THE STATE OF SOUTH CAROLINA

OFFICE OF THE ATTORNEY GENERAL

COLUMBIA

OPINION NO. _____ September 11, 1989

SUBJECT: Taxation and Revenue - The Payment In Lieu Of Taxes For Industrial Development Projects With An Initial Cost In Excess Of $85,000,000.

SYLLABI: 1. The millage rate to be used to calculate the amount of the in lieu of payments as provided by Section 4-29-67(A)(1) cannot be less than the millage rate applicable at the time of the execution of the agreement.

2(a). Under the agreement, the period set forth in Section 4-29-67(A)(1) for the annual payments would begin to run when industrial development is complete for the use intended.

2(b) and (c). The statute does not authorize a modification of the agreement to later add additional investments or to extend the time set forth in the qualifying agreement.

TO: Robert C. Childs, Esq.
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FROM: Joe L. Allen, Jr.
Chief Deputy Attorney General

QUESTIONS:

1. Is the millage rate floor referred to in Section 4-29-67(2)(a) the millage rate existing at the time of the inducement agreement or the execution of the lease agreement?

2(a). Does the 20-year period referred to in Section 4-29-67(B)(2) for the payment of a fee in lieu of taxes commence from the date on which the lease agreement is effective?

2(b). If so, does a modification of the lease agreement in a subsequent tax year for the purpose of adding additional

property to the lease, though not in an amount equalling an additional $85,000,000 but within the amount of the original commitment (i.e., $400,000,000), act to extend the term of the payment of the fee in lieu of taxes for the additional property for a period not to exceed 20 years from the lease modification date?

2(c). If the term of the payment of the fee in lieu of taxes is extended, does the millage rate previously negotiated for the initial lease agreement remain unchanged for the purposes of the lease modification agreement?

APPLICABLE LAW: Act 487, Acts of 1988, Now codified as Section 4-29-67, Code of Laws of South Carolina, 1976.

DISCUSSION (Question 1):

We do not find any language in the Act that relates to an "inducement agreement." For purposes of this opinion, we construe this type agreement to be in the nature of an offer. The statute refers to "the lease or lease purchase agreement" and provides certain conditions the agreement must contain. This is the only agreement set forth in the Act and consequently is the agreement under which the millage rate is to be determined.[1]

The statute further provides that the millage rate cannot be "less than the rate applicable at the time of the execution of the agreement."

CONCLUSION (Question 1):

The millage rate to be used to calculate the amount of the in lieu of payments as provided by Section 4-29-67(A)(1) cannot be less than the millage rate applicable at the time of the execution of the agreement.

DISCUSSION (Question 2(a)):

The statute, Section 4-29-67(A), provides that the lease or lease purchase agreement must contain a provision for a payment in lieu of taxes as follows:

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[1]Under settled rules of construction, the language of the statute has been given its ordinary meaning. For cases see 17 S.C.D., Statutes, Key 188.

> "(1) a predetermined annual payment for not more than twenty years . . ."

It must be noted that Section 12-37-670 provides in part that "no new structure shall be listed or assessed until it is completed and fit for the use for which it is intended." Under this provision, new structures are not subject to taxation until completed.[2]

Again applying settled rules of construction[3] and giving effect to each provision of the Act and of other related statutes, the twenty years would commence to run when the industrial development or any phase thereof is first completed for the use intended.[4] It would be illogical to conclude that the in lieu of tax payments would begin where there is no tax due.

CONCLUSION (Question 2(a)):

Under the agreement, the period set forth in Section 4-29-67(A)(1) for the annual payments would begin to run when the industrial development is complete for the use intended.

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[2]This has been the longstanding administrative interpretation. The appeal of a case from Charleston Dockside Condominiums, plaintiff, was dismissed under Supreme Court Rule 23. The lower court's holding was that the condominiums had to be complete for human occupancy before the same were taxable. The administrative interpretation is long standing and entitled to great weight. Etiwan Fertilizer Co. v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E.2d 682.

[3]For cases see 17 S.C.D., Statutes, Key 184, Policy and Purpose of Act.

[4]This, however, does not negate the tax that would be due on the land for tax periods prior to the completion for the use intended. The same would be due and payable in those tax years in which the development was under construction as otherwise provided.

DISCUSSION (Questions 2(b) and (c)):

We do not find any authority within the Act to modify the terms of the agreement so as to later add additional developments. If such is to be done, it would be by a separate agreement that satisfied the conditions of the statute.[5]

CONCLUSION (Questions 2(b) and (c)):

The statute does not authorize a modification of the agreement to later add additional investments or to extend the time set forth in the qualifying agreement.

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[5]The above is not intended to treat a qualifying investment that is to be completed in phases. The statute does not prohibit these investments from qualifying, however, the agreement should set forth the conditions and details of such a project.