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January 6, 2003

Jay Holmquist, General Manager
Nebraska Rural Electric Association
P.O. Box 82048
Lincoln, NE 68501

Re: Investment Authority of Public Power Districts

Dear Jay:

QUESTION

You have asked whether a city or village has the authority to annex agricultural land that is not contiguous with or adjacent to the corporate limits of a city or village, and if so, whether such city or village is entitled to provide electric service within the newly annexed area?

ANSWER

A city or village under certain conditions described below has the authority to annex noncontiguous agricultural land. This authority however, is the exception rather than the general rule. Such city or village is not entitled to provide electric service within the newly annexed area unless it serves the city or village at retail and until it has annexed the intervening territory between the corporate limits of the city or village and the noncontiguous agricultural land. A city or village must also obtain Power Review Board approval before it can provide electric service to newly annexed land.

ANALYSIS

I. Authority of Cities and Villages to Annex.

An analysis of the questions presented begins with an examination of the authority of cities and villages to annex land outside their corporate limits. As will be pointed out below, the general rule is that cities and villages have the authority to annex land that is contiguous or adjacent to their corporate limits and such land is required to be urban or suburban and not agricultural or rural in character. There exist however, certain statutory exceptions to this

general rule. One exception is the "deemed contiguous area" of not more than 200 feet for cities of the first class and 500 feet for cities of the primary and second class. This "deemed contiguous area" must be located between the corporate limits of a city and the land sought to be annexed. Another exception is for economic development purposes and involves redevelopment projects in blighted and substandard areas and single projects for agricultural processing facilities. This exception allows certain cities and villages the right to annex noncontiguous land.

A. Cities of the Metropolitan Class.

1. Population. Generally, a city of the metropolitan class is governed by *Neb. Rev. Stat.* §§14-101 to 14-138. In order to qualify as a city of the metropolitan class, such city is required to have 300,000 inhabitants or more. *Neb. Rev. Stat.* § 14-101.

2. Annexation Authority. A city of the metropolitan class has the authority to "extend the corporate limits of such city over lands, lots, tracts, street, or highway such distance and in such direction as may be deemed proper in any direction, and may include, annex, merge or consolidate with such metropolitan city, by such extension of its corporate limits, any adjoining cities of the first class with population of less than 10,000, or adjoining city of the second class or villages." *Neb. Rev. Stat.* § 14-117. This authority to annex however does not extend to "any agricultural land that is rural in character." *Id.*

B. Cities of the Primary Class.

1. Population. Generally, a city of the primary class is governed by *Neb. Rev. Stat.* §§ 15-101 to 15-118. In order to qualify as a city of the primary class such city is required to have 100,000 inhabitants or more. *Neb. Rev. Stat.* § 15-101.

2. Annexation Authority. A city of the primary class has the authority to "include within the corporate limits of such city any contiguous or adjacent lands, lots, tracts, streets, or highways such distance and in such direction as may be deemed proper, and may include, annex, merge or consolidate with such city by such extension of its corporate limits any village which is within the limits of such city, and which is served with water service or supply or with a sanitary sewerage system and service, or both such water and sanitary sewage service." *Neb. Rev. Stat.* § 15-104.

3. Deemed Contiguous Areas. Land is deemed contiguous by *Neb. Rev. Stat.* § 15-105 "although a stream, embankments, strip or parcel of land, not more than 500 feet wide, lies between such land and the corporate limits."

C. Cities of the First Class.

1. Population. Generally, a city of the first class is governed by *Neb. Rev. Stat.* §§ 16-101 to 16-129. In order to qualify as a city of the first class, such city is required to have inhabitants of more than 5,000 and not more than 100,000. *Neb. Rev. Stat.* § 16-101.

2. Annexation Authority. A city of the first class has the authority to include within the corporate limits of such city "any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character and in such direction as may be deemed proper." *Neb. Rev. Stat.* § 16-117. This authority to annex however does not extend to "any agricultural land that is rural in character." *Id.*

3. Deemed Contiguous Areas. Land is deemed contiguous by *Neb. Rev. Stat.* § 16-1118 "although a stream, embankments, strip or parcel of land, not more than 200 feet wide, lies between such land and the corporate limits."

D. Cities of the Second Class and Villages.

1. Population. Generally, a city of the second class and villages are governed by *Neb. Rev. Stat.* §§ 17-101 *et seq.* All cities, towns, and villages containing more than 800 and not more than 5000 inhabitants shall be cities of the second class and be governed by *Neb. Rev. Stat.* §§ 17-101 to 17-153 unless they adopt a village government as provided in §§ 17-306 to 17-309.

2. Annexation Authority. A city of the second class or village has the authority, except as provided in sections 13-111 to 13-1118,[1] "to include within the corporate limits of such city or village any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character and in such direction as may be deemed proper." *Neb. Rev. Stat.* § 17-405.01(1). This authority to annex does not extend to "any agricultural lands which are rural in character." *Id.*

3. Deemed Contiguous Areas. *Neb. Rev. Stat.* § 17-405.2 provides that "lands, lots, streets, or highways shall be deemed contiguous although a stream, roadway, embankment, strip, or parcel of land not more than five hundred feet wide lies between the same and the corporate limits."

II. Economic Development.

There exist several statutory schemes to assist cities and villages with economic development. Some of these schemes allow cities and villages to annex noncontiguous parcels of land in order to extend tax increment financing options to businesses that desire to locate on the noncontiguous parcel of land. Three schemes are discussed below, however only two allow for annexation of noncontiguous parcel of land.

A. Nebraska Redevelopment Act.

1. Purpose. The Nebraska Redevelopment Act (the "Act"), *Neb. Rev. Stat.* §§ 58-501 to 58-533, was enacted to encourage both new and existing businesses to relocate to and expand in Nebraska and to provide appropriate inducements to encourage them to do so. Another purpose of the Act was to prevent and eliminate blighted and substandard areas.

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[1] *Neb. Rev. Stat.* §§ 13-111 to 13-118 place limitations on the ability of a city of the second class or village to annex a designated "Industrial Area" even if it is contiguous to the corporate limits such city or village.

2. Applicability. The Act applies to any city, village or joint entity (created by Interlocal Cooperation Act). Such city, village or joint entity may apply to the state to designate an area as a designated blighted and substandard area under the Act. *Neb. Rev. Stat.* § 58-504. A company may file a project application with the city or joint entity where the blighted and substandard area is located to undertake and complete a redevelopment project in such designated area and to receive tax increment financing under the Act for such project. *Neb. Rev. Stat.* § 58-505.

3. Property Taxes are Divided. Taxes are divided for a period not to exceed fifteen years between the City and to pay the principal and interest of any financing used by the City or joint entity to develop the redevelopment project area. *Neb. Rev. Stat.* § 58-507.

4. Annexation of Noncontiguous Land. The city or joint entity that enter into the redevelopment project agreement with a company has the authority

"to annex all or any portion of the project area, whether such area is contiguous or not contiguous to the area of operation[2] [of the city or joint entity] . . . .

* * * *

(c) the provisions of section 70-1008 shall apply to the annexation of any contiguous land . . ., but the annexation of any noncontiguous land undertaken pursuant to the act . . .shall not result in any change to the service area of any electric service area of any electric utility without the express agreement of the electric utility serving the annexed noncontiguous area at the time of annexation, except that at such time following annexation of the noncontiguous area as [the city or joint entity] annexes sufficient intervening territory so as to directly connect the noncontiguous area to the main body of [the city or joint entity] such noncontiguous area shall, solely for the purposes of section 70-1008, be treated as if it had been annexed by the [city or joint entity] on the date upon which the connecting intervening territory had been formally annexed."

5. Territorial Limitation. Blighted and substandard area is defined in part as "an area within a city ... up to ten miles outside of the area of operation of a city ... of the metropolitan or primary class, up to six miles outside the area of operation of a city...of the first class, and up to three miles outside the area of operation of a city ... of the second class or village . . ." *Neb. Rev. Stat.* § 58-503(6).

6. Expiration Date for New Applications under Act. *Neb. Rev. Stat.* § 58-533 provides that no new applications may be filed after February 1, 2000, without further authorization of the legislature. To date the legislature has not re-authorized the filing of applications.

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[2] Area of operation is defined as "the area within the corporate limits of the public body." *Neb. Rev. Stat.* § 58-503(3).

B. Community Development Law.

1. Purpose. Under the Community Development Law, *Neb. Rev. Stat.* §§ 18-2101 to 18-2144, cities of all classes and villages have the authority to create community redevelopment authorities and limited community redevelopment authorities for the purpose of identifying and eliminating substandard or blighted urban areas through appropriate public action and the cooperation and voluntary action of owners and tenants of property in such areas. *Fitzke v. City of Hastings,* 255 Neb. 46, 582 N.W.2d 301 (1998).

2. Community Redevelopment Authority. A community redevelopment authority has the power, among others to, acquire within its area of operation[3] real or personal property or any interest in such property, together with any improvements thereon, necessary or incidental to a redevelopment project. *Neb. Rev. Stat.* § 18-2107(4). Before any real estate is acquired for a redevelopment project, the governing body of the city in which the redevelopment project area is located must approve the redevelopment plan. *Neb. Rev. Stat.* § 18-2109.

3. Acquisition of Noncontiguous Land Outside a City. If the governing body of a city determines that the acquisition and development of undeveloped vacant land located within a 3 mile radius of the city, not within a substandard or blighted area, is essential to the proper clearance or redevelopment of substandard or blighted areas, it has the authority to acquire such land. *Neb. Rev. Stat.* § 18-2123. This section does not authorize such land to be annexed but only authorizes its purchase. Since annexation is not involved, the current power supplier is authorized to serve any electric load that may be developed on the vacant land.

C. Limited Community Development.

1. Purpose and Authority. *Neb. Rev. Stat.* §§ 18-2145 to 18-2154 contains limited community redevelopment authority and authorizes cities and villages to adopt minimum standards for housing. Limited community redevelopment authority means a community redevelopment authority created pursuant to section 18-2102.01 and having only one single pilot project authorized. *Neb. Rev. Stat.* § 18-2103(2). Any redevelopment plan may contain a provision pursuant to § 18-2147 that "any ad valorem tax levied upon real property in a redevelopment project for the benefit of any public body shall be divided for a period not to exceed fifteen years . . . as follows:

(a) That portion of the ad valorem tax which is produced by the levy at the rate fixed each year by or for each such public body upon the redevelopment project valuation shall be paid into the funds of each such public body in the same proportion as are all other taxes collected by or for the body.

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[3] Area of operation is defined as "an area within the corporate limits of the city and such land outside the city as may come within the purview of section 18-2123." *Neb. Rev. Stat.* § 18-2103(9).

(b) That portion of the ad valorem tax on real property in the redevelopment project in excess of such amount, if any, shall be allocated to and, when collected, paid into a special fund of the authority to be used solely to pay the principal of, the interest on, and any premiums due in connection with the bonds of, loans, notes, or advances of money to, or indebtedness, including interest and premiums due . . ."

2. Additional powers. *Neb. Rev. Stat.* § 18-2153 provides that the powers conferred by sections 18-2147 to 18-2153 are in addition and supplemental to the powers conferred by the Community Development Law and any other law.

3. Annexation of Noncontiguous Land. An agricultural processing facility may be annexed pursuant to *Neb. Rev. Stat.* § 17-405.01(2), if the land upon which it sits constitutes a redevelopment project area in accordance with the Community Development Law and sections 18-2145 to 18-2154.

Neb. Rev. Stat. § 17-405.2(2) contains one of the exception to the general rule that land must be contiguous or adjacent to the limits of a city or village and urban or suburban in character before it may be annexed.

Subsection (2) provides that a city of the second class or village:

> [m]ay annex any lands, lots, tracts, streets, or highways which constitute a redevelopment project area so designated by the city or village or its community redevelopment authority in accordance with the provisions of the Community Development Law and sections 18-2145 to 18-2154 when such annexation is for the purpose of implementing a lawfully adopted redevelopment plan containing a provision dividing ad valorem taxes as provided in subsection (1) of section 18-2147 and which will involve the construction or development of an agricultural processing facility, notwithstanding that such lands, lots, tracts, streets, or highways are not contiguous or adjacent or are not urban or suburban in character. Such annexation shall comply with all other provisions of law relating to annexation generally for cities of the second class and villages. The city or village shall not, in consequence of the annexation under this subsection of any noncontiguous land, exercise the authority granted to it by statute to extend its jurisdiction beyond its corporate boundaries for purposes of planning, zoning, or subdivision development without the agreement of any other city, village, or county currently exercising such jurisdiction over the area surrounding the annexed redevelopment project area. The annexation of any noncontiguous land undertaken pursuant to this subsection shall not result in any change in the service area of any electric utility without the express agreement of the electric utility serving the annexed noncontiguous area at the time of annexation, except that at such time following the annexation of the noncontiguous area as the city or village lawfully annexes sufficient intervening territory so as to directly connect the noncontiguous area to the main body of the city or village, such noncontiguous area shall, solely for the purposes of section 70-1008, be treated as if it had been annexed by the city or village on the date upon

which the connecting intervening territory had been formally annexed." (Emphasis added).

3. Territorial Limitation. An agricultural processing facility that is noncontiguous to a city of the second class or village may only be annexed if it is within a three-mile radius of the limits of such city or village. *Neb. Rev. Stat.* §18-2123.

4. Definition of Agricultural Processing Facility. Agricultural processing facility means "a plant or establishment where value is added to agricultural commodities through processing, fabrication, or other means and which eighty percent or more of the direct sales from the facility are to other than the ultimate consumer of the processed commodities. A facility shall not qualify as an agricultural processing facility unless its construction or development involves the investment of more than one million dollars derived from nongovernmental sources." *Neb. Rev. Stat.* § 17-405.01(3).

5. Obligation to Provide City Services. A second class city or village is required to provide to the agricultural processing facility substantially the benefits that it provides to other inhabitants, as soon as practicable, such as police, fire, snow removal, and water services. A second class city or village is required to adopt a plan to provide such services within one year after annexation. *Neb. Rev. Stat.* §17-405.04

III. Cities and Villages Owning Their Electric Systems May Provide Electric Service to Newly Annexed Areas Subject to Power Review Board Approval.

If a city or village desires to serve newly annexed areas, they must file an application with The Nebraska Power Review Board ("Board"). The Board has authority to approve applications of municipalities (cities and villages) to serve newly annexed areas. Under the provisions of *Neb. Rev. Stat.* § 70-1008(2), "[a] municipally owned electric system, serving such municipality at retail, shall have the right, upon application and approval by the board, to serve newly annexed areas of such municipality." The statute goes on to provide that the electric distribution facilities and customers of another supplier in the newly annexed area may be acquired in accordance with the procedure and criteria set forth in § 70-1010, within one year of annexation. This statute however, does not authorize a city of the second class or a village to serve a newly annexed agricultural processing facility located on a noncontiguous parcel of land unless such city or village serves its inhabitants with electric power at retail, and until it annexes the intervening territory between the corporate limits of the city or village and the noncontiguous parcel of land.

IV. Annexation of Intervening Territory in Order to Acquire Service Area Rights of a Public Power District in a Noncontiguous Parcel of Land.

A city or village may attempt to annex intervening territory in order to acquire a public power district service area rights to a noncontiguous parcel of land. Strictly speaking, "strip or corridor annexation" is not a valid legal means for a city or village to acquire intervening territory in order to annex noncontiguous parcels of land. Nevertheless, a city or village may attempt to justify this type of annexation by claiming that the annexation is authorized by the "deemed contiguous" exception to the general rule. *See, Johnson v. City of Hastings,* below. If a

city or village is successful in acquiring intervening territory in order to annex a noncontiguous parcel, it may result in adverse consequences to a power district. Among the adverse consequences, is the loss of facilities and/or customers, or subjecting a power district to the zoning jurisdiction of a city or village.

Also to be considered in an annexation of intervening territory is the distinction between urban and suburban and agricultural and rural land. Often times this distinction is not so easily identified. *See, i.e. Wagner v. City of Omaha,* 156 Neb. 163, 55 N.W.2d 490 (1952) (The intention of the legislature was not to prevent annexation of tracts which are only partially developed as residential areas where substantial parts of the land are used for agricultural purposes but which tracts are urban in character, but to prevent annexation of agricultural areas which are rural in character).

It seems plausible that a city of the second class or a village may consider annexing intervening areas between the corporate limits of the city or village and the noncontiguous parcel of land in order to acquire the service area rights of a public power districts to an agricultural processing facility.

The seminal case of *Johnson v. City of Hastings,* 241 Neb. 291, 488 N.W.2d (1992) is the classic example of the unlawful use of "strip or corridor annexation". In the *Johnson* case, the City of Hastings, a city of the first class, annexed a saucepan-shaped tract of land that included a 120 foot-wide strip of U.S. Highway 6. The subject of the annexation was the Central Community College campus that was connected to the City of Hastings solely by the 120-foot-wide strip that included Highway 6. Suit was brought by two farmers, the Southern Nebraska Rural Public Power District ("Southern") and the Nebraska Public Power District ("NPPD") to declare the annexation invalid. The two farmers were located within 2 miles of the territory to be annexed. Part of Southern's service area was within the annexed tract and it had facilities and lines within 2 miles of the area to be annexed. NPPD served customers within the annexed area.

The Court in *Johnson* relied on the holding in *Whitham v. City of Lincoln,* 125 Neb. 366, 373, 250 N.W. 247 (1933), in finding the annexation invalid. Quoting from *Whitham,* the Court stated:

> "We are constrained to hold that the city exceeded its power when it annexed a narrow strip of plaintiff's land, reaching out like a finger, along the exact location of an 8-inch water-main required to construct the Veteran's Hospital, and that such annexation of such farm land was wrongful and without authority."

The *Johnson* Court then stated:

> "Similarly, in this case, the City of Hastings is reaching out like a finger, along Highway 6, a 120-foot-wide strip, to the college campus. . ."

* * * *

> "We hold that as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. (Citation omitted.) The requirement of contiguity has not been achieved in this case, since the boundary of the area sought to be annexed is not substantially adjacent to the boundary of the city."

The Court rejected the City of Hastings argument that the language of § 16-118 supports annexation of the 120-foot-wide strip of Highway 6. Section 16-118 states: "Lands, lots, tracts, streets, or highways shall be deemed contiguous although a stream, embankment, strip, or parcel of land not more than 200 feet wide lies between the same and the corporate limits." The Court found that this statute "applies to a situation where the city limits and the land sought to be annexed are separated by a strip of land no more than 200 feet wide" and ...is not applicable to this case. The statute implies a situation where a strip of land is located parallel to the city limits, which is not the case here."
Id. at 297.

The Court, quoting from *McQuillin,* The Law of Municipal Corporations, stated:

> "As applied to annexation of streets or roads projecting beyond the limits of a municipality, 'contiguous' has been construed to mean contiguous in the sense of adjacent and parallel to the existing municipal limits. Accordingly, the annexation of a portion of a highway extending beyond the border of a municipality, connected only by the width of the highway as it adjoined the municipal boundary, has been held an invalid 'strip' or corridor' annexation."

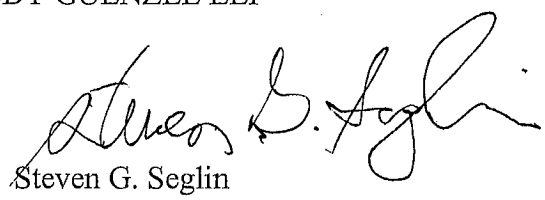
Id. at 298. *Cf, Piester v. North Platte,* 198 Neb. 220, 252 N.W.2d 159 (1977) (Annexation of area of Interstate 80 in excess of 200 feet wide was valid in spite of claim that the land was rural in character); *Voss v. City of Grand Island,* 186 Neb. 232, 1821 NW.2d 427 (1970) (The use of land for agricultural purposes does not necessarily mean it is rural in character).

It may be possible for a city of the second class or village to attempt to serve an agricultural processing facility with electricity by annexing intervening territory. Whether this is illegal "strip or corridor annexation", a legal "deemed contiguous annexation", or the annexation of urban or suburban land, will depend on the peculiar facts of each individual case. Although a city or village has been granted an exception to annex non-contiguous agricultural land used for an agricultural processing facility, such city or village is not entitled to serve a agricultural processing facility with electricity unless it serves its inhabitants with electricity at retail and until it has annexed intervening territory between the limits of the city or village and the agricultural processing facility.

Therefore, it would seem important for a public power district to be vigilant and notify its attorney at the earliest possible time if a city of the second class or village is contemplating annexation of any territory between the corporate limits of the city or village and the land used for an agricultural processing facility.

Very truly yours,

CROSBY GUENZEL LLP

By 
Steven G. Seglin

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