

# DIRT ALERT

September, 2009  
Volume 1, Number 1  
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*The latest updates in real estate, land use, renewable energy, environmental and construction law.*

## *Developers and Architects Beware: Fair Housing Accessibility Testing On the Rise*

The federal Fair Housing Act requires design professionals and developers to include certain minimum accessibility features in multifamily housing constructed after March 13, 1991. While the specific accessibility features are set forth in the Fair Housing Act Accessibility Guidelines adopted by the U.S. Department of Housing and Urban Development, they generally include:

1. an accessible building entrance on an accessible route;
2. accessible public and common use areas;
3. usable doors wide enough to accommodate wheelchairs;
4. accessible routes into and through dwelling units;
5. accessible electrical outlets, thermostats, and other environmental controls;
6. reinforcements in bathroom walls for grab bars; and
7. accessible kitchens and bathrooms.

The Fair Housing Act does not require local government to enforce these federal accessibility requirements. Consequently, local building inspectors are not inspecting for accessibility violations and a multifamily

project will receive a building permit and certificates of occupancy even though it does not comply with the Fair Housing Act requirements.

While these accessibility requirements became effective over fifteen years ago, there is still substantial noncompliance. The consequences of noncompliance can be severe. Fully retrofitting a noncompliant project with substantial violations can easily exceed \$1 million for even small projects. Within the last six months, architects and developers were required to pay in excess of \$500,000 in damages and complete retrofits to eleven projects after the U.S. Department of Justice found the developments lacked the required Fair Housing Act accessible features.

The risk of a fair housing accessibility complaint is increasing through the rise in use of fair housing testing. Testing has long been used by fair housing groups and governmental agencies to ferret out fair housing discrimination. Testing involves visiting a housing development to determine if rental or sales information given to applicants in a protected class is different than that given to others. Accessibility testing is much more simple and cost-effective than other forms of fair housing testing. Indeed, a tester need only drive by a development to

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determine if the development lacks some of the accessibility features required by the law.

Both the Obama Administration and state fair housing agencies are placing more emphasis on testing for accessibility violations. On the state level, the Iowa Civil Rights Commission (ICRC) recently announced a “research project” to strengthen enforcement and determine the nature and extent of compliance with the fair housing accessibility laws. The project includes inspecting 25-30 newly constructed multifamily developments around Iowa to measure compliance with the fair housing accessibility requirements. The ICRC intends to file fair housing complaints against any of the 25-30 developments that do not comply with the accessibility requirements. On the federal level, fair housing advocates criticized the former administration for alleged lack of fair housing enforcement. The Obama Administration has promised more vigorous enforcement which will certainly include an increase in fair housing testing, including accessibility testing.

Fair housing accessibility violations are easy to detect and coupled with aggressive enforcement by governmental agencies and fair housing groups means that design professionals and builders must pay close attention to accessibility. Design professionals and builders must ensure everyone involved in the design and construction process, including site engineers and subcontractors, understand the accessibility requirements. Plan inspection by a fair housing accessibility expert can help ensure the designs are compliant before construction begins. It is also wise to consider reviewing other multifamily construction completed after March 13, 1991 to determine if retrofits need to be made to bring the project into compliance.

**Scott P. Moore**

## *Wind Projects in Nebraska*

In 2008, Midwest Wind Energy, together with Edison Mission Group (Irvine, California) and Tenaska, Inc., developed an 80 megawatt wind farm in Bloomfield, Nebraska (Knox County). The Bloomfield project will serve approximately 25,000 homes with renewable energy.<sup>1</sup> Twenty-seven Vestas V-90 wind turbines were used to complete the project. Each turbine spans 410 feet from the base to the blade tip.

The Bloomfield project—the largest privately developed wind energy project in Nebraska—signaled a turning point in the development of wind energy in the state. Nebraska has a wind resource which some estimate to be the sixth best wind in the nation,<sup>2</sup> and an abundance of farmland in which to situate wind turbines and develop projects.

However, Nebraska is also not without challenges with respect to wind energy projects. Nebraska is the only “public power” state in the United States, which limits the available purchasers of renewable energy developed from wind (and other) resources. In the Bloomfield project, Elkhorn Ridge Wind LLC—the entity formed by the above developers—entered into a power purchase agreement with Nebraska Public Power District (NPPD) for the purchase of the power generated.

Nonetheless, certain tax incentives, political pressure, and America’s desire to increase renewable sources of energy make Nebraska poised to expand its wind development. Nebraska’s neighbors, Iowa and Missouri, constituted two of the top three states in the addition of new wind power generation capacity created in 2009.<sup>3</sup> In 2009, Iowa added 160 megawatts of new wind power generating capacity, and Missouri added 146 megawatts.<sup>4</sup> Nebraska’s unique

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<sup>1</sup> [www.nppd.com/wind-generation/elkhorn-ridge.pdf](http://www.nppd.com/wind-generation/elkhorn-ridge.pdf)

<sup>2</sup> [www.nationalwind.com/nebraska-wind-facts](http://www.nationalwind.com/nebraska-wind-facts)

<sup>3</sup> American Wind Energy Association

<sup>4</sup> American Wind Energy Association

public power distinction may limit it from reaching those goals, but NPPD and Omaha Public Power District have publicly stated a desire to help Nebraska increase its wind energy generation.

As wind energy expands in Nebraska, the myriad of legal issues associated with these projects will also develop. The passage of Nebraska's Community-Based Energy Development (C-BED) statute in 2007 expanded developer demand to build wind projects in Nebraska. In short, the C-BED statute offers the developer of a wind energy generation project an exemption from state sales tax on equipment purchased for a project.

To earn the C-BED benefit, at least thirty-three percent of the revenues from the power purchase agreement for the project—the amount the utility pays the project for the electricity it generates—must flow to “qualified owners.” The statute defines “qualified owners” as Nebraska residents, a limited liability company or companies made up entirely of Nebraska residents, a Nebraska non-profit corporation, an electric supplier, a tribal council, or the “local community.” Nebraska law defines payments to the local community for this purpose as including, but not limited to, “lease payments to property owners on whose property a turbine is located, wind energy easement payments, and real and personal property tax receipts from the C-BED project.” No single qualified owner may own more than 15 percent of the project.<sup>5</sup>

Upon origination, wind farms must be completed in an efficient and fair manner between a group of landowners and a developer. Landowners may wish to agree on a single form of lease or easement and select a landowner committee to negotiate directly with the developer, ensuring the developer cannot play landowners against each other. Of course, developers are entering into a potential 40-year

relationship involving hundreds of millions of dollars in equity and equipment. Thus, developers have a strong incentive to treat landowners fairly and maintain good relationships.

Most wind developers will require an option agreement with landowners in the subject county prior to entering into an easement or lease agreement. Of course, savvy developers and their attorneys will check with the local county zoning officials to determine any zoning and occupancy issues. The developer or the attorney will typically approach a landowner to determine the elements of the option agreement.

As in any option agreement, it is critical to specify the property description, and to perform any necessary due diligence to verify clean title. For instance, a developer will want to make sure there are no encumbrances to the property which could be foreclosed and affect the desired option, or impede the developer's intended use of the property. Developers should request leasehold title insurance policies insuring the leasehold to be created, and should request subordination and non-disturbance agreements from any lienholders or crop lessees.

The developers will typically secure easements which mirror easements on commercial real estate development projects. However, Nebraska has enacted specific statutes with respect to wind easements and leases which are more narrowly focused than typical easements. In particular, the legal description on any easement for a wind energy project must contain a description of the dimensions of the wind energy easement sufficient to determine the horizontal space across and the vertical space above the burdened property that must remain unobstructed.<sup>6</sup>

In addition, Nebraska Legislative Bill 568 was passed in 2009, which requires wind leases and easements to be recorded.<sup>7</sup>

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<sup>5</sup> Neb.Rev.Stat. § 77-2704.57

<sup>6</sup> Neb.Rev.Stat. § 66-911

<sup>7</sup> Nebraska Laws 2009, LB 568

Additionally, LB 568 requires that wind leases and easements are automatically terminated after 10 years if construction has not commenced.<sup>8</sup> This is an important component to the new legislation, as previously, landowners were at risk of burdening their land to wind developers who might not site the land with turbines (which would “tie up” the land and deprive landowners of income generated from wind turbines). LB 568 also limits the term of wind leases and easements in Nebraska to 40 years, subject to renewal.<sup>9</sup>

Additionally, wind developers need to be thoughtful about other easements which are necessary in connection with wind projects. For instance, the large machinery which is necessary to be delivered to construct turbines requires that trucks delivering this equipment “cut corners” due to wide turning radiuses across interstates, highways and local roads. Accordingly, developers need to determine delivery routes ahead of time, and obtain easements from landowners who will have their corners “cut”. A variety of other easements may be required, including easements to maintain transmission lines, to construct, repair, remove and/or replace wind turbine components, and easements for any corollary equipment to be maintained, such as meteorological tower siting.

From a landowner’s perspective, wind energy projects can present a good opportunity to produce extra income for property, although landowners must determine the value to be obtained versus the burdens of a wind site. Obviously, landowners will want to maximize compensation in connection with the leasing of land in connection with the turbine site. Most easement agreements compensate landowners on a per megawatt, per year basis. However, landowners are free to negotiate any agreement which may be available, such as a percentage of revenues available to the developer. Like any legal negotiation, leverage is of critical importance.

Obviously, crop damage is of crucial concern to any landowner. A landowner will want to obtain an easement or lease agreement containing indemnification provisions for any damage to crops (or other damage). Additionally, the easement agreement should state accurately and precisely how crop damage will be calculated.

The removal of wind turbines at the expiration of an easement/lease term should be addressed in any agreement. Because wind projects may span 15-30 years, and there is a risk of developer failure, landowners should consider whether or not a bond or other forms of collateral are available to ensure maintenance and removal of wind turbine equipment.

Finally, zoning, permitting and environmental issues will factor into any wind development project. In Nebraska, many counties have been receptive to wind projects due to the income and jobs created at the county level. The primary environmental issues that arise with wind energy development in Nebraska are impacts to migrating birds and prairie chickens. Prairie chickens, which are hunted in Nebraska for sport, are like sage grouse in that they create and use “leks” for mating dances and other rituals. Leks are areas on the ground to which the prairie chickens return each year. There is some concern that wind turbines within a quarter of a mile or less of a lek may displace the prairie chickens, but the evidence is inconclusive.

Nonetheless, most wind developers survey their sites for active leks and try to set turbines back from active leks by a quarter mile or more. Regarding migrating birds, the biggest concerns arise with respect to threatened or endangered species, which in Nebraska is primarily the whooping crane. To date, developers have worked with the United States Fish and Wildlife Service and the Nebraska Game and Parks Commission to develop plans on a case-by-case basis

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<sup>8</sup> Nebraska Laws 2009, LB 568

<sup>9</sup> Nebraska Laws 2009, LB 568

to mitigate for any loss of prairie chicken habitat and for impacts to migratory birds.

While there are certainly a myriad of other issues that can arise in connection with the development of wind energy development project, the above outlines just a few considerations for any developer or landowner. With creativity and sound legal advice, Nebraska is poised to take advantage of an exciting opportunity.

**Jon Blumenthal**  
**David Levy**

*Levy and Blumenthal represented the developer of Nebraska's first privately developed C-BED wind energy project, an 80 megawatt wind project in Bloomfield, Nebraska.*

## *Green Construction Contracts and Risks in the LEED Green Building Rating System*

A significant trend in the construction industry over the past decade is the development and emergence of the voluntary building certification system known as the Leadership in Energy and Environmental Design (LEED) Green Building Rating System. Buildings which achieve certain "green" benchmarks set forth by the U.S. Green Building Council can apply for LEED certification with the

Green Building Certification Institute. Specifically, buildings can achieve credits toward LEED certification if building owners and operators can demonstrate energy savings, water efficiency, carbon dioxide emissions reduction, improved indoor environmental quality, and stewardship of resources.

The LEED certification program was initiated by the U.S. Green Building Council to establish a third-party certification of green buildings. According to the U.S. Green Building Council, buildings in the United States account for 72% of domestic electricity consumption, 39% of energy use, 38% of all carbon dioxide emissions, 40% of raw materials use, 30% of waste output, and 14% of potable water consumption. The U.S. Green Building Council has developed and revised LEED certification in consideration of these impacts, and has designed the LEED certification approval system to require building owners and operators seeking certification to demonstrate that sustainable practices were used in all phases of building construction. Building owners and operators must demonstrate compliance with individual LEED credits by documenting that the building meets the credit-specific criteria set forth by the U.S. Green Building Council. If a building achieves enough LEED credits, the building will be certified at one of four levels of LEED certification.

Over the past several years, the LEED Green Building Rating System has been increasingly recognized by legislators as a method to identify buildings which have minimized environmental impacts. Several cities and states have enacted legislation requiring that government buildings be designed using LEED practices, and others have required LEED certification for government buildings. Additionally, some states have provided incentives to private building owners and operators to achieve LEED certification by granting sales or energy tax credits for buildings that reached a certain level of LEED certification.

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As a result of the increasing legislation related to LEED, architect contracts and construction contracts for those projects where the owner wants LEED certification should contain appropriate provisions to require that the design and construction of the project be undertaken in a manner that will achieve the certification level desired by the owner. In contracts for LEED projects, parties should address expectations and responsibilities that are unique to the LEED certification process, including the following:

- Provisions establishing responsibility for the LEED certification process, including which party is responsible for individual LEED credits and which party is ultimately responsible for LEED certification.
- Specific steps that must be taken by non-responsible parties to ensure that LEED certification is not compromised.
- As damages for failure to reach LEED certification may be difficult to determine, parties may want to set liquidated damages. When negotiating liquidated damages, parties should consider how failure to achieve LEED certification will affect any tax credits, marketing strategies, third party contracts—including lease agreements—or other anticipated benefits from LEED certification.

By including provisions that allocate LEED certification responsibilities, parties will be able to clearly set forth agreed expectations, and perhaps avoid future legal disputes.

In one case involving LEED certification, a developer sued its contractor for failing to obtain LEED Silver certification, thus failing to obtain certain tax credits. The form contract in that case did not clearly specify which party was responsible for the LEED certification and obtaining the related tax credits. Though the parties settled out of court, the case demonstrates the need for LEED specific provisions

in LEED construction contracts and the disputes that may arise that are unique to green construction. We anticipate that contracts involving LEED projects will be the subject of future disputes, many of which may be avoided or mitigated with appropriate allocation of responsibilities in construction contracts.

Attorneys at Baird Holm are monitoring this development in commercial construction, and several Baird Holm attorneys have demonstrated their knowledge on LEED certification by becoming LEED accredited professionals.

**Gretchen L. Twohig**  
**Ben M. Klocke**  
**Christine C. Benson**

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## *Inconsistent Restrictive Covenants Held Unenforceable to Prevent Construction of Apartment Building*

In *Elkhorn Ridge Golf Partnership v. Mic-Car, Inc.*, the Nebraska Court of Appeals held restrictive covenants that prohibited apartment buildings, but also provided size requirements for any such apartments, were internally inconsistent, and therefore

unenforceable to prevent a developer from constructing an apartment building. 767 N.W.2d 518, 526 (Neb. App. 2009). After Mic-Car, Inc., obtained a permit to construct an apartment building in the High Point subdivision, Mic-Car's neighbors filed suit to prevent the construction. The neighbors argued the High Point restrictive covenants prohibited multi-family units.

The court analyzed the High Point restrictive covenants, noting an apparent internal conflict. Specifically, Article III of the restrictive covenants provided that "[e]xcept lots designated in Article IV herein, all lots within the Properties shall be used only for detached single family residences, and not more than one single family dwelling with garage attached shall be erected, altered, placed or permitted to remain on any one of said lots." However, Article IV provided that "no building or structure may be erected thereon exceeding two and one-half stories in addition to basement or garden-type apartments."

The court concluded the two articles were inconsistent and in direct conflict with each other. The court noted that Article III prohibited multi-family buildings but excepted those lots designated in Article IV, and that Article IV contemplated, but did not expressly allow apartment buildings. Finding the articles inconsistent and ambiguous, the court applied the well-settled principle that "covenants which restrict the use of land are not favored by the law, and, if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property." Accordingly, the court held that the restrictive covenants should be interpreted to apply the provision that allows the broadest possible use of the land, and thus ruled that the apartment building did not violate the restrictive covenants.

**David C. Levy**  
**Ben M. Klocke**

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