

### PILOT Payments

BY CHARLOTTE A. BIBLOW

Real estate development on Long Island (and elsewhere throughout the state) often involves a government entity as the property owner or as one of the parties helping to structure the transaction by providing tax benefits that assist the project's financing. In both cases, local municipalities may find that their property tax rolls are impacted. That is because, in New York, property owned by a government entity generally is exempt under state law from local property taxation, and because incentives offered to private property owners often include exemptions or reductions in required local property tax payments.

Payments in lieu of taxes (PILOT payments)<sup>1</sup> can ameliorate the burdens that these kinds of exemptions or reductions can impose on municipalities and other local tax-dependent agencies.<sup>2</sup> The terms of contracts creating PILOTs often are among the most highly contentious issues that must be resolved before a project is able to move from the "plans" stage to the approvals and construction stages. Even after extensive negotiations, disputes can arise that require court intervention. Just recently, for example, the New York Court of Appeals, in a case arising in Nassau County, had to decide whether a provision in the Nassau



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County Administrative Code (NCAC) that makes deficits "by reason of...reductions of assessments...a county charge" applied to PILOT payments. In *Matter of Steel Los III v. Board of Assessors of County of Nassau*,<sup>3</sup> the Court ruled that it did.

Of course, in addition to resolving the legal issue in question, the decision in *Matter of Steel Los III* illustrates how a PILOT payments transaction can be structured.

#### The Format

*Matter of Steel Los III* involved two properties in Nassau County.

The first, a 16 acre parcel, was acquired by the Nassau County Industrial Development Agency (IDA)<sup>4</sup> in the late 1990s. With the aid of agency-issued bonds and other incentives, Steel Los III/Goya Foods Inc., purchased the parcel. Simultaneously, Goya reconveyed the property to the development agency in exchange for a

leasehold interest on which it constructed a food processing facility.<sup>5</sup> Because the agency's ownership rendered the property tax-exempt under Article 18-A of the General Municipal Law,<sup>6</sup> and in consideration for financing assistance, the development agency and Goya entered into a corollary PILOT payment agreement, the annual amount of which was to be determined by the county's assessments of the property. Under the PILOT agreement, Goya had the express right to commence a tax certiorari proceeding to challenge the county's assessments pursuant to Article 7 of the Real Property Tax Law. If the tax certiorari proceeding was successful (i.e., if Goya was able to get the assessments reduced), the agreement provided that Goya would receive a refund in the form of a credit against future PILOT payments.

Beginning in 1999, Goya commenced several tax certiorari proceedings, later consolidated, challenging the county's assessments. In 2003, the Nassau County Supreme Court directed the county to credit Goya approximately \$700,000 in PILOT overpayments between 1999 and 2002, to be applied to future PILOT payment cycles to "affected taxing jurisdictions." Of this amount, \$454,628 represented proportional overpayments to the Bethpage Union Free School District. Meanwhile, after presentation of, and vote upon, the school district's budget for the 2004-2005 school year, and with the expectation that it would receive Goya's full PILOT payment, the school district received notice that its share of Goya's PILOT payments (\$504,154.19) would be reduced by Goya's credit.

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The school district subsequently intervened in the tax certiorari proceeding and successfully obtained relief declaring that Nassau County Administrative Code §6-26.0(b)(3)(c) applied to PILOT payments (i.e., that any refund to which Goya was entitled was solely “a county charge” that could not be used to offset PILOT payments due the school district). The Appellate Division, Second Department, affirmed.

The Nassau County Industrial Development Agency took title to the second property at issue in the *Matter of Steel Los III* case in 1993 from the Pall Corp. in exchange for a return leasehold interest and approximately \$90 million in financing assistance. As with the Goya property, the agency’s ownership of the Pall parcel rendered the property tax-exempt. The parties entered into a PILOT agreement that was virtually identical to the Goya/development agency agreement.

After a series of tax certiorari proceedings spanning the 1990 through 2000 tax years, Pall obtained a judgment that entitled it to a credit of approximately \$680,136 in over-assessed PILOT payments proportionate to the Port Washington Union Free School District. As in Goya Foods, the school district learned of the judgment entitling Pall to the credit after the school district’s budget for the 2002-2003 school year had been approved. Thus, the school district faced a significant deficit in that tax year.

The Second Department directed the county to remit to the school district the total credit granted Pall, finding that the administrative code’s “no charge-back” provision required the county “to absorb the cost of any tax refund or credit” awarded in a tax certiorari proceeding.

The Court of Appeals affirmed, rejecting the county’s argument that §6-26.0(b)(3)(c) did not apply to PILOT payments because such monies were contractual, rather than tax payments, and, consequently, a law governing tax revenue should not apply.

The Court found that although the county was technically correct that the payments were contractual and not taxes, per se, that was not a relevant distinction under the circumstances. It then held that the essence of the PILOT payment agreements, and the

rights and obligations of the county, the PILOT payers and the school districts—express third-party beneficiaries under each agreement and by statute<sup>7</sup>—compelled it to conclude that the county was responsible for its erroneous assessments, even if the monies it was responsible for arose out of contract.

## Wind and Solar Power

PILOT payments can come up in a wide variety of other transactions and projects.

For example, New York Real Property Tax Law §487 provides for an exemption from taxation for certain solar or wind energy systems or farm waste energy systems, as well as for PILOT payments. Under this section, real property that includes an approved solar or wind energy system or farm waste energy is exempt from taxation to the extent of any increase in the value thereof by reason of the inclusion of such solar or wind energy system or farm waste energy system for a period of 15 years. Interestingly, the RPTL also permits local governments to adopt resolutions that provide that no exemption shall be applicable within its jurisdiction and that any such government that has not acted to remove the exemption may require the owner of a property that includes a solar or wind energy system to enter into a contract for PILOT payments. Under the RPTL, a PILOT contract may require annual payments in an amount not to exceed the amounts that would otherwise be payable but for the exemption under §487.<sup>8</sup>

## Conclusion

Certainly, property tax exemptions and reductions, and PILOT agreements, can be controversial and can lead to negative publicity as they may be perceived as “sweet-heart” tax breaks for wealthy developers while negatively impacting community resources.<sup>9</sup> But they also provide incentives that increase developers’ interests in revitalizing particular areas that may be otherwise overlooked. Accordingly, in the appropriate circumstances and under the

proper conditions, PILOT payments can be a useful land use planning tool for local and state governments and property owners.



1. General Municipal Law §854(17) defines PILOTs as “any payment made to an agency, or affected tax jurisdiction equal to the amount, or a portion of, real property taxes, or other taxes, which would have been levied by or on behalf of an affected tax jurisdiction if the project was not tax exempt by reason of agency involvement.”

2. General Municipal Law §858(16) provides that “Unless otherwise agreed by the affected tax jurisdictions, any such [PILOT] agreement shall provide that payments in lieu of taxes shall be allocated among affected tax jurisdictions in proportion to the amount of real property tax and other taxes which would have been received by each affected tax jurisdiction had the project not been tax exempt due to the status of the agency involved in the project. A copy of any such agreement shall be delivered to each affected tax jurisdiction within [15] days of signing the agreement.”

3. 2008 NY Slip Op. 03513 (April 24, 2008).

4. Creatures of state law, IDAs are public benefit corporations with broad powers to issue attractive financing, including tax-exempt bonds, in order to promote local economic development (see General Municipal Law §858 et seq.; see also L 1969, ch 1030).

5. Goya received bonds in the principal amount of \$9.5 million “to finance a portion of the costs of the acquisition, construction and equipping” of the facility.

6. See Section 874(1).

7. See General Municipal Law §§858(15) and 874(3), 4(a), (5), and (6).

8. A common PILOT structure in these situations is based on an amount determined by the installed capacity. It has been reported, for example, that PILOT payments by a wind power project in upstate New York equal about \$30,000 per year each for both the town and the school district, or approximately \$5,200 per installed megawatt. See [http://www.powernaturally.org/programs/wind/tool-kit/19\\_propertytaxexemptions.pdf](http://www.powernaturally.org/programs/wind/tool-kit/19_propertytaxexemptions.pdf).

9. See, e.g., Celeste Hadrick, “Tax breaks for Garden City Hotel deal win approval,” *Newsday*, June 11, 2008, available at <http://www.newsday.com/news/printedition/longisland/ny-poida15722166jun11,0,2370954.print.story>; William Murphy, “Garden City Hotel’s tax exemption raises concerns,” *Newsday*, May 28, 2008, available at <http://www.newsday.com/news/local/nassau/ny-po-hote285704573may28,0,1219987.story>; Juan Gonzalez, “Deals that lead to lost property taxes,” *NY Daily News*, Dec. 20, 2007, available at [http://www.nydailynews.com/money/2007/12/20/2007-12-20\\_deals\\_that\\_lead\\_to\\_lost\\_property\\_taxes.html](http://www.nydailynews.com/money/2007/12/20/2007-12-20_deals_that_lead_to_lost_property_taxes.html).