627 (emphasis added) (quoting Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 164, 159 S.E.2d 745, 764 (1968) (Parker, C.J., dissenting)).

348. *Id.* (emphasis added); *see also Haugh*, 208 N.C. App. at 318, 702 S.E.2d at 823 (quoting *Maready*, 342 N.C. at 727, 467 S.E.2d at 627) ("The potential impetus to economic development, which might otherwise be lost to other states, likewise serves the public interest."); Blinson v. State, 186 N.C. App. 328, 337, 651 S.E.2d 268, 276 (2007) (citing to the same sentence from *Maready*); *supra* Part II.B.2.c (explaining the role of interstate competition in case law).

349. *See supra* notes 242–45 and accompanying text.

350. *Maready*, 342 N.C. at 725 & n.1, 467 S.E.2d at 626 & n.1.

351. *See, e.g.*, Linscott v. Orange Cnty. Indus. Dev. Auth., 443 So. 2d 97, 99–100 (Fla. 1983) (noting that the state's posture on revenue bonds placed it "at a competitive disadvantage with other states"); Hayes v. State Prop. & Bldgs. Comm'n, 731 S.W.2d 797, 798 (Ky. 1987) (noting that "Kentucky was involved in a fierce competition with many of the other states of this nation regarding the location of a major automotive manufacturing plant"); Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212, 218 (Pa. 1968) ("There is another important factor to consider. Industrial development authorities are so prevelant [sic] throughout the country that Pennsylvania is at a competitive disadvantage in attracting industry to this state should we declare this act unconstitutional."); Mayor & Members of City Council v. Indus. Dev. Auth., 275 S.E.2d 888, 890 (Va. 1981) ("The General Assembly has rejected these arguments and determined that this type [of] authority is necessary to promote the economy of the Commonwealth, and enable it to

D. *Procedural Requirements for Approval of Incentives*

The *Maready* court looked favorably upon the "strict procedural requirements" of G.S. 158-7.1 as preventing abuse of incentives.[352] This Article's framework incorporates the court's deference to "strict procedural requirements" by taking the stricter of either (1) requirements described as "typical" procedures for the incentives at issue in *Maready*,[353] or (2) those procedures set forth in G.S. 158-7.1 for the situation most closely analogous to a grant of incentives; that is, the procedures imposed for a subsidized conveyance of property.[354] That comparison left four procedures to be added to the framework: (1) a "but-for" or necessity determination, (2) notice and a hearing prior to approval, (3) a written agreement governing implementation, and (4) a written incentive guidelines or policy. Each will be discussed in turn.

1. "But-For" or Necessity Determination

As already explained in Parts II.A and II.C.2, a threshold "but-for" or necessity determination should be made for every incentive; that is, "but for" the incentive payment to a company, the company would not locate its facility and jobs in the jurisdiction.[355] This determination by the local government prior to awarding an incentive accomplishes two objectives. First, it ensures that the public receives valid consideration for the incentive in compliance with the Exclusive Emoluments clause of the North Carolina Constitution.[356] If the promised public benefit exchanged for an incentive has already occurred or would be provided anyway without the incentive, then such an incentive would amount to a constitutionally impermissible gift.[357] Second, it matches the "typical procedures" for approving the incentives at issue in *Maready*[358]—failure to make a "but-for" or necessity determination would leave an incentive outside the

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compete with other states which utilize this 'tool' to attract industry and promote their economic growth."); State *ex rel.* Hammermill Paper Co. v. La Plante, 205 N.W.2d 784, 798–99 (Wis. 1973) ("The development of such programs will also place Wisconsin upon a competitive basis with neighboring states that heretofore have approved similar legislation." (footnotes omitted)).

352. *See Maready*, 342 N.C. at 724, 467 S.E.2d at 625; *see also supra* Part II.C.3 (discussing the procedural requirements described in case law).

353. *See Maready*, 342 N.C. at 713, 467 S.E.2d at 619; *see also supra* Part II.B.2.b (highlighting the procedural requirements recognized by the court as "typical").

354. *See supra* Part I.B.4.

355. *See supra* Parts II.A, II.C.2.

356. *See* N.C. CONST. art. I, § 32.

357. *See supra* notes 156–59 and accompanying text.

358. *See Maready*, 342 N.C. at 713, 467 S.E.2d at 619.

protective umbrella of incentives "parallel" to those approved in *Maready*.[359] Accordingly, if a local government incentive does not meet a threshold "but-for" test, then it is likely a fatal flaw making further analysis unnecessary.

2. Notice and Hearing Prior to Approval

Part I's analysis of G.S. 158-7.1 demonstrated that a public hearing is required as a technical matter only for approval of a subsection (b) activity.[360] But, Part II concluded—after evaluating the *Maready* court's comments about "strict procedural requirements"[361] and determining that cash incentive payments invoke the procedures associated with subsection (b) activities[362]—that every incentive that subsidizes a subsection (b) activity (related to land and facilities) should be approved following a public hearing as required by subsection (c).[363] To conclude otherwise—to suggest that a local government could avoid the "strict procedural requirements" of G.S. 158-7.1 by merely subsidizing subsection (b) activities through cash payments rather than engaging in them directly—would elevate form over substance.[364] Aside from creating jobs,[365] the only way most companies are able to increase the tax base is by engaging in subsection (b) activities such as purchasing property, preparing the site (to include building upfits and installation of personal property),[366] and constructing improvements. Accordingly, incentives

359. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) ("Incentives parallel to those at issue already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent."); Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007) ("Plaintiffs have made no attempt to demonstrate how the incentives in this case are legally different from the 24 local economic incentive packages offered in *Maready* .... In the absence of a showing of some distinction between the incentives in this case and the incentives in the *Maready* case, we hold that ... the [challenged incentives] did not violate the Public Purpose Clauses.").

360. *See* N.C. GEN. STAT. § 158-7.1(c) (2011); *supra* Part I.B.3.

361. *See supra* notes 221–22 and accompanying text.

362. *See supra* notes 223–29 and accompanying text.

363. *See supra* notes 229–31 and accompanying text. G.S. 158-7.1(c) requires that the county or city provide notice to the public at least ten days in advance of the hearing, and the contents of the notice must follow the form prescribed in the statute. § 158-7.1(c). For more detail on the form of notice, see Mulligan, *supra* note 75.

364. *See supra* notes 235–37 and accompanying text.

365. For a discussion of how job creation also leads to an increase in the tax base, see *supra* notes 340–41 and accompanying text.

366. *See* Maready v. City of Winston-Salem, 342 N.C. 708, 736, 467 S.E.2d 615, 632 (1996) (Orr, J., dissenting) (listing "upfitting of rental property" and "facility upfit" as activities subsidized by the incentives at issue). Note also that subsection (d) requirements pertain both to the lease or conveyance of "interests in real property" as well as "interests

paid to induce a company to increase the tax base typically involve at least one subsection (b) activity and, therefore, the associated procedural requirements should be followed.[367]

3. Written Agreement to Govern Implementation

All contracts entered into by municipalities, whether related to economic development or not, "shall be in writing."[368] Recent case law suggests the same rule for counties.[369] In the economic development context, there are additional reasons to memorialize an incentive agreement in writing. Chief among them is that a written agreement was noted by the *Maready* court as one of the "typical procedures" used by the local governments: Once "a project is formally approved, it is administered pursuant to a *written contract.*"[370] Furthermore, when a property conveyance is subsidized, thereby invoking the requirements of subsection (d2), the subsidy recipient must be contractually bound to construct the improvements necessary to generate the revenue to recoup the subsidy within ten years.[371] Additionally, a written agreement is arguably necessary to provide the oversight required by G.S. 158-7.2 for appropriations "turned over to any agency or organization other than the county or city for expenditure."[372] Local governments should remain mindful that a written agreement should include the recapture provisions listed in subsection (h) of G.S. 158-7.1.[373]

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in property" generally. § 158-7.1(d). The fact that consecutive sentences differentiate between real property and property generally should probably be understood to mean that any type of property—real or personal—falls within the purview of subsections (d) and (d2).

367. *See supra* notes 232–34 and accompanying text. As a matter of practice, Professor Lawrence recommends that local governments hold a public hearing prior to approving any incentive, whether related to subsection (b) activities or not. *See* LAWRENCE, *supra* note 6, at 97–98.

368. *See* § 160A-16.

369. *See supra* note 102 and accompanying text.

370. *See Maready*, 342 N.C. at 713, 467 S.E.2d at 619 (emphasis added); *see also supra* Part II.B.2.b (describing the typical procedures used for the *Maready* incentives).

371. *See* § 158-7.1(d2)(2); *see also supra* Part I.B.4 (describing the requirements pertaining to subsidized conveyances of property); Part II.B.2.b (describing the typical procedures used for the *Maready* incentives).

372. *See* § 158-7.2; *see also supra* notes 63–65 and accompanying text (explaining the legislative history and case law regarding oversight of economic development expenditures).

373. *See* § 158-7.1(h); *see also supra* Part I.B.6 (describing the recapture requirements of subsection (h)).

4. Written Incentive Guidelines or Policy to Be Applied to Determine the Maximum Amount of Incentive

The local governments in *Maready* applied a set of "written guidelines" to determine the maximum amount of assistance (or subsidy) for which each company was eligible.[374] To the extent that a local government seeks to conform as much as possible to the profile of the incentives approved in *Maready*,[375] drafting an incentive policy is a necessary step. Perhaps just as important, a policy or guideline for handling incentive requests makes good practice for several reasons. In the typical incentive negotiation, the local government finds itself in what can be described as a "prisoner's dilemma," whereby the "interrogator" is the company negotiating incentives with several localities and the "prisoners" are competing local governments—the governmental entities have no way to communicate and cooperate with each other.[376] Although a pre-approved policy or guideline does not resolve the issue with communicating and cooperating with other local governments, it can be helpful in shaping how the local government will respond once placed in a prisoner's dilemma. A policy causes the company and the local government to acknowledge

374. *Maready*, 342 N.C. at 713, 467 S.E.2d at 619 ("Officials then apply a formula set out in written guidelines to determine the maximum amount of assistance that can be given to the receiving corporation. The amounts actually committed are usually much less than the maximum.").

375. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 319, 702 S.E.2d 814, 824 (2010) ("Incentives parallel to those at issue already have been held to comport to the Public Purpose Clauses of our State Constitution in view of the test articulated in *Madison Cablevision*, and we are bound by that precedent."); Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007) ("Plaintiffs have made no attempt to demonstrate how the incentives in this case are legally different from the 24 local economic incentive packages offered in *Maready* .... In the absence of a showing of some distinction between the incentives in this case and the incentives in the *Maready* case, we hold that ... the [challenged incentives] did not violate the Public Purpose Clauses.").

376. *See* Matthew Schaefer, *State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response*, 28 N.M. L. REV. 303, 311–12 (1998) ("The prisoner's dilemma is typically described as follows: Two prisoners are separately interrogated by the authorities, who attempt to extract confessions from each implicating the other. If both are silent, each will go free. If both confess, each will get a moderate sentence. If one confesses and the other does not, the former will get a light sentence and the latter a heavy sentence. Accordingly, both prisoners would be best off if each remains silent, but each fears the other will confess. To avoid the danger of the heavy sentence that would follow from the other's confession, each confesses and incurs a moderate sentence. The prisoners are unable to reach their preferred outcome (total silence) because they are unable to communicate and reach a binding agreement. How does the prisoner's dilemma apply to the situation of state subsidy wars? ... A state that idly sits by while other states offer investment attraction subsidies will have a heavy sentence placed upon it as mobile capital and tax revenues accompanying the capital flow to those other states.").

in negotiations the "opening bid" set by the policy, since in the absence of a policy, the company can open the bidding at any level it wishes. The incentive level set in the policy can serve as an "anchor" in the negotiation, ideally (but not always) pinning the negotiations over incentive amounts within a range that presumably favors the local government.[377]

IV. APPLYING THE FRAMEWORK

Fully assembled, and after omitting means as a component,[378] the framework can be represented in summary form as follows:

1. Primary forms of consideration
   a. Job creation
   b. Increasing the tax base
2. Secondary forms of consideration
   a. Diversifying the economy
   b. Interstate competition
3. Strict procedural requirements
   a. "But-for" or necessity determination
   b. Notice and hearing
   c. Written agreement to govern implementation
   d. Written policy or guidelines to evaluate incentive requests

A conservative approach to offering incentives under G.S. 158-7.1 would permit such incentives only when companies meet every form of consideration identified in the framework and only after following all of the listed procedural requirements.[379] Any local government that approves an incentive when one or more of the factors are not present will assume some risk. The risk is substantial when one or both of the primary forms of consideration—jobs and tax base—are missing; it is lessened somewhat when those factors are present but other factors are missing. In the absence of case law

377. *See* Adam D. Galinsky, *Should You Make the First Offer?*, NEGOTIATION, July 2004, at 1–2, *available at* http://hbswk.hbs.edu/archive/4302.html ("Real estate agents, for example, should be able to resist the anchoring effects of a property's list price because of their presumed skill at estimating property values. Testing this theory, researchers . . . had real estate agents inspect a house and estimate its appraisal value and its purchase price. [Researchers] manipulated the house's list price, providing high and low anchors. All of the agents' estimates were influenced by the list price, yet they denied factoring the list price into their decisions, instead citing features of the property that would justify their estimates.").

378. *See supra* Part III.A (explaining why the means used to effectuate economic development should not be part of this framework).

379. *See supra* notes 300, 358 and accompanying text.

evaluating a scenario in which one or more factors are absent, it is difficult to assess the relative risk. However, as will be illustrated in the examples below, in many cases it is not even a close call. The framework makes it simple to distinguish between a clearly permissible incentive under G.S. 158-7.1 and one that is significantly flawed.

A. Two Incentive Requests

To illustrate the point, this Part applies the framework to two different hypothetical, but common incentive requests. The first incentive request will be referred to as a "classic" request and the second as a "tax-base-alone" request.

1. The "Classic" Incentive Request

Our "classic" incentive request[380] comes from a manufacturing company, similar to those that received incentives in *Blinson*[381] and *Haugh*.[382] The company intends to purchase land, construct a $20 million manufacturing facility, and employ 100 workers at the facility. The company has engaged a site selection consultant to identify several suitable sites across the nation—their locations remain confidential—and incentives offered will be among the final criteria to be evaluated in determining where the facility will ultimately be built. One of the sites identified by the company is located in North Carolina, and the county in which the site is located has been asked to offer cash incentives. As is typically the case with manufacturing facilities, the wages paid to employees at the facility will exceed the county's average wage.[383]

At the moment, the county is considering whether to offer a cash grant each year for the next five years, with the amount of the grant calculated to be equivalent to 50% of the additional property tax revenue generated by the facility. The county is aware that it cannot adjust the property tax rate for the company,[384] so the company will

380. The concept of the "classic" incentive request was first advanced in the Introduction. *See supra* notes 20–21 and accompanying text.

381. *See* Blinson v. State, 186 N.C. App. 328, 331–33, 651 S.E.2d 268, 272–73 (2007).

382. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 306–07, 702 S.E.2d 814, 816–17 (2010).

383. *See* DAVID LANGDON & REBECCA LEHRMAN, U.S. DEP'T OF COMMERCE, ESA ISSUE BRIEF NO. 01-12, THE BENEFITS OF MANUFACTURING JOBS 5 (2012), *available at* http://www.esa.doc.gov/sites/default/files/reports/documents/thebenefitsofmanufacturingjobsfinal5812.pdf ("Clearly, manufacturing jobs are attractive relative to other industries.").

384. An adjustment of the rate would violate the constitutional requirement of uniform taxation or would amount to an illegal tax abatement. *See* N.C. CONST. art. V, § 2(2); N.C.

be expected to pay its taxes in full prior to receiving a grant. An incentive agreement will govern the arrangement with each year's grant payment conditioned on (1) the company's investment in its facility meeting or exceeding the promised amount (thereby generating the promised additional property tax revenue), (2) the creation of the 100 promised jobs, and (3) maintenance of the jobs and operations at the facility continuously during the term of the agreement. If, at any point during the five-year term, the company fails to meet all of the economic development agreement's requirements, the company will not be eligible for any future grant payments, and payments made in the past will be subject to recapture.

2. The "Tax-Base-Alone" Incentive Request

In the same county, a real estate developer has approached the governing board with a "tax-base-alone" incentive request. The developer intends to build a $20 million mixed-use structure in the county containing retail and office space. The developer's market analysis shows that the population and economic activity in the local area are adequate to support the retail businesses likely to be located at the project. The governing board likes the developer's plan, which comports with the county's vision for commercial development in the area.

No tenants have signed leases or purchase agreements for the space yet, but similar developments constructed by this developer in the past have resulted in a mix of restaurants, shopping, and office space for small businesses. There is no interstate competition for this development. No jobs can be promised because it is the tenant businesses that will provide the jobs, not the developer. The developer is unwilling to make any promises about maintaining operations; again, the tenants will determine whether to maintain operations, not the developer. The wages to be paid to employees at the development cannot be determined at this point, as the tenants will determine the wages. However, the developer's other projects have followed a familiar pattern: The retail operations likely to locate at the development typically pay wages below the county's average wage. There will be construction jobs as the structure is built, but

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GEN. STAT. § 105-380 (2011); *see also supra* note 126 and accompanying text (explaining that while utility and property tax rates cannot be changed directly, cash reimbursements from a local government's general fund can be used to offset a portion of a company's utility costs or property taxes).

those jobs are temporary in nature.[385] Besides, the developer is not prepared to promise to create construction jobs or to monitor them, because the developer will not be hiring any construction workers directly. Contractors will be used to build out the project. The developer states that the project cannot go forward in its present form without financial assistance from the county.

The developer has requested an incentive similar to the one being considered for the company that made the "classic" incentive request. That is, the developer seeks a cash grant to be paid each year for five years in an amount equal to 50% of the additional property tax generated by the development. The developer is willing to sign an incentive agreement—and indeed desires an agreement to show the project's investors a government commitment and to explain how the investors' returns will be affected—but the content of the incentive agreement would address only the amount of capital investment. No mention of jobs or maintaining operations will be made.

B. Factor Analysis of Each Incentive Request

With the "classic" and "tax-base-alone" scenarios laid out, we can test them against each factor in the framework.

1. Primary Form of Consideration: Job Creation

In the classic incentive request, job creation is a given. The manufacturing facility will employ 100 workers on-site throughout the term of the agreement. As is typically seen with manufacturing jobs, the wages paid to workers at this facility will be higher than the county's average wage.[386] In short, the classic incentives request clearly offers superior consideration in terms of job creation.

The classic request lies in stark contrast to the tax-base-alone request, where the developer is unwilling—and, more accurately, unable—to promise job creation. The developer, after all, is simply constructing space, not employing permanent workers. If there were to be any subsection (h)-compliant incentive agreements resulting from the tax-base-alone project, the tenant businesses would need to be involved, as only they can promise to create jobs and maintain them over time.[387] In theory, it is possible for a developer and a tenant

385. *See* LAWRENCE, *supra* note 6, at 57 (noting, in the context of residential development, that construction jobs are temporary in nature and are, therefore, fundamentally different from the permanent jobs resulting from industrial and commercial projects).

386. *See* LANGDON & LEHRMAN, *supra* note 382, at 4, fig. 5.

387. *See* § 158-7.1(h).

business to seek incentives together, with the developer promising to construct the project and the tenant agreeing to create jobs, thereby generating together the necessary net public benefit for incentives. While theoretically possible, such multi-party arrangements are difficult to achieve as a practical matter. Developers seek to attract tenants to their space, and that task becomes more difficult when the developer demands that tenant businesses sign an agreement with the local government promising to create jobs and maintain them over a term of years. Furthermore, were tenant businesses to come to the table and promise to create jobs as part of a multi-party incentive agreement, they would certainly expect to receive a portion of any incentive payments for themselves, adding a new complication to the developer's negotiation with the tenant over any lease or sale of space. As a result, multi-party arrangements are rare.[388]

2. Primary Form of Consideration: Increasing the Tax Base

Both the classic and tax-base-alone incentive requests involve a $20 million capital investment, so there is little difference between the two requests in terms of increasing the tax base. In both scenarios, the local government could expect "to recoup the full amount of their investment within three to seven years" based upon "revenues generated by the additional property taxes paid by participating corporations."[389] One difference exists, to the extent that revenue is also generated indirectly through job creation,[390] because only the classic incentive promises job creation and related indirect revenue. Accordingly, even in the tax-base component of the framework, where the classic and tax-base-alone requests initially appear to be on equal footing, the classic request still outperforms the tax-base-alone request.

388. The author has had experience with multi-party incentive agreements involving one lead company and several associated companies combining their efforts, but in those cases, the relationship between the various companies at the table was closer than the typical landlord-tenant relationship. In those multi-party agreements, the associate companies—subsidiaries, suppliers, or companies otherwise closely related to the operations of the lead company—were typically required to sign the incentive agreement and acknowledge that their jobs and investment were being counted toward incentives being received by the lead company (and, therefore, the associate companies were not entitled to request incentives separately). The associate companies allowed their capital investment and job creation to be counted in favor of the lead company because they highly valued their relationship with the lead company.

389. Maready v. City of Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 619 (1996); *see also supra* Part II.B.2.a (describing the key terms of the incentives approved in *Maready*).

390. *See supra* notes 339–40 and accompanying text.

Note, too, that in both cases the incentive will subsidize property-related transactions listed under subsection (b), such as purchasing property and constructing improvements thereon.[391] This is particularly clear in the case of the tax-base-alone incentive; the incentive must be subsidizing subsection (b) activities because *nothing else is being promised* by the developer.[392] Were a reviewing court to view this subsidization of subsection (b) activities as equivalent to undertaking those activities directly—a position consistent with the substance of the transaction and consistent with the *Maready* court's assessment of cash reimbursements under G.S. 158-7.1[393]—then the court would be expected to inquire about substantial compliance with subsection (d2), which requires job creation.[394] It is clear that the tax-base-alone project could not meet these requirements of the statute, thereby suggesting that the project might not be permitted to receive an incentive under G.S. 158-7.1 in the first place.[395]

3. Secondary Form of Consideration: Diversifying the Economy

Although the scenario does not provide any information about the industry involved in the classic incentive request, the fact that the company is locating a manufacturing facility is probably sufficient to know that it diversifies the economy. Recall the earlier discussion in Part III.C.1 suggesting that an industrial or manufacturing facility serves to diversify the economy whether that facility contributes to a growing industry cluster or is entirely new to the area.[396] Additionally, the higher-than-average wages paid to new workers will infuse

391. *See, e.g.*, § 158-7.1(b)(1)–(4).

392. A related problem arising from the fact that the developer is promising only to increase the tax base is the possibility that a court would view the substance of the incentive as amounting to an unconstitutional classification of property by the local government, violating the principle of uniform taxation or constituting an illegal tax rebate. *See* N.C. CONST. art. V, § 2(2); N.C. GEN. STAT. § 105-380 (2011). A comparison of the tax-base-alone incentive request (amounting to a grant of cash that is related in some way to the property tax paid by the developer) and the classic request (where the cash grant is offered in exchange for job creation and the annual maintenance of operations—in addition to a property-tax-revenue-generating facility) lays bare the issue. The incentive paid for the tax-base-alone incentive looks much more like an illegal tax rebate or tax classification than the classic incentive, which can be viewed as an ongoing service contract for the continuous provision of jobs and economic activity over a term of years.

393. *See Maready*, 342 N.C. at 731, 467 S.E.2d at 629; *supra* notes 223–29 and accompanying text.

394. *See* § 158-7.1(d2); *supra* notes 232–34 and accompanying text.

395. It might, however, be permitted under an alternative source of authority. *See infra* Part IV.D (describing alternative sources of authority for cash incentives when jobs are not promised).

396. *See supra* notes 192–98 and accompanying text.

households—and the local economy—with money that will further strengthen and diversify the local economic base.[397]

It is difficult to argue that the tax-base-alone incentive will serve to diversify the economy. Retail and office buildings offer space for commercial activity to take place, but they offer no substantial economic activity in their own right.[398] The tenant businesses envisioned by the developer, given their retail nature, are likely to shift household spending from existing retail businesses in the community to the developer's tenant businesses rather than generate significant new economic activity.[399] To the extent that any diversification can be said to result from the retail and office space envisioned by the developer, it is very different from the diversification achieved by the companies evaluated in *Maready*[400] and its progeny.[401] The case for the tax-base-alone development to diversify the economy is therefore weak or non-existent.

4. Secondary Form of Consideration: Interstate Competition

The classic incentive request is made in the explicit context of interstate competition. The company stated up front that the county in North Carolina is in direct competition with locations in other states. An incentive in the classic scenario, therefore, gets right to the concern expressed in *Maready* that, in the absence of an incentive, the company's facility "might otherwise be lost to other states."[402]

There is no interstate competition in the tax-base-alone scenario. As already explained, retail space is developed on the basis of local market conditions and whether households in the area can support the tenant businesses envisioned for the space.[403] The developer is almost never in a position to threaten to locate a project outside of the jurisdiction, let alone in another state, because the market analysis is almost entirely dependent upon local market conditions within a short distance of the proposed development.[404]

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397. *See supra* note 340 and accompanying text.

398. *See supra* notes 199–200 and accompanying text.

399. *See supra* notes 201–02 and accompanying text.

400. Maready v. City of Winston-Salem, 342 N.C. 708, 713, 467 S.E.2d 615, 618–19 (1996).

401. *See* Haugh v. Cnty. of Durham, 208 N.C. App. 304, 306–07, 702 S.E.2d 814, 816–17 (2010); Blinson v. State, 186 N.C. App. 328, 331–33, 651 S.E.2d 268, 272–73 (2007).

402. *Maready*, 342 N.C. at 727, 467 S.E.2d at 627.

403. *See supra* notes 201–02 and accompanying text.

404. *See supra* notes 201–02 and accompanying text. In the rare circumstance that a real estate developer is considering a project in a community that straddles a state border, and provided the developer is truly agnostic about one location in one state and another location in the other state just across the border, then it might be possible for such a

5. Strict Procedural Requirements

The last component of the framework to evaluate is compliance with the "strict procedural requirements" that gave the *Maready* court confidence that incentives paid to private companies would serve a public purpose.[405] There are four procedures to consider: (1) a "but-for" or necessity determination; (2) notice and a hearing prior to approval; (3) a written agreement governing implementation; and (4) a written policy or guidelines for determining the incentive amount.

a. "But-For" or Necessity Determination

The first procedure is the "but-for" or necessity determination; that is, an initial determination of whether an incentive is "necessary to cause a project to go forward in the community."[406] The classic incentive request clearly meets the "but-for" requirement. The company stated explicitly that the incentives package will be a determinative factor in its location decision. A company making the classic incentive request will have no difficulty certifying that "but for" the incentive, the company will not locate its facility in the local government's jurisdiction.

The same cannot be said of the tax-base-alone request. There, the developer is constructing retail and office space that market analysis suggests will be supported by the population in the area surrounding the project. The developer selected the location, expended resources on pre-development of the project (such as site assemblage, market research, and design, among others), and courted investors for the project based on the characteristics of the local population—not on the basis of incentives. If a particular local market supports the construction of additional retail and office space, then it does not matter whether this particular developer abandons the project. Another developer will recognize those same

development to involve some form of interstate competition. A competition over the location of retail and office space, however, would be of substantially different character from the interstate competition about which the *Maready* majority expressed concern, in which states are pitted against each other in incentive competitions that span the nation, and sometimes the globe. *See Maready*, 342 N.C. at 726–27, 467 S.E.2d at 627 (stating it is "unrealistic to assume that the State will not suffer economically in the future if the incentive programs created pursuant to [G.S.] 158-7.1 are discontinued," given that "we are competing with inducements to industry offered through legislative enactments in other jurisdictions" (quoting Mitchell v. N.C. Indus. Dev. Fin. Auth., 273 N.C. 137, 164, 159 S.E.2d 745, 764 (1968) (Parker, C.J., dissenting)); *see also supra* Part II.B.2.c (describing the role of interstate competition in case law).

405. *See Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

406. *Id.* at 713, 467 S.E.2d at 619; *see also supra* Part III.D.1 (explaining the rationale for including a "but-for" or necessity determination in this Article's framework).

fundamentals and construct a similar project independently.[407] The best that the developer in the tax-base-alone scenario could say is that "but for" the incentive that subsidizes the purchase of land and construction of the commercial buildings, the project could not go forward *in its proposed form.* That is a weak, if not entirely ineffectual, "but-for" argument, and it is fundamentally different from the "but-for" determination described for the incentives approved in *Maready*, where the incentives were offered to induce companies to locate in one jurisdiction rather than another.[408]

b. Notice and Hearing Prior to Approval

The scenario does not provide any information about the jurisdiction's policy regarding notice and hearing, but compliance is neither difficult nor controversial in either the classic request or the tax-base-alone request. Accordingly, we will assume that the county is able to comply with this particular procedure for both incentive requests. Were the county to fail to issue notice and hold a public hearing as required, the transaction could be voided.[409]

c. Written Agreement to Govern Implementation

The written agreement is another matter. Only the classic incentive request can comply fully with subsection (h); the tax-base-alone request complies only with a portion. We know at the outset that, should an incentive be awarded, the parties to both the classic incentive request and the tax-base-alone request are amenable to reducing their respective incentive agreements to writing. Additionally, in each case, the agreement can be drafted so as to contractually bind the company or developer, as appropriate, to construct the improvements to generate the tax revenue to recoup any incentive grant.[410] However, only in the case of the classic

407. There are instances in which a public purpose is served by inducing a real estate developer to locate a development in a particular area, such as a distressed or blighted area, a redevelopment area, or downtown. However, the statutory authority and public purpose for incentives in those situations is not based upon *Maready*, economic development, or even G.S. 158-7.1. Rather, the authority and public purpose is taken from urban redevelopment law, community development, or downtown revitalization. These concepts will be discussed as alternatives to G.S. 158-7.1. *See infra* Part IV.D.

408. *See Maready*, 342 N.C. at 713, 467 S.E.2d at 619.

409. *See, e.g.*, Darla Slipke, *Nash Wins Sanderson Site Lawsuit*, ROCKY MOUNT TELEGRAM, Nov. 10, 2012, at 1A (reporting a trial court order granting summary judgment in favor of Nash County, which originally failed to hold a public hearing as required by G.S. 158-7.1 but subsequently cured the defect by issuing new notice and holding a hearing).

410. *See supra* note 370 and accompanying text.

incentive request can the written agreement fully comply with subsection (h) of G.S. 158-7.1, that is, to include provisions for the recapture of appropriated funds in the event the company fails to fulfill its promises with respect to capital investment, job creation, and maintaining operations at the facility.[411] It is difficult to see how the developer requesting the tax-base-alone incentive could enter into a written agreement committing to job creation and to maintaining operations at the facility when the developer has no intention of doing so himself or herself, to say nothing of whether the county should accept an agreement with a developer who has little control over performance under the agreement.[412]

d. Written Incentive Policy or Guidelines to Be Applied to Determine the Maximum Amount of Incentive

In our hypothetical scenarios, there is no indication that a written policy or guideline is being used by the county to determine eligibility for, and the maximum amount of, an incentive for either the classic request or the tax-base-alone request. In the author's experience, the majority of such policies set forth requirements for capital investment, job creation, wages, and maintenance of operations over the term of any incentive agreement.[413] Were the county to adopt such a policy, it is possible that it would exclude the tax-base-alone request altogether because the developer is unable to promise to create jobs and maintain operations over some term.

411. *See* N.C. GEN. STAT. § 158-7.1(h) (2011).

412. As noted in the description of the tax-base-alone incentive request, only the tenant businesses can make such commitments. *See supra* Part IV.A. The possibility of a multi-party arrangement remains available. *See supra* note 386 and accompanying text.

413. *See, e.g.*, BUNCOMBE COUNTY ECONOMIC DEVELOPMENT INCENTIVES POLICY: INDUSTRIAL DEVELOPMENT INCENTIVES AND INFRASTRUCTURE ENHANCEMENT FOR ECONOMIC DEVELOPMENT 1–3, http://www.buncombecounty.org/common/admin/economicpolicy.pdf (last visited May 3, 2013) (providing incentives on the basis of capital investment and job creation with an adjustment for wages, provided that the "increase in ad valorem taxes on real and personal property resulting from the project will, in the three (3) to five (5) years following essential completion of the project, equal or exceed the amount of funds provided by the County"); CHATHAM COUNTY INCENTIVE POLICY 1–2 (2012), http://www.chathamedc.org/sites/default/files/page-files/Chatham%20County%20Incentive%20Policy%20Final%20Format%20-%206-18-12.pdf (noting several different factors that Chatham County uses to determine whether to award incentives, including the number of jobs that will be created by the project, the wages and benefits provided to employees, the total amount of capital investment in the project, the business type or industry cluster, as well as other "qualitative criteria outlined in [the incentive policy] and other policy documents").

C. *Summary of Analysis*

With our analysis complete, the results of the comparison between the classic incentive request and the tax-base-alone request are displayed in the table below.

Primary Forms of Consideration	*Classic Incentive Request*	*Tax-Base-Alone Request*
Job creation	Strong	None
Increasing the tax base	Strong	Strong
Secondary Forms of Consideration		
Diversifying the economy	Strong	Weak or none
Interstate competition	Strong	None
Strict Procedural Requirements		
"But-for" determination	Strong	Weak or none
Notice and public hearing	Yes	Yes
Written agreement	Strong (full compliance with subsection (h))	Weak (unable to comply with subsection (h))
Written policy or guidelines	Not provided (would probably meet standards found in typical policies, such as investment, job creation, wages, and maintaining operations)	Not provided (probably would not meet all standards found in typical policies)

The difference is stark.[414] The classic incentive request includes all of the important primary and secondary forms of consideration

414. Although the chasm between these two scenarios is wide due to the fact that they reside at opposite ends of the spectrum, one can imagine scenarios in the middle. For example, how would a court handle a scenario involving a small main street retail business that requested an incentive in exchange for a promise to make a small capital investment and produce two or three jobs, but for which there was no hint of interstate competition and the case for diversifying the economy was weak or non-existent? In that case, the primary forms of consideration, jobs and tax base, could be present but insubstantial. The secondary forms, diversifying the economy and interstate competition, are weak or non-

and adheres to all procedural requirements, so the county could be confident of its authority to move ahead with approval of the request. The classic incentive request can be said to be "parallel" to the incentives approved in *Maready*.[415]

It should be apparent, however, that the tax-base-alone request is missing almost all of the important elements for ensuring a net public benefit. The tax-base-alone request is unable to provide both primary forms of consideration, and it fails to provide any of the secondary forms. Furthermore, its compliance with the "but-for" requirement and standards for a written agreement is weak at best. With so many gaps illuminated by the framework, it is clear that the county would place itself on shaky legal ground by approving the tax-base-alone incentive request. It is not "parallel" to the incentives in *Maready*; that is, it would be a simple matter for a complaining taxpayer to "demonstrate how the incentives in [the tax-base-alone request] are legally different from the 24 local economic incentive packages offered in *Maready*."[416] Thus, the tax-base-alone incentive falls outside the protective umbrella of *Maready* and would be vulnerable to challenge as not serving a public purpose. This is a potentially fatal flaw that cannot be routinely fixed by legislation because its roots are constitutional.

The tax-base-alone incentive request, therefore, appears to be problematic under G.S. 158-7.1. If the county is intent on assisting the developer, it will need to consider options that do not involve an incentive or subsidy to the developer. One possibility is a loan that *contains no subsidy*. An unsubsidized loan is one that is more favorable to the local government lender than a private lender would demand under the same circumstances; for example, a well-

existent. The business owner may be willing to certify that the business's expansion will not occur "but for" the incentive, but the local government would understandably be skeptical because the incentive the local government could provide and still generate a net revenue would be so small (given the relatively minor capital investment and tax revenue generated by the business) as to be inconsequential as an incentive. This Article's framework would reveal that any incentive provided to this business would be on shaky ground, but could the framework be used to rule out any possibility of an incentive? In the absence of case law exploring this middle ground, the answer is uncertain. This only serves to reinforce the importance of identifying other sources of authority for a local government incentive in these situations—other than G.S. 158-7.1—as described *infra* Part IV.D. *See* Tyler Mulligan, *Cash Incentives for Revitalizing Main Street*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Jan.12, 2010, 10:09 AM), http://canons.sog.unc.edu/?p=1622; Tyler Mulligan, *Incentives for Infill Development on Main Street*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (May 18, 2010, 9:00 AM), http://canons.sog.unc.edu/?p=2428.

415. *See* Haugh v. Cnty. of Durham, 208 N.C. App 304, 319, 702 S.E.2d 814, 824 (2010).

416. Blinson v. State, 186 N.C. App. 328, 338, 651 S.E.2d 268, 276 (2007).

securitized loan with an above-market interest rate that imposes a relatively short term to maturity.[417] A loan that contains no subsidy for the recipient is akin to an *un*subsidized conveyance of property (sold for at least fair market value) under subsection (d): The procedural requirements include a properly noticed hearing and a determination of the probable wages to be paid by the business, but securing the primary and secondary forms of consideration outlined in this Article is not required.[418] This makes sense in the context of this Article's discussion. When a means of promoting economic development does not involve a direct subsidy to a private entity, the constitutional concerns about the private benefit outweighing the public benefit diminish. More specifically, they do not implicate the analysis seen in *Maready* and further explored in this Article. Accordingly, an unsubsidized loan may be a viable option for dealing with a developer who makes a tax-base-alone request.[419]

Can a subsidy or grant ever be offered as an incentive in the tax-base-alone scenario? Probably not under G.S. 158-7.1. There are, however, some other sources of authority that could be employed—e.g., statutory provisions unrelated to economic development that pursue different public purposes and are, therefore, subject to separate lines of case law—provided the consideration received by the local government amounts to something more than just an increased tax base.

D. Alternative Statutory Authority in the Tax-Base-Alone Scenario

There are several sources of statutory authority, outside of G.S. 158-7.1, that enable a local government to make a grant of public dollars to a private developer in the tax-base-alone scenario. Note, however, that "tax-base-alone" is a bit of misnomer, because even the alternative sources of statutory authority require that the local government receive something more than merely increasing the tax base. A full exploration of these authorities is beyond the scope of this Article, but two deserve brief mention here.

417. Compare to the earlier description of subsidized loans. *See supra* notes 292–93 and accompanying text.

418. *See* Mulligan, *Local Government Assistance*, *supra* note 22.

419. *See id.*

1. Urban Redevelopment

North Carolina's Urban Redevelopment Law[420] authorizes a local government to exercise special statutory powers within a designated geographic area called a "redevelopment area."[421] The designated area must be classified as blighted—meaning the growth of the area is impaired by the presence of dilapidated or obsolete buildings, overcrowding, or other unsafe conditions—or in danger of becoming blighted.[422] One of the powers that may be exercised in a redevelopment area is engaging in "programs of assistance and financing, including the making of loans, for rehabilitation, repair, construction, acquisition, or reconditioning of residential units and commercial and industrial facilities in a redevelopment area."[423] In other words, a local government possesses authority to offer "programs of assistance and financing," presumably including grants, to developers who agree to construct or rehabilitate buildings in a redevelopment area.[424]

The difference between financial assistance offered pursuant to the Urban Redevelopment Law and incentives offered under G.S. 158-7.1 is the form of public benefit obtained by the local government in return. In the context of redevelopment, the public benefit is derived not from job creation and increasing the tax base, but from attracting development to a blighted area.[425] Jobs are, therefore, not a factor when providing a financial subsidy to a developer in a redevelopment area. Accordingly, redevelopment powers can be used to offer a grant in some tax-base-alone situations where construction in a designated redevelopment area is promised as consideration.

2. Community Development

Municipal and county governing boards possess specific authority, as part of "undertaking community development programs

420. N.C. GEN. STAT. §§ 160A-500 to 534 (2011). Municipal governing boards may exercise the powers of a redevelopment commission pursuant to G.S. 160A-456(b) and county boards pursuant to G.S. 153A-376(b). *See id.* §§ 153A-376(b), 160A-456(b).

421. *Id.* § 160A-512.

422. *Id.* § 160A-503(16), (21).

423. *Id.* §§ 160A-512, 160A-503(19).

424. *Id.* § 160A-503(19). The majority in *Maready* observed that the powers granted to local governments under G.S. 158-7.1 are analogous to the powers granted by the Urban Redevelopment Law. Maready v. City of Winston-Salem, 342 N.C. 708, 724, 467 S.E.2d 615, 625 (1996).

425. The Supreme Court of North Carolina has upheld the Urban Redevelopment Law as serving a public purpose. *See* Redevelopment Comm'n of Greensboro v. Sec. Nat'l Bank, 252 N.C. 595, 606, 114 S.E.2d 688, 696 (1960).

and activities," to offer "assistance and financing," including "the making of grants or loans, the subsidization of interest payments on loans, and the guaranty of loans," for the "rehabilitation of private buildings" in two situations: (1) "for the benefit of low and moderate income persons," or (2) "for the restoration or preservation of older neighborhoods or properties."[426]

This statute provides authority for grants to be offered in the tax-base-alone scenario, but there are important limitations to note. First, the grant or other form of assistance must be associated with a program or activity being undertaken for community development purposes.[427] Community development is usually associated with federal Community Development Block Grants ("CDBG")[428] and other activities undertaken for the benefit of low- and moderate-income persons.[429] Second, assistance and financing that goes toward "private buildings" must involve "rehabilitation," not new construction.[430] Thus, in a tax-base-alone scenario, a local government is authorized to provide financial assistance for private rehabilitation activities that occur as part of a community development program for the benefit of low- and moderate-income persons. A conservative test for such assistance would examine whether the grant or other financial assistance would qualify under the federal CDBG program.

Here again is an instance where authority to offer financial assistance in support of private activity is provided not for job creation and increasing the tax base, but for a different public purpose—for the benefit of low- and moderate-income persons.[431] Thus, in the tax-base-alone scenario, a grant could be offered to a private company for undertaking rehabilitation activities that restore or preserve an older property as part of a community development program.

426. §§ 153A-376(a) (counties), 160A-456(a) (cities).

427. *Id.* § 153A-376(a) ("In undertaking community development programs and activities ... a county may engage in the following activities ...."); *id.* § 160A-456(a) (providing identical language for municipalities).

428. *See* 42 U.S.C. § 5301(c) (2006).

429. *See* LAWRENCE, *supra* note 6, at 112.

430. N.C. GEN. STAT. §§ 153A-376(a) (counties), 160A-456(a) (cities).

431. For a discussion of the public purpose of undertaking activities for the benefit of low- and moderate-income persons, see *In re* Housing Bonds, 307 N.C. 52, 60, 296 S.E.2d 281, 286 (1982) (holding that an expansion of a state agency's housing bonds authority to "help those with 'moderate incomes' " is acting with "the same public purpose in mind" as assisting low-income families).

3. Conclusion Regarding Alternative Sources of Authority

This discussion has surveyed two instances in which North Carolina statutes authorize local governments to provide financial assistance to private companies in the tax-base-alone scenario.[432] The important lesson is that these alternative sources of authority are provided in pursuit of public purposes that are different from the purpose of economic development—which focuses on job creation and increasing the tax base—as described in *Maready*. In the case of the Urban Redevelopment Law, the overriding purpose is to spur development in a blighted area irrespective of job creation.[433] Likewise, authority to subsidize private development activity under the community development power is limited to rehabilitation of older properties, principally for the benefit of low- and moderate-income persons.[434] These alternative authorities do not require jobs in exchange for a subsidy, but they are otherwise limited in terms of geography and purpose.

This provides yet another reason why G.S. 158-7.1 should not be read to authorize cash grants in the tax-base-alone scenario. If G.S. 158-7.1 was so broad as to authorize cash grants for any private company in sole service of generating additional tax base, anywhere in the jurisdiction for any conceivable commercial purpose, then the limitations and procedures set forth in the alternative statutes just surveyed would be rendered irrelevant or unnecessary. Indeed, if such an interpretation were upheld, it would be difficult to conceive any meaningful limits on a local government's authority to offer grants to private companies in pursuit of economic development. Surely this fact would lead a court to resist such an overly broad interpretation of G.S. 158-7.1.

CONCLUSION

Local governments must field incentive requests not only from manufacturers who promise ample job creation and capital

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432. There may be others, such as downtown revitalization pursued within a properly designated Municipal Service District. *See* N.C. GEN. STAT. § 160A-536 (Supp. 2012); *see also* Kara Millonzi, *Funding Capital Projects in a BID (Business Improvement District)*, COATES' CANONS: N.C. LOC. GOV'T L. BLOG (Mar. 31, 2011, 3:47 PM), http://canons.sog.unc.edu/?p=4273 (explaining how a North Carolina municipality can create a business improvement district using a municipal service district for downtown revitalization). The public purpose limitations of Municipal Service Districts, however, have not been tested in court.

433. *See supra* Part IV.D.1.

434. *See supra* Part IV.D.2.

investment to increase the tax base, but also from business interests and real estate developers who are unable or unwilling to promise job creation. This Article closely examined G.S. 158-7.1 and *Maready* along three dimensions—means, consideration, and procedural requirements—in order to develop a framework for analyzing incentive requests across the entire spectrum.

In its essence, this Article's framework suggests that subsidies (or incentives) provided to private companies in pursuit of economic development should be bounded in two important ways. First, the consideration obtained by local governments in exchange for the incentives must be meaningful, primarily in terms of job creation and increasing the tax base. Second, the approval of incentives should comply with procedural requirements set forth in G.S. 158-7.1 and further described by the Supreme Court of North Carolina in *Maready*.

The framework was tested using two types of incentive requests frequently submitted to North Carolina local governments: one that fits the classic *Maready* mold, and another tax-base-alone request that omits many of the elements considered important in *Maready*. This Article's framework illuminated the missing elements in the tax-base-alone incentive request, suggesting that such an incentive would have difficulty surviving a public purpose challenge if granted pursuant to G.S. 158-7.1. However, other sources of statutory authority—for other public purposes—might provide an alternative in the tax-base-alone scenario. Urban redevelopment and community development are two possible alternatives to G.S. 158-7.1, provided that the incentive conforms to the statutory requirements and case law of those alternative authorities.

In conclusion, the value of this Article's framework for analyzing economic development incentives will be determined by the extent to which local governments employ it as part of their decision-making process when confronted with incentive requests. Hopefully, local governments in North Carolina, armed with this Article's framework, will be better able to assess the wide variety of incentive requests they receive and to respond with confidence that they are acting in conformity with the available legal authority.

APPENDIX A. CASES CITED IN *MAREADY* IDENTIFYING JOB CREATION AS A FACTOR IN HOLDING THAT ECONOMIC DEVELOPMENT EXPENDITURES SERVE A PUBLIC PURPOSE

1. *In re* Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875, 884 (Colo. 1991) (en banc) ("The Public purposes specifically enunciated by the General Assembly in H.B. 1005 include increased employment and economic development in Colorado.... We conclude that these public purposes are no less legitimate or particularized than the public purposes we have approved in prior cases.");
2. Wilson v. Conn. Prod. Dev. Corp., 355 A.2d 72, 76 (Conn. 1974) ("[T]he support of enterprises eligible for assistance under the act would result in an improved economy for the people of Connecticut by helping to keep new business in the state, to provide increased employment opportunities, and to establish a new source of public revenues."); Roan v. Conn. Indus. Bldg. Comm'n, 189 A.2d 399, 401 (Conn. 1963) (upholding industrial projects defined by the statute allowing for projects that will "provide gainful employment for the people of the state");
3. *In re* Opinion of the Justices, 177 A.2d 205, 213 (Del. 1962) (per curiam) (describing the legislative findings of the statute to continue the "steady employment of its citizens" and defining unemployment as "an evil properly the subject of State action for remedy");
4. Nations v. Downtown Dev. Auth., 338 S.E.2d 240, 247 (Ga. 1985) ("The trial court found that the project will promote and develop the public purposes of trade, commerce, industry, and employment opportunities. There is evidence in the record to support this determination.");
5. Potter v. Judge, 444 N.E.2d 821, 825 (Ill. App. Ct. 1983) (noting the legislative purpose of "reducing unemployment, expanding commerce, and enlarging municipal tax bases" and upholding the statute as having a proper public purpose);
6. Hawkins v. City of Greenfield, 230 N.E.2d 396, 400 (Ind. 1967) (holding "[t]he public purpose to alleviate poverty and unemployment" is amply supported by the Indiana Constitution);
7. Brady v. City of Dubuque, 495 N.W.2d 701, 707 (Iowa 1993) (noting the legislative purpose of a "continuing need for

programs to alleviate and prevent conditions of unemployment" and upholding the statute);

8. Hayes v. State Prop. & Bldgs. Comm'n, 731 S.W.2d 797, 801 (Ky. 1987) ("The relief of unemployment is a public purpose within the purview of the case law and the constitution.");
9. Farlouis v. LaRock, 315 So. 2d 50, 58 (La. Ct. App. 1975) ("The gain to the Parish was the development of an industry that hired from 170 to 200 persons. Nothing in this undertaking was violative of any constitutional provision.");
10. Common Cause v. State, 455 A.2d 1, 19–20, 23–24 (Me. 1983) (noting that the project would "enhance employment opportunities" and "create jobs" and, while there was not previously a Maine case upholding job creation as a public purpose, "the concept of public purpose is not static");
11. Williams v. Anne Arundel Cnty., 638 A.2d 74, 79–80 (Md. 1994) (noting several uses of public funds for public purposes, despite a benefit to privately owned property, including the support of a "privately owned lingerie factory [that] promoted employment and thereby served [a] public purpose" (citing City of Frostburg v. Jenkins, 136 A.2d 852, 855–56 (Md. 1957))); Reyes v. Prince George's Cnty., 380 A.2d 12, 28 (Md. 1977) (upholding an arena project that "employs 400 people, with an annual payroll of $2,000,000");
12. Opinion of the Justices to the House of Representatives, 335 N.E.2d 362, 365 (Mass. 1975) (per curiam) (noting that the "declared purpose of the proposed bill is the '[stimulation of] industrial growth and expansion' in order to increase gainful employment of citizens of the Commonwealth" and that stimulating job development is a proper public purpose (alteration in original));
13. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 458–59 (Mich. 1981) (conflating public use and public purpose in holding that "[t]he power of eminent domain is to be used in this instance primarily to accomplish the essential *public purposes* of alleviating unemployment and revitalizing the economic base of the community [and the] benefit to a private interest is merely incidental" (emphasis added)), *overruled* by Cnty. of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (analyzing, eight years after *Maready*, the *Poletown* court's conflation of public use and public purpose, and overruling *Poletown* not on the basis of public purpose but because *Poletown*'s interpretation of "public use . . . cannot reflect the common understanding of that phrase"); City of Gaylord v. Beckett, 144 N.W.2d 460, 469 (Mich. 1966) (en banc) ("[T]he probabilities would seem to

favor the credits—that is to say, employment and other benefits to the community and the area as opposed to additional costs for schools, public utilities, and the hazard of unemployment.");

14. Minn. Energy & Econ. Dev. Auth. v. Printy, 351 N.W.2d 319, 325 (Minn. 1984) (en banc) ("[T]he project will create or maintain a sufficient number and type of jobs to justify Authority participation in its financing, and the use of appropriated monies in the Economic Development Fund for insurance will enhance the creation or maintenance of jobs as a result of the loan.");
15. Bd. of Supervisors of Lamar Cnty. v. Hattiesburg Coca-Cola Bottling Co., 448 So. 2d 917, 919 (Miss. 1984) (en banc) (" 'The end being legitimate [here, the relief of unemployment and the promotion of the state's agricultural and industrial welfare], the means is for the legislature to choose.' " (alteration in original) (quoting Albritton v. City of Winona, 178 So. 799, 804 (Miss. 1938));
16. State *ex rel.* Wagner v. St. Louis Cnty. Port Auth., 604 S.W.2d 592, 597 (Mo. 1980) (en banc) ("The Court [in an earlier opinion] held that the issuance of revenue bonds for commercial, industrial, agricultural and manufacturing facilities did serve the essential public purposes of improving employment and stimulating the economy. The same could be said for the issuance of revenue bonds pursuant to the purposes of this Act.");
17. Fickes v. Missoula Cnty., 470 P.2d 287, 292 (Mont. 1970) ("The legislative purpose of encouraging the development of the state's natural resources without cost to the taxpayer is being accomplished. Here, every dollar expended on the bond issue is to be repaid from and by the project the issue makes possible. The county commissioners expressly find the project will be of value as a source of employment and county revenue and will protect the health, safety and welfare of the citizens. The plant will be enabled to comply with the new legal requirements for environmental improvement. Thus, a valid public purpose appears.");
18. State *ex rel.* Brennan v. Bowman, 512 P.2d 1321, 1322 (Nev. 1973) (upholding a statute "designed to encourage industry to locate or remain in this State in order to relieve unemployment and to secure and maintain a stable economy");
19. Roe v. Kervick, 199 A.2d 834, 843 (N.J. 1964) (noting that the relevant statute's purpose is to "alleviate unemployment in localities where that condition has been substantial and

persistent" and that if the New Jersey area is not found to suffer from such substantial and persistent unemployment, "it cannot be designated a redevelopment area");

20. Vill. of Deming v. Hosdreg Co., 303 P.2d 920, 928 (N.M. 1956) ("The promotion of the industry authorized by the hereinbefore mentioned provisions of Chapter 137 is clearly of incidental public benefit to the municipality where such industry may be located at least, to the extent that it will furnish employment to a substantial number of its inhabitants. It is, then, at least incidentally for a public purpose, though it results in the promotion of and gain to a private corporation.");
21. Yonkers Cmty. Dev. Agency v. Morris, 335 N.E.2d 327, 331 (N.Y. 1975) ("It would not then be necessary, as a precondition to the taking, to determine that the public benefit in assuring the retention of Otis as an increased source of employment opportunity in Yonkers was sufficient to outweigh the benefit that may be conferred on Otis.");
22. Stark Cnty. v. Ferguson, 440 N.E.2d 816, 819 (Ohio Ct. App. 1981) (" 'To create or preserve jobs and employment opportunities [or] to improve the economic welfare of the people of the state . . . is hereby determined to be in the public interest and a proper public purpose.' " (quoting OHIO CONST. art. VIII, § 13));
23. Burkhardt v. City of Enid, 771 P.2d 608, 610–11 (Okla. 1989) (noting that the City of Enid had suffered a "significant increase in unemployment" and that its plan to purchase a failing university in the city would preserve "hundreds of jobs at the university" and have a "significant effect upon the city's ability to attract new industry and new jobs" ultimately creating "overwhelming benefits to the community of Enid" that qualified as a public purpose);
24. Basehore v. Hampden Indus. Dev. Auth., 248 A.2d 212, 217–18 (Pa. 1968) (noting that "[a]ll parties are agreed that unemployment is a problem which falls within the police power of the state" and that the legislature's actions to quell unemployment are entitled to deference, and finding that the projects at bar would "be effective means of combating unemployment since they will create jobs directly");
25. *In re* Advisory Opinion to Governor, 324 A.2d 641, 647 (R.I. 1974) (per curiam) ("We believe that the conditions of unemployment within the state are well known and need no documentation here. Legislation such as that under consideration here, intended to alleviate these conditions and their inherent problems, certainly is in the public interest.");

26. Nichols v. S.C. Research Auth., 351 S.E.2d 155, 163 (S.C. 1986) ("It would be anomalous to hold that a government which expends hundreds of millions to alleviate the suffering of its indigent population through multiple social and humanitarian programs, and properly so, is proscribed from providing jobs for the unemployed, who, once employed, contribute tax revenues in support of those very programs." (footnote omitted));
27. Clem v. City of Yankton, 160 N.W.2d 125, 133 (S.D. 1968) ("[S]timulation and development of our general economic welfare and prosperity is clearly a public purpose.");
28. West v. Indus. Dev. Bd., 332 S.W.2d 201, 202 (Tenn. 1960) ("The stated and obvious purpose of the act in question is to promote industry and develop trade to provide against low wages and unemployment. Such a purpose is public in nature under conditions existing in this State at the time of the enactment of the law and at the present time.");
29. Utah Tech. Fin. Corp. v. Wilkinson, 723 P.2d 406, 413 (Utah 1986) ("We cannot say in the face of those precedents that the stimulation of Utah's economy and the creation of employment is not a legitimate public purpose.");
30. Vt. Home Mortg. Credit Agency v. Montpelier Nat'l Bank, 262 A.2d 445, 449 (Vt. 1970) (upholding a statute with legislative findings that "refer to the public purpose and policy of stimulating industrial growth, utilizing commercial potential and expanding employment opportunity");
31. City of Charlottesville v. DeHaan, 323 S.E.2d 131, 137 (Va. 1984) (upholding the city's actions where "the city has made an investment in its future in order to complete a redevelopment project more than twenty years in the making and in order to provide jobs, more tax revenues, and other benefits for its citizens."); Mayor & Members of the City Council v. Indus. Dev. Auth., 275 S.E.2d 888, 890 (Va. 1981) ("The Act was designed to stimulate the economy of Virginia, thereby providing jobs, increasing business activity, and broadening the state's tax base. Appellant argues that the financing of private projects with industrial development authority revenue bonds often gives a competitive advantage to the developer involved. It further argues that such bonds unfairly compete in the market place with true municipal bonds issued to finance legitimate public improvements. While these arguments may have merit, they would more properly be addressed to the legislative body.");
32. State *ex rel.* Ohio Cnty. Comm'n v. Samol, 275 S.E.2d 2, 4 (W. Va. 1980) ("It does not require any lengthy discussion to

realize that the renovation, expansion or creation of existing or new commercial projects gives much the same economic benefit to a community as would comparable activities in the industrial area. Each serves to create or maintain employment and enhance tax revenues, and thereby operates to benefit the community and public in general.");

33. State *ex rel.* Hammermill Paper Co. v. La Plante, 205 N.W.2d 784, 794–95 (Wis. 1973) (noting a legislative statement of purpose that the court gives deference to, namely that the state may "promote the right to gainful employment").

A number of cases used broad economic welfare language that, while not mentioning job creation specifically, arguably encompasses job creation.

1. Wright v. City of Palmer, 468 P.2d 326, 331 (Alaska 1970) ("[I]t is recognized that the location of an industry in a particular community may have widespread economic benefits and that these do fulfill the public purpose and the general welfare of the community, broadly conceived.");
2. Indus. Dev. Auth. of Pinal Cnty. v. Nelson, 509 P.2d 705, 710 (Ariz. 1973) (en banc) ("The system of financing pollution control facilities . . . is essentially the same as that provided in many other states for industrial development. We believe that the best reasoned cases support the view . . . that such method of financing . . . is an expenditure in the public interest.");
3. Andres v. First Ark. Dev. Fin. Corp., 324 S.W.2d 97, 99 (Ark. 1959) (" 'The purposes of each development finance corporation organized under the provisions of [the statute are] to promote, stimulate, develop and advance the business prosperity and economic welfare of the State of Arkansas and its citizens.' " (citation omitted));
4. Duckworth v. City of Kansas City, 758 P.2d 201, 203 (Kan. 1988) ("[In previous cases], this court upheld the constitutionality of governmental assistance of private economic development for the purpose of promoting the overall economic welfare of the general public. Although both cases involve the grants of industrial revenue bonds rather than the issuance of loans by a city, the analysis for constitutional purposes is identical.");
5. Chase v. Cnty. of Douglas, 241 N.W.2d 334, 339 (Neb. 1976) ("[T]he general encouragement of growth and industry

through such devices as publicity and advertising are public purposes.");

6. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237 (N.D. 1964) (noting that the court upheld [in an earlier opinion] the public purpose doctrine "for the creation and establishment of certain State utilities, industries, enterprises, and business projects");
7. Carruthers v. Port of Astoria, 438 P.2d 725, 730–31 (Or. 1968) ("The action of the Port is predicated upon its finding of a general benefit to the economy of the community. This is a public purpose.");
8. Powers v. City of Cheyenne, 435 P.2d 448, 453 (Wyo. 1967) ("Also, on its face, the project is in pursuance of law (the Industrial Development Projects Act as amended); and it is for a public purpose specified by law in the sense that Ch. 95, § 1(b), specifies that plants and facilities of industrial development projects are declared to be and constitute public purposes.").

APPENDIX B. CASES CITED IN *MAREADY* IDENTIFYING INCREASING THE TAX BASE AS A FACTOR IN HOLDING THAT ECONOMIC DEVELOPMENT EXPENDITURES SERVE A PUBLIC PURPOSE

1. Wilson v. Conn. Prod. Dev. Corp., 355 A.2d 72, 76 (Conn. 1974) ("It was their considered opinion that the support of enterprises eligible for assistance under the act would result in an improved economy for the people of Connecticut by helping to keep new business in the state, to provide increased employment opportunities, and to *establish a new source of public revenues*." (emphasis added)); Roan v. Conn. Indus. Bldg. Comm'n, 189 A.2d 399, 401 (Conn. 1963) (upholding a statute that would "increase the tax base of the economy");
2. Potter v. Judge, 112 444 N.E.2d 821, 825 (Ill. App. Ct. 1983) (noting the legislative purpose of "reducing unemployment, expanding commerce, and enlarging municipal tax bases" and upholding the statute as serving a proper public purpose);
3. Hayes v. State Prop. & Bldgs. Comm'n, 731 S.W.2d 797, 799 (Ky. 1987) (upholding a statute as serving a valid public purpose because the project created "incremental taxes" and the "Commission has made the necessary findings required by the statute [including that it] would be economic madness for Toyota to expend up to $800 million for the plant and then fail to use it [and that, even] standing idle, the development would generate additional property taxes");
4. Common Cause v. State, 455 A.2d 1, 20 (Me. 1983) (noting that the project would "improve commerce and create jobs, generating sufficient tax revenues to repay the state's investment");
5. Opinion of the Justices to the House of Representatives, 335 N.E.2d 362, 363–64 (Mass. 1975) (per curiam) (" 'The reduction of unemployment and alleviation of economic distress,' as well as the '*[s]timulation of investment* and job opportunity . . . are proper public purposes.' " (alteration in original) (emphasis added) (quoting Anderson v. O'Brien, 524 P.2d 390, 394 (Wash. 1974)));
6. Minn. Energy & Econ. Dev. Auth. v. Printy, 351 N.W.2d 319, 323 (Minn. 1984) (en banc) (noting that "the State of Minnesota will benefit in the form of . . . expanded state or local tax bases");
7. Fickes v. Missoula Cnty., 470 P.2d 287, 292 (Mont. 1970) ("Here, every dollar expended on the bond issue is to be

repaid from and by the project the issue makes possible. The county commissioners expressly find the project will be of value as a source of employment *and county revenue* and will protect the health, safety and welfare of the citizens." (emphasis added));

8. Burkhardt v. City of Enid, 771 P.2d 608, 611 (Okla. 1989) (noting that Enid's purchase of a failing university would benefit the city's economy by ensuring "the continued presence of students who spend in Enid," and conceivably increase tax revenues through such spending);
9. Nichols v. S.C. Research Auth., 351 S.E.2d 155, 163 (S.C. 1986) ("It would be anomalous to hold that a government which expends hundreds of millions to alleviate the suffering of its indigent population through multiple social and humanitarian programs, and properly so, is proscribed from providing jobs for the unemployed, who, once employed, *contribute tax revenues in support of those very programs*." (emphasis added) (footnote omitted));
10. Utah Tech. Fin. Corp. v. Wilkinson, 723 P.2d 406, 413 (Utah 1986) (citing Wilson v. Conn. Prod. Dev. Corp., 355 A.2d 72 (Conn. 1974), as support for the proposition that a law that increases public revenues serves a public purpose);
11. Mayor & Members of the City Council v. Indus. Dev. Auth., 275 S.E.2d 888, 890 (Va. 1981) ("The Act was designed to stimulate the economy of Virginia, thereby providing jobs, increasing business activity, and *broadening the state's tax base*." (emphasis added));
12. State *ex rel.* Ohio Cnty. Comm'n v. Samol, 275 S.E.2d 2, 4 (W. Va. 1980) ("It does not require any lengthy discussion to realize that the renovation, expansion or creation of existing or new commercial projects gives much the same economic benefit to a community as would comparable activities in the industrial area. Each serves to create or maintain employment and *enhance tax revenues*, and thereby operates to benefit the community and public in general." (emphasis added) (footnote omitted));
13. State *ex rel.* Hammermill Paper Co. v. La Plante, 205 N.W.2d 784, 794–95 (Wis. 1973) (deferring to legislative determination that "security against unemployment and the preservation and enhancement of the tax base can best be provided by the promotion, attraction, stimulation, rehabilitation and revitalization of commerce, industry and manufacturing").