<u>DON'T LEAVE MONEY ON THE TABLE – RECRUITMENT AND EXPANSION INCENTIVES FOR BUSINESSES</u>

<u>HISTORY OF INCENTIVES</u>

Because of all of the current publicity and the frequency with which business recruitment incentives are utilized, many people believe that incentives are a relatively new set of tools used to recruit business facilities and retain expansions of existing facilities. In fact, this is not a new innovation at all.

Some years ago, *Colonial Williamsburg* magazine contained an article about how a colony had utilized incentives to recruit a potter from England. Apparently, the colony was in need of kitchen utensils and other things made by a potter. The colony recruited a capable potter from England by offering free land upon which to build a facility and a grant of funds for the start up of the facility. They successfully recruited a capable artisan. However, as the story goes on, the potter got a better offer at a later date from another colony and moved. Clearly the colony which initially brought him from England should have relied upon a contract to bind his commitments and to provide for claw back provisions such as are utilized today.

Additionally, G.S. §158-7.1, the Local Development Act, was originally passed in 1924. A copy of this statute is attached. The portion that was passed then was Subsection (a), which granted extraordinarily broad authority to local governments to utilize grants and other mechanisms to recruit businesses and retain expansions of existing industries.

Also, one of the incentive measures still in place today has existed since the early 1960's. This is the community colleges' training program which is targeted toward companies that are hiring new employees.

Consequently, incentives to recruit and grow industries have been around for quite some time.

<u>MODERN UTILIZATION OF INCENTIVES IN NORTH CAROLINA</u>

As mentioned above, one of the first incentives in the current era, that is still in place, is the community colleges' training program. At one time, this was a distinct competitive advantage for North Carolina. Put very simply, this allowed the State to say to a company which was considering the location of a new facility, or the expansion of an existing facility, that the State would pay some or all of the cost of training the company's employees the way the company wanted them trained. This still remains as a very important recruitment tool. Most states have a similar program, so the competitive advantage has been somewhat lessened.

In the mid-1980's, the State initiated its first more direct incentive measure, which was a job tax credit mechanism. Under that law, the company could get a credit against its state income tax liability for each job created.

Initially this tax credit program was not well targeted. After a retail food establishment that was being built sought the tax credits, the law was amended to focus on certain types of industries and to exclude others. The logic is that a retail facility will open where it can sell its products and its decision can not be affected by the availability of a tax credit mechanism.

Originally this legislation was targeted at the 20 most economically distressed counties in the State. Subsequently, that was expanded to the 25 most distressed counties in the State, and after that was extended to the 30 most distressed counties in the State.

At the local level, incentives were used sparingly by local governments to recruit industry and retain expansions of existing industries. A primary reason for this is that G.S. §158-7.1, the Local Development Act, was until the early 1990's limited to being utilized by cities or counties which had specifically opted in under the provisions of the law by the passage of a local bill. Therefore, only a few local governments had done this. For this reason, authority for local government incentives was only extended to a very limited number of cities and counties in the State.

During this period of time, one of the reasons that incentives were not used more frequently by state and local governments, and particularly here in North Carolina, was that so few companies asked for incentives. Throughout this writer's tenure with the Department of Commerce from 1989 to 1993, there were only three projects which even mentioned the need for incentives as a part of their decision processes.

Starting in 1993, the use of incentives at the local level began to expand rapidly. The first project in the State in which there was a very aggressive use of local incentives was Alleghany County's recruitment of a Bristol Compressors manufacturing facility. Incentives were a significant factor in recruiting the company to North Carolina. Although the incentive packages offered by Alleghany County and the Town of Sparta were relatively minor in relation to the $7 million cash up front incentive offered in Virginia, it was a factor in successfully recruiting this facility.

Following that project, a number of other local governments began to consider using incentives. However, at that time, a local government still had to opt under the provisions of the Local Development Act by the passage of a local bill. In 1994, the Local Development Act was amended to not require a local government to opt under it by the passage of a local bill, but instead extended the allowance of using incentives to every city and county in the State. Subsequently, the utilization of incentives by local governments began to expand exponentially.

Another factor in the expansion of the use of incentives by local governments was the ruling in *Maready v. City of Winston-Salem*, 342 N.C. 708 (1996), by the State Supreme Court. The *Maready* ruling determined, that the use of incentive grants by local governments, pursuant to G.S. 158-7.1, to recruit new industry facilities or gain the expansion of an existing facility, was constitutionally permitted as an appropriate public purpose. In specific, the Court stated the following:

> "Viewed in this light, section 158-7.1 clearly serves a public purpose. Its self-proclaimed end is to 'increase the population, taxable property, agricultural industries and business prospects of any city or county' . . . . The public advantages are not indirect, remote, or incidental; rather, they are directly aimed at furthering the general economic welfare of the people of the communities affected. While private actors will necessarily benefit from the expenditures authorized, such benefit is merely incidental. It results from the local government's efforts to better serve the interests of its people."

Following the *Maready* case, more and more governments began to delve into using local incentives to recruit and grow industries.

Also during the early to mid 1990's, it became much more common for companies to request incentives as a part of their decision process. Whereas very few projects had incentive components in it prior to that, it became almost routine that every project would list among its criteria the provision of supportive incentives from the local and state level.

Additionally during the early to mid 1990's, the State began to offer incentives beyond the traditional community college training assistance.

The first effort in this regard was the legislative enactment and appropriation which provided what was intended to be a deal closing fund to be used by the Governor to make final offers in order to land projects. In its initial use, this was only funded at a very low level. Although it was intended to be a deal closing fund, it quickly became expected on the front end by most recruitment projects. This later became what will be discussed below, the One North Carolina Fund Program.

Also in this period of time, the State expanded the Job Tax Credit Program by the adoption of the William S. Lee Act. This Act allowed for credits against state income tax liabilities for jobs created, capital investments, and research and development. This Act was named after the former CEO of Duke Energy who lobbied tirelessly for it and tragically died of heart attack at the Raleigh Durham Airport after speaking to a legislative committee about the need for these tax credits.

At at later date, the William S. Lee Act was changed significantly and replaced by what was called the Article 3J tax credits. This made some changes in the amounts of tax credits and in the structuring of the tiers among the counties which allowed for different levels of tax credits depending upon the economic distress of the counties. The more distressed counties had the higher level of grant credits, whereas the most prosperous counties had the lower levels.

Effective January 1, 2014, after the state income tax rate was reduced, the North Carolina General Assembly repealed the Article 3J tax credits. Some companies still are realizing the benefit of the tax credits which accrued prior to that date, but they are no longer available as a recruitment tool. The repeal of the Article 3J tax credits has not hurt the State's recruitment efforts significantly. Studies show that tax credits generally were not very strong motivators of decisions for companies making site selection or expansion decisions.

The most significant program adopted other than the above-mentioned ones, was the Job Development Investment Grant Program, which allowed the State to make grants based upon the state income tax withholdings on employees of companies that built new facilities in the State or expanded existing facilities. This was done after this mechanism was initially used by the State of Alabama to recruit the Mercedes automotive assembly project and after other states had begun to adopt similar programs.

All of the above programs are discussed in more detail below.

STATE AND LOCAL INCENTIVES IN NORTH CAROLINA

Incentives at the state and local level are quite similar from state to state. For example, South Carolina has the equivalent of a job development investment grant program, although the terms of the program differ. Also, local incentives such as are done in North Carolina are done in South Carolina.

However, the focus of this paper is on North Carolina incentives. The incentive grants and programs which are currently available are as follows.

State Incentives

Job Development Investment Grants (JDIG)

The JDIG program is a discretionary incentive that provides grants over a period of years to companies which will create a significant number of new jobs. Typically through the years, the program has had a limit on either the number of JDIG awards that can be made and/or the total amount of JDIG grants which can be committed in a single year. Because of the cap(s) on this program, since it's inception the JDIG program has been limited to companies which are creating a substantial number of new jobs. The amount has varied from time to time, but typically it will be for companies that are creating in excess of 100 jobs in the most distressed counties to over 200 jobs in the least distressed counties.

G.S. §§ 143B-437.50 through 437.63 provides the statutory authority for the JDIG program and defines the requirements of that program. A copy of this statute is attached. The administrative criteria for the operation and implementation of the JDIG program are also set forth in an attached document. Although these are not rules adopted pursuant to the Administrative Procedures Act, in that this program is excepted from the Administrative Procedures Act, these guidelines are followed by the Commerce Finance Center in the administration of this program.

The JDIG program is overseen by an Economic Investment Committee ("EIC") which is required by statute. The EIC consists of five members, who are the Secretary of Commerce, Secretary of Revenue, Director of the Office of State Budget & Management, and two private sector individuals appointed by the North Carolina General Assembly. The two private sector members are appointed one by the House and one by the Senate.

The JDIG program has very rigorous and strict requirements. In order for the EIC to make a grant, it must find that:

- The project will result in a net increase in employment.
- The project increases opportunities for employment and will strengthen the State's economy.
- The project is consistent with the economic development goals of the State and the general geographic area in which the project will be located.
- The project must be competitive with another state or country, which indicates that the project must be considering locations in another state or country.
- The JDIG grants are necessary for attracting the project to North Carolina.

Also, the company must meet certain requirements, such as:

- Providing certain health insurance benefits for its employees.
- Meeting certain workplace safety requirements.
- Being environmentally sound.

There must be a showing of a positive return on investment for the State. Consequently, the Commerce Finance Center utilizes an IMPLAN model to compute the cost/benefit of the project. Typically grants under this program are delineated as a certain specified percentage of withholdings for state income tax liabilities of employees of the company each year for a stated number of years. These percentages can range from 10 percent to 75 percent. Obviously, the larger and more compelling projects receive a higher percentage, and the less compelling projects receive a lower percentage. Additionally, these grants are made each year for a stated number of years which can be up to twelve years. Again, the more compelling projects will receive grants for a longer period of time and the less compelling project will receive grants for a shorter period of time. These grants can apply either to a new facility located within the State or the expansion of an existing facility.

These grants are performance based. The company must achieve and maintain specified levels of capital investments in order to receive the full level of grants. If the company falls short by a minimal amount, normally 5% to 10%, the amounts of the grants are reduced proportional to the shortfall. If the company falls short by more than the agreed upon 5% or 10% shortfall, it can lose all of the future grants and have to reimburse to the state previously paid grants. In order to assure a high and enduring return on investment to the state, the company must maintain its committed levels of capital investments and jobs created for 150% of the grant period. For example, if grants are made each year for ten years, the company must maintain its performance commitments for fifteen years.

The JDIG program is rigorously monitored. Annual reporting is required by companies that receive a commitment of JDIG grants. The reporting requirements are detailed and strenuous. As a result, North Carolina has been ranked by various third party entities as having one of the most sound and verifiable incentive programs in the Country.

There is a filing fee when a company files an application for a JDIG grant. Quite often, the company can negotiate to have that fee paid by the local government in which it might consider locating the facility. There is also a fee which is paid by the company each year with its annual report.

For very large new projects or expansions which are creating a considerable number of employees, the amount of these grants can be quite substantial.

<u>One North Carolina Fund Grants</u>

One North Carolina Fund program is also a discretionary program. The provision of grants under this program is subject to negotiation.

Grants under the One North Carolina Fund Program are typically given for projects that are creating too few jobs to qualify for the JDIG program. As a general rule, the Commerce Finance Center will only provide grants under either the JDIG program or the One North Carolina Fund program. In some limited projects, one can negotiate to receive grants under both programs. The One North Carolina Fund program's enabling legislation is set forth in G.S. § 143B-437.71 through 437.73. A copy of this legislation is attached.

This program is also exempted from the requirements of rulemaking under the Administrative Procedures Act. The guidelines for the One North Carolina Fund grant as promulgated by the Department of Commerce are set forth in the attached materials.

The One North Carolina Fund program is funded by non-recurring appropriations made by the North Carolina General Assembly. Consequently, it is dependent upon an appropriation each year and the total amount of grants is limited by the amount appropriated. This is also provided for companies that are locating a new facility in the State or expanding an existing facility.

The following factors are considered by the Department of Commerce in determining what projects will receive grants and the amount of those grants:

- The economic impact of the project, including cost and benefits to the State.
- The strategic importance of the project to the State, region, or locality.
- The number and quality of jobs.
- The type of industry and project.
- Any environmental impacts of the project.

- Special consideration is generally given to companies that locate in areas that have experienced sudden and severe economic disruptions.
- The project must be competitive with another state or country to be considered.

In order for a One North Carolina Fund grant to be provided, the company must agree to meet an average wage test, which requires that its average wages be in excess of the average wage in the county in which the project would be located. Additionally, the local units of government must agree to match financial assistance to the company.

The statute creating this program specifically requires that companies can utilize the funds only for the following purposes:

- Installation or purchase of equipment.
- Structural repairs, improvements, or renovations of existing buildings to be used for an expansion.
- Construction of or improvements to new or existing water, sewer, gas, or electric utility distribution lines.
- To purchase equipment for an existing building.

An application is required to be submitted to the Commerce Finance Center. It is reviewed by the Commerce Finance Center with a recommendation to the Secretary of Commerce and the Governor. Technically, the Governor makes decisions on these grants, but as a practical matter, they are made by the Secretary of Commerce.

This is a performance based incentive. The company must meet its performance expectations in order to receive grants. Typically, a total grant amount is provided with portions to be paid as the company creates a portion of the required jobs. For example, payment may be in three portions, such that when the company creates 30 percent of the jobs, it gets 30 percent of the grant; when it creates the next 30 percent of the jobs expected, it receives an additional 30 percent of the grant; and when the company employees the remaining 40 percent of the new jobs, it receives the remaining 40 percent of the grant. If the company falls short on its commitments, it receives less grants or can receive possibly no grants.

There is an annual reporting requirements. The company must also report when it reaches employment milestones which qualifies it for a particular grant amount.

<u>Community College Training Assistance</u>

The North Carolina Community College System provides grants and in-kind assistance to offset the cost of training a company's employees. The funding and assistance provided by the community colleges does not dictate the manner in which the employees are trained. That is left up to the company. The Community College System, through the local community college where the company will be located, will work with the company in designing training programs and funding certain training costs.

This program is very flexible to meet the needs of the company. In general, companies are quite well satisfied with the assistance provided by community colleges.

Grant awards under this program are typically denominated as a range of cost per employee, with a total estimated range of the value of the assistance, based on the number of employees. It is impossible during the recruitment process to define the specific type of training assistance because the company has not yet begun hiring employees. Consequently, the details are worked out after a company announces a new facility being located or an expansion of an existing facility.

The funding and training assistance can take many forms. Typically the type of things that might be provided are as follows:

- Reimbursement of travel costs for lead employees to go to another company location to be trained in the process.
- Salaries for lead employees during periods of time that they are working exclusively to train other employees.
- Customized production of training videos.
- Provision of "off the shelf" training materials that might be available through the community college.
- Others that may be unique to a particular company.

All of these forms of assistance are discretionary and are negotiated between the company and the community colleges. However, as stated above, company are almost routinely well satisfied with the services and assistance they receive.

<u>Local Incentives</u>

G.S. § 158-7.1 provides the primary statutory authority for local governments to provide incentives to induce companies to locate new facilities within their jurisdiction or to induce existing companies to expand within their territory. A copy of this statute is attached.

There are two primary types of incentives provided for under this statute. They are as follows.

Subsection (a) provides extraordinarily broad authority for local governments to expend funds for grants and other purposes to recruit companies. In particular, the statute provides that:

> "(a) <u>Economic Development</u>. Each county and city in this State is authorized to make appropriations for economic development purposes. These appropriations must be determined by the governing body of the city or county to increase the population, taxable property, agricultural industries, employment, industrial output, or business prospects of the city

> or county. These appropriations may be funded by the levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law."

The scope of this authority is emphasized by language in subsection (a) which reads as follows:

> "The specific activities listed in subsection (b) of this section are not intended to limit the grant of authority provided by this section."

This authority which has been in existence since 1924, has been used much more frequently since 1993 as the legal authority to provide direct cash grants to companies. As noted above, the *Maready* decision has determined this to be a constitutional utilization of public funds to promote the public purposes of creating jobs and increasing the tax base.

As a matter of practice, these grants are typically calculated as some percentage of anticipated property tax collections and grants are made each year for a specified number of years. Typically grant periods run for no more than 10 years.

However, the broad discretion that is allowed does permit local governments to base the amount of grants on all taxes and revenues which may be created by the company instead of just limiting it to anticipated property tax collections. Also, grant periods can be shorter than 10 years or can run more than 10 years. There have been certain projects in the State's recent history that have qualified for anywhere from 15 to 30 years of grants. Although it is not very common for these grants to be made over a period of time greater than 10 years. Also, under the authority of subsection (a), grants can be paid up front instead of each year over a period of years. Then under that circumstance, certain amounts of the grants may be clawed back if a company fails to meet and maintain performance requirements.

As stated, it is normal that these grants might be calculated as a certain percentage of anticipated property tax collections each year for a certain number of years. How this is expressed varies widely in grant agreements. Sometimes it is stated just in that way, as a certain percentage of anticipated property tax collections. Sometimes the grants are stated as a much smaller percentage of the property tax base which is created by the company. Sometimes the grants are stated in dollar amounts. Sometimes there is a much more complex calculation based on the current tax rate and trend factors which can affect the change in the tax rate.

Often in determining how grants will be denominated in an agreement, consideration is given to protecting against the grants being interpreted to be a property tax rebate or abatement, which are constitutionally prohibited in North Carolina.

For grants to now be approved by the local government, there is a requirement of a hearing for the members of the public to comment on the proposed assistance, preceding by a public notice of at least 10 days. This requirement is based upon an amendment of G.S. §

158-7.1 in the 2015 Session of the General Assembly. Prior to this amendment, one could contend that such public notice and public hearing were not required for approval of grants under subsection (a). But it was generally the practice that all local governments did hold public hearings preceded by a public notice.

It is required by statute that these grants be provided pursuant to an executed agreement between the local government and the company. Typical provisions in such an agreement would include, but not be limited to:

- A description of the company's performance requirements in terms of jobs to be created, average wage levels, and capital investments requirement.
- A statement of the amount of incentives to be provided to the company in return for its performance.
- A formula for the reduction of incentive amounts each year if the company fails to meet performance expectations; or if the grants were provided up front instead of being spaced over a number of years, provisions for a claw back of certain amounts of grants if the company fails to meet or maintain performance requirements.

Although the agreements will have many other terms, the above are primarily the operative terms.

Subsection (b) of G.S. § 158-7.1 allows local governments to acquire and develop business parks and to construct or renovate buildings to be used for attracting companies. Very specific authorities are granted under Subsection (b). Those specific authorities are not in any way considered to limit the broad general discretion local governments have under Subsection (a).

Specific measures which can be undertaken by a local government under subsection (b) are as follows:

"(1) A county or city may acquire and develop land for an industrial park, to be used for manufacturing, assembly, fabrication, processing, warehousing, research and development, office use, or similar industrial or commercial purposes. A county may acquire land anywhere in the county, including inside of cities, for an industrial park, while a city may acquire land anywhere in the county or counties in which it is located. A county or city may develop the land by installing utilities, drainage facilities, street and transportation facilities, street lighting, and similar facilities; may demolish or rehabilitate existing structures; and may prepare the site for industrial or commercial uses. A county or city may convey property located in an industrial park pursuant to subsection (d) of this section.

(2) A county or city may acquire, assemble, and hold for resale property that is suitable for industrial or commercial use. A county may acquire such property anywhere in the county, including inside of cities, while a city may acquire such property inside the city or, if the property will be used by a business that will provide jobs to city residents, anywhere in the county or counties in which it is located. A county or city

may convey property acquired or assembled under this subdivision pursuant to subsection (d) of this section.

(3) A county or city may acquire options for the acquisition of property that is suitable for industrial or commercial use. The county or city may assign such an option, following such procedures, for such consideration, and subject to such terms and conditions as the county or city deems desirable.

(4) A county or city may acquire, construct, convey, or lease a building suitable for industrial or commercial use.

(5) A county or city may construct, extend or own utility facilities or may provide for or assist in the extension of utility services to be furnished to an industrial facility, whether the utility is publicly or privately owned.

(6) A county or city may extend or may provide for or assist in the extension of water and sewer lines to industrial properties or facilities, whether the industrial property or facility is publicly or privately owned.

(7) A county or city may engage in site preparation for industrial properties or facilities, whether the industrial property or facility is publicly or privately owned.

(8) A county or city may make grants or loans for the rehabilitation of commercial or noncommercial historic structures, whether the structure is publicly or privately owned."

Certainly, if it is not competitively necessary, a local government would desire to have a company pay full fair market value for any land or building to be utilized by a company. However, it is becoming increasingly the case that companies expect to receive free or reduced cost of land or to have subsidized rental on a building, or a reduced cost of the building if it is being purchased. G.S. § 158-7.1 allows this. The local government must show that it will recover the fair market value over a period of time not to exceed 10 years through taxes and other revenues to be created by the company. This is a fairly flexible formula which one could content would allow for calculating direct taxes and revenues generated by the company, and indirect or induced taxes or revenues.

In the event that this type of property based incentive is utilized, the agreements become much more complicated. Quite often there are provisions regarding a claw back of cost of the property if the company fails to perform over a period of time. Also, it is necessary to have an appropriate contract to purchase or lease agreement attached.

By negotiating a reduced lease cost, the benefits to a company can be significantly increased. It is also possible to not only negotiate a reduced lease cost, but to negotiate provisions allowing the company to acquire the building at a later date below fair market value, quite often the amount of the amortized debt. Any company should give consideration to maximizing its incentive value by negotiating favorable terms on property that may be offered by a local government.

Other Incentive Sources

In addition to the above, there are other sources of incentive support that may apply for some companies.

Some regional economic development organizations will provide incentive grants. This is very limited and only done in a few isolated incidents.

For companies which will be large electric users, Duke Energy has an economic development rider that applies to its rates and provides a reduced cost of electricity over a period of time. Also, Duke Energy will provide cash grants of up to $250,000 to local economic development organizations which will then be paid to the company. ElectriCities and the Electric Membership Cooperatives have the ability to provide reduced rates as well.

For a pharmaceutical or biotechnology project, the North Carolina Biotechnology Center has grants which it will provide in certain cases.

There are quite a few grant programs in the State to provide for the cost of infrastructure which generally would include water, wastewater treatment, and road improvements. Frequently these infrastructure grants can be utilized to the benefit of a company.

The North Carolina Department of Transportation routinely provides grants for road improvements in or near the entrance to the location of a new facility or an expanded facility. These road improvements which might include deceleration lanes, turn lanes, signalization, or other improvements are often things that a developer would normally have to pay for.

Other grant sources that fund infrastructure improvements, such as Community Development Block grants, Rural Infrastructure Division grants for infrastructure, and Golden LEAF Foundation grants can sometimes be used to the benefit of a company. For example, if a company needs a water tank, wastewater pretreatment, or other improvements which would be in the nature of infrastructure improvements, these grants may be utilized for these purposes under certain circumstances. It is necessary that these improvements be owned by a local government and ostensibly be available for use by other companies in order to qualify as an infrastructure item.

Additionally, for a company locating in an existing building or expanding a building, the Rural Economic Development Division of the Department of Commerce has available grants for funding a small portion of the cost of such improvements.

PRACTICAL ADVICE

The above outlines some basic principles and legal requirements of state and local incentives in North Carolina. However, there are several areas of practical advice which should be taken into account by any person serving as a general counsel for or advising a company which might be a candidate for incentives.

All of the below are considerations which quite often will result in a company losing all incentives or not realizing as much as possible.

<u>Competitive – “But For” Requirement</u>

It is frequently the case that companies will disqualify themselves from state or local incentives by not being aware of the competitive necessity requirement, which is also frequently referred to as a “but for” requirement. The “but for” requirement essentially says that “but for” the incentives which are being provided, the company would not choose to locate in this State or the locality involved.

The State incentives mentioned above have specific “but for” requirements, except for the community college training program. It is statutorily required under the JDIG program and One North Carolina Fund grant program that there must be a competitive necessity for the incentives in order for a company to qualify for them.

This writer could give numerous examples where companies have been totally disqualified from state incentives because they failed to take this factor into account. Typically this will happen when a company representative is talking with a state recruiter and will make a statement indicating that they intend to locate in North Carolina to the exclusion of any other state. That company is then statutorily disqualified from receiving any state incentives.

The Local Development Act does not have an explicit but for or competitive necessity requirement. Some interpret the *Maready* decision as implying that there must be a competitive necessity for incentive grants in order for them to be utilized. Some local governments in this State do impose a competitive necessity or “but for” requirement and will refuse to provide incentives to a company which is not considering multiple locations. Other local governments do not impose this requirement. Only through working with local governments around the state can one be aware of how a particular locality might treat this issue.

One should never be disingenuous in indicating that another area is under consideration in addition to this State or a locality. But if a company at least is willing to consider the benefits of another location, in the opinion of this writer, that is sufficient to meet the requirement of the competitive necessity or “but for” requirement.

Under the state incentive programs, there simply no way to get around this. The applications for the JDIG and One North Carolina Fund programs contain a section in which a company must disclose other states or countries that are under consideration, provide a summary of the incentives which are being provided, and provide a contact name and telephone number for a person in those other geographic areas.

This is probably the most frequent cause of companies losing the availability of incentives.

<u>Timing of Incentive Negotiations</u>

Many companies go through a strenuous and detailed process in determining where to put a new or expanded facility. Quite often these decisions are made based on information that is available from internet sources, engineering analyses, and other data. It is often the case that they have made preliminary decisions as to the location of a new facility or expansion, and then as an afterthought, begin to think about incentives.

Incentive negotiations should be inserted early in the process of evaluating all other site selection criteria.

First, this does no harm. It is often the case that incentives are negotiated on projects which are in fact built a year to 3 years after the final decision on where to locate a facility. Consequently, having this information available does not cause the company to have to rush its other areas of evaluation.

Secondly, it only makes good sense to be aware of what incentives are available at multiple locations. Although incentives generally are not the final deciding factor on a location for a new or expanded facility, they are a factor. For example, a company will not locate a facility where there is an inadequate or costly labor pool. No amount of incentives can offset that cost or lack of availability. But certainly incentives are a factor, and that information should be inserted into the decision making process along with all other data and information. This is simply a good due diligence.

Consequently, it is encouraged that companies be involved in thinking about and negotiating incentives early in a site selection process.

Incremental Growth or Expansion Project

Most companies are constantly updating and installing new equipment. Quite often, companies are hiring new people as they go along. Frequently a company will have a plan for making new capital investments in a facility and adding employees over a one to five year period.

In doing so, many companies never think of this as a potential expansion project which could qualify for incentives. If the number of new employees is sufficient and the amount of capital investments are large enough, the company should consider approaching state and local officials to discuss the availability of incentive support.

Even though the capital investments and job creation will be over a period of years, this is often the case in recruitment or expansion projects. Generally, most companies do implement new or expansion projects over a period of years in terms of hiring new employees and making capital investments. Consequently, companies should be alert to positioning planned growth and expansion as a project which, if presented properly and negotiated effectively, could result in significant financial support.

Lack of Experience in Incentive Matters

Incentives and economic development processes are not what most business people deal in on a day to day basis. Also, it is not what most business attorneys deal with on a day to day basis. Because of this, it is understandable that companies not represented by capable and experienced representatives who routinely deal with incentive and economic development matters, would end up being shortchanged in terms of the support they receive.

This may take the form of less than potential incentive amounts. Only through routine involvement in incentive negotiations in North Carolina and other states can one have an idea of what are customary or reasonable expectations on the amount of incentives.

This also takes the form of failing to take advantage of types of incentives which are not obvious. One can easily obtain "off the shelf" incentive offers from state and local governments if they do not trip up over the "but for" or competitive necessity issue. But understanding how incentives can be creatively negotiated or in a way that increases the financial return to the company is very important. For example, most companies will not contemplate or understand how to utilize infrastructure grants to fund needed facilities for a company. In fact, some local or state economic developers do not understand this, but it is a potential area of substantial financial assistance.

CONCLUSION

These materials provide a very general overview of incentives which can be used to support new or expanded facilities. The level of detail is only intended to make the practitioner aware of opportunities.

It is beyond the scope of this presentation and these materials to go into all the details as to how to maximize incentive benefits.

The title of this presentation included the term "don't leave money on the table." Although some may consider that a rather crass term, it was used for a particular reason.

Some years ago, the writer of these materials was with a senior state official over lunch. In the course of that discussion, there was mention of some of the representatives who were coming forward to assist companies in negotiating incentives. A comment was made by the state official that many of these representatives did not have experience in incentive matters and in the words of that person, "you would not believe how much money they are leaving on the table."

Consequently, the title is well taken.

In conclusion, when representing a company that is considering the location of a new facility in this or any other state, or the expansion of an existing facility, don't allow your client to "leave money on the table."