

al.). The Supreme Court has not had occasion to review either the Streamlined FILOT Act or the Simplified FILOT Act. The Simplified FILOT Act, moreover, relies upon a completely different constitutional analysis than the other two statutes. In recent years, more and more companies have relied upon the Simplified FILOT Act, which contains a “cure” provision allowing companies 180 days to switch to a lease structure in the event of an adverse court decision.

Companies and counties should also note that no court or regulatory body has reviewed many of the ancillary provisions of these statutes, including the Original FILOT Act. Accordingly, with respect to many of the deal terms, the parties must rely on their own statutory analysis.

Investment Deadlines

Under each of the acts, a company must comply with the minimum investment criteria within five years from the end of the property tax year in which the company places the project or the first phase of the project in service (the "Statutory Compliance Period"). The county may, in its discretion, allow up to ten years for completion of the project (the "Investment Period") as long as the company meets the minimum, threshold investment within the five-year Statutory Compliance Period. The parties may also agree to allow replacement property to be included in the negotiated fee after the five-to-ten-year Investment Period up to the basis of the original property and for the remaining term applicable to the original property. In addition, the parties may provide for reductions in the FILOT when the company disposes of project assets. Each increment of the project placed in service during the five to ten year Investment Period benefits from the reduced assessment ratio for a period of 20 years calculated separately for each increment. Thus, the FILOT agreement may extend to a maximum term of 30 years.

Super Fee Projects

As noted above, certain very large projects ("Super Fee Projects") qualify for a 4% assessment ratio for a period of thirty years. In addition, the Statutory Compliance Period for purposes of meeting the minimum investment required is eight years with the possibility of a ten-year Investment Period for project completion. Generally, Super Fee Projects must reflect investment of at least \$150,000,000 and at least 125 new, full-time jobs at the project site or at least \$400,000,000 in investment. In certain cases, the FILOT statutes allow for further extension of the investment period.

Other Statutory Options

Under the Original FILOT Act and the Simplified FILOT Act, the parties can opt to adjust the Standard Calculation (see "FILOT Benefits" above) to suit the cash flow requirements of the company. Under this option, most companies opt for equal annual payments with respect to each project increment, an arrangement often referred to as the "Flat Fee" arrangement. Such a Flat Fee calculation, or any other deviation from the Standard Calculation, must produce the same net present value as the Standard Calculation over the twenty-year term. The Original FILOT Act also permits facilities previously subject to property taxes in South Carolina ("Previously Existing Property") to benefit from the negotiated FILOT if acquired in an arms-length transaction and if the company invests an **additional** \$45 million in the project.

The Streamlined FILOT Act allows for none of these options. Moreover, it purports to give the county the right to terminate the lease and sell the property free and clear of any claim by the company upon ninety-days notice if the company fails to make any payments under the lease. The Streamlined FILOT Act does, however, eliminate the need for the county to issue industrial development bonds in conjunction with the FILOT arrangement as will be discussed below, a circumstance which

simplifies the documentation and the procedures.

The Simplified FILOT Act allows for a Flat Fee calculation or other deviation from the Standard Calculation, and it significantly simplifies the FILOT arrangement. As with the Streamlined FILOT Act, the Simplified FILOT Act eliminates the need to issue industrial revenue bonds. Moreover, the Simplified FILOT Act retains the provisions allowing companies to include Previously Existing Property in the FILOT arrangement where there is \$45 million in additional investment. Most importantly, however, the Simplified FILOT Act eliminates the requirement that the county hold title to the FILOT assets and requires use of a simple "fee agreement" instead of a lease-purchase structure.

Investment Shortfall and Early Termination

If the company fails to reach the minimum level of investment within the applicable Threshold Period (five years, or for Super Fee Projects, eight years), the FILOT rate reverts retroactively to a payment equal to the taxes which would otherwise have been due had the industry owned the property. The Company must then pay any differential to the county together with interest thereon at the statutory rate. Note, however, that the industry would have been eligible for a five-year moratorium on the county portion of the *ad valorem* taxes (school taxes are not abated), and the retroactive application of this exemption considerably diminishes the impact of the loss of the fee at the five/eight-year mark.

Similarly, purchases of property by the company during the term of the lease and certain transfers of project property or interests under the lease may subject the company to an obligation to pay such a differential.

Special Source Revenue Bonds, Special Source Credits and Other Incentives

A county may offer a FILOT in conjunction with the enhanced jobs tax credit of a multi-county park and/or with Special Source Revenue Bonds or Special Source Credits or it may offer the multi-county park benefits and/or Special Source Revenue Bonds or Special Source Credits without a FILOT. In 2001, the South Carolina Supreme Court upheld the constitutionality of Special Source Bonds issued in conjunction with multi-county park arrangements. (See *Horry County School Dist. v. Horry County*).

Special Source Revenue Bonds are payable solely from FILOT payments received by the county for projects located in a multi-county park. The proceeds of such bonds may be used by the county to pay the costs of infrastructure serving the county or for improved or unimproved real property used by manufacturing or commercial enterprises and aircraft ("Special Source Improvements"). The county may also pay certain costs of issuance and capitalized interest with bond proceeds. The county also has the right to use FILOT revenues for the same purposes for which Special Source Revenue Bond proceeds could have been used, a right which has led counties to offer Special Source Credits to prospects that are willing to front the cost of the Special Source Improvements. Thus, instead of issuing a bond to pay for land to be given to a prospect, the company could pay for the land and receive a credit against a certain percentage of future FILOT payments until it had recouped the cost of the land.

As with the industrial revenue bonds associated with some FILOTs, the company can purchase the Special Source Revenue Bonds or the county may agree to place the debt with a third party such as a local bank. Companies should anticipate that the county will ask for covenants and security arrangements which will ensure that sufficient revenues will be payable under the FILOT to pay debt service on the Special Source

Revenue Bonds. Such arrangements may include a mortgage and covenants to maintain a certain level of investment while the Special Source Revenue Bonds are outstanding.

Because of the delicacy of negotiating such covenants during the recruiting process, many counties prefer to offer the Special Source Credits rather than bring in a bank to buy the bonds. The Credits have the added advantage of being self-adjusting. If the company fails to invest as much as it anticipates and within the time anticipated, they simply do not earn the full Credit.

Some counties have looked to Special Source Revenue Bonds as a means of financing economic development infrastructure, such as new industrial parks, spec buildings, roads and water and sewer. By combining FILOT revenues from a large number of projects, the county can achieve a blended credit which can be funded by the banks. For counties which have a lower volume of projects, planning should start several years in advance to allow a critical mass of revenues to aggregate.

All Special Source Revenue Bond and Special Source Credit transactions are particularly sensitive for school districts and other taxing entities. Accordingly, care should be taken to put in place policies regarding the use of these incentives, as to which all governmental entities can concur. **Attachment A** illustrates the manner in which Special Source Revenue Bonds and multi-county park arrangements dovetail with a FILOT arrangement.

Procedures

Because FILOT and Special Source Revenue Bond arrangements are at the county's discretion, the company should agree on the terms of the transaction with the county prior to announcement of the company's intent to locate in the county. The county will weigh the potential benefits and

costs associated with the project in determining the appropriate level of commitment. Once the company has committed, the county has no incentive to forego revenue.

Once the parties set the basic terms, the county must approve the incentives through a series of public votes. Counsel to the company generally drafts the incentive documentation for review by the county attorney, and except in unusual circumstances the company should expect to pay the fees of the county attorney as well as those of its own counsel. If the company has internal policies concerning review and approval of contracts such as incentive contracts, it should communicate those policies to its South Carolina counsel at the outset of the transaction.

County approval begins with preliminary approval in the form of an inducement resolution and, typically, an inducement agreement. The inducement agreement spells out the basic business terms and usually gives the company certain options, such as the option to document the incentives under a lease-purchase agreement or simple contract and the option to utilize the Flat Fee or another alternative calculation. If confidentiality is an issue, the county may employ a code name for the project as part of the preliminary approval.

Once the company makes its elections regarding the structure of the incentives and agrees to announce its identity, the county must approve a final incentive contract or lease-purchase agreement through one or more ordinances, which require three readings and a public hearing. If the incentive package includes a multi-county park, a partner county must also undertake three readings of an ordinance to authorize the multi-county park agreement. If the parties contemplate issuance of industrial revenue bonds or Special Source Revenue Bonds (but not Special Source Revenue Credits), then the county must also petition the State Budget and Control Board for authority to issue such bonds.

The two-step approval process allows the company time to confirm the county's incentive package in writing through the preliminary inducement process prior to making its own decision to proceed with the project. It also gives the company time to evaluate its options under the various statutes while protecting its identity. The company, however, should not consider the arrangement binding upon the county until the final agreement is executed following the ordinance process. We are unaware of any instances in which a county in South Carolina has reneged on the terms of the preliminary approval. Accordingly, most companies proceed with due diligence, land acquisition and construction while the ordinance process is underway.

The entire approval process will require at least 60 days and often stretches into many months. The company should plan to decide on the options allowed under the inducement agreement in sufficient time to allow for completion of the ordinance process and execution of the final contract or lease-purchase agreement and all related documentation prior to the end of the property tax year in which the initial assets comprising the project are placed in service.

ATTACHMENT A

Estimate and Comparison of South Carolina Property Tax Options
 Three Year Phased Investment Aggregating \$85 Million

Investment Phase One

<u>Real Estate</u>			<u>Rates</u>	
Land Cost		\$1,000,000	Millage rate	0.2044
Site Improvement		\$1,000,000	5 year abatement	0.0402
New Construction		<u>\$20,000,000</u>	Discount rate	0.0635
Subtotal		\$22,000,000	SSRC's	0.2500
			Depreciation	0.1100
<u>Machinery & Equipment</u>		<u>\$20,000,000</u>		
Total		<u>\$42,000,000</u>		

		<u>Assessed value before depreciation</u>
Assessment ratio - <i>Ad valorem</i>	10.50%	\$4,410,000
Assessment ratio - FILOT	6.00%	\$2,520,000

	<u>Standard Property Tax</u>	<u>Standard Tax Abatement</u>	<u>Net Property Tax</u>	<u>Standard FILOT</u>	<u>Flat Fee FILOT</u>	<u>SSRC's</u>	<u>1% Multi County</u>	<u>Net to County</u>
Year 1	\$854,188	\$167,996	\$686,192	\$488,107	\$353,668	\$88,417	\$2,653	\$262,598
Year 2	\$806,971	\$158,710	\$648,262	\$461,126	\$353,668	\$88,417	\$2,653	\$262,598
Year 3	\$759,755	\$149,423	\$610,331	\$434,146	\$353,668	\$88,417	\$2,653	\$262,598
Year 4	\$712,538	\$140,137	\$572,401	\$407,165	\$353,668	\$88,417	\$2,653	\$262,598
Year 5	\$665,322	\$130,851	\$534,471	\$380,184	\$353,668	\$88,417	\$2,653	\$262,598
Year 6	\$618,106	\$0	\$618,106	\$353,203	\$353,668	\$88,417	\$2,653	\$262,598
Year 7	\$570,889	\$0	\$570,889	\$326,222	\$353,668	\$88,417	\$2,653	\$262,598
Year 8	\$523,673	\$0	\$523,673	\$299,242	\$353,668	\$88,417	\$2,653	\$262,598
Year 9	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$88,417	\$2,653	\$262,598
Year 10	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$88,417	\$2,653	\$262,598
Year 11	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 12	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 13	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 14	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 15	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 16	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 17	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 18	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 19	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 20	\$515,088	\$0	\$515,088	\$294,336	\$353,668	\$0	\$3,537	\$350,131
Year 21	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Year 22	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
	<u>\$11,692,498</u>		<u>\$10,945,381</u>	<u>\$6,681,427</u>	<u>\$7,073,356</u>	<u>\$884,169</u>	<u>\$61,892</u>	<u>\$6,127,294</u>
NPV	\$6,901,569		\$6,273,328	\$3,943,753	\$3,943,753			

ATTACHMENT A

Estimate and Comparison of South Carolina Property Tax Options
 Three Year Phased Investment Aggregating \$85 Million
Investment Phase Two

Real Estate

Land Cost	\$0
Site Improvement	\$0
New Construction	<u>\$5,000,000</u>
Subtotal	\$5,000,000

Rates

Millage rate	0.2044
5 year abatement	0.0402
Discount rate	0.0635
SSRC's	0.2500
Depreciation	0.1100

Machinery & Equipment \$19,000,000

Total \$24,000,000

Assessed value before depreciation

Assessment ratio - <i>Ad valorem</i>	10.50%
Assessment ratio - FILOT	6.00%

\$2,520,000
\$1,440,000

	<u>Standard Property Tax</u>	<u>Standard Tax Abatement</u>	<u>Net Property Tax</u>	<u>Standard FILOT</u>	<u>Flat Fee FILOT</u>	<u>SSRC's</u>	<u>1% Multi County</u>	<u>Net to County</u>
Year 1	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Year 2	\$470,232	\$92,482	\$377,750	\$268,704	\$140,987	\$35,247	\$1,057	\$104,683
Year 3	\$425,377	\$83,660	\$341,717	\$243,072	\$140,987	\$35,247	\$1,057	\$104,683
Year 4	\$380,521	\$74,838	\$305,683	\$217,441	\$140,987	\$35,247	\$1,057	\$104,683
Year 5	\$335,666	\$66,016	\$269,649	\$191,809	\$140,987	\$35,247	\$1,057	\$104,683
Year 6	\$290,810	\$57,195	\$233,616	\$166,177	\$140,987	\$35,247	\$1,057	\$104,683
Year 7	\$245,955	\$0	\$245,955	\$140,545	\$140,987	\$35,247	\$1,057	\$104,683
Year 8	\$201,099	\$0	\$201,099	\$114,914	\$140,987	\$35,247	\$1,057	\$104,683
Year 9	\$156,243	\$0	\$156,243	\$89,282	\$140,987	\$35,247	\$1,057	\$104,683
Year 10	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$35,247	\$1,057	\$104,683
Year 11	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 12	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 13	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 14	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 15	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 16	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 17	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 18	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 19	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 20	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 21	\$148,088	\$0	\$148,088	\$84,622	\$140,987	\$0	\$1,410	\$139,577
Year 22	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
	<u>\$4,282,957</u>		<u>\$3,908,765</u>	<u>\$2,447,404</u>	<u>\$2,819,736</u>	<u>\$317,220</u>	<u>\$25,025</u>	<u>\$2,477,490</u>
NPV	\$2,751,254		\$2,434,462	\$1,572,145	\$1,572,145			

FN: Millage rate, abatable millage, discount rate, and calculations are estimates. Final calculations depend on actual amount of investment.

ATTACHMENT A

Estimate and Comparison of South Carolina Property Tax Options
 Three Year Phased Investment Aggregating \$85 Million
Investment Phase Three

<u>Real Estate</u>		<u>Rates</u>	
Land Cost	\$0	Millage rate	0.2044
Site Improvement	\$0	5 year abatement	0.0402
New Construction	<u>\$0</u>	Discount rate	0.0635
Subtotal	\$0	SSRC's	0.2500
		Depreciation	0.1100

Machinery & Equipment \$19,000,000

Total \$19,000,000

		<u>Assessed value before depreciation</u>
Assessment ratio - <i>Ad valorem</i>	10.50%	\$1,995,000
Assessment ratio - FILOT	6.00%	\$1,140,000

	<u>Standard Property Tax</u>	<u>Standard Tax Abatement</u>	<u>Net Property Tax</u>	<u>Standard FILOT</u>	<u>Flat Fee FILOT</u>	<u>SSRC's</u>	<u>1% Multi County</u>	<u>Net to County</u>
Year 1	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Year 2	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Year 3	\$362,922	\$71,377	\$291,545	\$207,384	\$79,667	\$19,917	\$598	\$59,153
Year 4	\$318,067	\$62,555	\$255,512	\$181,752	\$79,667	\$19,917	\$598	\$59,153
Year 5	\$273,211	\$53,733	\$219,478	\$156,121	\$79,667	\$19,917	\$598	\$59,153
Year 6	\$228,356	\$44,911	\$183,444	\$130,489	\$79,667	\$19,917	\$598	\$59,153
Year 7	\$183,500	\$36,090	\$147,411	\$104,857	\$79,667	\$19,917	\$598	\$59,153
Year 8	\$138,645	\$0	\$138,645	\$79,225	\$79,667	\$19,917	\$598	\$59,153
Year 9	\$93,789	\$0	\$93,789	\$53,594	\$79,667	\$19,917	\$598	\$59,153
Year 10	\$48,933	\$0	\$48,933	\$27,962	\$79,667	\$19,917	\$598	\$59,153
Year 11	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 12	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 13	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 14	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 15	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 16	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 17	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 18	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 19	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 20	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 21	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
Year 22	\$40,778	\$0	\$40,778	\$23,302	\$79,667	\$0	\$797	\$78,870
	<u>\$2,136,757</u>		<u>\$1,868,090</u>	<u>\$1,221,004</u>	<u>\$1,593,336</u>	<u>\$159,334</u>	<u>\$14,340</u>	<u>\$1,419,662</u>
NPV	\$1,554,639		\$1,325,909	\$888,365	\$888,365			

FN: Millage rate, abatable millage, discount rate, and calculations are estimates. Final calculations depend on actual amount of investment.

ATTACHMENT A

Estimate and Comparison of South Carolina Property Tax Options
 Three Year Phased Investment Aggregating \$85 Million
Totals for Three Phases

	<u>Net Property Tax</u>	<u>Standard FILOT</u>	<u>Flat Fee FILOT</u>
Phase One	\$10,945,381	\$6,681,427	\$7,073,356
Phase Two	\$3,908,765	\$2,447,404	\$2,819,736
Phase Three	\$1,868,090	\$1,221,004	\$1,593,336
	<u>\$16,722,236</u>	<u>\$10,349,835</u>	<u>\$11,486,428</u>

	<u>Flat Fee FILOT</u>	<u>SSRC's</u>	<u>Net Company Payment</u>	<u>1% Multi County</u>	<u>Net to County</u>
Year 1	\$353,668	\$88,417	\$265,251	\$2,653	\$262,598
Year 2	\$494,655	\$123,664	\$370,991	\$3,710	\$367,281
Year 3	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 4	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 5	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 6	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 7	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 8	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 9	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 10	\$574,322	\$143,581	\$430,741	\$4,307	\$426,434
Year 11	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 12	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 13	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 14	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 15	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 16	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 17	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 18	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 19	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 20	\$574,322	\$0	\$574,322	\$5,743	\$568,579
Year 21	\$220,654	\$0	\$220,654	\$2,207	\$218,447
Year 22	\$79,667	\$0	\$79,667	\$797	\$78,870
	<u>\$11,486,440</u>	<u>\$1,360,729</u>	<u>\$10,125,711</u>	<u>\$101,257</u>	<u>\$10,024,454</u>
NPV	\$6,207,482		\$5,237,498		\$5,185,123

FN: Discount rate and calculations are estimate. Final calculations depend on actual amount of investment.