

Dirt Alert

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BAIRD HOLM^{LLP}
ATTORNEYS AT LAW

Nebraska Supreme Court Upholds Credit Provision of Nameplate Capacity Tax

The Nebraska Supreme Court has upheld the credit provision of the Nameplate Capacity Tax applicable to wind energy generation facilities against challenges that it is unconstitutional. *Banks v. Heineman*, 286 Neb. 390 (2013). This ruling means that all privately-developed, utility-scale wind energy generation facilities in the state will be treated the same for property tax purposes. More generally, it makes important clarifications to Nebraska law regarding the constitutional requirements for excise taxes versus property taxes and special legislation.

In 2010, the Nebraska Legislature passed Legislative Bill 1048. Among other things, this “omnibus wind bill” replaced the personal property tax to which wind energy facilities were subject with a new excise tax known as the Nameplate Capacity Tax.

The Nameplate Capacity Tax is a flat tax, calculated by multiplying \$3,518 by the nameplate capacity of each turbine in the facility. Thus, it creates a level obligation for the facility owner and a level revenue stream for the county in

which the facility is located. The personal property tax, on the other hand, depreciates over five years, meaning it creates a very front loaded obligation and revenue stream, which neither the facility owner nor the local county prefer.

Only one privately-developed, utility-scale wind energy generation facility existed at the time the law took effect, the Elkhorn Ridge project in Knox County. Because Elkhorn Ridge’s owner had already started paying the front loaded personal property tax, moving it to the Nameplate Capacity Tax would cause the owner to pay tax twice – once as personal property tax and once under the replacement Nameplate Capacity Tax.

To avoid this unfair result, the Legislature included a provision in LB 1048 whereby any facility pre-dating the Nameplate Capacity Tax would receive a credit against that future tax for the amount of personal property tax it had paid. Thus, such projects could operate under the Nameplate Capacity Tax like all future projects, without being double taxed.

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Knox County sued Governor Heineman, Tax Commissioner Ewald and Treasurer Stenberg. Knox County claimed the credit provision was unconstitutional because it commuted (forgave) taxes due and because it was special legislation. The Lancaster County District Court ruled in Knox County's favor. The Supreme Court reversed and upheld the credit provision as constitutional.

The Court also held that the Legislature may enact special legislation where general legislation cannot accomplish the desired purpose and the special legislation does not confer an undue benefit on the closed class.

With respect to the commutation argument, the Court determined that the Nameplate Capacity Tax is an excise tax. The Court then held that the Nebraska Constitution's prohibition on commutation of taxes only applies to property taxes, and not to excise taxes. Therefore, the Nameplate Capacity Tax could not, and did not, constitute a commutation of taxes.

More generally, this portion of the ruling also provides important clarification on the application of the constitutional prohibition to excise taxes. The recent decision in *Kiplinger v. Nebraska Department of Natural Resources*, 803 N.W.2d 28 (2011) muddied these waters, but here the Court expressly confirmed that the commutation prohibition only applies to property taxes.

With respect to special legislation,

the Court determined that the Nameplate Capacity Tax is special legislation in that it applies to a closed class of one, namely the Elkhorn Ridge Project. However, the Court also held that the Legislature may enact special legislation where general legislation cannot accomplish the desired purpose and the special legislation does not confer an undue benefit on the closed class.

Here, the Court found that putting the Elkhorn Ridge project on the new tax system is a legitimate objective that the Legislature can not achieve with general legislation. The Court also found that the Elkhorn Ridge project will not receive an undue benefit because the credit provision merely puts it on the same footing as all other projects and avoids unfair double taxation.

More generally, this portion of the ruling also helps dispel the notion that all special legislation is unconstitutional. As noted, special legislation may be permissible where it is necessary and serves a legitimate purpose.

Baird Holm played a key role in drafting the underlying legislation, and the Court's ruling maintains the way for Baird Holm client Elkhorn Ridge Wind to be treated the same as all other wind energy generation facilities as to taxation, and to avoid double taxation with respect to the Nameplate Capacity Tax.

The Supreme Court's decision is available at: <http://www.supremecourt.ne.gov/sites/supremecourt.ne.gov/files/sc/opinions/s12-723.pdf>. ■

David C. Levy

EPA Targets Animal Confinement Operations for Criminal Enforcement

A recent alert from the United States Environmental Protection Agency announced a national enforcement initiative targeting animal waste pollution from livestock and poultry operations for criminal prosecution. Traditionally, the EPA and state agencies have been hesitant to initiate criminal actions in Concentrated Animal Feeding Operations ("CAFO") cases absent strong evidence of intentional conduct and substantial environmental harm such as fish kills or contamination of drinking water sources.

Last month's EPA alert stated that more CAFO criminal prosecutions are necessary to deter other, "less serious" potential violators, to eliminate the "temptation to pay to pollute" and to avoid "unfair competition" to compliant operators arising from other operators who break the rules. Under the Clean Water Act, criminal sanctions, including fines and imprisonment, apply to any person who knowingly or negligently discharges pollutants without a permit or in violation of a permit. This includes not only overflows from animal waste containment facilities, but also the over-application of animal wastes to cropland and pastures. According to EPA, federal prosecutors will be seeking "six- and seven-figure fines" as well as imprisonment for convicted violators.

In recent years, the EPA has conducted flyover surveillance of Midwestern feeding operations to spot illegal disposal of animal waste and to obtain photographic evidence of runoff into rivers and streams. Last year, U.S. Senator Mike Johanns offered a farm bill amendment to end federal funding for EPA aerial surveillance missions. While the Johanns amendment obtained 56 votes, it was 4 votes short of the 60 votes needed for adoption.

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During a U.S. Senate Appropriations Committee Hearing on April 24, 2013, Senator Johanns questioned Acting EPA Administrator Bob Perciasepe regarding the agency's continuing failure to respond to Congressional concerns about the flyover surveillance. Perciasepe responded that the EPA was *only* trying to "find the bad actors in the most efficient way by trying to narrow where we would send people to go to talk to the landowner." Apparently the EPA enforcement focus has been diverted from "bad actors" to "less serious" violators since Mr. Perciasepe's April Congressional testimony. ■

John P. Heil

United States Supreme Court Issues Significant Land-Use Decision

Despite lack of media attention, a recent decision of the United States Supreme Court poses historic impact on land use permitting across the United States. The U.S. Supreme Court recently handed property owners and developers a significant win, ruling that a Florida government agency violated a landowner's constitutional rights by demanding money or a conservation easement in return for permits to develop his property.

The case involves 14.9 acres of undeveloped wetland property near Orlando, Florida. In 1994, the property owner, Coy Koontz, applied to the St. Johns River Water Management District for permits to dredge and develop the land. In exchange for permits, Koontz offered to limit his development to 3.7 acres of the property, while permanently conserving the remaining 11.2 acres from development. The District rejected Koontz's proposal as inadequate and told Koontz it would deny his permit unless he agreed to either: (1) reduce the planned development to one acre and give the District a larger 13.9 acre conservation easement; or (2) maintain the proposal, but pay for improvements to separate unrelated land owned by the District. Koontz rejected both options and sued the District.

Koontz sought monetary damages under Florida law for what he claimed was the District's unreasonable exercise of state

police power constituting a taking. Koontz argued the District's requirements violated the standards established in two U.S. Supreme Court cases related to a government agency's ability to impair property interests with land-use regulations, *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*.

Otherwise known as the *Nollan-Dolan* standard, government agencies may only demand mitigation conditions that give the agency an interest in the land when it can show a "nexus" and "rough proportionality" between its demand and the effects of the proposed land use.

Koontz argued the *Nolan-Dolan* standard applied to the District's demand for payment of money as well as the District's denial of his permit when he refused to accede to the District's demands, and such, constituted a taking.

The Florida Circuit Court granted the District's motion to dismiss, but the Florida District Court of Appeal reversed. On remand, the State Circuit Court held the District's actions unlawful and the Florida Circuit Court affirmed. The Florida Supreme Court reversed.

The Florida Supreme Court held that Koontz's takings claim was not an appropriate response to the District's conduct. It also held that *Nollan-Dolan* only applies to the approval of a permit, not a denial, and does not apply to a demand for payment—only burdens on the property.

The U.S. Supreme Court reversed the Florida Supreme Court. In a five-to-four decision, the Supreme Court confirmed that both

demands for money and denial of a permit until the applicant accedes are unconstitutional conditions. The Supreme Court explained that *Nollan-Dolan* established that the Fifth Amendment protects property owners from takings that occur in connection with applications for land-use permits. The Supreme Court held that a government agency may choose whether and how an owner must mitigate the impacts of a proposed development, but it “may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” As such, the Supreme Court held that *Nollan-Dolan* applies regardless of whether the agency approves a permit conditioned on the owner’s submission to its demands or denies a permit because the owner refuses to do so.

Justice Kagen, joined by Justices Ginsburg, Breyer, and Sotomeyer, dissented. The dissenters agreed with the majority decision on the determination that *Nollan-Dolan* applies to both denials and approvals of permits. They disagreed, however, that it applies to demands for payment. The dissent reasoned that the District never demanded anything from Koontz, so *Nollan-Dolan* did not apply and, had there been a demand, Koontz never acceded, so a taking did not occur. The dissent warned that the majority’s decision “threatens to subject a vast array of land-use regulations, applied daily in states and localities throughout the county, to heightened constitutional scrutiny.”

Overall, *Koontz* broadens developers and property owners’ rights to bring constitutional challenges to land-use decisions and requirements. As such, the ruling may prevent permitting agencies from abusing power or making unreasonable demands by forcing the agencies to prove that denials or obligations imposed on a permit bear a nexus and rough proportionality to the impact of the proposed use of the land. ■

Amy L. Lawrenson

Upcoming Speaking Engagements

David C. Levy, along with Thomas O. Ashby, a member of the Firm’s Financial Transaction section, will present at the Nebraska State Bar Association’s “Annual Real Estate Institute” on September 27, 2013 in La Vista. David will discuss Renewable Energy Law. Mr. Ashby’s topic is constructive and actual fraudulent transfers.

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

(1) Also admitted to practice in Iowa

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