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Pilot Agreements in West Virginia: A Tale of Turbulent Taxation

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**PILOT AGREEMENTS IN WEST VIRGINIA:
A TALE OF TURBULENT TAXATION**

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I. INTRODUCTION

In 2014, a storm was forming on the radar for one of West Virginia's county governments.¹ With a multi-million-dollar economic development project on the horizon, Marshall County Commission members were called to answer the question: should a private, for-profit energy corporation be given the opportunity to make contractual "payments" to the county government *in lieu* of paying state property tax?² No, this was not just a procedural vote to modify or alter a county zoning ordinance, nor was it a routine vote to allow the private company to receive permits to construct the facility.³ The vote was on whether Marshall County would buy a power plant—upon completion of construction—from Moundsville Power. In other words, would Marshall County enter into a "payment-in-lieu of taxes" ("PILOT") agreement with Moundsville Power—a private, for-profit corporation?⁴

In brief, Moundsville Power would first purchase the land from Honeywell, another private corporation.⁵ Then, after Moundsville Power constructed the \$700 million, 549-megawatt plant, Marshall County would assume ownership of the facility—all for the cost of \$1.00.⁶ Marshall County would, therefore, become the legal "owner" of the property, thereby exempting the land and facility from *ad valorem* state property tax.⁷ After that, Moundsville Power would "lease" the county-owned property under a lease agreement that outlined annual installments, or payments, made in lieu of taxes.⁸

The outcome? Based upon estimates from local elected officials, "Marshall County would receive about \$31 million in lease payments over 30 years from the proposed 549-megawatt plant,"⁹ a loss of approximately \$150 million in foregone property tax revenue.¹⁰ While Moundsville Power would

¹ *PILOT Program Debated*, INTELLIGENCER: WHEELING NEWS-REG. (July 27, 2014), <https://www.theintelligencer.net/news/top-headlines/2014/07/pilot-program-debated/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Payment in Lieu of Taxes Agreement*, W. VA. PUB. SERV. COMM'N, [hereinafter *Moundsville Power Agreement*], <http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=401200&NotType=> (last visited Sept. 7, 2020).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *PILOT Program Debated*, *supra* note 1.

¹⁰ Casey Junkins, *Natural Gas Plant's Cost to Schools: \$181 Million*, W. VA. EDUC. ASS'N, <https://www.wvea.org/content/natural-gas-plants-cost-schools-181-million> (last visited Sept. 7, 2020). Here, while the payments were scheduled at \$31 million, the county would have originally received roughly \$180 million in tax revenue over approximately 30 years at then-current tax rates,

receive the advantages of reduced property tax liability, similar businesses without a PILOT agreement would be required to—relatively speaking—pay higher state property tax.

When the storm finally lifted and the votes were tallied, a majority of the Marshall County Commission agreed to the proposed Moundsville Power PILOT agreement.¹¹ At the time, Marshall County Commissioner Robert A. Miller, Jr. was the sole dissenting vote against the PILOT proposal.¹² Commissioner Miller stated, “I am not in favor of government ownership. I feel the state needs to fix the tax structure to make us competitive with other states.”¹³ Even in light of Commissioner Miller’s statement to the local press, significant questions still remain unanswered, and legal arguments remain unaddressed with respect to whether PILOT agreements are an example of the government impermissibly owning the private assets of a for-profit corporation, or whether West Virginia needs to fix this provision in the interest of fairness and equity.

Fast forward to 2020—West Virginia’s PILOT law is still very much on the radar. Since Moundsville Power, other local governments in West Virginia have entered into PILOT agreements with for-profit private corporations. For example, recent attention has been given to the proposed PILOT agreement for the Rockwool plant—a heavy manufacturing facility that will reportedly bring 150 jobs to Jefferson County, West Virginia.¹⁴ But long before either Moundsville Power or Rockwool, in the early 2000s, the Monongalia County Commission signed a PILOT agreement with Longview Power.¹⁵ The company operating the Longview Power Plant filed for Chapter 11 bankruptcy in 2013, and the PILOT agreement managed to survive corporate reorganization.¹⁶ In 2019, the Monongalia County Commission announced that another PILOT agreement with Longview Power was under consideration for the expansion of

thereby leading to \$150 million in forgone revenue from the Moundsville Power PILOT agreement. *Id.*

¹¹ See *PILOT Program Debated*, *supra* note 1.

¹² *Id.*

¹³ Brian Canterbury, *Marshall County Tax Plan Meets Resistance*, W. VA. PRESS (June 30, 2014), <https://wvpress.org/copydesk/insight/marshall-county-tax-plan-meets-resistance/>.

¹⁴ See Patricia Sullivan, *Insulation Plant Divides Community in West Virginia*, WASH. POST (June 9, 2019, 4:44 PM), https://beta.washingtonpost.com/local/virginia-politics/insulation-plant-divides-community-in-west-virginia/2019/06/09/d0ea34a8-7d68-11e9-8ede-f4abf521ef17_story.html?noredirect=on. While this Note does not address ancillary concerns with the proposed Rockwool facility, such as environmental worries or the site’s close proximity to an elementary school, this Note will address and discuss the fact that a PILOT agreement was proposed between Rockwool and the Jefferson County Development Authority. See *infra* notes 183–199 and accompanying text.

¹⁵ *PILOT Program Debated*, *supra* note 1.

¹⁶ Vicki Smith, *Longview Power, Coal Supplier File for Bankruptcy*, CHARLESTON GAZETTE-MAIL (Aug. 30, 2013), https://www.wvgazette.com/business/longview-power-coal-supplier-file-for-bankruptcy/article_6145d0b4-3710-5f6a-ad0a-1ed97be0a313.html.

the “Longview Power Clean Energy Center.”¹⁷ What is the total cost in forgone property tax revenue for Monongalia County taxpayers? A continued uncertainty.

Recently, in *Ohio Valley Jobs Alliance v. Public Service Commission of West Virginia*,¹⁸ the Supreme Court of Appeals of West Virginia acknowledged that the West Virginia Code “authorizes” the creation of PILOT agreements.¹⁹ While the decision in *Ohio Valley Jobs Alliance* was narrowly decided on grounds related to the Public Service Commission’s (“PSC”) fact-finding responsibility when approving PILOT agreements vis-à-vis granting a “siting certificate,” the court left substantive legal questions unanswered.²⁰

Do PILOT agreements²¹ bend the true meaning of Article X of the West Virginia Constitution? Is the purported statutory authorization for PILOT agreements consistent with other sections of the West Virginia Code? Is the nature of a PILOT agreement inherently offensive to the public interest? And critically, what types of safeguards related to PILOT agreements are in place to provide taxpayers with transparency and accountability?

In response to both *Ohio Valley Jobs Alliance* and recent circuit court litigation in Jefferson and Kanawha counties, this Note provides a historical and legal analysis about the background, structure, usage, and future of PILOT agreements in West Virginia. What is the end result of this tax scheme? While PILOTs are designed to attract businesses to West Virginia, if this tool is used unfairly, it may have the opposite effect. Practically speaking, this Note is not “against” something. Rather, it is a discussion of the economic future that West Virginia could be *for*.²² As Simon Sinek contends, “being *for* focuses our attention on the unbuilt future in order to spark our imagination.”²³

¹⁷ David Beard, *New Longview Power Plant Projects Await PSC Decision*, DOMINION POST (Mar. 17, 2020), <https://www.dominionpost.com/2020/03/17/new-longview-power-plant-projects-await-psc-decision/>.

¹⁸ No. 18-0249, 2018 WL 5734679 (W. Va. Nov. 1, 2018).

¹⁹ *See id.* at *2 n.4 (citing W. VA. CODE ANN. § 8-19-4 (West 2020)).

²⁰ *Id.*

²¹ The Author would briefly note that the PSC considers PILOT agreements when such an agreement implicates the expressed authority of the Commission. For example, a power plant—which might implicate the utility aspect of the Commission’s responsibilities—would fall under the purview of the PSC. However, this Note addresses PILOTs writ largely because of the fact that the State Code permits the usage of PILOTs in other contexts, such as with regard to manufacturing facilities. Therefore, although the *Ohio Valley Jobs Alliance* opinion was decided on the grounds of analyzing the PSC’s role in public utility PILOTs, the point the Court left off at is still unanswered more broadly in terms of all types of PILOT agreements.

²² SIMON SINEK, *THE INFINITE GAME* 43 (2019) (explaining that “[t]oo many of our cultures are filled with people working to protect their own interests and the interests of those above them before those of the people they are supposed to be serving”).

²³ *Id.*

First, Part II of this Note offers a historical perspective and overview of how PILOT agreements have developed throughout the course of history. Section II.A includes a discussion about PILOT agreements, applied to both the private and nonprofit sectors. Second, Section II.B gives the reader an overview of West Virginia Code Section 7-12-10,²⁴ the statutory authorization for PILOT agreements. This section provides background on how PILOT agreements have developed in West Virginia over time and will investigate this particular issue as it relates to PILOTs serving as an “economic development tool.”²⁵

Third, Part III provides a comparative state analysis of West Virginia’s neighbor states²⁶ statutes and court rulings relating to PILOT laws. Fourth, Part IV offers a preliminary legal analysis of the West Virginia Constitution and the West Virginia Code as applied to PILOTs. This portion of the Note analyzes the ramifications of Article X of the West Virginia Constitution and its interplay with former, existing, and future PILOT agreements. Even more intriguing, the West Virginia Code offers competing understandings of what county commissions can and cannot do with county-owned property. And at the same time, in light of legislative history, Part IV of this Note shows that these underlying statutory inconsistencies, when considered *in pari materia*,²⁷ cannot be easily reconciled. Finally, Part V concludes with examples of how state policymakers can either transform, amend, rehabilitate, or preserve PILOT agreements in West Virginia.

The United States was founded upon the belief that free enterprise and free markets contribute to the betterment of our society.²⁸ In an ideal marketplace, businesses, corporations, private entities, and individuals could *fairly* compete in a market-based economy—one with level playing fields and *equality* of opportunity. What happens when the market is set up—by the government’s design—to favor entities that the state selects as worthy of public support? While proponents of PILOT agreements suggest that eliminating these

²⁴ W. VA. CODE ANN. § 7-12-10.

²⁵ See, e.g., Rebecca McPhail, Opinion, *Anti-Growth Mentality Hurts West Virginia*, CHARLESTON GAZETTE-MAIL (Jan. 11, 2019), https://www.wvgazette.com/opinion/rebecca-mcphail-anti-growth-mentality-hurts-west-virginia-daily-mail/article_365e2d7e-0a1d-5963-a474-175ed780d92a.html.

²⁶ For the purpose of this Note, the terms “neighbor states” or “peer states” are terms that are used interchangeably and refer to the following states: State of Ohio, Commonwealth of Virginia, Commonwealth of Pennsylvania, Commonwealth of Kentucky, and State of Maryland.

²⁷ For a discussion of this general statutory interpretation rule, see Francis J. McCaffrey, *The Rule in Pari Materia as an Aid to Statutory Construction*, 3 LAW. & L. NOTES 11 (1949).

²⁸ See generally Thomas West, *The Economic Principles of America’s Founders: Property Rights, Free Markets, and Sound Money*, HERITAGE FOUND. (Aug. 30, 2019), <https://www.heritage.org/political-process/report/the-economic-principles-americas-founders-property-rights-free-markets-and>.

provisions would make West Virginia “dead in the water”²⁹ in terms of business attraction and economic development efforts, the legal and equitable externalities that PILOTs generate are undiscussed and unaddressed. Until now.

II. HISTORICAL PERSPECTIVE AND BACKGROUND

A. History of PILOT Agreements in the United States

PILOT agreements have a longstanding history in the United States.³⁰ Dating back to the founding era, the roots of property tax exemptions find support in case law and can be traced to British legal traditions that settlers brought with them to the American colonies.³¹ Explicit property tax exemptions did not arise in the United States until sometime later.³² At the federal level, beginning with the seminal decision *McCulloch v. Maryland*,³³ the Supreme Court of the United States held that Article I, Section 8 of the United States Constitution allowed for the creation of the Second Bank of the United States and that the State of Maryland lacked the power to tax the Federal Bank.³⁴

In light of this paramount decision, state and local governments were unable to tax federal property or lands.³⁵ In 1976, Public Law 94-565 stated that because land owned by the federal government is not subjected to state or local taxation, the federal government can make payments in lieu of taxes to local governments affected by these reductions in the local tax bases.³⁶ De facto PILOT agreements have therefore emerged as a tool for the Federal Government’s fiscal interactions with state tax laws. For state governments, the United States Supreme Court has articulated the standard that “any state legislature unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.”³⁷

²⁹ See Conor Griffith, *Rockwool Case Could Set New West Virginia Precedent on Taxes*, WVNEWS (Dec. 16, 2018), https://www.wvnews.com/news/wvnews/rockwool-case-could-set-new-west-virginia-precedent-on-taxes/article_ecff2b96-30a6-56e6-910f-37cc113fe6d1.html.

³⁰ See Daphne A. Kenyon & Adam H. Langley, *Payments in Lieu of Taxes: Balancing Municipal and Nonprofit Interests*, LINCOLN LAND INST. (2010), https://www.lincolninst.edu/sites/default/files/pubfiles/payments-in-lieu-of-taxes-full_0.pdf.

³¹ See Janne Gallagher, *The Legal Structure of Property Tax Exemption*, in PROPERTY-TAX EXEMPTION FOR CHARITIES 3–22 (Evelyn Brody ed., 2002).

³² *Id.*

³³ 17 U.S. (4 Wheat.) 316 (1819).

³⁴ *Id.*

³⁵ See KATIE HOOVER, PILOT (PAYMENTS IN LIEU OF TAXES): SOMEWHAT SIMPLIFIED, CONGR. RSCH. SERV. (Oct. 5, 2017), <https://fas.org/sgp/crs/misc/RL31392.pdf>.

³⁶ *Id.*

³⁷ See *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886).

1. Nonprofit PILOT Agreements

Nonprofit (“NFP”) PILOT agreements (“NFP PILOTS”) offer tax-exempt, charitable, and other similarly situated organizations the opportunity to make voluntary payments to local governments. It is a well-established legal principle that a charitable entity, such as a church or nonprofit, can be exempted from state property taxation.³⁸ Instead, a qualifying NFP entity might elect—or be asked—to make payments (in lieu of taxes) to its local government.³⁹ These exemptions are broad and universal; as of 2019, “charitable nonprofit organizations, which include private universities, hospitals, museums, soup kitchens, and churches, are exempt from property taxation in all 50 states.”⁴⁰ Because these types of NFP organizations are generally exempt from paying property tax under state law, the possible reasons for making these types of elective payments could be to gain a sense of goodwill in the community or to support the tax base in order to provide quality public services, such as education and infrastructure.⁴¹

On the other hand, some contend that NFP PILOTS establish a quid pro quo—a charitable entity will make the payments, and in exchange, it might obtain a desired zoning change or building permit.⁴² Despite aspirational goals of equity and fairness, NFP PILOTS have been characterized as extortionate, inconsistent, and inefficient.⁴³ Various commentators even argue that some NFPs make these PILOT payments under threat,⁴⁴ or based upon a fear that the local government will retaliate against them for electing to *not* make these types of “voluntary” in lieu payments for state and local property tax.⁴⁵

Specifically, for religious organizations, Justice Brennan’s concurrence in *Walz v. Tax Commission of New York*⁴⁶ notes that the

³⁸ See, e.g., *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 676 (1970) (“[Exemption] restricts the fiscal relationship between church and state and tends to complement and reinforce the desired separation insulating each from the other.”); see also 51 AM. JUR. 2D TAXATION § 602 (1944) (“It is a well-established principle of law that a charitable institution does not lose its charitable character and its consequent exemption from taxation merely because recipients of its benefits who are able to pay are required to do so, as long as funds derived in this manner are devoted to the charitable purposes of the institution.”).

³⁹ Kenyon & Langley, *supra* note 30.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Evelyn Brody, *The States’ Growing Use of a Quid-Pro-Quo Rationale for the Charity Property Tax Exemption*, 56 EXEMPT ORG. TAX REV. 269 (2007).

⁴³ See Kenyon & Langley, *supra* note 30.

⁴⁴ See *id.* at 6.

⁴⁵ See *id.*

⁴⁶ 397 U.S. 664 (1970).

government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.⁴⁷

Further, at the municipal level, NFP PILOT agreements serve as a way to increase revenue from the city's tax-exempt institutions.⁴⁸ The City of Boston, Massachusetts, is known for maintaining a wide variety of PILOT agreements with NFP organizations because of the volume of NFP entities located in the city, such as universities and hospitals.⁴⁹ "[T]heir nonprofit status exempts them from contributing to city revenues through property-tax payments, which partially fund such municipal services as fire and police protection, road construction and maintenance, and snow removal."⁵⁰ These NFP PILOT agreements are not foolproof, however. In fiscal year ("FY") 2009, for example, the City of Boston received \$15.7 million in payments from NFPs.⁵¹ Then, in FY 2018, qualified institutions contributions fell short of Boston's overall request; the city asked 47 institutions for more than \$104 million, but only received \$33.6 million in cash contributions.⁵² The requested amount would have been a 6.5 fold increase over a nine year period, but the amount that was paid to the City of Boston only doubled over the same period.

Organizations with NFP PILOT agreements generally do not pay property taxes because of their tax-exempt status, but these agreements can still arise in various ways. For instance, NFPs "may be asked to make a direct payment to the local government to help the local government offset the costs of providing services to the institution."⁵³ The NFP similarly might negotiate a PILOT agreement to build a sense of "goodwill" in the surrounding community.⁵⁴ Public colleges and universities—which are generally

⁴⁷ *Id.* at 689 (Brennan, J., concurring) (citing *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957)).

⁴⁸ See Emily K. LaClair, *Payments in Lieu of Taxes: Calculating the Fiscal Impact of Boston's PILOT Program*, AM. UNIV., https://www.american.edu/spa/publicpurpose/upload/laclair_12.pdf (last visited Sept. 7, 2020).

⁴⁹ *Id.*

⁵⁰ *Id.* at 2.

⁵¹ See Kenyon & Langley, *supra* note 30.

⁵² Zeninor Enwemeka, *Boston Institutions Fall Short—Again—on City-Requested Payments*, WBUR (July 30, 2018), <https://www.wbur.org/bostonomix/2018/07/30/boston-pilot-payments-fall-short>.

⁵³ *Payments in Lieu of Taxes (PILOT)*, AICPA (Dec. 31, 2015), aicpa.org/interestareas/notforprofit/resources/financialaccounting/pilot.html.

⁵⁴ *Id.*

subdivisions of state governments—often reimburse municipal governments “for part of the tax revenue [they] would otherwise have collected had the property been held by an individual or a for-profit entity.”⁵⁵ Needless to say, NFPs and municipalities execute PILOT arrangements often. With declines in local revenue streams, the Lincoln Land Institute estimates that “local government revenue pressures have led to heightened interest in PILOTs, and over the last decade, they have been used in at least 117 municipalities in at least 18 states.”⁵⁶

2. Private Sector PILOT Agreements

Because of the substantial benefits associated with wholesale property-tax exemptions or abatements, these types of lucrative PILOT agreements are also used to meet the needs of private enterprises or businesses.⁵⁷ As a general proposition, one might first ask, “what is the goal of a state’s tax structure?” J.B. Colbert, finance minister under King Louis XIV, suggests “the art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing.”⁵⁸ The modern advent of private sector PILOT agreements seems to involve lots of plucking and feathers. These types of PILOT tax exemptions bring with them captivating qualms and quarrels.

For private-sector corporations, broadly speaking, “[t]ax authorities, legislators, and drafters of some state constitutions have intuitively seen that to allow private interests in public property to benefit from the government property exemption is an invitation for abuse.”⁵⁹ Some argue that local governments are unequipped to raise substantial revenue because “labor and capital flow easily in and out of local taxing jurisdictions.”⁶⁰ Despite this justified desire to raise revenue by way of economic activity, “glaring abuses”⁶¹ of private sector PILOT agreements are evident under certain circumstances. When public property is

⁵⁵ *Id.* For a local example of a public university being exempt from state-property tax, consider West Virginia University and Monongalia County, West Virginia’s agreement to enter into a voluntary payment on student housing complexes built on public lands. See *WVU and Mon. County Agree on Voluntary Tax Plan*, WDTV (Aug. 25, 2016, 11:59 AM), <https://www.wdtv.com/content/news/WVU-and-Mon-County-agree-on-voluntary-tax-plan-391299741.html>.

⁵⁶ See Kenyon & Langley, *supra* note 30.

⁵⁷ See Daphne A. Kenyon, Adam H. Langley & Bethany P. Paquin, *Rethinking Property Tax Incentives for Business*, LINCOLN LAND INST., <https://staging.community-wealth.org/sites/clone.community-wealth.org/files/downloads/paper-kenyon-et-al.pdf> (last visited Sept. 7, 2020).

⁵⁸ H. L. MENCKEN, A NEW DICTIONARY QUOTATION ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES 1178 (H. L. Mencken ed., 1952).

⁵⁹ See John A. Swain, *The Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation*, 2000 UTAH L. REV. 421, 434 (2000).

⁶⁰ *Id.* at 423.

⁶¹ *Id.*

used for private purposes, “the private lessee gains a competitive advantage over competitors that own or lease taxable private property.”⁶²

Moreover, because PILOT agreements are usually discretionary tools at the disposal of the government,⁶³ there are pitfalls to these types of property tax incentives. For example, “[s]elective use of incentives raises . . . concerns about . . . the distribution of taxes, [sic] because granting tax breaks to some mobile businesses likely means that long-standing local businesses or homeowners will pay more.”⁶⁴ These types of agreements also raise the concern that elected officials can grant these incentives regardless of the economic rationale,⁶⁵ and elected officials can then make the claim that they played an “instrumental role in attracting a new facility to the community, even if a firm may have located there without incentives.”⁶⁶

Distinguishing a “tax incentive” from a “subsidy” is an important concept to define from the outset. We again turn to Justice Brennan, who articulated in *Walz* that

[t]ax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.⁶⁷

Accordingly—and more recently—while state and local governments often engage in what has been defined as a “race to the bottom”⁶⁸ in providing incentives, the lion’s share of said efforts come in the form of state-sponsored subsidies,⁶⁹ not state property tax exemptions.

⁶² *Id.*

⁶³ Kenyon et al., *supra* note 57.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.*; *see also* Harold Wolman & David Spitzley, *The Politics of Local Economic Development*, 10 *ECON. DEV. Q.* 115 (1996).

⁶⁷ *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 690 (1970) (Brennan, J., concurring).

⁶⁸ *See* Evan Mast, *Race to the Bottom? Local Tax Break Competition and Business Location*, 25 *W.E. UPJOHN INST. EMP. RES.* 1 (2018); Alex Wagner, *Corporate Tax Breaks Pit States in Race to the Bottom*, MSNBC (Nov. 20, 2013, 6:15 PM), <http://www.msnbc.com/now-alex-wagner/corporate-tax-breaks-race-the-bottom>.

⁶⁹ Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, *N.Y. TIMES* (Dec. 1, 2012), https://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html?_r=0.

B. *History of PILOT Agreements in West Virginia: A Push To Facilitate Economic Development and Stability*

West Virginia's tepid history with PILOT agreements arises out of a robust, well-intentioned desire by lawmakers, industry leaders, development agencies, and leading interest groups to promote economic development activity in the state—especially in poorer, more remote counties with less access to capital markets and private investment.⁷⁰ For West Virginia, a decline in state tax revenue in recent years due to a decrease in collections from the coal severance tax⁷¹ has forced the state and county governments to make significant budget reductions.⁷² Accompanying this loss of revenue, state leaders have aggressively pushed for “economic diversification”⁷³ in order to mitigate the decline in tax revenues from longtime staple industries such as coal and manufacturing.

⁷⁰ W. VA. CODE ANN. § 7-11B-2 (West 2020).

⁷¹ Kris Maher, *In Pro-Trump West Virginia Coal Country, the Jobs Keep Leaving*, WALL ST. J. (Oct. 28, 2019), <https://www.wsj.com/articles/in-pro-trump-west-virginia-coal-country-the-jobs-keep-leaving-11572269967>; see also Hoppy Kercheval, Opinion, *Coal, Natural Gas Slowdown Affects W.Va. Budget*, W. VA. METRONews (Oct. 29, 2019), <http://wvmetronews.com/2019/10/29/coal-natural-gas-slow-down-impacts-state-budget/> (“The coal and natural gas industries are critical to the state’s economy, but as commodities, they are subject to significant market swings, and right now the trend is downward.”).

⁷² See, e.g., Amelia Ferrell Knisely, *Coal Tax Decline Forces Boone County, W. Va., To Slash Jobs; More Budget Cuts Expected*, CHARLESTON GAZETTE-MAIL (Sept. 5, 2019), <https://wvpress.org/wvpa-sharing/coal-tax-decline-forces-boone-county-w-va-to-slash-jobs-more-budget-cuts-expected/>; Brad McElhinny, *W. Va. Colleges Brace for Another Round of Cuts*, W. VA. METRONews (Oct. 31, 2019), <http://wvmetronews.com/2019/10/31/w-va-colleges-brace-for-another-round-of-cuts/>; Brad McElhinny, *State Revenue Is Better, but Demands on Budget Are Mounting*, W. VA. METRONews (Jan. 6, 2019), <http://wvmetronews.com/2019/01/06/state-revenue-is-better-but-demands-on-budget-are-mounting/>; Brad McElhinny, *\$100 Million in Cuts Ahead for W.Va. State Agencies*, W. VA. METRONews (Oct. 25, 2019), <http://wvmetronews.com/2019/10/25/100-million-in-cuts-ahead-for-w-va-state-agencies/>; *West Virginia Bracing for Potential \$100M Budget Cut*, AP NEWS (Oct. 25, 2019), <https://apnews.com/eee8020ea21b4ff8b894e43ab51f68a2>; cf. Jake Jarvis, *West Virginia Budget Enjoys Eight Straight Months of Budget Wins, Officials Say*, WVNEWS (Dec. 10, 2018), https://www.wvnews.com/news/wvnews/west-virginia-budget-enjoys-eight-straight-months-of-budget-wins/article_44f4ce83-417c-54e6-96cf-33a45d1dc411.html.

⁷³ See, e.g., Conor Griffith, *Vantage Ventures Launched to Help Business Development*, STATE J. (Oct. 4, 2019), https://www.wvnews.com/morgantownnews/news/vantage-ventures-launched-to-help-business-development/article_d0531544-383c-50d5-8b05-37008877940d.html; Conor Griffith, *W. Va. Continues To Grapple with Energy Dependence, Low Workforce Participation*, WVNEWS (Oct. 21, 2019), https://www.wvnews.com/w-va-continues-to-grapple-with-energy-dependence-low-workforce/article_70305997-c89c-5478-a3e5-ea35a11e1286.html (quoting Dr. John Deskins that “[g]iven the complexity that we see in the real world, nobody really, really knows how to diversify our economy or where to diversify our economy until somebody tries it. That’s why it all boils down to entrepreneurship”); JoAnn Snoderly, *WV Officials Hoping to Turn the Tide of Population Decline*, WVNEWS (Oct. 20, 2019),

Enter the novel concept of private-sector PILOT agreements. Although the premise is a noble and worthy proposition, the specific statutory scheme is based on the notion that county governments—or authorized economic development authorities serving as agents of county governments—should be in the business of owning corporate property, private-land assets, or structuring lease agreements to allow private corporations to sidestep paying state property taxes.⁷⁴ As evident from West Virginia Code Section 7-11B-2, the legislative findings and purpose center upon promoting and facilitating “the orderly development and economic stability of its communities.”⁷⁵ In this enactment, the legislature specifically references a need for county commissions to have the ability to “raise revenue to finance capital improvements and facilities that are designed to encourage economic growth and development in geographic areas . . . of unemployment, stagnant employment, slow income growth, contaminated property or inadequate infrastructure.”⁷⁶

In terms of policy players, various business organizations advocate and defend the inclusion of PILOT agreements in the West Virginia Code,⁷⁷ while others assail them.⁷⁸ Proponents of the policy vociferously argue that these types of agreements are a “critical tool in helping West Virginia communities attract major investment” from businesses and corporations.⁷⁹ They also contend that “PILOT agreements allow local governments to leverage future tax revenues to secure typically long-term, major developments.”⁸⁰ At the end of the day, supporters contend that the business bringing new jobs or economic activity “offset[s] the loss in future [property] tax revenue.”⁸¹ Undeniably, sustainable, long-term economic growth and development are in the public’s best interest. As a matter of public policy, these desired ends of shared economic prosperity and robust development are irrefutably well-intentioned.

1. Statutory Authorization for PILOT Agreements

But are the legal and statutory means West Virginia has developed to achieve these desired ends rooted in a semblance of fairness or uniformity?

https://www.wvnews.com/news/wvnews/wv-officials-hoping-to-turn-the-tide-of-population-decline/article_bdbf2a23-e57b-5b15-981a-49288e27ca8d.html.

⁷⁴ W. VA. CODE ANN. § 8-19-14.

⁷⁵ *Id.* § 7-11B-2.

⁷⁶ *Id.*

⁷⁷ *See* McPhail, *supra* note 25.

⁷⁸ Sullivan, *supra* note 14 (“They assailed a payment-in-lieu-of-taxes plan that transfers the ownership of the plant site to the local economic development authority in a lease-back arrangement; and they boycotted and demonstrated at the company’s [Rockwool] open houses.”).

⁷⁹ *See* McPhail, *supra* note 25.

⁸⁰ *Id.*

⁸¹ *Id.*

Indeed, as noted below, in a number of sections, the West Virginia Code authorizes PILOT agreements between county government (and development authorities) and private, for-profit corporations.⁸²

Generally, West Virginia Code Section 11-3-9 discusses the various types of property exempted from state-property taxation, including property belonging to the United States,⁸³ property belonging “exclusively to the state,”⁸⁴ property “belonging exclusively to any county . . . in this state and used for public purposes,”⁸⁵ property “used for charitable purposes and not held or leased out for profit,”⁸⁶ property “used for the public purposes of distributing electricity, water or natural gas or providing sewer service by a duly chartered NFP corporation when such property is not held, leased out or used for profit,”⁸⁷ property “used for area economic development purposes by nonprofit corporations when the property is not leased out for profit,”⁸⁸ and “[a]ny other property or security exempted by any other provision of law.”⁸⁹ This exempts “exclusively owned” state property from *ad valorem* state-property taxation.⁹⁰

Moreover, West Virginia Code Section 7-12-10 relates to a county government’s ability to create a “joint development district”⁹¹ in order to promote “coordinated” economic-development projects. With regard to *ad valorem* property taxation under West Virginia Code Section 7-12-10,

⁸² W. VA. CODE ANN. § 7-11B-18 (West 2020).

⁸³ *Id.* § 11-3-9(a)(1).

⁸⁴ *Id.* § 11-3-9(a)(2).

⁸⁵ *Id.* § 11-3-9(a)(3).

⁸⁶ *Id.* § 11-3-9(a)(12).

⁸⁷ *Id.* § 11-3-9(a)(13).

⁸⁸ *Id.* § 11-3-9(a)(14).

⁸⁹ *Id.* § 11-3-9(a)(30).

⁹⁰ *See Musick v. Univ. Park at Evansdale, L.L.C.*, 820 S.E.2d 901, 905 n.5 (W. Va. 2018).

⁹¹ The West Virginia Code defines a “joint development entity” as

[a]ny combination of two or more county governing bodies, municipal governing bodies, municipal development authorities or county development authorities may jointly form and hold all of the partnership, ownership or membership interests in a partnership, corporation or limited liability company, the sole purpose of which is to develop and own one or more joint economic development projects (for purposes of this section, a “joint development entity”). No person or entity other than a county governing body, municipal governing body, municipal development authority or county development authority may own any ownership or membership interest in a joint development entity. Any existing partnership, corporation or limited liability company is a joint development entity on and after the effective date of this section if: (i) It was organized for the purposes described in this subsection prior to the effective date of this section; and (ii) the partnership, ownership or membership interests in it meet the requirements of this subsection on and after the effective date of this section.

W. VA. CODE ANN. § 7-12-9B(b).

[f]or West Virginia tax purposes, a joint development entity is a political subdivision of the State of West Virginia and is exempt from all state and local taxation and all real and personal property owned by a joint development entity, or which the joint development entity may acquire to be leased, sold or otherwise disposed of, is exempt from taxation by the state or any county, municipality or other levying body as public property.⁹²

In effect, Section 7-12-10 ostensibly gives legal force to PILOT agreements between a county government—or economic development authority—and a for-profit corporation, provided that the company is not an electric generating facility that requires a siting certificate.⁹³ For non-utility, private sector PILOT agreements, a county and corporation enter into a basic contractual agreement whereby the conditions of the PILOT are defined and the corporation agrees to make “payments” to the county over a certain period of time.⁹⁴ But in order for this purported “tax-exempt” status to attach, the county or development authority must purchase the property from the corporation.

PILOT agreements find some additional support in the West Virginia Economic Development Authority Act (“EDAA”).⁹⁵ The EDAA’s findings lend credence to the proposition that the State’s Economic Development Authority (“EDA”) is responsible for combatting unemployment and lack of business opportunity in the state.⁹⁶ West Virginia Code Section 31-15-6 also gives the EDA “all powers necessary to carry out the purposes” of the EDAA.⁹⁷ How does this implicate PILOT agreements? Supporters may primarily contend that the EDAA *expressly permits* the EDA’s ability to “issue and deliver revenue bonds or notes in exchange for a project.”⁹⁸ The ability to issue “loans to industrial development agencies and enterprises for projects”⁹⁹ would therefore seem to allow the EDA, *inter alia*, to contract to a private corporation “up to [100%] of the estimated costs of such project from . . . [t]he proceeds of bonds or notes

⁹² *Id.* § 7-12-9B(e).

⁹³ Here, no PSC approval is required because the facility would not implicate the publicly regulated utility market in West Virginia. PSC approval is only required when the facility entering into a PILOT agreement with a county—or county economic development authority—implicates some aspect of the PSC’s regulatory purview. *See* W. VA. CODE ANN. § 24-2-11c.

⁹⁴ *See, e.g.*, MONONGALIA CNTY. DEV. AUTH., DEVELOPMENT AUTHORIZATION AGREEMENT (June 13, 2013), <https://wvpolicy.org/wp-content/uploads/2019/10/Longview-Pilot-1-Agreement-2003-.pdf>.

⁹⁵ W. VA. CODE ANN. § 31-15-1.

⁹⁶ *Id.* § 31-15-2.

⁹⁷ *Id.* § 31-15-6.

⁹⁸ *Id.* § 31-5-6(j).

⁹⁹ *Id.* § 31-15-7.

issued by the [EDA].”¹⁰⁰ Accordingly, coupled with the EDA’s “exemption from taxation,” the EDAA is relied on to advance the legal position that the EDA can enter into PILOT agreements with private corporations.

PILOTs also arise in other sections of the West Virginia Code. Section 7-11B-18 deals with the relationship between “payments in lieu of taxes” and tax increment financing (“TIF”) districts:

The county commission or municipality that created the development or redevelopment district shall deposit in the tax increment financing fund of the development or redevelopment district all payments in lieu of taxes received pursuant to any agreement entered into on or subsequent to the date of creation of a development or redevelopment district on tax exempt property located within the development or redevelopment district.¹⁰¹

The exact method for payment obligations under a TIF PILOT is set forth as follows:

(b) The lessee of property that is exempt from property taxes because it is owned by this state, a political subdivision of this state or an agency or instrumentality thereof, which is the lessee of any facilities financed, in whole or in part, with tax increment financing obligations, shall execute a payment in lieu of tax agreement that shall remain in effect until the tax increment financing obligations are paid, during which period of time the lessee agrees to pay to the county sheriff an amount equal to the amount of ad valorem property taxes that would have been levied against the assessed value of the property were it owned by the lessee rather than a tax exempt entity. The portion of the payment in lieu of taxes attributable to the incremental value shall be deposited in the tax increment-financing fund.¹⁰²

While Section 7-12-9b presumably covers private sector PILOT arrangements,¹⁰³ this Note explains how the relationship of this provision to other sections of the state code is markedly unclear.¹⁰⁴ Under Section 7-12-9b(e), the lessee (*e.g.*, the private corporation) of the county-owned property does not have to pay state property taxes because the property is (a) “public” property and is thereby (b) exempt from state property taxation.¹⁰⁵ By “leasing” the county

¹⁰⁰ *Id.* § 31-15-9(a).

¹⁰¹ *Id.* § 7-11B-18(b).

¹⁰² *Id.*

¹⁰³ *See infra* Section IV.B.

¹⁰⁴ *See infra* Section IV.B.

¹⁰⁵ *See generally* W. VA. CODE. ANN. § 7-12-9b(e).

property instead of “owning” it, the private corporation’s property then falls within the scope of the county’s tax exempt status under West Virginia Code Section 11-3-9.¹⁰⁶

Further, public utilities or power plants also enter into PILOT agreements, but in those cases, the PSC of West Virginia must approve said agreements by issuing a “siting certificate” to the operator of the facility.¹⁰⁷ In brief, a siting certificate is simply approval by the PSC for an electricity generating facility to enter into a PILOT agreement for “any public funding or any agreement relating to the abatement of property taxes.”¹⁰⁸ The policy rationale for this type of approval is that the PSC should only approve PILOT agreements for electricity generating facilities or public works projects that “do not offend the public interest” and “will result in a substantial positive impact on the local economy and local employment.”¹⁰⁹ “In deciding whether to issue, refuse to issue, or issue in part and refuse to issue in part a siting certificate, the [PSC] shall appraise and balance the interests of the public, the general interests of the state and local economy, and the interests of the applicant.”¹¹⁰ This test articulates the following standard:

The commission may issue a siting certificate only if it determines that the terms and conditions of any public funding or any agreement relating to the abatement of property taxes do not *offend the public interest*, and the construction of the facility or material modification of the facility will result in a substantial positive impact on the local economy and local employment. The commission shall issue an order that includes appropriate findings of fact and conclusions of law.¹¹¹

Modern examples of the application of this balancing test include PSC approval of PILOT agreements for Longview Power, Moundsville Power, Brooke Power, and Harrison Power.¹¹² While the PSC must make a

¹⁰⁶ *Id.*; cf. H. Woods Bowman, *Reexamining the Property Tax Exemption*, LINCOLN INST. LAND POL’Y (July 2003), <https://www.lincolnst.edu/publications/articles/reexamining-property-tax-exemption> (arguing that “[t]he strong consensus in favor of exempting government property is due to inertia, power and precaution”).

¹⁰⁷ W. VA. CODE ANN. § 24-2-11(c).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See id.* (emphasis added); *see also Moundsville Power Agreement*, *supra* note 5, at 2 (reciting that the PILOT agreement “will promote the public interest and public purposes by, among other things, providing certainty and soundness in fiscal planning and promoting the present and prospective prosperity, health, happiness, safety and general welfare of the people of the County”).

¹¹² *See infra* Section II.B.

determination about whether the PILOT “offend[s] the public interest,”¹¹³ the PSC made a finding that a PILOT proposal was not in the “public interest” on only one occasion.¹¹⁴

PILOT agreements also arise in other circumstances outside of simple leasehold interests in real property being held by a state or county government. In 2012, for example, the West Virginia Development Office negotiated an economic development deal with Gestamp, a Spanish auto parts manufacturer, in which “[t]he Development Authority [would] purchase the equipment needed for the stamping plant and lease it back to Gestamp, which [would] allow Gestamp to avoid paying property taxes on that equipment.”¹¹⁵ The Development Office then became the owner of the equipment that Gestamp uses to manufacture products.¹¹⁶ This type of ownership arrangement is not an anomaly. In fact, it is similar to agreements currently in effect with Quad Graphics in Martinsburg and Toyota Motor Manufacturing in Buffalo.¹¹⁷

Arising out of litigation concerning these types of agreements, the Supreme Court of Appeals has only recognized that the West Virginia Code authorizes county governments—or their economic development authorities—to enter into a PILOT agreement with a private, for-profit corporation.¹¹⁸ And in both a legal and practical sense, the county government becomes the freehold owner of the property. The private corporation becomes the county’s leasehold tenant. The legal merits of this scheme have yet to be subject to judicial review.

2. West Virginia Constitution Article X, Section 1

PILOT agreements also interact with West Virginia’s Constitution. In a broad sense, Article X of the West Virginia Constitution deals with taxation and finance.¹¹⁹ “Among other things, the West Virginia Constitution imposes requirements of equality and uniformity on property taxes; limits such taxes; and

¹¹³ *Id.*

¹¹⁴ *Affiliated Constr. Trades Found. v. Pub. Serv. Comm’n of W. Va.*, 565 S.E.2d 778, 789–90 (W. Va. 2002) (holding that the PSC’s limited inquiry into corporation’s assertions that project would be paid for by “internal funding” was inconsistent with its obligation to serve the public interest).

¹¹⁵ See Sean O’Leary, *Gestamp Property Tax Deal Worth \$25 million*, W. VA. CTR. ON BUDGET & POL’Y (May 23, 2013), <https://wvpolicy.org/gestamp-property-tax-deal-worth-25-million/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *Ohio Valley Jobs All. Inc. v. Pub. Serv. Comm’n of W. Va.*, No. 18-01249, 2018 WL 5734679, at *8 (W. Va. Nov. 1, 2018) (“PILOT agreements are specifically provided for by the Legislature to equalize opportunities for West Virginia – there is no presumption the applicant must overcome that the PILOT Agreement is ill-conceived.”).

¹¹⁹ W. VA. CONST. art. X.

authorizes privilege, franchise, and income taxes.”¹²⁰ This fundamental notion of “equal and uniform” has historical and enduring roots in West Virginia that date back to the government of pre-Civil War Virginia.¹²¹ The founders of West Virginia were openly begrudged by the inequality that “special treatment” created in Virginia; there, wealthy plantation owners did not pay their fair share of taxes due to government deals.¹²² Although this provision has not always been faithfully followed by legislators and tax officials,¹²³ Section 1’s requirement of “strict uniformity for all but exempted property” remained the constitutional rule until the Tax Limitation Amendment in 1932 created four categories of property with stepped rates.”¹²⁴

Under the current structure, the property tax classifications are (1) Class I—intangible personal property, personal property used for agricultural purposes, and agricultural products owned by the producer; (2) Class II—residential and agricultural property; (3) Class III—all other property outside of municipalities; and (4) Class IV—all other property inside municipalities.¹²⁵ And “after the 1932 amendment, the Equal and Uniform Clause and the No Species Clause meant that the legislature and local governments could discriminate . . . between the classes, but not within them.”¹²⁶

In response to the 1932 constitutional amendment, the Supreme Court of Appeals of West Virginia took the opportunity to interpret various aspects of

¹²⁰ ROBERT M. BASTRESS, JR., *THE WEST VIRGINIA STATE CONSTITUTION* 284 (2d ed. 2016).

¹²¹ *Id.* “The requirement that taxation be uniform first appeared in state constitutions in the early nineteenth century.” *Id.* (citing Howard, *Commentaries*, 2:1037). The inclusion of such a provision in the 1851 Constitution of Virginia resulted directly from festering sectional differences between Tidewater Virginia and the transmontane sections of the Commonwealth. *Id.* “As a result of that history, the delegates at West Virginia’s Constitutional Convention of 1861 devoted considerable attention to the taxation question.” *Id.* at 285.

¹²² JOHN E. STEALEY, III, *WEST VIRGINIA’S CIVIL WAR ERA CONSTITUTION* 52–60 (2013).

¹²³ *See, e.g.,* Chesapeake & Ohio Ry. Co. v. Miller, 19 W. Va. 408, 435–37 (1882), *aff’d*, 114 U.S. 176 (1885); *see also* Jane Moran, *Is Everyone Paying Their Fair Share? An Analysis of Taxpayers’ Actions to Equalize Taxes*, 85 W. VA. L. REV. 209, 212–13 (1983).

¹²⁴ BASTRESS, *supra* note 120, at 285. Professor Bastress contends that the purpose of the classification scheme and the graduated increases in the maximum tax that could be imposed on each class was to lower the tax burden on farmers and homeowners, and to increase it for commercial and industrial interests. *Id.* Further, he asserts that because of this shift, the system has the effect of shifting the support of public schools and governmental services away from reliance on property taxes and toward more progressive taxes (such as the income tax) imposed at the state level. *Id.* (citing Killen v. Logan Cnty. Comm’n, 170 W. Va. 602 (1982) (Neely, J., dissenting) *overruled in part by In re Tax Assessment of Foster Found.’s Woodlands Ret. Cmty.*, 223 W. Va. 14, 27 (2008)).

¹²⁵ BASTRESS, *supra* note 120, at 285.

¹²⁶ *Id.*; *see also In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346 (1959) (holding that assessing one species of property at a higher percentage of its actual value than another species within the same class violates Article X, Section 1 of the West Virginia State Constitution).

Article X and Section 1. In *Killen v. Logan County Commission*,¹²⁷ the court addressed the validity of a statute that authorized counties to assess property at anywhere between 50% to 100% of appraised value under the Equal and Uniform Clause.¹²⁸ This holding has been interpreted to mean that “‘value’ means ‘worth in money’ or ‘market value,’ [and] a system in which assessments vary among the counties at some fraction of market value could not produce equal and uniform taxation.”¹²⁹ The court understood that assessment must be at 100% of true and actual value.¹³⁰ In a stinging retort of the court, the West Virginia Legislature passed the Property Tax Limitation and Homestead Amendment of 1982,¹³¹ which dictated that the fixed assessments must be 60% of true and actual value unless the legislature by two-thirds vote in each house sets a higher rate.¹³²

Article X, Section 6 also creates constitutional limitations on the State’s ability to lend its “credit” to local governments and private entities or individuals:

The credit of the state shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the state ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person. The investment of state or public funds shall be subject to procedures and guidelines . . . established by the Legislature for the prudent investment of such funds.¹³³

This provision consequentially bars the state from investing state funds in various private enterprises.¹³⁴ But why did the framers of the West Virginia Constitution include this protective provision? History tells the best story. As Professor Robert Bastress¹³⁵ aptly recounts,

[t]he framers included section 6 to prevent the reoccurrence in West Virginia of certain fiscal crises experienced under earlier

¹²⁷ 170 W. Va. 602 (1982).

¹²⁸ *Id.*; see also BASTRESS, *supra* note 120, at 286.

¹²⁹ BASTRESS, *supra* note 120, at 286.

¹³⁰ *Killen v. Logan Cnty. Comm’n*, 170 W. Va. 602, 614 (1982).

¹³¹ BASTRESS, *supra* note 120, at 286.

¹³² W. VA. CONST. art. X, § 1b(A).

¹³³ *Id.* § 6.

¹³⁴ BASTRESS, *supra* note 120, at 302.

¹³⁵ Professor Robert Bastress is the John W. Fisher II Professor of Law at the West Virginia University College of Law. In his scholarship, he is a leading expert in Constitutional Law, West Virginia Constitutional Law, and Employment Discrimination. Professor Bastress has written extensively on the West Virginia Constitution. See, e.g., Robert Bastress, *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683 (2007); Robert Bastress, *Constitutional Considerations for Local Government Reform in West Virginia*, 108 W. VA. L. REV. 125 (2005). In addition, Professor Bastress is a member of various statewide and national legal organizations.

practices in Virginia of lending . . . credit to private internal development projects Many of those ventures proved to be *financial disasters* and greatly contributed to the large public debt accumulated by Virginia in the mid-nineteenth century.¹³⁶

Section 6 of the West Virginia Constitution consequentially serves the unique purpose of protecting West Virginia’s “fiscal and economic integrity” and, arguably, the fiscal integrity of county and local governments.¹³⁷ Under Section 6 of the West Virginia Constitution, the State is only permitted to make direct grants or subsidies to private entities that serve a “public purpose.”¹³⁸

3. Practical Examples of PILOTs in West Virginia

Given the West Virginia Code’s language, counties routinely enter into PILOT agreements with private corporations. In an elementary sense,

[t]he way PILOTs usually work in West Virginia is that a government entity—usually the county or a local development authority, but sometimes the West Virginia Economic Development Authority—purchases the property (sometimes by issuing revenue bonds) to be developed and then enters into a long-term lease with the company when construction begins.¹³⁹

One might then logically wonder: when is a PILOT agreement offered to a private party? The quintessential line from the legal professoriate sums it up best; “it depends.” When framed as a tax credit, PILOT agreements are available when “property owned by a tax-exempt entity, then negotiated payment in lieu of real and personal taxes,” but nonetheless, the amount of the true tax abatement is “project dependent.”¹⁴⁰

¹³⁶ BASTRESS, *supra* note 120, at 302 (emphasis added); see Ralph Judy Bean Jr., Note, *Constitutional Law: Extension of State Credit—Industrial Development Bond Act*, 67 W. VA. L. REV. 228 (1965); see also *State ex rel. Appalachian Power Co. v. Gainer*, 143 S.E.2d 351 (W. Va. 1965).

¹³⁷ For an example of the West Virginia Supreme Court applying this principle, see *State ex rel. City of Charleston v. W. Va. Econ. Dev. Grant Comm’n*, 588 S.E.2d 655 (W. Va. 2003).

¹³⁸ BASTRESS, *supra* note 120, at 303.

¹³⁹ See Ted Boettner, *PILOT Agreements Cost State Millions in Tax Revenue: An In-Depth Look at Longview Power Plant*, W. VA. CTR. ON BUDGET & POL’Y (Oct. 15, 2019), <https://wvpolicy.org/pilot-agreements-cost-state-millions-in-tax-revenue-an-in-depth-look-at-longview-power-plant/>.

¹⁴⁰ *Economic Development Progress, Programs and Plans in West Virginia*, W. VA. DEP’T OF COM. (Oct. 30, 2018) (emphasis added), https://m.wvtaxinstitute.com/upload/Hooker%20Economic%20Development%20Progress%20Programs%20and%20Plans_WV%20Tax%20Institute_10.30.18.pdf.

i. Public Utility PILOT Agreements

As noted above, in select cases, electric-generation facilities enter into PILOT agreements with local governments or development authorities.¹⁴¹ Recently, West Virginia experienced a “boom” in the natural gas industry,¹⁴² largely fueled by the discovery of the Marcellus shale formation in the Appalachian Basin.¹⁴³ With the extraction of shale gas occurring across the region, the number of “gas-fired” power projects is on the rise.¹⁴⁴ In response to this increased interest in investment in natural gas, PILOT agreements are commonly utilized as an “economic attraction tool” for these facilities.¹⁴⁵

The following section of this Note provides various examples of public utilities—or plants that must obtain a “siting certificate” from the PSC—and the use of PILOT agreements between public utilities and local governments.

a. Longview Power Plant (Monongalia County)

As T.S. Eliot once said, “Only those who will risk going too far can possibly find out how far it is possible to go.”¹⁴⁶ Looking back now, that is what Monongalia County, West Virginia, wanted to find out when it piloted¹⁴⁷ the first Longview PILOT agreement. On November 3, 2003, Longview Power, L.L.C., (“Longview”) applied to the PSC for a siting certificate¹⁴⁸ to authorize the construction and operation of an electric wholesale generating facility in

¹⁴¹ See *supra* Part II.

¹⁴² See Ken Silverstein, *With Coal Flaming Out, the Nation Is Turning to Natural Gas—and West Virginia. Lessons Learned?*, FORBES (Jan. 13, 2019, 12:00 PM), <https://www.forbes.com/sites/kensilverstein/2019/01/13/with-coal-flaming-out-the-nation-is-turning-to-natural-gas-and-west-virginia-lessons-learned/#133c325a3cff>.

¹⁴³ Christopher J. Schenk & Hannah M. Hamilton, *USGS Estimates 214 Trillion Cubic Feet of Natural Gas in Appalachian Basin Formations*, U.S. GEOLOGICAL SURV. (Oct. 3, 2019), <https://www.usgs.gov/news/usgs-estimates-214-trillion-cubic-feet-natural-gas-appalachian-basin-formations>.

¹⁴⁴ Charles Young, *Gas-fired Power Projects on the Rise in WV*, WVNEWS (Oct. 7, 2019), https://www.wvnews.com/gas-fired-power-projects-on-the-rise-in-wv/article_df38936a-2d7e-54bf-9906-6758e3d129e6.html.

¹⁴⁵ See *infra* text accompanying note 161.

¹⁴⁶ See Mitch Ditkoff, *50 Awesome Quotes on Risk Taking*, HUFFINGTON POST (Sept. 29, 2017, 4:05 PM), https://www.huffpost.com/entry/50-awesome-quotes-on-risk_b_2078573.

¹⁴⁷ No pun was purposefully intended.

¹⁴⁸ See W. VA. CODE ANN. § 24-2-11c (West 2020).

Monongalia County.¹⁴⁹ While construction was originally on schedule,¹⁵⁰ there was significant resistance from local environmental groups¹⁵¹ vociferously opposed to the project, as well as various legal challenges.¹⁵²

After the PSC granted Longview a siting certificate, the certification was appealed. In *Longview I*, the West Virginia Supreme Court noted a two-part test for determining whether granting a siting certificate “offends the public interest” for the purpose of authorizing a PILOT agreement:

Longview I created a two-step process to that end: In Part One of the analysis, the Commission will perform its duty to appraise and balance: (a) an applicant’s interest to construct an electric wholesale generation facility; (b) the State’s and region’s need for new electrical generating plants; and (c) the economic gain to the State and the local economy, against: (i) community residents’ interest in living separate and apart from such facility; (ii) a community’s interest that a facility’s negative impacts be as minimally disruptive to existing property uses as is reasonably possible; and (iii) the social and environmental impacts of the proposed facility on the local vicinity, the surrounding region, and the State.

The Commission performs Part Two of its analysis only if it determines in Part One that, taken as a whole, positive impacts relating to the various interests outweigh the negative impacts on the various interests. (See W. Va. Code § 24-2-11c(c)). In Part Two the Commission decides whether a project’s public

¹⁴⁹ Longview had to file for a siting certificate with the PSC. See Case No. 03-1 860-E-CS – Application of Longview Power, L.L.C., W. VA. PUB. SERV. COMM’N (Aug. 27, 2004), <http://www.psc.state.wv.us/scripts/orders/ViewDocument.cfm?CaseActivityID=110859&Source=Archives>.

¹⁵⁰ Kelsey Swaim, *Longview Construction on Schedule*, DAILY ATHENAEUM (Jan. 26, 2009), https://www.thedaonline.com/longview-construction-on-schedule/article_5264384a-d1f2-57d6-86c2-977c653c53cb.html.

¹⁵¹ See *id.* (“In 2004, the Sierra Club first appealed the air pollution permit for Longview because the permit failed to meet the requirements of the Clean Air Act. The Sierra Club succeeded somewhat in its attempt to reduce air pollution emissions. As a result, Longview will place environmental controls on the back of the plant. These controls will reduce sulfur and nitrous oxide emissions, which could increase air pollution levels.”).

¹⁵² See *In re Longview Power (Longview I)*, P.S.C. Case No. 03-1860-E-CS (Aug. 27, 2004); see also *Longview II*, P.S.C. Case No. 03-1860-E-CS & 05-1467-E-CN (June 6, 2006) (noting that because of expert testimony, the PSC “accepted the one-year estimate as reasonable, and noted that “[t]he tax estimate does not stand on its own. It must be considered in the context of Longview’s extensive testimony regarding the need for the PILOT agreement”).

funding, if any, and property tax abatement, if any, offends the public interest. (W. Va. Code § 24-2-11c(c)).¹⁵³

Therefore, in response to the *Longview I* decision, any PILOT agreement that involves the PSC granting a siting certificate must be analyzed under this two-part test. Part one balances the equities to determine whether the positive benefits outweigh the negative impacts on various interests. Part two examines whether granting the siting certificate—and approving the PILOT agreement—would “offend the public interest.” Under this dual standard, if the answer to the latter question is yes, then the siting certificate is denied. If the answer is no, then the PILOT agreement will ultimately be permitted vis-à-vis the PSC.¹⁵⁴

In 2019, Longview Power resurfaced in the news.¹⁵⁵ This time, Longview Power was asking the Monongalia County Commission for a second PILOT agreement for a new natural-gas plant plus 50 megawatts of solar generation.¹⁵⁶ This much celebrated announcement was made despite the fact that Longview sought Chapter 11 bankruptcy protection in 2013.¹⁵⁷ Eventually, in 2015, a confidential settlement with contractors and insurers effectively cleared obstacles in Longview’s efforts to exit Chapter 11.¹⁵⁸

But underscoring the uncertainty with this proposed expansion project, in 2020, after the new PILOT agreement was announced, Longview once again announced that it was seeking Chapter 11 bankruptcy protections because of the COVID-19 pandemic and plummeting energy prices.¹⁵⁹ Interestingly, according to the developed prepackaged bankruptcy plan, “[t]he plan will allow Longview

¹⁵³ See *Ohio Valley Jobs All., Inc. v. Pub. Serv. Comm’n of W. Va.*, No. 18-0249, 2018 WL 5734679, at *4–5 (W. Va. Nov. 1, 2018) (citing *Longview I*, P.S.C. Case No. 03-1860-E-CS (Aug. 27, 2004)).

¹⁵⁴ And ultimately, Monongalia County did in fact enter into a binding PILOT agreement with Longview Power. See *MONONGALIA CNTY. DEV. AUTH.*, *supra* note 94.

¹⁵⁵ See David Beard, *Longview Power Files Application for Gas-Powered Plant*, W. VA. METRONews (Sept. 12, 2019, 8:35 PM), <http://wvmetronews.com/2019/09/12/longview-power-files-application-for-gas-powered-plant/> (noting that “[t]he facility will pay an additional \$2 million annually in a payment in lieu of county property taxes and tax payments, over and above the \$3 million currently generated by the coal plant”).

¹⁵⁶ See Ben Conley, *Longview To Make \$1.2 Billion Investment in Natural Gas, Solar Power*, DOMINION POST (Feb. 23, 2019), <https://www.dominionpost.com/2019/02/23/longview-to-make-1-2-billion-investment-in-natural-gas-solar-power/>.

¹⁵⁷ See Tom Hals & Sakthi Prasad, *Power Company Longview Seeks Bankruptcy, Blames Siemens*, REUTERS (Aug. 30, 2013, 11:39 AM), <https://www.reuters.com/article/us-longviewpower-bankruptcy/power-company-longview-seeks-bankruptcy-blames-siemens-idUSBRE97T0MV20130830>.

¹⁵⁸ See Matt Jarzemsky, *Longview Power Settles Disputes with Contractors, Insurer*, WALL ST. J. (Jan. 4, 2015, 7:12 PM), <https://www.wsj.com/articles/longview-power-settles-disputes-with-contractors-insurer-1420239823>.

¹⁵⁹ *Longview Power Files Bankruptcy, Blames COVID-19*, W. VA. METRONews (Apr. 14, 2020, 12:57 PM), <https://wvmetronews.com/2020/04/14/longview-power-files-bankruptcy/>.

Power to continue operations and pay employees, creditors and continue making PILOT payments to Monongalia County.”¹⁶⁰ Good news for taxpayers.

b. Moundsville Power (Marshall County)

Moundsville Power is a prime example of a public utility PILOT agreement gone awry because it simply never materialized. In 2014, a private developer approached Marshall County to form a PILOT agreement to support a natural gas power plant.¹⁶¹ According to public information, “[Moundsville Power] plans to begin building its \$615 million facility on the 37-acre portion of land south of Moundsville.”¹⁶² Because of the tax abatement associated with the PILOT agreement, the forgone revenue from the PILOT was estimated to eclipse “\$181 million worth of potential property tax.”¹⁶³ While “the firm would pay the county commission as much as \$39.29 million to lease the property over 30 years,”¹⁶⁴ these proposed payments were to be made directly to the Marshall County Commission—the freehold owner of the property, per the terms of the proposed PILOT agreement.¹⁶⁵

Reasoning why this specific project needed a PILOT agreement in order to be fulfilled and realized, Andrew Dorn of Moundsville Power, L.L.C., noted the following benefits that a PILOT agreement with Marshall County would provide to the company:

Moundsville Power requires a Payment in Lieu of Tax Agreements (PILOT) in order to be economically viable. PILOTs have long been used by industrial development agencies in West Virginia and throughout the United States as an economic development tool. PILOTs provide for the abatement of taxes as an incentive for projects which could not be built without the tax abatement and which will serve as a catalyst for additional economic growth and development.

¹⁶⁰ Mike Nolting, *Longview Files for Chapter 11 Bankruptcy*, WAJR (Apr. 14, 2020), <https://wajr.com/longview-files-for-chapter-11-bankruptcy/>.

¹⁶¹ See David Bertola, *Building a Natural Gas Plant a Family Affair for Dorn*, BUFFALO BUS. FIRST (Apr. 24, 2014, 3:05 PM), <https://www.bizjournals.com/buffalo/news/2014/04/24/building-a-natural-gas-plant-a-family-affair-for.html> (“Early projections call for the Moundsville plant to buy \$105 million of natural gas a year, and pay \$4.2 million over 30 years as part of a payment in lieu of taxes (PILOT) agreement, which was approved April 22.”).

¹⁶² See Casey Junkins, *Moundsville Power Plant Clears Hurdle*, INTELLIGENCER: WHEELING NEWS-REG. (Feb. 17, 2015), <https://www.theintelligencer.net/news/top-headlines/2015/02/moundsville-power-plant-clears-hurdle/>.

¹⁶³ See, e.g., Junkins, *supra* note 10.

¹⁶⁴ *Id.*

¹⁶⁵ See *Moundsville Power Agreement*, *supra* note 5.

....

The PILOT is a process in which the title of the property is transferred to a tax-exempt entity, in our case Marshall County, for \$1. The plant is in effect tax-free, so that taxes can then be individually negotiated by the County. The County has no ownership interest or investment in the plant, does not operate or maintain the plant and has no liability for the facility.¹⁶⁶

However, in light of the West Virginia Supreme Court's decision in *Ohio Valley Jobs Alliance*¹⁶⁷ upholding the PSC's granting of a siting certificate to a sister project in Brooke County, as of 2020, the Moundsville Power PILOT project has failed to take off.¹⁶⁸

c. ESC Brooke Power (Brooke County)

In a more recent court case concerning a public-utility PILOT, the Supreme Court of Appeals of West Virginia considered the PSC's granting of a siting certificate to ESC Brooke County Power I, L.L.C. ("ESC").¹⁶⁹ The facts and background of this specific PILOT agreement are well-documented by the West Virginia Supreme Court of Appeals:

ESC Brooke, the Brooke County Commission, the Brooke County Board of Education, the Sheriff of Brooke County, and the Assessor of Brooke County entered into a PILOT (Payment In Lieu of Taxes) Agreement. The PILOT Agreement states that

¹⁶⁶ See Andrew Dorn, *Andrew Dorn: Moundsville Power Plant Will Create Jobs, Revenues*, W. VA. GAZETTE-MAIL (Aug. 5, 2014), https://www.wvgazette.com/opinion/andrew-dorn-moundsville-power-plant-will-create-jobs-revenues/article_d1bc69f6-93ec-53d7-96d6-0f1ed7a9f8a5.html.

¹⁶⁷ See Ken Ward, Jr., "*Jobs Alliance*" Backed by Coal Giant Loses Bid To Stop West Virginia Natural Gas Plant, PROPUBLICA (Nov. 2, 2018, 3:00 PM), <https://www.propublica.org/article/jobs-alliance-backed-by-murray-energy-loses-bid-to-stop-west-virginia-natural-gas-plant> (noting that "[o]ne such legal challenge, aimed at the Moundsville Power plant proposed for Marshall County, was resolved in favor of the developers. But litigation took so long that investors got nervous and the project may not be built, supporters say").

¹⁶⁸ See Alan Olson, *Marshall County Officials Seek Answers on Proposed Power Plant*, INTELLIGENCER: WHEELING NEWS-REG. (Nov. 28, 2017), <https://www.theintelligencer.net/news/community/2017/11/marshall-county-officials-seek-answers-on-proposed-power-plant/> ("The deadlines previously given by Moundsville Power — set to be open and operational by 2018, with construction underway by early 2016 — seem to be slipping, as ground has not yet been broken. However, the facility's website still lists an anticipated completion date of 2018."); Alan Olson, *Moundsville Power Plant Project Delayed*, INTELLIGENCER: WHEELING NEWS-REG. (Oct. 5, 2016), <https://www.theintelligencer.net/news/top-headlines/2016/10/moundsville-power-plant-project-delayed/>.

¹⁶⁹ *Ohio Valley Jobs All., Inc. v. Pub. Serv. Comm'n of W. Va.*, No. 18-0249, 2018 WL 5734679 (W. Va. Nov. 1, 2018).

ESC Brooke is exempt from ad valorem property taxes for a period of thirty years, and instead will make payments in lieu of taxes to be distributed to the Brooke County Board of Education and the Brooke County Commission. The property, being owned by the WVDNR, does not produce any ad valorem tax revenue at present, but the project would generate a minimum of \$7,331,751 over the thirty-year term, subject to a CPI escalator of a minimum 2.5% per year. Evidence was presented to the Commission indicating that this type of agreement is designed to make West Virginia more competitive than, or at least on equal footing for business ventures with, for example, Pennsylvania, which has a different and more lenient tax calculation for electrical power generation as well as lower property taxes than that of Brooke County, which borders Pennsylvania.¹⁷⁰

Despite legal blockades from interest groups opposed to the project,¹⁷¹ ultimately, the PSC's order was affirmed and the project is moving forward as originally planned.¹⁷² As for the finalized PILOT agreement, "[t]he company entered into [PILOT] agreements with the Brooke County Commission and the Brooke County Board of Education and a lease agreement with the Brooke County Commission for the project."¹⁷³ At the time, it was reported to local news outlets that the "agreements provide for a minimum lease payment to the Brooke County Commission of approximately \$19 million over a 30-year period for use of the property, and additional compensation of \$1 million at the closing of the

¹⁷⁰ See *id.* at 2. While this memorandum opinion dealt with the evidentiary standard surrounding the PSC's granting of a siting certificate—and whether or not the PSC had proper findings to grant such a siting certificate—ultimately, the Court did not specifically address the overall, general constitutional validity of PILOT agreements. *Id.* Rather, in passing, the Court noted that the West Virginia Code simply "authorizes" this type of arrangement. *Id.*

¹⁷¹ See Ward, *supra* note 167 (noting that the West Virginia Supreme Court of Appeals said "[g]iven the current economic condition of West Virginia and Brooke County, in particular, it is apparent that the project will substantially and positively impact the state and local economies").

¹⁷² See Linda Comins, *West Virginia Supreme Court Tosses Challenge to Proposed Brooke County Power Plant*, INTELLIGENCER: WHEELING NEWS-REG. (Nov. 5, 2018), <https://www.theintelligencer.net/news/top-headlines/2018/11/west-virginia-supreme-court-tosses-challenge-to-proposed-brooke-county-power-plant/> ("A spokesman for Orion Strategies, a public relations firm representing ESC Brooke County Power, said, 'The facility will provide \$1 million to Brooke County on the commencement of construction with yearly contributions during operation of \$433,000 to the Brooke County Commission and \$167,000 to the Brooke County Board of Education.'").

¹⁷³ See Kevin Randolph, *West Virginia PSC Grants Siting Certificate to ESC Brooke County Power for Natural Gas Plant*, DAILYENERGYINSIDER (Feb. 22, 2018), <https://dailyenergyinsider.com/news/10871-west-virginia-psc-grants-siting-certificate-esc-brooke-county-power-natural-gas-plant/>.

project's financing."¹⁷⁴ The forgone property tax revenue from this PILOT agreement is unreported.

What is reported, however, is a recent disagreement that spilled into the public forum when Governor Jim Justice questioned the "need" for the plant.¹⁷⁵ After weeks of speculation and conjecture, ultimately, the West Virginia Economic Development Authority approved a \$5.5 million loan guarantee for the proposed project.¹⁷⁶ But strikingly and without notice, on October 9, 2020, it was announced that the ESC Brook Power project was suddenly "called off."¹⁷⁷

ii. Other Private Sector PILOT Agreements

In addition to public utility PILOT agreements, state and county governments have entered into PILOT agreements with various private, for-profit corporations.¹⁷⁸ Political and business leaders in West Virginia have argued that these types of agreements provide economic developers with "flexibility."¹⁷⁹ Keeping with this proposition, it is worth noting that businesses and county governments in West Virginia's Eastern Panhandle frequently take advantage of PILOT agreements; various private-sector companies that have benefited from PILOT agreements include Quad Graphics (commercial printer), Macy's (warehouse and distribution center),¹⁸⁰ Procter & Gamble (product

¹⁷⁴ See Comins, *supra* note 172.

¹⁷⁵ Steven Allan Adams, *Justice, West Virginia Officials Raise Red Flags About Brooke County Power Plant Project*, PARKERSBURG NEWS & SENTINEL (Aug. 27, 2020), <https://www.newsandsentinel.com/news/business/2020/08/justice-west-virginia-officials-raise-red-flags-about-brooke-county-power-plant-project/>.

¹⁷⁶ Joe Severino, *Development Board Approves Loan Guarantee for Brooke County Power Plant*, CHARLESTON GAZETTE-MAIL (Sept. 9, 2020), https://www.wvgazette.com/news/energy_and_environment/development-board-approves-loan-guarantee-for-brooke-county-power-plant/article_6688e450-b340-5e63-9fc1-f221eb0089cc.html.

¹⁷⁷ John Lynch (@JohnLynchWTRF), TWITTER (Oct. 9, 2020, 1:51 PM), <https://twitter.com/JohnLynchWTRF/status/1314624634680213504> ("BREAKING: The Brooke County Power Project is OFF according to Brooke County Power CEO Drew Dorn.").

¹⁷⁸ See Boettner, *supra* note 139.

¹⁷⁹ See Thomas A. Heywood, *Let's Keep the PILOT Light on*, W. VA. ROUNDTABLE (Jan. 1, 2019), <https://wvbrt.org/post/op-ed-lets-keep-the-pilot-light-on.aspx>.

¹⁸⁰ Matthew Umstead, *Berkeley Co. Approves Procter & Gamble PILOT Agreement*, HERALD-MEDIA (Aug. 24, 2017), https://www.heraldmillmedia.com/news/tri_state/west_virginia/berkeley-co-approves-procter-gamble-pilot-agreement/article_6e29d4d9-12b5-51fc-afbc-8f232fcabf4b.html ("The PILOT agreement with Macy's allows the company to avoid paying real-estate taxes until 2028 in exchange for payments to the county totaling more than \$11 million.").

manufacturer),¹⁸¹ Knauf Insulation (insulation manufacturer), and Argos (cement factory).¹⁸² This trend comes despite the fact that legislative history shows that the purpose of PILOT agreements was to provide for economic development in rural, underdeveloped areas.

More recently, ROXUL, Inc.'s ("Rockwool") PILOT agreement with Jefferson County, West Virginia, has brought PILOT agreements back into the centerfold.¹⁸³ For context, Rockwool announced its plans to invest \$150 million to build a facility to manufacture its stone wool insulation.¹⁸⁴ The company will initially create between 120 and 150 jobs.¹⁸⁵ The corresponding PILOT agreement with the Jefferson County Commission vis-à-vis the Jefferson County Development Authority ("JCDA"), which was the first PILOT agreement utilized by the county government, was challenged on legal grounds by Jefferson County Vision ("Vision"), a local advocacy group.¹⁸⁶ While Vision's court filings acknowledge that the West Virginia Code allows and permits PILOT agreements, the group "believes the Rockwool agreement was not pursued lawfully."¹⁸⁷ Here, Vision argued that

West Virginia Code allows for PILOT agreements in the context of redevelopment zones—some of the existing PILOTS may have been done lawfully. However, the Rockwool PILOT was not done in accordance with any law. The West Virginia constitution requires taxation to be equal and uniform unless otherwise provided for by law.¹⁸⁸

¹⁸¹ *Id.* ("During the 20-year period, the 458 acres that P&G purchased in 2015 and improvements to the site will be exempt from taxation while the property is titled to the state economic-development authority.").

¹⁸² *See* Boettner, *supra* note 139.

¹⁸³ *See* Danyel VanReenen, *Debate Around PILOT Agreements Continues*, JOURNAL (Jan. 27, 2019), https://www.journal-news.net/journal-news/debate-around-pilot-agreements-continues/article_13bcb517-fd36-572f-9416-4fcd87042584.html.

¹⁸⁴ *See generally* Emily Daniels, *JCC Approves Tax Incentives for Roxul*, JOURNAL (Aug. 3, 2017), https://www.journal-news.net/news/local-news/jcc-approves-tax-incentives-for-roxul/article_168c0211-16f6-5432-afe0-dfba4eb2add.html.

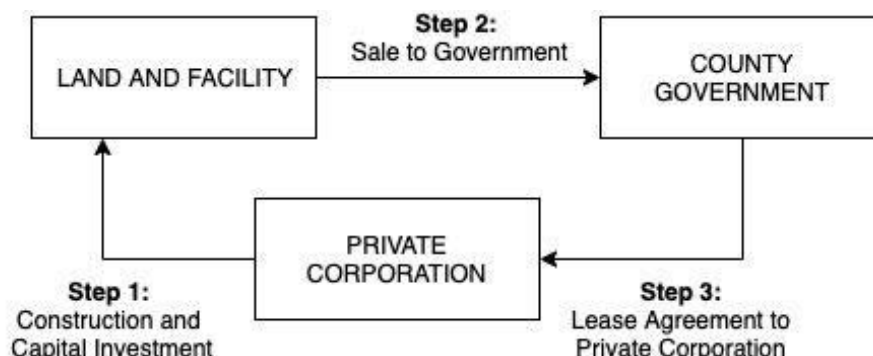
¹⁸⁵ *Id.*

¹⁸⁶ *See* VanReenen, *supra* note 183.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

Vision likewise characterized PILOT agreements as “unconstitutional tax shelters, not business arrangements.”¹⁸⁹ This type of standard PILOT utilizes the following model:¹⁹⁰



For example, once the Rockwool PILOT agreement is in full force and effect, the JCDA was to become the *actual* owner of the land, while Rockwool was to become its tenant. The “term of years” provided in the PILOT agreement was to become the lifespan of the lease, and the PILOT’s legally operative language was to serve as the *de facto* governing instrument—even superseding state property tax law—by ensuring the business makes annual, pre-determined payments to the county. And at the end of the PILOT agreement, like in other cases, the legal title was to revert back to the corporation, or the corporation was to exercise a first right of refusal.¹⁹¹

The Rockwool PILOT, however, took an unexpected turn following the dismissal of Vision’s suit in Jefferson County Circuit Court. After Judge David Hammer dismissed the case on standing grounds, in October 2019, it was reported that the West Virginia Economic Development Authority (“WVEDA”) entered into a PILOT agreement with Rockwool.¹⁹² Some advocates said the WVEDA agreement with Rockwool was “not a PILOT,”¹⁹³ while Delegate John Doyle (D-Jefferson) said, “[i]t may be legal, but it is certainly wrong.”¹⁹⁴ Regardless, the announcement led to a second wave of litigation in *Jefferson*

¹⁸⁹ *Id.*

¹⁹⁰ This chart is of the Author’s own design and based upon information contained in this Note.

¹⁹¹ See Umstead, *supra* note 180.

¹⁹² Kate Mishkin, *Jefferson Residents Thought Losing a County Agreement Might End Rockwool. Then the State Offered a \$150 Million Deal*, CHARLESTON GAZETTE-MAIL (Oct. 10, 2019), https://www.wvgazette.com/news/jefferson-residents-thought-losing-a-county-agreement-might-end-rockwool-then-the-state-offered-a/article_b0848fe1-83bd-5d51-a878-332aa790e954.html.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

County Foundation, Inc. v. West Virginia Economic Development Authority.¹⁹⁵ While the parties in that case engage in motion practice, the underlying arguments from *Jefferson Vision* seem to be preserved—the plaintiff contends the PILOT violates state law, while the defendants contend PILOTs are authorized by law and serve a “public purpose of combating unemployment and stimulating commerce.”¹⁹⁶

The Rockwool–WVEDA PILOT is not without precedent, however. In other cases, the standard PILOT model has been retrofitted and modified. For example, in Kanawha County, the West Virginia Department of Commerce entered into a modified PILOT agreement with Gestamp, a Spanish auto-parts manufacturer.¹⁹⁷ The Gestamp agreement provided for various tax incentives, such as the Economic Opportunity Tax Credit, the Manufacturing Investment Tax Credit, and the Manufacturing Property Tax Adjustment Tax Credit.¹⁹⁸ It was reported in 2012 that the

[West Virginia] Tax Department estimates Gestamp’s tax liability for state personal property tax will be zero dollars, based on the company’s equipment investments of up to \$150 million. The company won’t owe property tax because most of the equipment in *the plant will be owned by the state Economic Development Authority*.¹⁹⁹

Accordingly, the EDA became the legal owner of Gestamp’s manufacturing equipment. The bottom line is this; depending upon the specific needs of the development project, the PILOT agreement may be adjusted in order to offset property tax collection through public ownership of land, real property, business inventory, or tangible property (e.g., machinery).

¹⁹⁵ See Defendant’s Motion to Dismiss, *Jefferson Cnty. Found., Inc. v. W. Va. Econ. Dev. Auth.*, No. 20-C-332, (Kanawha Cnty. Cir. Ct. (2020)).

¹⁹⁶ *Id.* at 1.

¹⁹⁷ See George Hohmann, *State Releases Gestamp Incentives*, CHARLESTON GAZETTE-MAIL (May 2, 2012), https://www.wvgazette.com/business/state-releases-gestamp-incentives/article_1229173a-2be0-515b-8f27-5d9ced7f4181.html.

¹⁹⁸ See *id.*

¹⁹⁹ *Id.* (emphasis added). But, as noted by Hohmann,

[a]lthough the agreement eliminates Gestamp’s property tax liability, the company and the Kanawha County Commission will likely come to terms on a payment in lieu of taxes, or PILOT, whereby the company agrees to make payments to the county to help fund essential services like schools. Any agreement forged by Gestamp and the Kanawha Commission will come up for a vote at a future public commission meeting.

Id.

iii. *PILOT Agreements in Higher Education*

PILOT agreements also emerge in higher education. While different in a conventional sense from a for-profit PILOT agreement (where the corporate entity “leasing” from the county exists to make money), West Virginia’s institutions of higher learning have employed the use of per se PILOT agreements in order to harness capital and investment from private sources.²⁰⁰ The leading case on this front is *Musick v. University Park at Evansdale, L.L.C.*²⁰¹ In *Musick*, West Virginia University (“WVU”) constructed a student housing complex in the Sunnyside neighborhood of Morgantown.²⁰² This project utilized a “public-private partnership” model (commonly referred to as “P3s”) for capital financing and construction.²⁰³ WVU was leasing university-owned property to a private corporation—UPE—for the development and construction of University Park, and UPE simultaneously subleased the student housing properties back to WVU for purposes of offering it to students for housing.²⁰⁴

In January 2015, Monongalia County Assessor Mark Musick “assessed UPE’s leasehold interest in University Park at \$9,035,617 for the tax year 2015,” and because it is property of the state, “the fee estate owned by West Virginia University is not taxable.”²⁰⁵ UPE challenged Mr. Musick’s assessment before the Board of Equalization and Review, arguing that “because the leasehold was neither freely assignable nor a bargain lease, its leasehold interest was \$0.”²⁰⁶ As one can imagine, this discrepancy is extremely consequential for the status of both the project and the payment of taxes. Ultimately, the court held that in light of “procedural errors” in conducting the assessment, the correct assessment for 2015 was \$0.²⁰⁷ Therefore, UPE was exempt from state property tax because of WVU’s state property tax exemption. Circling back to NFP PILOT agreements,

²⁰⁰ See Paul Van Osdol, *West Virginia University Student Housing Deals Focus of Controversy*, WTAE (May 30, 2017, 9:48 AM), <https://www.wtae.com/article/west-virginia-university-student-housing-deals-focus-of-controversy/9916758#> (“In a document given to state tax officials, Monongalia County said the two public-private developments should pay a combined \$1.5 million per year in property taxes based on their lease value. The county assessor has filed suit but the developers and WVU said they should not have to pay any property tax. The case is now before the state Supreme Court.”).

²⁰¹ 820 S.E.2d 901 (W. Va. 2018).

²⁰² *Id.* at 904.

²⁰³ *Id.* at 905.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 904–05.

²⁰⁶ *Id.* at 905.

²⁰⁷ *Id.* at 916.

WVU had previously agreed to make “payments in lieu of taxes” to the Monongalia County Commission in the amount of \$175,000 annually.²⁰⁸

C. Contrasting PILOTs with West Virginia’s Tax Increment Financing Act

An important economic development tool that needs to be distinguished from standard and modified PILOT agreements is West Virginia’s Tax Increment Financing Act.²⁰⁹ Tax increment financing (“TIF”) allows for “counties and municipalities [to] finance redevelopment projects and help promote economic activity in distressed areas.”²¹⁰ Unlike PILOTs, TIF districts still generate property taxes; these funds become the “project financing” (the difference between the assessed value of the property pre-development and the value of the property post-development) that funds the TIF district.²¹¹

Essentially, TIF districts—which are established by local governments—direct portions of taxes collected within a designated TIF district to go toward a project within the bounds of said district.²¹² With respect to approval and creation of the TIF district, “[c]ounty commissions and some municipalities can apply directly to the [West Virginia] Development Office for TIF approval. Other municipalities have to be approved by their county commissions prior to asking the Development Office for approval.”²¹³ Factors that the Development Office considers in creating a TIF district include whether the TIF project affects anything that can be considered “public infrastructure”—*i.e.*, water, roads, fiber optic, gas service, or power service into sites and projects.²¹⁴ TIF districts are widely utilized by local governments across West Virginia—the West Virginia Department of Commerce had 35 TIF districts on

²⁰⁸ See John Bolt, *WVU, Mon County Agree on Process To Handle Non-Mission Critical Commercial Operations on Campus*, WVU TODAY (Aug. 25, 2016), <http://wvutoday-archive.wvu.edu/n/2016/08/25/wvu-mon-county-agree-on-voluntary-method.html> (“Under an agreement unanimously approved today (Aug. 25) by the Monongalia County Commission, the county tax assessor will review space in several public-private partnership buildings on campus, and determine the amount of property tax that would be paid if they were on private property. The University will then collect that amount from the vendor, and turn it over to the county.”).

²⁰⁹ See W. VA. CODE ANN. § 7-11B-1 (West 2020).

²¹⁰ See *TIF Districts*, NEIGHBORHOOD REVITALIZATION, <https://www.morgantownpartnership.com/neighborhoods-revitalization/tif-district/> (last visited Sept. 7, 2020).

²¹¹ See Max Garland, *TIF Districts Are Unseen Growth Drivers in West Virginia’s Cities*, CHARLESTON GAZETTE-MAIL (Sept. 13, 2018), https://www.wvgazette.com/dailymailwv/daily_mail_features/tif-districts-are-unseen-growth-drivers-in-west-virginia-s/article_61655a57-ea9c-5218-8d0a-30f36babc8db.html.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

the books in 2017.²¹⁵ “The county or municipality the TIF district is in will continue to collect the amount in funds they did pre-development while, as the assessed value of the property rises, those newfound tax dollars go directly toward the district’s desired project or bonds/notes issued for their funding.”²¹⁶

Like West Virginia, adjacent states permit TIFs through state law, but the duration or life of the TIF varies. For example, Kentucky and Pennsylvania allow for 20-year TIFs, while Ohio follows West Virginia and permits 30-year TIFs.²¹⁷ Neighboring states Maryland and Virginia, on the other hand, take a more malleable approach—Virginia permits a TIF to last “so long as any obligations or development project costs are unpaid.”²¹⁸ Unlike the flexible, ambiguous, and superfluous nature of a PILOT agreement, TIF districts have been characterized as “very precise economic development tool[s].”²¹⁹ This is due in large part to the fact that the West Virginia Code specifically states that these projects are expressly “designed to encourage economic growth and development in *geographic areas* characterized by high levels of unemployment, stagnant employment, slow income growth, contaminated property or inadequate infrastructure.”²²⁰ Most notably, while TIF projects benefit *any* business looking to relocate within the defined geographic area of an existing TIF district, PILOT agreements, on balance, tend to benefit a single lessee—the private corporation who enters into the agreement and obtains a leasehold interest in the property.

At bottom, PILOTs, TIFs, and other economic incentives invite a host of complex legal, economic, political, and societal questions of efficacy, transparency, and fairness. These examples underscore a broad number of corporations and utilities that have utilized PILOTs in West Virginia. How have other states addressed this issue?

²¹⁵ Garland, *supra* note 211.

²¹⁶ *Id.*

²¹⁷ See *Summary Table: Tax Increment Financing State Statutes*, COUNCIL OF DEV. FIN. AGENCIES, [https://www.cdfa.net/cdfa/cdfaweb.nsf/ord/tifsummary.html/\\$file/Statute%20Summary.pdf](https://www.cdfa.net/cdfa/cdfaweb.nsf/ord/tifsummary.html/$file/Statute%20Summary.pdf) (last visited Sept. 7, 2020).

²¹⁸ *Id.*

²¹⁹ See Garland, *supra* note 211 (“John Stump, a Steptoe & Johnson lawyer who has guided several municipalities through establishing TIF districts, called them ‘a very precise economic development tool’ because the lines of the district can also be drawn precisely to benefit the project.”).

²²⁰ See W. VA. CODE ANN. § 7-11B-2(a) (West 2020) (emphasis added). This portion of the law is fascinating for another reason. If PILOTs are intended to be used in underserved geographic areas, then are they in fact being used in that manner? If all PILOT data—both at the county and state level—is made public, then this could be analyzed more fully. Most of the more highly reported and anticipated projects are in more prosperous, larger counties.

III. COMPENDIUM OF PEER-STATE PILOT LAWS

Turning outward on the radar, West Virginia is not alone in the cockpit when it comes to the practice of creating PILOT agreements and navigating the corresponding legal storm that, from time to time, pops up on the radar. Some neighboring states allow for local governments to enter into PILOT agreements with private businesses. However, these states' statutes—and significant judicial pronouncements—differ from West Virginia's PILOT status quo.

A. *Commonwealth of Kentucky*

First, in the Commonwealth of Kentucky, the state government issues Industrial Revenue Bonds ("IRB") to finance "industrial buildings."²²¹ These IRBs may be used to finance the total project costs, including engineering, site preparation, land, buildings, machinery and equipment, and bond issuance costs.²²² Kentucky Revised Statute 103 also permits the "issuer to hold title to the improvements financed with IRB proceeds," but the "property owned by the issuer may be exempt from local property taxes during the duration of the bond issue."²²³ However, "[a]ny portions of such projects financed by private capital are subject to the full state and local property taxes applicable to private ownership."²²⁴ According to the Kentucky Economic Development Finance Authority, "[c]ommunities may negotiate for payments by industrial tenants to replace portions of local property taxes lost through public title to the property."²²⁵ In effect, this creates a de facto PILOT agreement between the negotiating community and business.

B. *State of Ohio*

Second, PILOT agreements play a unique role in the State of Ohio's economic development and attraction efforts. Ohio Revised Code states that

(A) [a] board of county commissioners may, by resolution, declare improvements to certain parcels of real property located in the unincorporated territory of the county to be a public purpose. Except as otherwise provided . . . not more than seventy-five per cent of an improvement thus declared to be a *public purpose* may be exempted from real property taxation,

²²¹ See KY. REV. STAT. 103.200 (West 2020).

²²² See, e.g., *Just the Facts: Industrial Revenue Bonds (IRB)*, THINKKENTUCKY (July 2019), <http://www.thinkkentucky.com/kyedc/pdfs/irb.pdf>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

for a period of not more than ten years. The resolution shall specify the percentage of the improvement to be exempted and the life of the exemption.²²⁶

This personal property tax exemption is authorized under Sections 5709.62 and 5709.631, thereby permitting municipalities to offer specified incentives to a for-profit enterprise that “agrees to establish, expand, renovate, or occupy a facility and hire new employees, or preserve employment opportunities for existing employees” in economically depressed areas.²²⁷

However, guidance provided by former–Ohio Attorney General—and current Governor—Mike DeWine outlines the effect and impact of Ohio’s PILOT laws. According to Mr. DeWine, Ohio Revised Code Section 307.09 “grants a board of county commissioners the broad authority to lease any real property belonging to the county and not needed for public use. This statutory provision, however, does not grant a board of county commissioners authority to grant a tax exemption as part of such a lease.”²²⁸

Mr. DeWine ultimately contends that Ohio Revised Code Chapter 307 does not permit a board of county commissioners to grant a tax exemption to a private business as a part of a lease agreement.²²⁹ However, other tax exemptions may be applicable, but only if specific requirements are satisfied as set forth under Ohio Revised Code.²³⁰ Ultimately, balking in the legal analysis, Mr.

²²⁶ See OHIO REV. CODE ANN. § 5709.78 (West 2020) (emphasis added).

²²⁷ *Id.* § 5709.62(C)(1).

²²⁸ See R. Michael DeWine, *OAG Opinion No. 2012-030*, OHIO ATT’Y GEN. (Sept. 19, 2012), <https://www.ohioattorneygeneral.gov/getattachment/5d248302-9465-4711-851b-5b0aa92585e8/2012-030.aspx>.

²²⁹ *Id.*

²³⁰ *Id.* at 2-267 to 2-268. Per Mr. DeWine’s September 2012 Opinion Letter to Ms. Anneka P. Collins, the Highland County Prosecuting Attorney,

[s]everal statutory provisions in this chapter authorize a board of county commissioners to grant a tax exemption when specific requirements are satisfied. First, R.C. 5709.61 to .69 permit the creation of enterprise zones in order “to encourage businesses to establish, expand, renovate, and occupy facilities and to create jobs within economically distressed zones.” 1989 Op. Att’y Gen. No. 89-013, at 2-55. A board of county commissioners may designate proposed enterprise zones in municipal corporations or townships or in unincorporated areas of the county with the consent of the affected legislative authority of the municipal corporation or the board of township trustees. R.C. 5709.63; R.C. 5709.632. After an enterprise zone is created, a board of county commissioners, with the consent of the legislative authority of each affected municipal corporation or of the board of township trustees, is expressly authorized to enter an agreement granting tax exemptions to an enterprise in return for the enterprise agreeing to establish or expand a business within a designated enterprise zone. R.C. 5709.63; R.C. 5709.632; see also 1989 Op. Att’y Gen. No. 89-013, at 2-55. Accordingly, where the requirements set forth in R.C. 5709.63 or R.C. 5709.632 have been satisfied, a board of county commissioners may grant a tax exemption to an enterprise located within a designated enterprise zone.

DeWine writes “[w]hether a particular business or lease agreement satisfies the conditions set forth in Sections 5709.63, 5709.632, or 5709.78 is a question of fact and *cannot* be resolved by means of an opinion of the Attorney General.”²³¹

C. Commonwealth of Pennsylvania

Third, Pennsylvania, West Virginia’s northeastern neighbor, also differs substantially from West Virginia’s PILOT scheme and practice. On the NFP front, the City of Philadelphia has long been known for not collecting PILOT payments for NFPs to supplant lost revenue from property tax exemptions,²³² and other parts of the state have also battled with untaxed NFP owned property.²³³ The question of who qualifies for charitable tax exemptions under Pennsylvania state law has been heavily litigated,²³⁴ and Pennsylvania state law provides that

Additionally, R.C. 5709.78(A) authorizes a board of county commissioners to declare, by resolution, public infrastructure improvements to certain parcels of property located in the unincorporated territory of the county to be a public purpose. The statute further authorizes a board to exempt such an improvement from real property taxation as provided therein. R.C. 5709.78(A). R.C. 5709.78(B) authorizes a board of county commissioners to adopt a resolution creating an incentive district and to declare improvements to parcels within the district to be a public purpose. Parcels located within an incentive district may be exempt from taxation as provided in R.C. 5709.78(B). Accordingly, a board of county commissioners may grant a tax exemption when the requirements set forth in R.C. 5709.78(A) or (B) are satisfied.

Id.

²³¹ *Id.* at 2-268 (citing *OAG Opinion No. 90-020*, OHIO ATT’Y GEN. (Nov. 8, 1990) (“It is inappropriate to use the opinion-rendering function of the Attorney General as a means for making findings of fact.”)) (emphasis added). Note that Mr. DeWine’s Opinion Letter only examined the precise question of whether Ohio Revised Code authorized a board of county commissioners to grant a tax exemption. *Id.* In practice, West Virginia’s PILOT law has been construed to give private businesses de facto tax exemptions because of the fact that the land and adjoining physical plant facilities are also owned by the county government or local economic development agency. In contrast, Ohio’s law allows lease agreements for locally owned lands, and Mr. DeWine argues that these lease agreements—entered into by government agencies—may not contract away a “tax exemption.” *Id.*

²³² See Amanda O’Brien, *Penn Maintains Stance Against Paying PILOTs in Wake of Renewed Petitions*, DAILY PENNSYLVANIAN (Apr. 16, 2019), <https://www.thedp.com/article/2019/04/penn-pilots-petition-funding-nonprofit-tax-exempt-philadelphia>; see also George S. Forde, Jr. & Christopher E. Cummings, *Payments in Lieu of Taxes: The Philadelphia Experience*, 37 CATH. LAW. (1996); Laura McCrystal, *\$29.6 Billion of Philly Real Estate Is Exempt from Property Taxes. Should Nonprofits Be Asked To Pay Up?*, PHILA. INQUIRER (Sept. 30, 2019), <https://www.inquirer.com/news/philadelphia-nonprofit-exempt-property-tax-pilots-penn-aramark-20190930.html>.

²³³ See, e.g., Katie Blackley, *How Much of Pittsburgh Property Is Untaxed? (And How Does the City Get Its Money?)*, WESA (Apr. 17, 2017), <https://www.wesa.fm/post/how-much-pittsburgh-property-untaxed-and-how-does-city-get-its-money#stream/0>.

²³⁴ *Pinnacle Health Hosp. v. Dauphin Cnty. Bd. of Assessments Appeals*, 708 A.2d 845 (Pa. 1998); cf. *Wilson Area Sch. Dist. v. Easton Hosp.*, 747 A.2d 877 (Pa. 2000).

“[w]here real property of the county is not presently being used for the purposes for which it was acquired, the *county* may make payments in lieu of taxes for such property to political subdivisions in which the property is located.”²³⁵

On point, for-profit corporations that maintain PILOT agreements with government actors must abide by Section 4706.3 of Pennsylvania Statute:

All public property used for public purposes, with the ground thereto annexed and necessary for the occupancy and enjoyment of the same, shall be exempt from all county, city and school tax, but shall not include property otherwise taxable which is owned or held by an agency of the United States Government, nor shall this act be construed to exempt from taxation any privilege, act or transaction conducted upon public property by persons or entities which would be taxable if conducted upon nonpublic property regardless of the purpose or purposes for which such activity occurs, even if conducted as agent for or lessee of any public authority.²³⁶

The test of whether property qualifies for a tax exemption under Pennsylvania state law is a question of who holds the “indicia of ownership”—or who is the “real owner” of the land.²³⁷ Under this rule, the *In re Blue Knob* Court held that “premises titled in the Commonwealth and leased to a ski resort were not entitled to an exemption from real estate taxes as public property.”²³⁸ The court has found, however, that a “public purpose” includes the operation of a hotel at a public airport,²³⁹ an indoor stadium facility,²⁴⁰ and a public parking facility²⁴¹ (even if the operation is conducted by a third party for profit).

D. Commonwealth of Virginia

Fourth, neighboring Virginia’s seminal case on PILOT agreements, *Industrial Development Authority of City of Chesapeake v. Suthers*,²⁴² held that

²³⁵ 16 PA. STAT. AND CONS. STAT. ANN. § 2302.1 (West 2020) (emphasis added). Note that this section of state code does not address whether private, for-profit corporations leasing county property can make similar payments. *Id.*

²³⁶ 72 PA. STAT. AND CONS. STAT. ANN. § 4706.3.

²³⁷ *In re Blue Knob Recreation, Inc.*, 551 A.2d 9 (Pa. 1988).

²³⁸ *See id.*; see also Joseph C. Bright, *Public Property—Leased Property*, in 27 SUMMARY OF PENNSYLVANIA JURISDICTION TAXATION § 15:35 (2d ed. 2020).

²³⁹ *See Appeal of Moon*, 127 A.2d 361 (Pa. 1956).

²⁴⁰ *See Spectrum Arena Ltd. P’ship v. Commonwealth*, 951 A.2d 1226 (Pa. Commw. Ct. 2008), *aff’d*, 983 A.2d 641 (Pa. 2009).

²⁴¹ *See Pub. Parking Auth. of Pittsburgh v. Bd. of Prop. Assessment, Appeals & Rev., Allegheny Cnty.*, 105 A.2d 165 (Pa. 1954).

²⁴² 155 S.E.2d 326 (Va. 1967).

fixed sum PILOTS were unconstitutional under the state constitution.²⁴³ In *Suthers*, the Chairman of the Industrial Development Authority of the City of Chesapeake refused to execute documents relating to a lease agreement with a private corporation to establish a manufacturing plant in Chesapeake, Virginia.²⁴⁴ Suthers challenged the constitutionality of the Industrial Development and Revenue Bond Act (“IDRBA”) and the validity of a lease agreement transaction.²⁴⁵ The Supreme Court of Appeals of Virginia disagreed with Suthers, except for his contention that IDRBA Section 15.1-1382 was unconstitutional, and therefore, section 6.06 of the proposed lease agreement was invalid.²⁴⁶ The court ultimately agreed that the statutory and lease provisions were contrary to Section 183 of the Virginia Constitution²⁴⁷ because they permitted the parties “to agree to the payment of a leasehold interest tax by Evans which might not equal the proper amount or which might be less than another lessee similarly situated might be required to pay, thus resulting in a lack of uniformity or in no taxation at all.”²⁴⁸ As the *Suthers* Court notes in its ruling,

as between the various lessees of industrial authority similarly situated, the amount of the fixed sum may vary as the abilities of the negotiators vary. And, as between such lessees and those leasing other tax-exempt property, the former are granted the right to negotiate the fixed sum to be paid in lieu of taxes while the latter are granted no such right but are *left to the mercy of the assessing authorities*.²⁴⁹

E. State of Maryland

Fifth, the holding in *Firestone Tire*²⁵⁰ set forth the general rule in Maryland that provided for the taxation of any business lessee using—for business purposes—any county-owned real or personal property, in addition to federal or state property leased for similar business purposes.²⁵¹ The *Firestone*

²⁴³ *Id.* at 334.

²⁴⁴ *Id.* at 329.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 334.

²⁴⁷ *Id.* (noting that Section 168 requires that “all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general law”).

²⁴⁸ *Id.* (“We must agree with the respondent that the portion of Code, s 15.1-1382 providing for the payment of a fixed sum in lieu of taxes is unconstitutional and that Section 6.06 of the lease is invalid.”).

²⁴⁹ *Id.* at 335 (emphasis added).

²⁵⁰ See *Firestone Tire & Rubber Co. v. Supervisor of Wicomico Cnty.*, 275 Md. 349 (1975).

²⁵¹ *Id.*

Tire Court articulated that the statutory–government property tax exception encompassed only “intergovernmental” payments in lieu of taxes—or payments from one governmental entity (which owned the property) to another governmental entity that had the taxing authority, and consequentially, payments made by a private business *in lieu of taxation* do not meet the exception.²⁵² Therefore, the court concluded that Firestone Tire was not exempt from paying assessed property taxes on the property leased from Wicomico County (who would be otherwise exempt from state property taxation as a political subdivision of the state).²⁵³

F. United States Court of Appeals for the Sixth Circuit

Sixth, and on the federal level, a Sixth Circuit case in *Cuno v. DaimlerChrysler, Inc.*²⁵⁴ provides an interesting discussion of Ohio’s property tax incentives and their relation to the federal Commerce Clause and Dormant Commerce Clause. In *Cuno*, the Sixth Circuit Court of Appeals was faced with deciding whether a local tax abatement and investment tax credit granted to an automobile manufacturer—for the sole purpose of keeping its manufacturing facility within the city—was constitutional under the Dormant Commerce Clause Doctrine.²⁵⁵ While the Supreme Court dismissed the case on standing grounds,²⁵⁶ as some legal commentators have noted, “the Court was able to put off an extremely vexing question with its decision on standing.”²⁵⁷ There, absent any intent that the law was applied discriminatorily to favor Ohio’s in-state

²⁵² *Id.* at 354–55.

The language of the statute is clear on this point. The key words referring to ownership in the first sentence of [Section] 8(7) (e) are ‘real and personal property which is owned by the federal or State governments.’ Since the State and federal governments are the only ‘owners’ mentioned in [Section] 8(7)(e), the term ‘aforesaid owners’ must refer to them. Thus, the language of [Section] 8(7)(3) clearly indicates that payments by Wicomico County to the State in lieu of State taxes would have been necessary to obtain an exemption from taxation.

Id.

²⁵³ *Id.* at 356 (“[S]ince there were no payments in lieu of taxes by the governmental entity owning the property, the lessee was not excused under Art. 81, [Section] 8(7)(e), from paying property taxes.”).

²⁵⁴ 386 F.3d 738 (6th Cir. 2004).

²⁵⁵ *Id.*

²⁵⁶ The Supreme Court of the United States granted certiorari only with respect to Ohio’s franchise tax exemption. *See generally* *DaimlerChrysler Corp. v. Cuno*, 545 U.S. 1165, 1859 (2005). The *Cuno* plaintiffs abandoned arguments that they were injured because they were displaced by DaimlerChrysler’s expansion and also abandoned contentions by Michigan residents that, but for the Ohio incentives, DaimlerChrysler would have expanded in Michigan, bringing attendant benefits to that state. *Id.*

²⁵⁷ Brandon P. Denning, *DaimlerChrysler Corp. v. Cuno, State Investment Incentives, and the Future of the Dormant Commerce Clause Doctrine*, CATO SUP. CT. REV. 173, 179 (2005).

businesses, the Sixth Circuit held that while the investment tax credits did violate the Commerce Clause, the corresponding property tax abatements—in this case—did not violate the Dormant Commerce Clause.

On the latter point, the Sixth Circuit’s analysis is insightful. Relying on the Supreme Court’s holdings in *Boston Stock Exchange v. State Tax Commission*²⁵⁸ and *Bacchus Imports, Ltd. v. Dias*,²⁵⁹ the Sixth Circuit held that Ohio’s personal-property tax “conditional exemptions raise[d] no constitutional issues when the conditions for obtaining the favorable tax treatment are related to the use or location of the property itself.”²⁶⁰ The Sixth Circuit reasoned that “if the conditions imposed on the exemption do not discriminate based on an independent form of commerce, they are permissible.”²⁶¹ In its thorough analysis, the *Cuno* Court held that

[c]ontrary to the plaintiffs’ assertions, the conditions imposed on the receipt of the Ohio property tax exemption are minor collateral requirements and are directly linked to the use of the exempted personal property. The authorizing statute requires only an investment in[]new or existing property within an enterprise zone and maintenance of employees. *See* Ohio Rev. Code Ann. § 5709.62(C)(1). The statute does not impose specific monetary requirements, require the creation of new jobs, or encourage a beneficiary to engage in an additional form of commerce independent of the newly acquired property. As a consequence, *the conditions placed on eligibility for the exemption do not independently burden interstate commerce.*²⁶²

Here, if the Sixth Circuit’s holding in *Cuno* was applied to West Virginia’s statutory scheme that authorizes PILOT agreements, would the result change? It likely depends. Scholars like Professor Peter Enrich²⁶³ argue that these

²⁵⁸ 429 U.S. 318, 336–37 (1977).

²⁵⁹ 468 U.S. 263, 272 (1984).

²⁶⁰ *Cuno*, 386 F.3d at 746. “Stated differently, an exemption may be discriminatory if it requires the beneficiary to engage in another form of business in order to receive the benefit or is limited to businesses with a specified economic presence.” *Id.*

²⁶¹ *Id.* at 747.

²⁶² *Id.* (emphasis added).

²⁶³ Peter Enrich is a Professor of Law at the Northeastern University School of Law. Professor Enrich is a leading authority on state and local government and state tax policy, and frequently serves as an advisor to state and local governments and to advocacy groups interested in state and local fiscal policy. His areas of research and expertise include state taxation of businesses, tax equity, relationships between different levels of government, and funding of public education. Professor Enrich has published extensively on tax law and related subjects. *See, e.g.*, Peter Enrich, *Federal Courts and State Taxes: Some Jurisdictional Issues with Special Attention to the Tax Injunction Act*, 65 TAX LAW. 731 (2012); Peter Enrich, *Constraining State Business Tax Incentives: The Commerce Clause’s Role*, in STATE TAX NOTES (2007); Peter Enrich, Comment, *Citizen and*

types of “discriminatory” incentives are violative of the United States Constitution.²⁶⁴ West Virginia’s statutory provisions would be unconstitutional under *Cuno* if there was legislative history—or an independent, controlling provision of a PILOT agreement—indicating that the exemption is contingent upon the private business agreeing to, for example, hire *only* West Virginia workers or sell products *only* in the state. So far, such a challenge has not been made.

IV. ANALYSIS UNDER WEST VIRGINIA’S CONSTITUTION AND STATE CODE

PILOT agreements have so far endured and proliferated in West Virginia, but unlike the states mentioned above, they have not received significant judicial or legislative scrutiny with regard to either constitutionality or legality. In fact, only two West Virginia Supreme Court of Appeals cases even mention the term “PILOT.”²⁶⁵ All the while, state and local governmental agencies continue to enter into these powerful contractual agreements with private businesses and various public utilities. Arguably, the practice is no longer an anomaly for use by county governments or government actors in the state. Rather, it is commonplace in West Virginia’s economic development efforts.²⁶⁶ Furthermore, while the West Virginia Supreme Court of Appeals has stayed quiet on PILOT agreements, the West Virginia Legislature, too, has not recently indicated an interest in thoroughly examining and analyzing PILOT laws.

Lurking in the shadows, the penultimate question still remains unanswered: are PILOT agreements constitutional under West Virginia law? The *Jefferson County Foundation* matter may answer this penultimate question in due time.²⁶⁷ When the time comes, there are two clear approaches for undertaking this type of analysis. First, this Part of the Note analyzes the more conventional argument that PILOT laws run afoul of Article X of the West Virginia Constitution. This argument was most recently made by Jefferson County Vision over the disputed Rockwool PILOT agreement. Second, when the West Virginia

Taxpayer Standing (Valley Forge Christian College v. Americans United for Separation of Church and State), 96 HARV. L. REV. 196 (1982).

²⁶⁴ See Peter Enrich, *Saving the States from Themselves: Commerce Clause Restraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996).

²⁶⁵ A Westlaw Advanced search with the term “Payment in Lieu of Taxes” revealed only two cases in which the term was even mentioned. See *Ohio Valley Jobs All., Inc. v. Pub. Serv. Comm’n of W. Va.*, No. 18-0249, 2018 WL 5734679 (W. Va. Nov. 1, 2018); see also *Affiliated Const. Trades Found. v. Pub. Serv. Comm’n of W. Va.*, 565 S.E.2d 778 (W. Va. 2002). Neither of those cases ruled—or even analyzed—the constitutionality or legality of PILOT agreements. Instead, both cases addressed the Public Service Commission’s factfinding responsibility when granting a “siting certificate” to a public utility that was seeking to enter into a PILOT agreement. *Id.*

²⁶⁶ See Heywood, *supra* note 179.

²⁶⁷ See Plaintiff’s Complaint, *Jefferson Cnty. Found., Inc. v. W. Va. Econ. Dev. Auth.*, No. 20-C-332, (Kanawha Cnty. Cir. Ct. 2020).

Code is read in its entirety, competing provisions generate friction; on one hand, the Tax Increment Financing Act and Land Bank Program statute seem to authorize county governments to lease county-owned property to private corporations. But, on the other hand, as explained in detail below, West Virginia Code Section 7-1-3k seemingly points this analysis in a different direction.

A. State Constitutional Analysis

First, PILOT agreements appear to test the outer limits of the “equal and uniform” clause. Article X of the West Virginia Constitution mandates that

[s]ubject to the exceptions in this section contained, taxation shall be *equal and uniform* throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value.²⁶⁸

Undeniably, the West Virginia Constitution does create expressed exceptions to this general rule: “property used for educational, literary, scientific, religious or charitable purposes, . . . [and] *public property*, . . . may by law be exempted from taxation.”²⁶⁹ As Professor Bastress notes, while not always followed strictly by the legislature and tax officials, Article X’s mandate of “strict uniformity” for all property—except exempted property—was supplanted in 1932 by the Tax Limitation Amendment which created a four-tiered structure for property taxation.²⁷⁰ But even with this categorical system for property tax classification, “the Equal and Uniform Clause and the No Species Clause meant that the legislature and local governments could discriminate (within the caps) between the classes, but not within them.”²⁷¹ “Therefore, assessing one species of property at a higher percentage of its actual value than another species within the same class ostensibly violates section 1.”²⁷²

While the West Virginia Constitution expressly creates tax exemptions for public property or charitable entities,²⁷³ “[e]xemptions to taxation are the exception to the rule and must be strictly construed.”²⁷⁴ As the West Virginia Supreme Court noted in *Pilgrim’s Pride Corporation v. Morris*,²⁷⁵ “[i]t is

²⁶⁸ W. VA. CONST. art. X, § 1 (emphasis added).

²⁶⁹ *Id.* (emphasis added).

²⁷⁰ BASTRESS, *supra* note 120, at 285.

²⁷¹ *Id.*

²⁷² *Id.* at 285–86 (citing *In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346 (1959)).

²⁷³ W. VA. CONST. art. X, § 1.

²⁷⁴ See BASTRESS, *supra* note 120, at 287.

²⁷⁵ 723 S.E.2d 642 (2011).

incumbent upon a person who claims his property is exempt from taxation to show that such property clearly falls within the terms of the exemption; and if any doubt arises as to the exemption, that doubt *must be resolved against the one claiming it.*²⁷⁶ The legislature, then, is empowered to exempt certain types of properties from taxation,²⁷⁷ but the judicial test for a qualified exemption is whether the property is “used for educational, literary, scientific, religious or charitable purposes” based upon primary and immediate—not secondary and remote—actual, physical “use” of the property.²⁷⁸

Here, the legal basis for property-tax exemption given to private corporations by way of a PILOT agreement is, at best, a legal fiction engineered to survive the mandate set forth in Article X.²⁷⁹ Private corporations cannot reasonably claim that they are using public property for a “charitable purpose” or in line with one of the narrow exemptions in Article X, Section 1.²⁸⁰

Reliance on Section 7-12-10 is somewhat misplaced, too; the “created exemption” within the meaning of the listed terms is found therein, and PILOTs do not seem to comport.²⁸¹ In order to work around the “equal and uniform” language, one may argue that because the PILOT property is “technically and legally” owned by the state or a political subdivision of the state, it falls under a statutory exemption from property tax.²⁸² If a government agency takes a freehold estate in the property, and the lease authorized gives the private corporation a leasehold estate in the property, then Article X, Section 1 is not violated under *In re Northview Services, Inc.*²⁸³ or *In re Kanawha Valley Bank.*²⁸⁴

However, employing a legal fiction to defeat a state law or result in illegality—or where it would result in the violation of any established legal rule—

²⁷⁶ See *id.* at Syl. Pt. 1 (emphasis added) (quoting Syl. Pt. 2, *In re Hillcrest Mem’l Gardens, Inc.*, 119 S.E.2d 753 (1961)). This general rule is also noted by Professor Bastress in his commentary on Article X. See BASTRESS, *supra* note 120, at 287.

²⁷⁷ See *Maplewood Cmty., Inc. v. Craig*, 607 S.E.2d 379, 386 n.22 (W. Va. 2004); BASTRESS, *supra* note 120, at 287.

²⁷⁸ See *State ex rel. Cook v. Rose*, 299 S.E.2d 3, 8 (1982); BASTRESS, *supra* note 120, at 287.

²⁷⁹ Black’s Law Dictionary defines a “legal fiction” as “believing or assuming something not true is true.” *Legal Fiction*, BLACK’S LAW DICTIONARY (9th ed. 2009).

²⁸⁰ W. VA. CONST. art. X, § 1.

²⁸¹ See *Cent. Realty Co. v. Martin*, 30 S.E.2d 720, 723–24 (W. Va. 1944) (noting that created exemptions must be within the meaning of the listed terms in Article X, Section 1).

²⁸² See W. VA. CODE ANN. § 11-3-9(a)(3) (West 2020).

²⁸³ *In re Northview Services, Inc.*, 398 S.E.2d 165 (W. Va. 1990) (“[A]ll property both real and personal shall be taxed except such property as the Legislature may exempt.”).

²⁸⁴ *In re Kanawha Valley Bank*, 109 S.E.2d 649, 672 (W. Va. 1959) (“The Legislature has the power and the duty to designate the manner in which the actual value of difference kinds or ‘species’ of property may be ascertained, but when such value has been ascertained, all species of property must be taxed equally in proportion to its value.”).

–is generally an avoided practice.²⁸⁵ Instead, under West Virginia Code Section 11-3-9(a), the common reason for granting a state property tax exemption is to further the public’s interests, not “for the purpose of evading taxation”²⁸⁶ or for creating an artificial façade that allows for a runaround on state-property tax valuations. Indeed, arguing that “leasehold” interests are taxed separately from “freehold” interests is an accurate statement of existing law, but with PILOTs, it is a distinction without a difference.

Further, some argue that West Virginia Code Section 7-12-10 permits the conveyance of real and personal property from the private business to the county or development authority, thereby evading Article X’s mandate. But, for example, like the plaintiff in *Jefferson Vision* argues, Rockwool’s proposed PILOT agreement with the JCDA does not provide the JCDA with an “indicia of ownership” over the actual use of the property. There, the plaintiff argued that

[t]he real and personal property is not “property of the authority.” In all aspects, it is the property of Rockwool. The JCDA does not have the ability to sell, otherwise lease or otherwise dispose of the real and personal property during the lease term. Rockwool (or its contractors) will have total control over the Project. The “rent” to be paid by Rockwool is a ruse because part of it is simply investment in the plant that will inure solely to Rockwool’s benefit, and the cash payments due each year, when combined with its PILOT payments, will still leave Rockwool with a lower amount in obligations to the county than it would have if it paid its equal and uniform share of property taxes. Nor will the county have any property when the lease expires. The one right the county did obtain under the PILOT is the right, in case of Rockwool’s default on the PILOT payments, to compel Rockwool’s repurchase of the property and its submission to ad valorem tax assessments. That right, of course, simply reinforces the fact that it really is Rockwool who owns the property.²⁸⁷

Applying Article X of the West Virginia Constitution to *all* PILOT agreements, if the phrase “equal and uniform” is more than just a surplusage

²⁸⁵ Arguably, the technical transfer of property from a county or economic development authority provided for in the text of a PILOT agreement cannot excuse the private corporation from state property taxation. Besides, it is well-established that West Virginia does not employ fictional or technical maneuvers to enable evasions of constitutional requirements. *See, e.g., State ex rel Marockie v. Wagoner I*, 438 S.E.2d 810 (W. Va. 1993); *Winkler v. Sch. Bldg. Auth.*, 434 S.E.2d 420 (W. Va. 1993); *Robertson v. Hatcher*, 135 S.E.2d 675 (W. Va. 1964); *Heck’s Discount Ctrs. v. Winters*, 132 S.E.2d 374 (W. Va. 1963).

²⁸⁶ *See* W. VA. CODE ANN. § 11-3-9(b).

²⁸⁷ *See* Plaintiff’s Response to Defendant’s Motion to Dismiss, *Jefferson Cnty. Vision, Inc. v. Jefferson Cnty. Dev. Auth.*, No. CC-19-2018-C-171, (Jefferson Cnty. Cir. Ct. 2019).

added by the framers of the State Constitution, it is then a requirement that all state taxation must be fair, just, and uniform. This is in line with the argument made by the plaintiffs in *Jefferson Vision*. In effect, by “contracting away” *ad valorem* property tax assessment through a title-swap land agreement, the state and political subdivisions provide tax-exempt status to a lessee that would otherwise pay full property taxation. While the corporation receives the property-tax exemption, similarly situated corporate entities who did not have the opportunity to enter into a PILOT agreement are still paying the full property-tax rate.

A simple hypothetical explains the underlying “fairness” problem with this tax scheme. Imagine that you are a new homeowner who purchased a house in County A for \$300,000 in 2000. Right next to your new house is an empty, vacant lot. In 2010, a private party approached the County A Commission about entering into a PILOT agreement for the lot—they will construct a \$300,000 home (with almost identical features to your new home), and in exchange, once the home is completed, County A will purchase the home for \$1, thereby becoming the legal owner of the property. While you are paying the full, assessed value of state-property taxes, your new “PILOT neighbor” pays nothing in state property tax. Rather, over a 30-year period, they will make monthly “lease” payments to County A, in an amount significantly reduced from what they would pay in state *ad valorem* property taxes.

From the illustration above, the property tax exemptions associated with PILOT agreements also has a secondary—and significant—impact on a county’s revenue streams and tax base. For example, in a county that forgoes the revenue associated with a high-value commercial development project, school districts and public works are arguably shortchanged.²⁸⁸ As Justice Neely wrote in his *Winkler* concurrence, “[p]olitical leaders become wildly popular by spending money and wildly unpopular by taxing.”²⁸⁹

In the alternative, it has been argued that without PILOT agreements, businesses would elect not to locate in West Virginia, and therefore, job creation is in the public’s best interest. While a noble argument at its core, it rests upon a mistaken belief that there are no other reasons and factors that a company considers when undertaking an economic development project in a particular state.²⁹⁰ Of course, mitigating state–property tax liability may be a factor—and a

²⁸⁸ Alana Semuels, *Good School, Rich School; Bad School, Poor School: The Inequality at the Heart of America’s Education System*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/>.

²⁸⁹ See *Winkler*, 434 S.E.2d at 438–39 (Neely, J., concurring).

²⁹⁰ See Lawrence Moretti, *Decision-Makers, Drivers, and Inner Workings of the Location Selection Process*, AREA DEV. (Dec. 2014), <https://www.areadevelopment.com/corporate-site-selection-factors/December-2014/location-investments-and-achieving-company-goals-2626551.shtml> (noting that “[a]t the C-suite level, location strategy and site selection decisions

very significant factor—that a company considers when making business decisions. But, it is certainly not the *only* factor. When used subjectively, PILOT agreements may have an adverse incentive and *disserve* the public’s interest; if Company A receives an offer to enter into a PILOT agreement with County B and Companies C and D are not extended the same incentive, Companies C and D may choose to locate their facilities in a different state. “Equal and uniform” becomes mere subterfuge. And what happens when laws are used to ruse over taxpaying entities? When treated unfairly, there is always the real possibility that businesses will pack up shop in West Virginia.²⁹¹

Further, unlike a TIF district, which is functionally designed to build public infrastructure that supports private investment in economic development areas,²⁹² PILOT agreements are made available—on a case-by-case and, admittedly, subjective basis—to select companies or public utilities that *need* economic incentives to locate their business operations in West Virginia. While TIF incentives are mostly associated with a designated TIF district (a geographic area)—and arguably any private entity can hypothetically take advantage of the TIF if it obtains property and invests in said TIF district—a PILOT agreement is made exclusively between a private corporation and a county government or political subdivision. This exclusivity associated with a PILOT agreement

are: long-term investment decisions; trade-offs of risk, cost, and opportunity; and . . . about value-add to the bottom line”).

²⁹¹ Take, for instance, the issue surrounding Statoil ASA and its lawsuit against Marshall County, West Virginia. See Jamison Cocklin, *Statoil Sues West Virginia County over Tax Overpayment, Refund*, NAT. GAS INTEL. (Aug. 8, 2016), <https://www.naturalgasintel.com/articles/107331-statoil-sues-west-virginia-county-over-tax-overpayment-refund>. According to Mr. Cocklin’s reporting, “Statoil ASA has filed a lawsuit against Marshall County, WV, to recover about \$350,000 it overpaid for property taxes last year.” *Id.* Furthermore, “[t]he company says the overpayment resulted from a clerical error when it used production estimates instead of actual volumes to calculate its 2015 payment.” *Id.* On top of this mistake, even though state law permitted the remittance of overpaid taxes back to Statoil, the Marshall County Commission voted 2–1 not to refund the overpayment because it was made “negligently.” *Id.* As a result, ultimately, “Statoil agreed to sell all of its operated properties in the state to EQT Corp. for \$407 million.” *Id.*

²⁹² While this Note distinguished a traditional TIF district from specific examples of traditional PILOTs (e.g., Moundsville Power, Longview Power, Gestamp, etc.), the possibility still exists that a TIF district could be modified to favor one corporation or private entity over another and, in effect, create the same fundamental issues being discussed in this Note with PILOT projects. For example, if a county government creates a TIF district for one parcel of property, the beneficiary would be the private business who has exclusive use of that property. Or, the TIF could be created, and the TIF funds—e.g., from the redirected sales tax collected in the TIF district—could be used to construct commercial buildings; those parcels could then be leased to a private corporation that would not have to pay property tax because the parcel is technically and legally owned by the county government or a political subdivision of the county. See Brian Canterbury, *Cabela’s Brings Big Bucks to Wheeling Economy*, INTELLIGENCER: WHEELING NEWS-REG. (Aug. 11, 2014), <https://wvpress.org/copydesk/insight/cabelas-brings-big-bucks-wheeling-economy/> (“The sales tax TIF, which redirected all sales tax from Cabela’s back to the county to pay for construction of the store, was set to last for 10 years. It was paid off in four.”).

weighs against these types of agreements meeting the strict “equal and uniform” mandate of Article X. Ultimately, these are questions courts must address.

B. Statutory Analysis

Second, PILOT agreements raise the question of whether the West Virginia Code, when read *in pari materia*, can be reconciled to permit county governments to enter into private-sector PILOT agreements in the first place.²⁹³ In light of the passage of the Tax Increment Financing Act of 2002 and West Virginia Code Section 7-12-10, which counties rely on to create and enter into PILOT agreements between county governments and private corporations,²⁹⁴

²⁹³ For example, consider Moundsville Power.

²⁹⁴ Article X, Section 8a of the West Virginia Constitution was added by a 2002 amendment to validate tax increment financing schemes for local governments. *See* BASTRESS, *supra* note 120, at 308. It states:

10-8a. Issuance of bonds or other obligations payable from property taxes on increases in value due to economic development or redevelopment projects in counties and municipalities.

Notwithstanding any other provision of this Constitution to the contrary, the Legislature by general law may authorize the issuance of revenue bonds or other obligations by counties and municipalities to assist in financing qualified economic development or redevelopment projects that benefit public health, welfare and safety subject to conditions, restrictions or limitations as the Legislature may prescribe by general law.

The bonds or other obligations are payable from property tax revenues generated by the increases in value of property located within the development or redevelopment project area or district due to capital investment in the project. The Legislature shall prescribe by general law the manner in which these increases are determined.

The term for any bonds or other obligations issued may not exceed thirty tax years. The bonds or other obligations may not be deemed to be general obligations of the issuing county or municipality or of this state. The bonds or other obligations may provide for the pledge of any other funds as the owner of the improvements may by contract or otherwise be required to pay. Upon payment in full of the bonds, the increased tax revenues shall revert to the levying bodies authorized under the provisions of this Constitution to receive the revenues. The bonds or other obligations may not be paid from excess levy, bond levy or other special levy revenues.

W. VA. CONST. art. X, § 8a. Further, Professor Bastress notes that “[t]he Amendment was necessary to override the [West Virginia] supreme court’s decision in *State ex rel. Cty. Commission of Boone Cty. v. Cooke* (1996), which had found that the State’s [previous] TIF statute violated section 8.” BASTRESS, *supra* note 120, at 308 (alteration added); *State ex rel. Cnty. Comm’n of Boone Cnty. v. Cooke*, 475 S.E.2d 483 (W. Va. 1996) (McHugh, C.J.) (“[W]e hold that the issuance of tax increment obligations pursuant to W. Va. Code, 7–11B–1, *et seq.* [1995], The Tax Increment Financing Act, is not in accordance with W. VA. CONST. art. X, § 8 because W. Va. Code, 7–11B–1, *et seq.* [1995] does not provide ‘for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article [W. VA. CONST. art. X, § 1], separate and apart from and in addition to all other taxes for all other purposes’ in order to pay the principal of and interest on such tax increment obligations and is, therefore, unconstitutional.”). And the third paragraph of Section 8a

Section 7-1-3k of West Virginia Code—on its face—still dictates a contrary rule that county-owned property can only be leased to an NFP:

The county commission of each county is authorized to lease, rent or to permit the use of county-owned buildings, lands and other properties or any portion thereof by *nonprofit organizations*. Authorized uses pursuant to this section shall include the granting of meeting places, service outlets and operational headquarters for organizations established within the county.²⁹⁵

What does this mean for PILOT agreements?²⁹⁶ At first blush, this section of the West Virginia Code suggests that PILOT payments must also be *equal* to the amount of *ad valorem* property taxes had the lessee owned the property. But under Section 7-12-10, if the “economic development authority” owns the property, “it is exempt from the payment of any taxes or fees to the state.”²⁹⁷ So, proponents would argue that as long as the local development authority owns the land, then it is not technically “county-owned land.”

Creative and persuasive, this argument flirts with passing legal muster; county governments are seemingly barred from leasing “county-owned land” to any organization except an NFP organization. For example, consider the newly announced PILOT agreement between Monongalia County and Longview Power. One recent estimate projects that the “tax abatement,” or the amount discounted in property taxes by the state vis-à-vis the county’s state property tax exemption, will be \$217 million *lower* than what the county would have received had there been no PILOT agreement.²⁹⁸ Likewise, for the proposed—but

sets forth some limitations, including a 30-year time frame for bonds and that the issuing government may require contract pledges from the developer of the funded project. *See* BASTRESS, *supra* note 120, at 308.

²⁹⁵ *See* W. VA. CODE ANN. § 7-1-3k (West 2020) (emphasis added).

²⁹⁶ Awkward and perverse in its relationship to the above-mentioned code section, under the TIF Act, for publicly-owned property located within a TIF “development or redevelopment district,” the county commission or municipality that created said development or redevelopment district can subsequently collect payments from the private business or public utility and deposit said payments into the tax increment financing fund of the TIF district. Furthermore, a critically important element of this scheme is that the TIF lease payments must be “*equal* to the amount of *ad valorem* property taxes that *would have been* levied against the assessed value of the property if it was owned by the lessee rather than a tax exempt entity.” *Id.* § 7-11b-18 (emphasis added).

²⁹⁷ *See id.* § 7-12-10.

²⁹⁸ *See* Boettner, *supra* note 139. Note that Longview Power also entered into a PILOT agreement with Monongalia County in 2004—that agreement provided Longview with a \$457 million abatement. *Id.* And, as Boettner notes, given the number of jobs for the new Longview project—794 jobs over a 30-year period—“the cost of the property tax abatement amounts to an estimated \$273,000 per job created.” *Id.* This cost per job is nearly 11 times the amount available under the state’s Economic Opportunity Tax Credit, which currently provides \$25,000 per job created. *Id.*

unrealized—public utility PILOT project in Marshall County, the forgone tax revenue from Moundsville Power was estimated to eclipse \$181 million.²⁹⁹ All the while, even though it is the Monongalia County Commission who votes on approving the tax exemption for Longview, the local development authority is still the “owner.” This appears to be another legal fiction that eludes Article X’s mandate of “equal and uniform.”

Additionally, another section of West Virginia Code seems to throw a wrench into this analysis. Under the West Virginia Land Bank Program,³⁰⁰ the West Virginia Land Stewardship Corporation can engage in a similar practice, but do note the following:

The property of the corporation shall be exempt from ad valorem property taxation. Property owned and leased by the corporation as lessor to a commercial lessee or an industrial lessee is hereby declared to be tax exempt and held by the corporation for a public purpose. *A payment in lieu of taxes, payable by the lessee, shall be established for any property so leased, in an amount not less than the property tax otherwise payable on the property.* The lessee’s leasehold interest therein is hereby declared to be a tax exempt leasehold interest held for a public purpose so long as the payment in lieu of taxes is timely paid. Payments made to any county commission, county school board or municipality in lieu of tax pursuant to such agreement shall be distributed as if the payments resulted from ad valorem property taxation.³⁰¹

While the Land Stewardship Corporation can enter into PILOT agreements, like the TIF statute’s decree for political subdivisions of the state, the payment in lieu must be in an amount “not less than the property tax otherwise payable on the property.”³⁰²

Proponents of PILOT agreements argue that if the legislature has already authorized, by statute, political subdivisions to form these types of contracts, as a matter of public policy, they are inherently in the “public’s best interest.” This argument may also rest on the proposition that the West Virginia Economic

²⁹⁹ See Junkins, *supra* note 10.

³⁰⁰ See W. VA. CODE ANN. § 31-21-11 (West 2020) (“Under this program, the corporation is authorized to acquire properties, hold title and prepare them for future use.”). Moreover, “The objective of the land bank program is to assist state and local government efforts for economic development by accepting formerly used or developable properties and preparing the properties so they can be conveyed to other parties to locate or expand businesses and create or retain jobs in this state.” *Id.* “The corporation may acquire by gift, devise, transfer, exchange, . . . purchase or otherwise on terms and conditions and in a manner the corporation considers proper, real or personal property or rights or interests in real or personal property.” *Id.*

³⁰¹ *Id.* § 31-21-15.

³⁰² *Id.*

Development Act permits the EDA to create PILOTs.³⁰³ West Virginia Code Section 31-15-6(ee) states that the EDA may

sell, license, lease, mortgage, assign, pledge or donate its property, both real and personal, or any right or interest therein to another or authorize the possession, occupancy or use of such property or any right or interest therein by another, in such manner and upon such terms as it deems appropriate.³⁰⁴

Because the alleged statutory authority was designed to help impoverished counties and rural areas, proponents contend these economic development tools serve the purpose of increasing employment and economic activity in West Virginia. The EDA's authorization to enter into PILOTs seems to be clear and straightforward; Section 31-15-6(ee) says as much.

But what about county governments and economic development authorities that enter into PILOT agreements? The result is not as clear. Admittedly, when read *in pari materia*, the specificity of authorizing statutes for PILOT agreements does seemingly trump the general statutory prohibition that county governments cannot lease land to for-profit corporations. But if that is the prerogative and choice of the West Virginia Legislature, then should the legislature amend the Code to extinguish any lingering statutory confusion? That would be a sensible option because the aforementioned code sections refer to property tax parity. And it seems as if "parity in code" is not necessarily translating into "parity in practice" in terms of the amount collected in annual payments from PILOTs. Fortunately (or unfortunately), West Virginia is not alone when it comes to tax abatement disparities between assessed value and actual, collected revenue. Note the following prominent tax abatement examples from Ohio and Pennsylvania as discussed by Mr. Boettner:

[T]he Caithness Moxie Freedom Generating Station in Salem Township in Luzerne County Pennsylvania, which is a new \$1 billion 1,000-megawatt gas-fired power plant that went online in 2018, had an assessed value of \$42.5 million and a total property tax bill of just \$752,000. Meanwhile, a new 940-megawatt gas-fired power plant in Westmoreland County Pennsylvania that had a direct construction cost of around \$500 million with 24 full-time employees was assessed at just \$1.9 million in 2019 with a total property tax bill of just \$179,000. The Lordstown Energy Center operates a 940-megawatt gas-fired power plant in Ohio that went online in 2018 and received

³⁰³ *Id.* § 31-15-1 (West 2020).

³⁰⁴ *Id.* § 31-15-6(ee).

a 100 percent tax abatement for 15 years while having to make annual payments that total \$19 million over 15 years.³⁰⁵

Tax abatements—just like PILOT agreements—reduce state and local property tax revenues.³⁰⁶ That is the logical and rational nature of the incentive; to provide the discount (e.g., reduction or complete tax discount) in order to secure the economic investment, even despite the argument that race-to-the-bottom economic incentivizing, is “worse than useless.”³⁰⁷

West Virginia’s PILOT agreements seem to take the concept of “economic incentive” to the next level—maintaining government ownership over private, corporate assets. Yes, the Author of this Note is well aware of the fact that West Virginia has legitimate government interests in promoting commerce within its borders. The Supreme Court of the United States said as much in articulating that the Commerce Clause “does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry,” nor does it prevent a state from “compet[ing] with other States for a share of interstate commerce” so long as “no State[] discriminatorily tax[es] the products manufactured or the business operations performed in any other State.”³⁰⁸ But, the question we must all ask is both a legal and normative one: are PILOT agreements *fair* or *discriminatory* in nature?

V. SOLUTIONS TO ADDRESS PILOT AGREEMENTS IN WEST VIRGINIA

In objective terms, the philosophy behind PILOT agreements ignites a thought-provoking economic policy debate for lawmakers, legal scholars, practitioners, community leaders, industry leaders, and businesses. At its core, this claimed legal authority—and similar laws found in other jurisdictions—brings up the fundamental question of public choice theory: what type of economy should West Virginia be *for*? In this Part, this Note will not offer up a firebrand’s manifesto. Rather, this Part disseminates important information to the scholar and citizen alike by outlining policy, legal, and economic solutions—or alternatives—for the contemporary PILOT agreement.

PILOT agreements are both praised and criticized, and although they are a well-established tool aimed at encouraging business and economic

³⁰⁵ See Boettner, *supra* note 139.

³⁰⁶ See Mike Maciag, *Analysis: Where Governments Are Losing the Most, Revenues to Tax Abatements*, GOVERNING (Apr. 26, 2018), <https://www.governing.com/gov-data/finance/local-tax-incentives-subsidies-income-inequality-report.html>.

³⁰⁷ See Richard Florida, *Handing Out Tax Breaks to Businesses Is Worse Than Useless*, CITYLAB (Mar. 7, 2017), <https://www.citylab.com/life/2017/03/business-tax-incentives-waste/518754/>.

³⁰⁸ See *Boston Stock Exch. v. State Tax Comm’n*, 429 U.S. 318, 336–37 (1977); see also *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272 (1984) (noting that the federal Commerce Clause “limits the manner in which States may legitimately compete for interstate trade”).

development in West Virginia—and in states across the Country—they are a relatively unfamiliar concept to the general public (who are, by the way, the true “owners” of PILOT agreements).³⁰⁹ Given normative values such as transparency and accountability, this point gives us something else to think about; “it is unknown how many PILOT agreements and property tax abatements exist in West Virginia and what their impact is on our revenue systems or economic development.”³¹⁰ At a very minimum, this Note adds information and solutions to the repository about these powerful economic development tools known as PILOT agreements.

First, one simple and important way for policymakers to fix the explicit and implicit disparities between the West Virginia Constitution and State Code PILOT provisions would be to do a wholesale overhaul and reform of the existing policy. Because of the “equal and uniform” mandate of Article X, this fix would need to include a proposed constitutional amendment expressly authorizing the state and its political subdivisions to enter into PILOT agreements with for-profit corporations. Furthermore, State Code sections pertaining to PILOTs should be reworded and rephrased, especially because the West Virginia Code expressly prohibits county governments from leasing county-owned land—e.g., land involved in a PILOT agreement—to any entity *except* NFPs. This should ensure that public lands are used for public or charitable purposes, but apparently, it does not. Instead, when a private corporation leases public land, the land is not being utilized for a true “public purpose.”³¹¹ And even with a constitutional amendment to supplement Article X, *Cuno* still leaves us with another looming question: are PILOT agreements—in the specific context of West Virginia’s law—constitutional under the United States Constitution’s Dormant Commerce Clause? Time will best answer this question.

Second, West Virginia’s lawmakers could impose a “possessory interest tax” on leasehold interests under a PILOT agreement. This would arguably be in line with precedent established by the Supreme Court of Appeals in *Musick v. University Park at Evansdale, L.L.C.*,³¹² and *Great A&P Tea Company, Inc. v. Davis*.³¹³ Naturally, when a private company enters into a PILOT agreement with a county government or political subdivision of the county, it maintains a “possessory [leasehold] interest”³¹⁴ in the property. The government owner,

³⁰⁹ The Author is aware of no other legal or academic scholarship that touches upon this subject in the context of West Virginia’s PILOT laws.

³¹⁰ See Boettner, *supra* note 139.

³¹¹ Although, admittedly, one can make a reasonable and compelling argument that job creation and economic development benefits the public interest.

³¹² 820 S.E.2d 901 (W. Va. 2018).

³¹³ 278 S.E.2d 352, 355 (W. Va. 1981) (“[A] separate leasehold is taxable if it has separate and independent value from the free hold.”).

³¹⁴ “In real estate, the right of a person to occupy and/or exercise control over a particular plot of land; distinguished from an ownership interest. For example, a tenant with a long-term lease has

however, maintains the freehold interest in the property. Because the state, county, and local governments are immune from state-property tax, so is the lessee's possessory interest. If we, as a state, make the policy determination that PILOT agreements are a scheme we are willing to accept (and amend our state constitution to permit), then so be it. But as long as the law is what it is, a possessory-interest tax on the leasehold interest would ensure that revenues are not unfairly reduced at the expense of taxpayers. Set at a rate equal to the property tax, this would ensure that the "equal and uniform" language of Article X is given its full force and effect, similar to the language set forth in code under the TIF statute and the West Virginia Land Bank statute.

Third, some argue "the West Virginia Development Office and county economic development authorities have few tools available to help them attract business investment,"³¹⁵ and consequentially, PILOTs are in effect a necessary evil. Proponents of PILOT agreements have even suggested that if the State eliminates the Business Inventory Tax,³¹⁶ then there will no longer be a "competitive need" for PILOT agreements.³¹⁷ If an inventory tax is indeed "anti-competitive," absent the repeal of the inventory tax, proponents would say that PILOT agreements "are a tool that West Virginia must keep."³¹⁸ What is said of the alleged anti-competitive inventory tax can arguably be said of PILOT agreements. When the government picks winners and losers³¹⁹ by way of contracting away property tax liability, competition is stymied and stifled.³²⁰

a possessory interest, but not an ownership interest." See *Possessory Interest*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/possessory_interest (last visited Sept. 7, 2020).

³¹⁵ See Rebecca McPhail, Opinion, *Anti-Growth Mentality Hurts West Virginia*, CHARLESTON GAZETTE-MAIL (Jan. 11, 2019), https://www.wvgazette.com/opinion/rebecca-mcphail-anti-growth-mentality-hurts-west-virginia-daily-mail/article_365e2d7e-0a1d-5963-a474-175ed780d92a.html.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ See Orin J. H. Johnson, Opinion, *Picking Economic Winners and Losers Is Dumb, No Matter Which Party Tries To Do It*, NEV. INDEP. (Dec. 22, 2019), <https://thenevadaindependent.com/article/picking-economic-winners-and-losers-is-dumb-no-matter-which-party-tries-to-do-it> ("But even with the best of intentions and the most noble of bureaucrats, you still have certain companies being treated differently than others, based on who can best appease a government committee. Even if the outcome is marginally 'better' from a cost-benefit standpoint, you still have the risks (or the unseemly appearance) of corruption, and the perception (and perhaps the reality) that the politically well-connected are treated differently than another company which is otherwise similarly situated.").

³²⁰ In fact, West Virginia's competitive edge was recently on display when Virgin Hyperloop announced its decision to locate its certification facility in West Virginia. While the underlying agreement includes a partnership between Virgin Hyperloop and the West Virginia University Foundation, no government-backed PILOT has been reported so far. See Eric M. Johnson & Joey Roulette, *Exclusive: Virgin Hyperloop Picks West Virginia To Test High-Speed Transport System*, REUTERS (Oct. 8, 2020, 11:07 PM), <https://www.reuters.com/article/virgin-hyperloop-west>

Fourth—and perhaps most immediately—policy analysts have recently suggested that if PILOT laws stay on the books, then the state must take recordkeeping, transparency, and accountability surrounding PILOT agreements seriously. Transparency, in this context, is significant for a slew of reasons. To begin, transparency allows for an accurate accounting of the amount of tax revenue that the state and county governments forgo in a fiscal year. Second, because the legislature’s intent of PILOT agreements was to help economically distressed and rural areas, having a full list of all the active PILOT agreements would help to ensure that this economic development tool is in fact being used to serve underdeveloped and rural areas. For what it is worth, most well-known PILOT agreements are in the more prosperous counties, such as Kanawha, Putnam, Berkeley, Jefferson, Harrison, and Monongalia. Third, while West Virginia has made recent efforts to modernize transparency and accountability in government,³²¹ PILOT agreements are ripe for much-needed transparency in terms of recordkeeping, recording, tracking, and forgone revenue estimates.

Lackluster transparency regarding PILOT agreements and tax exemptions is well-documented,³²² and West Virginia has faced its own share of controversy in this area.³²³ For example, West Virginia Code Section 5B-2I-8 exempts from Freedom of Information Act disclosure “[a]ny documentary material, data or other writing made or received by the West Virginia Tourism Office, the West Virginia Development Office or the Tourism Commission, for the purpose of furnishing assistance to a new or existing business is exempt.”³²⁴ This does not exempt “any agreement entered into or signed by the . . . West Virginia Development Office which obligates public funds is subject to inspection and copying . . . as of the date the agreement is entered into, signed or

virginia/exclusive-virgin-hyperloop-picks-west-virginia-to-test-high-speed-transport-system-idUSL1N2GZ11E.

³²¹ *New Website Gives W. Va. Residents Place To Check on Tax Dollar Spending*, WCHS (Feb. 21, 2020), <https://wchstv.com/news/local/new-website-gives-wva-residents-place-to-check-on-tax-dollar-spending>.

³²² Zach Schiller, *Local Tax Abatement in Ohio: A Flash of Transparency*, POL’Y MATTERS OHIO (Jan. 18, 2018), <https://www.policymattersohio.org/research-policy/quality-ohio/revenue-budget/tax-policy/local-tax-abatement-in-ohio-a-flash-of-transparency>; *see also* Cara Griffith, *Could There Finally Be Transparency About Tax Abatements?*, FORBES (May 15, 2015), <https://www.forbes.com/sites/taxanalysts/2015/05/15/could-there-finally-be-transparency-about-tax-abatements/#988d6dab8ea4>.

³²³ *Daily Gazette Co. v. W. Va. Dev. Off.*, 482 S.E.2d 180, 192 (W. Va. 1996); *see also* Patrick C. McGinley & Suzanne M. Weise, *West Virginia Open Government Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/open-government-guide/west-virginia/#h-economic-development-records> (last visited Sept. 7, 2020); *cf.* W. VA. CODE ANN. § 5B-2-1 (West 2020).

³²⁴ W. VA. CODE ANN. § 5B-2I-8.

otherwise made public.”³²⁵ Professors Patrick McGinley³²⁶ and Suzanne Weise³²⁷ suitably note that

[i]n 1997, a paragraph was inserted into a bill amending an economic development section of the Code (W. Va. Code § 5B-2-1). That amendment essentially barred public access to documents made or received by a “public body, whose primary responsibility is economic development, for the purpose of furnishing assistance to a new or existing business” and effectively concealed from public scrutiny the bulk of records pertaining to state economic development activities.³²⁸

Even in light of this reluctance to disclose PILOT-related information to the taxpayers, other jurisdictions have taken reasonable steps to make this type of information more accessible. Take, for instance, the standard used in Government Accounting Standard Board (“GASB”) 77.³²⁹ The standard articulates the following:

The objective of this Statement is to provide financial statement users with essential information about the nature and magnitude of the reduction in tax revenues through tax abatement programs in order to better assess (a) whether current-year revenues were sufficient to pay for current-year services, (b) compliance with finance-related legal or contractual requirements, (c) where a government’s financial resources come from and how it uses them, and (d) financial position and economic condition and how they have changed over time.³³⁰

³²⁵ *Id.*

³²⁶ Patrick C. McGinley is the Charles H. Haden II Professor of Law at the West Virginia University College of Law. Professor McGinley has taught Land Use Planning, Administrative Law, Environmental Law, Appellate Advocacy, and Environmental Justice. His scholarship focuses on environmental law, natural resources, access to public information, and administrative law. *See, e.g.*, Patrick C. McGinley, *Separation of Powers, State Constitutions, and the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 722 (1997); Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 UNIV. OR. L. REV. 409 (1992).

³²⁷ Suzanne Weise is a Teaching Associate Professor and Director of the Child & Family Advocacy Law Clinic at the West Virginia University College of Law.

³²⁸ *See McGinley & Weise, supra note 323.*

³²⁹ *See Statement No. 77 of the Governmental Accounting Standards Board: Tax Abatement Disclosures*, GOV’T. ACCT. STANDARD BD., https://www.gasb.org/jsp/GASB/Document_C/DocumentPage?cid=1176166283745&acceptedDisclaimer=true (last visited Sept. 7, 2020).

³³⁰ *Id.*

Adopting GASB 77 accounting would provide the public with information about the amount of tax abatements given by state and local governments.³³¹ While West Virginia does not currently comply with GASB 77,³³² it has been recommended that implementing GASB 77 accounting standards would increase transparency and accountability with respect to the numerous—and unknown amount—of PILOT agreements currently in effect. As Mr. Boettner points out, “[i]n the executive state budget . . . there is a section on the estimated forgone revenue from economic development tax expenditures . . . but according to the budget report, *no accurate estimate is available for county-imposed payment in lieu of tax (PILOT) arrangements.*”³³³

Deputy Revenue Secretary Mark Muchow has confirmed this claim; the Revenue Department does not track how many PILOT agreements there are in the state.³³⁴ West Virginia should take note of the efforts in Shelby County, Tennessee, a place where PILOT accountability and transparency is prioritized,³³⁵ but still remains criticized.³³⁶

Fifth and finally, the Author does not wish to cause panic or fear amongst current beneficiaries of PILOT agreements. If a court ultimately concludes that PILOT agreements are unconstitutional under Article X of the West Virginia Constitution, the West Virginia Code, or the Dormant Commerce Clause of the United States Constitution, as a matter of fairness, the state’s word must still mean something. Just like in other sticky legal situations, if this is in fact the decided and final outcome, existing PILOT agreements should stay in effect until their terms expire, and the new rule should apply prospectively.³³⁷

³³¹ B. Anthony Billings, Jeanette A. Boles & Kyungjin Kim, *Tax Abatements Under GASB Statement 77 Exploring the Effects of the New Disclosure Rules*, CPA J. (May 2018), <https://www.cpajournal.com/2018/05/02/tax-abatements-under-gasb-statement-77/>.

³³² See Scott Klinger, *West Virginia and GASB Statement No. 77*, GOOD JOBS FIRST, <https://www.goodjobsfirst.org/sites/default/files/docs/pdfs/WV%209-17.pdf> (last visited Sept. 7, 2020).

³³³ See Boettner, *supra* note 139 (emphasis added) (citation omitted).

³³⁴ See *Pilot Program Debated*, *supra* note 1.

³³⁵ Regina Morrison Newman, *PILOT Reports*, SHELBY CNTY. TR., <https://www.shelbycountytrustee.com/155/PILOT-Reports> (last visited Sept. 7, 2020); *EDGE Programs*, SHELBY CNTY., <http://www.growth-engine.org/business-assistance/tax-incentives/> (last visited Sept. 7, 2020).

³³⁶ Kevin McKenzie, *Are PILOTs a Necessary Evil for Luring Jobs to Tennessee?*, MEMPHIS COM. APPEAL (Sept. 17, 2017), <https://www.commercialappeal.com/story/news/2017/09/17/tennessee-jobs-payment-in-lieu-of-taxes/533871001/>.

³³⁷ See *Winkler v. Sch. Bldg. Auth.*, 434 S.E.2d 420, 420 (W. Va. 1993); see also *Kincaid v. Mangum*, 432 S.E.2d 74 (W. Va. 1993) (noting that the use of an omnibus bill to authorize legislative rules violates the State Constitution’s one-object provision, but also noting that the holding would be given only prospective effect).

VI. CONCLUSION

West Virginia has a powerful tax incentive by allowing county, local, and state governments to enter into PILOT agreements with private, for-profit corporations. Because political subdivisions are exempt from property tax, the benefits to private corporations that are associated with the resulting tax abatement—and in some cases, no state-property taxes at all—are tremendous. PILOT agreements are indeed a fascinating creation. This Note has added to the repository of information available about PILOT agreements, but the underlying philosophy behind PILOT agreements in West Virginia is open for consideration and judicial review. The jury may still be out on PILOT agreements, but this tempest is ever-present and looming on the horizon.

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