So you're thinking about economic incentives for your NC real estate project?

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So you're thinking about starting a new project or expanding your existing project in NC? What should you be thinking about to qualify for economic incentives?

For starters, your questions about economic incentives should be on the top of your list, not an afterthought. Your recommended first stop is to engage an economic incentives specialist. Short of that, at a bare minimum, be sure that your request for proposal/letter of intent/ purchase contract/lease contains words to the effect of an economic incentives qualifier:

[Your company name] is considering multiple sites, in NC and in other states. This [Request for Proposal/Letter of Intent/Purchase Contract/ Lease] is contingent upon final approvals of adequate economic incentives at the State and local level in amounts to be negotiated, in the sole discretion of [your company name].

Why does it matter? If your investment in NC is of a size to warrant an award of economic incentives, you want to make sure you qualify to receive them.

How big does your investment need to be to qualify for incentives? There is no "one size fits all" test for what projects will qualify for incentives at each level. Typically, governmental jurisdictions awarding incentives are looking at both capital investment and job creation, as well as wage levels. It is safe to say the greater the capital investment and the greater the number of jobs, the more incentives will be offered to you. We have participated in negotiating attractive incentive arrangements for projects ranging from two to three million dollars in capital investments and twenty employees, up to $1.2 billion in capital investments and 700 employees.

How do you qualify for incentives? North Carolina employs a "but for" test to qualify for economic incentives. In other words, "but for" the award of incentives, you would not have chosen the particular site. If you've already decided to come to NC or expand in NC, you obviously would not qualify for state incentives. In such a case, there would be no consideration for the incentives.

By adding an economic incentives qualifier, such as the phrase set forth above, to your request for proposal/ letter of intent/ purchase contract/lease, you have at least protected your right to negotiate for incentives. Once you are under contract, without first negotiating for incentives, you would be hard pressed to later argue that "but for" the incentives, you would not have chosen the site (that you are already obligated to purchase/lease)... Ditto for a building you have already purchased or improvements you have already constructed. The "but for" test is a prerequisite for state level incentives. For local government incentives, the "but for" test is interpreted by some local government lawyers as a condition to qualify for incentives. Other local government lawyers do not interpret this as a requirement. But at the very least, maintaining a competitive posture for the project enhances one's negotiating leverage.

Why protect your right to negotiate incentives? Incentives are a way to entice your business to come to, or expand in, NC. Likewise, on the local level, incentives also entice the business to a particular locale within NC. If you protect your rights, you may qualify for incentives at state, county and city levels. Why leave money on the table?

Incentive grants are based on jobs (and to a degree wage levels) and the amount of capital investments in real estate improvements and equipment which will result in increased property tax valuations and property tax payments.

Because the local tax base depends upon the value of real estate improvements and personal property, a typical award of economic incentives at the local level will be based largely upon a projection of new property taxes to be generated. This is the source of funding for local government incentives. This type of incentive is calculated based upon the verifiable capital improvements to be constructed (new building, together with new machinery and equipment). If your project is going to add hypothetically $10,000,000 to the tax base, the increase in tax benefits to the applicable local jurisdiction(s) can be quantified based upon tax rates. This may result in a cash grants calculated or certain percentages of anticipated future, new property taxes each year for a stated number of years. For example, the calculation might be along the lines of 60% of new property taxes each year for six years. In that the incentive grants will be less than the property taxes that will be paid, the local government still realizes a tax benefit in the excess over the incentives awarded to your company.

In addition to ad valorem tax calculations, in some projects there are monetary incentives based upon other taxes, such as the increase in the sales tax that will be generated from the project.

Apart from capital investment in real estate, incentive awards will look at the number of jobs your investment will bring. Job creation will look at the number of jobs (sometimes using "full time" and sometimes even using "full time equivalent," depending upon the criteria), the wages to be paid, and, in some cases, the job field. Incentives will be based upon a matrix taking into account all of the job creation figures. Local incentive grants will most often require a certain level of job creation as a condition of the incentive grants. But at the state level, the number of new jobs to be created is the primary basis upon which incentive grants are calculated and paid. The reason is that the increase in income taxes is the source of funding from which grants are paid.

North Carolina state economic incentive grant programs include two types:

- *Job Development Investment Grants (JDIG)* – a discretionary incentive program providing annual grants to new and expanding businesses relative to a percentage of withholding taxes paid by new employees each year for stated number of years.
- *One North Carolina Fund* – non-recurring appropriations by the NC General Assembly to help recruit targeted jobs, which provides grants based upon a negotiated amount for each new job.

Another incentive that adds value is the community college training programs to make sure your new project has the type of employees you will need for your business to thrive. These programs are administered by the North Carolina Community College System. These incentives are work force development programs which cover a broad array of workforce screening, job fairs, and training for new and incumbent employees.

There are a number of programs which provide funding for infrastructure improvements such as Utility Fund grants, Rural Infrastructure grants, Golden LEAF Foundation grants, DOT road improvements grants, DOT rail improvement grants, and others.

Although most grant programs are geared to state and local governmental agencies, there are also some federal infrastructure grant programs available, such as EDA grants.

By being creative there are a number of ways that incentive and infrastructure grants can be used for the benefit of a company, which might include:

- site preparation;
- expansion of utility infrastructure, such as water and sewer lines to the site;
- other utility benefits, such as a generator;
- specialized wastewater systems for manufacturing facilities;
- expansion of roads/road improvements/traffic signals;
- fire suppression systems;
- access to railway;
- access to an airport runway;
- acquisition, construction, conveyance or lease of buildings for industrial or commercial use; and
- grants or loans for rehabilitation of historic structures.

Besides direct grants, the governmental agency making the grants will be in a position to aid with zoning, permits, and other regulatory hurdles to getting your project off the ground. Remember, with the award of incentives, the governmental agency has already determined that your project will bring needed capital improvements and/or jobs to the locale, so the governmental agency has a vested interest in helping you make that happen.

To summarize, the number one goal to protect your right to incentives is to make sure you don't lose them by failing to take the necessary steps to qualify for them. Lost incentives are a lost opportunity. Look for incentives at every available level and from every available source. If you think it may not be worth your while, talk to an economic development specialist before you lose out. You may not qualify for the reported $1.6 billion economic incentives package recently offered in an effort to entice Toyota/Mazda to NC, but you may qualify for enough to make your project economically feasible. Don't leave money on the table!

Margaret Shea Burnham concentrates her practice in the areas of commercial real estate transactions and litigation. She is a Board Certified Specialist in Real Property Law: Business, Commercial, and Industrial Transactions by the North Carolina State Bar and is a member of the American College of Real Estate Lawyers.

Ernie Pearson is former Assistant Secretary for Economic Development in North Carolina. His broad experience allows him to understand and coordinate all legal issues connected with siting a new facility or expanding an existing one. After a move or expansion, he provides continuing assistance on various legal matters.