

Dirt Alert

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BAIRD HOLM^{LLP}
ATTORNEYS AT LAW

IRS Issues Guidance on Production Tax Credit Eligibility Requirements

On April 15, 2013, the Internal Revenue Service issued much-anticipated guidance on the eligibility requirements for the renewable energy Production Tax Credit. IRS Notice 2013-29 comes nearly four months after Congress extended the Production Tax Credit for one year to December 31, 2013. A project that begins construction in 2013 qualifies for the Production Tax Credit. This marked a change in direction from the prior requirements which required the project to be placed into service before the tax credit expired. The revision aims to allow developers to maximize the tax incentive in what many believe is the last extension of the credit.

This recent IRS guidance clarifies what activities constitute beginning construction. As expected, the guidance largely mirrors the rules and guidance the U.S. Department of the Treasury issued for the Section 1603 cash grant program. Like the cash grant program, a developer can establish it has begun construction by either starting physical work of a significant nature or by satisfying

a 5% safe harbor provision. In addition, wind developers may treat multiple turbines as a single project so they do not have to satisfy the requirements for each individual turbine location.

The guidance provides a broad view as to what constitutes “physical work of a significant nature”. Both on-site and off-site work (performed either by the taxpayer or by another person under a binding written contract) may be taken into account. Significant work, however, must be integral to the project. Preliminary development activities do not qualify as work of a significant nature. Preliminary activities include: planning or designing, securing financing, obtaining permits, licensing, conducting surveys, test drilling, environmental and engineering studies, construction of transmission towers or fencing, or clearing a site. Once physical work of a significant nature begins, the taxpayer must maintain a continuous program of construction, however, the IRS will allow disruptions due to factors outside the developer’s control.

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To satisfy the 5% safe harbor provision, a developer must demonstrate payment or incurrence (depending on its method of accounting) of at least 5% of total project costs before January 1, 2014, and, thereafter, the developer must make continuous efforts towards project completion. Such efforts include incurring additional costs, entering into construction contracts, obtaining necessary permits, and performing work of a significant nature. The IRS will allow flexibility for certain disruptions that are outside of a developer's control, such as delays due to severe weather, licensing or permitting, labor disputes, the presence of endangered species, financing, and supply or equipment shortages.

With regard to cost overruns, developers will not satisfy the safe harbor rule if the total cost of a wind energy project comprised of multiple turbines exceeds the initial anticipated cost of the project so that the amount the developer paid or incurred before January 1, 2014 is less than 5% of the total actual project cost. Developers may still satisfy the safe harbor rule with regard to individual turbines as long as the total aggregate cost of those individual turbines is not more than twenty times greater than the amount the developer paid or incurred before January 1, 2014.

Despite restrictions on qualifications for the Production Tax Credit, proponents credit the most recent extension for creating jobs, reviving businesses across the country and allowing continued growth of wind energy in both community and offshore projects. The short extension,

however, seems to proliferate the boom-bust cycle of the wind energy development. ■

Nebraska Supreme Court Upholds City of La Vista Ordinance Requiring License and Inspection for Rental Properties

D-Co, Inc. Et. Al. v. City of La Vista, 285 Neb. 676.

In October 2009, the City of La Vista adopted an ordinance to prohibit an owner from leasing out a rental dwelling without a license. To obtain a license, the owner must pay an application fee, satisfy the inspection requirements and maintain compliance with the International Property Maintenance Code. After inspection by a City building official, the official will assign a classification to the dwelling based on any code violations found.

In September 2012, owners of rental property located in the City sued the City. The Plaintiffs alleged the ordinance created special privileges and immunities for owner-occupied dwellings because those dwellings are not subject to the same requirements as rental properties. The Plaintiffs sought an injunction and a declaration finding the ordinance unconstitutional for violation of the Special Privileges and Immunities clause of the Nebraska Constitution. The District Court for Sarpy County granted the summary judgment to the City.

Plaintiffs appealed.

The Supreme Court of Nebraska affirmed. The Court held the evidence at trial showed the City based its classification of rental property residences on a real and reasonable distinction from other residential property. Specifically, the Court pointed to evidence that owners of rental properties can neglect necessary maintenance and repairs and tenants can be reluctant to confront landlords or consult authorities about deteriorating conditions. Further, based on a 2000 study, the City could reasonably conclude that deterioration of the City's rental housing would contribute to further deterioration of the City's older neighborhoods. Thus, the City's intervention through rental licensing and inspections was in the public's interest in maintaining housing for tenants and safe and livable neighborhoods for City residents. ■

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103rd Nebraska Legislature, First Session: Real Estate, Renewable Energy and Municipal Law Update

The first session of the 103rd Nebraska Legislature is now over two-thirds complete. Here is an update on the bills we are tracking related to real property, renewable energy and municipal law.

Bill	Summary	Introducer	Committee	Hearing Date	Current Status
LB 3	Change filing provisions related to nonconsensual liens	Krist	Judiciary	1/24/13	Placed on Select File with ER63; AM1067 and AM1128 filed; Speaker Priority Bill
LB 13	Require radon resistant construction and radon mitigation statements for residential real property	Krist	Human Services	1/23/13	Placed on General File with AM260; AM920 filed
LB 43	Change provisions relating to property tax exemption for charitable organizations	Cook	Revenue	3/1/13	With committee
LB 66	Authorize annexation of noncontiguous property and change provisions relating to the extension of city services	Schilz	Urban Affairs	1/29/13	Placed on General File with AM784; Committee Priority Bill
LB 90	Change sales and use taxes on the furnishing of electricity services	Haar	Revenue	3/7/13	Placed on General File; Speaker Priority Bill
LB 97	Adopt Nebraska Municipal Land Bank Act	Mello	Revenue	2/13/13	Placed on Select File with ER55; Senator Mello Priority Bill
LB 101	Change valuation of agricultural and horticultural land	Watermeier	Revenue	2/28/13	With committee
LB 104	Provide tax incentives for renewable energy projects	Lathrop	Revenue	2/14/13	Advanced to Enrollment and Review Initial
LB 140	Provide airport hazard area dimensions, zoning regulations, penalties and appeal procedures	Krist	Government Military & Veterans Affairs	1/25/13	Advanced to Enrollment and Review Initial; Senator Krist Priority Bill
LB 145	Change valuation of agricultural land and horticultural land	Brasch	Revenue	2/28/13	With committee

Bill	Summary	Introducer	Committee	Hearing Date	Current Status
LB 150	Change provisions relating to retail sale of natural gas by metropolitan utilities districts to exempt sales and purchases of energy or fuel used in the compression of natural gas	Nordquist	Revenue	3/13/13	With committee
LB 153	Change provisions relating to Civic and Community Center Financing Act to allow use of funds for recreation centers and to change grant evaluation and report provisions	Dubas	Revenue	2/13/13	Approved by the Governor 4/24/13
LB 191	Adopt the Nebraska Job Creation and Mainstreet Revitalization Act	Nordquist	Revenue	2/13/13	With committee; Senator Nordquist Priority Bill
LB 237	Change provisions relating to property tax exemption to add retirement community	Karpisek	Revenue	3/1/13	With committee
LB 289	Change duration of a real estate improvement contract lien	Lathrop	Judiciary	2/1/13	Placed on General File with AM571
LB 340	Change hearing requirements for Power Review Board	Natural Resources Committee	Natural Resources Committee	2/6/13	Approved by the Governor on 4/3/13
LB 348	Change assessment of rent-restricted housing projects	Harr	Revenue	3/1/13	Placed on General File with AM642; Speaker Priority Bill
LB 373	Change and eliminate provisions of Nebraska Prompt Pay Act	Mello	Business & Labor	2/11/13	With committee
LB 388	Provide for construction of electronic transmission lines by incumbent owner	Natural Resources Committee	Natural Resources	2/1/13	Approved by the Governor on 4/24/13
LB 402	Change provisions relating to power purchase agreements	Mello	Natural Resources	3/1/13	Placed on General File with AM684
LB 411	Change to renewable energy tax credit	Nordquist	Revenue	3/6/13	With committee
LB 419	Change Nameplate Capacity Tax provisions	Hadley	Revenue	3/6/13	With committee

Bill	Summary	Introducer	Committee	Hearing Date	Current Status
LB 442	Change provisions relating to homeowners' associations and the Nebraska Condominium Act	Schumacher	Banking, Commerce & Insurance	3/4/13	Advanced to Enrollment and Review for Engrossment
LB 482	Prohibit state and political subdivisions from adopting certain policy recommendations	Kintner	Judiciary	2/13/13	With committee
LB 501	Change to redefine a term regarding production of electricity by using one or more sources of renewable energy to produce electricity for sale	Hadley	Revenue	2/14/13	With committee
LB 516	Adopt Nebraska Water Legacy Act	Carlson	Revenue	3/15/13	With committee
LB 529	Change requirements for approval of redevelopment plans	Dubas	Urban Affairs	2/12/13	With committee
LB 557	Provide for community solar gardens	McGill	Natural Resources	3/5/13	With committee
LB 567	Change provisions relating to approval of facilities and lines	Haar	Natural Resources	3/1/13	With committee
LB 571	Adopt Community Enhancement Financing Assistance Act	Harr	Revenue	2/13/13	With committee
LB 598	Change provisions relating to net metering	Larson	Natural Resources	3/5/13	With committee
LB 622	Change provisions relating to research and conservation report	Haar	Natural Resources	2/6/13	With committee
LR 29CA	Constitutional amendment to change provisions relate to redevelopment projects	Adams	Urban Affairs	2/12/13	Placed on General File with AM273; Committee Priority Resolution

Copies of the bills and information regarding bill status and committee hearings can be found on the Nebraska Legislature's website at <http://www.nebraskalegisature.gov/bills/>. Please do not hesitate to contact us if you have any questions about any of these bills or want more information. ■

Nebraska Supreme Court Holds Nebraska Trust Deeds Act Does Not Apply to Unsecured Guaranty

In 2005, Sam Murante formed Sutherlands Plaza, LLC, and began development of property in Omaha, Nebraska. To finance the development, Mutual of Omaha Bank and its predecessor, Nebraska State Bank (“Mutual”), issued several loans to Sutherlands, and Sutherlands executed deeds of trust for the loans. As additional security, Murante executed a personal guaranty which unconditionally guaranteed full payment and satisfaction of Sutherlands’ debt as evidenced by the notes. The guaranty permitted Mutual to proceed against Murante without exhaustion of its remedies against Sutherlands. Further, in the guaranty Murante waived all defenses based on suretyship or impairment of collateral, including antideficiency laws.

Sutherlands defaulted on the loans, failed to cure defaults, and filed for bankruptcy. Mutual exercised its right to accelerate the debt of approximately \$3.2 million. Murante failed to pay and Mutual commenced action against Murante for breach of the guaranty. In the meantime, Mutual foreclosed the property which secured the loans, and Mutual purchased the property at the trustee sale with a credit bid of approximately \$1.6 million.

In defense of Mutual’s action to enforce the guaranty, Murante argued that, pursuant to the Nebraska Trust Deeds Act, Mutual could only recover the amount by which the guaranteed indebtedness exceeded the fair market value of the property secured by Sutherlands’ deed of trust. The District Court of Douglas County disagreed, and concluded that Murante remained liable to Mutual for the remainder of Sutherlands’ debt, holding that the provisions of the Nebraska Trust Deeds Act that may have barred a deficiency action against Sutherlands did not bar recovery from Murante. The District Court entered a judgment against Murante for the full amount of Sutherlands’ indebtedness, less the trustee’s sale price. Murante appealed.

The Supreme Court of Nebraska affirmed. The Court concluded that the Nebraska Trust Deeds Act did not apply to Mutual’s action on Murante’s guaranty. The Court explained that the antideficiency provisions of the Nebraska Trust Deeds Act only apply to deficiency actions against obligations secured by a deed of trust. The Court held that Murante’s guaranty was a separate and distinct obligation. Because the a deed of trust as was not security for Murante’s guaranty, the Act did not apply to the guaranty. Accordingly, the Court affirmed the District Court’s ruling that that Murante was liable for the full amount of Sutherlands’ remaining debt. ■

David C. Levy
Amy L. Lawrenson
Ben M. Klocke

DEVELOPMENT, CONSTRUCTION, ENVIRONMENTAL, REAL ESTATE, RENEWABLE ENERGY AND RELATED SERVICES

Jude J. Beller (5)
Jon E. Blumenthal (1)
P. Scott Dye
John P. Heil (2)
Ben M. Klocke (1)
Lawrence E. Kritenbrink
Amy L. Lawrenson (1)
David C. Levy (4)
Jacqueline A. Pueppke (3)

All attorneys are admitted to practice in Nebraska unless otherwise noted.

(1) Also admitted to practice in Iowa

(2) Also admitted to practice in Florida

(3) Also admitted to practice in Kansas

(4) Also admitted to practice in California and Iowa

(5) Also admitted to practice in Illinois and Missouri

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For more information contact David Levy, Chair, Real Estate Section: dlevy@bairdholm.com; 402.636.8310



Baird Holm

1500 Woodmen Tower
1700 Farnam St
Omaha, NE 68102
402.344.0500
402.344.0588
www.bairdholm.com