

CROSBY GUENZEL LLP

FEDERAL TRUST BUILDING
134 SOUTH 13TH STREET, SUITE 400
LINCOLN, NEBRASKA 68508
TELEPHONE: (402) 434-7300
FACSIMILE: (402) 434-7303

WRITER'S E-MAIL: SGS@CROSBYLAWFIRM.COM
WRITER'S DIRECT DIAL NO. (402) 434-7324

WILLIAM D. KUESTER
STEVEN G. SEGLIN
ROCKY C. WEBBER
DAVID A. JARECKE
WILLIAM R. KUTILIEK
RICHARD L. RICE
THOMAS E. JEFFERS
MATHEW T. WATSON

THEODORE L. KESSNER (RETIRED)

ROBERT B. CROSBY (1911-2000)
ROBERT C. GUENZEL (1921-2007)

March 25, 2011

Jay Holmquist, General Manager
Nebraska Rural Electric Association
1244 K Street
PO Box 82048
Lincoln, NE 68501-2048

Re: Taxable Property

Dear Jay:

QUESTION

You have asked whether property owned by a public power district ("PPD"), which is generally exempt from taxation, may be subject to tax by a county where the property is located.

The question arises as a result of a notice received by a PPD from a county that land where a communication tower is located is not exempt from taxation. The PPD also raises the question of whether leased space on the communication tower is subject to taxation.

ANALYSIS AND DISCUSSION

The state and political subdivisions are generally exempt from property Tax.

In general, the real or personal property of PPDs, as well as the state and other governmental subdivisions ("Public Property"), is exempt from taxation under the Nebraska Constitution if such property is used or being developed for a public purpose. Article VIII, § 2 of the Nebraska Constitution sets out the exemption, as follows:

Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary: (1) The property of the state and its governmental subdivisions shall constitute a separate class of property and shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental

subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes except as provided by law;

Pursuant to the authority granted in the above constitutional provision the Legislature has enacted *Neb. Rev. Stat. § 77-202*, which among other things, imposes a tax on Public Property otherwise exempt if it is not being used or developed for a public purpose or if it is leased to a private party for a non-public purpose. In addition, this statute sets out categories of Public Property which are exempt and defines public purpose.

Subsection (1)(a) provides an exemption and subjects certain taxation leased property to tax, as follows:

Property of the state and its governmental subdivisions to the extent **used or being developed for use by the state or governmental subdivision for a public purpose** [is exempt]. For purposes of this subdivision, public purpose means use of the property (i) to provide public services with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) to carry out the duties and responsibilities conferred by law with or without consideration. **Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose . . .**

In addition, subsection (1)(b) provides an exemption if in lieu of taxes are being paid on Public Property which is not leased and not being used or developed for a public purpose. This subsection provides in part as follows:

Unleased property of the state or its governmental subdivisions which is not being used or developed for use for a public purpose but upon which a payment in lieu of taxes is paid for public safety, rescue, and emergency services and road or street construction or maintenance services to all governmental units providing such services to the property. Except as provided in Article VIII, section 11, of the Constitution of Nebraska, the payment in lieu of taxes shall be based on the proportionate share of the cost of providing public safety, rescue, or emergency services and road or street construction or maintenance services unless a general policy is adopted by the governing body of the governmental subdivision providing such services which provides for a different method of determining the amount of the payment in lieu of taxes. The governing body may adopt a general policy by ordinance or resolution for determining the amount of payment in lieu of taxes by majority vote after a hearing on the ordinance or resolution. Such ordinance or resolution shall nevertheless result in an equitable contribution for the cost of providing such services to the exempt property;

* * * *

(Emphasis added.) In summary then, subsection (1) (a) provides that Public Property of the state and its governmental subdivisions, which includes PPDs, is exempt from taxation to the extent such property is used or is being developed for use for a public purpose or if it is leased to a private party for a public purpose at fair market value. On the other hand, Public Property that is leased to a private party for a non-public purpose is not exempt and is subject to tax. Subsection (1) (b) above also provides for an exemption from taxation if in lieu of tax is paid on Public Property which is not being used or being developed for a public purpose.

The leaseholder or owner of leased Public Property may be subject to tax.

Pursuant to *Neb. Rev. Stat. § 77-202.11*, Public Property leased to a private party for a non-public purpose is subject to taxation unless such property is leased at market value for a public purpose. *Neb. Rev. Stat. § 77-202.11* provides in part:

(1) Leased public property, other than property leased for a public purpose as set forth in subdivision (1) (a) of section 77-202, shall be taxed or exempted from taxation as if the property was owned by the leaseholder. The value of the property shall be determined as provided under section 77-201.

[Note the leaseholder or owner (lessor) is subject to the tax and not the lessee.]

* * * *

(4) The state or any governmental subdivision may, if it chooses to do so in its discretion, provide the appropriate county assessor a description of the property rather than a copy of the lease; request that the assessor notify it of the amount of tax which would be assessed to the leaseholder; voluntarily pay that tax; and collect that tax from the leaseholder as part of the rent.

[Note the state or governmental subdivision which is leaseholder or owner has the option to pay the tax and collect reimbursement through the rent]

(5) Except as provided in Article VIII, section 11, of the Constitution of Nebraska, no in lieu of tax payments provided for in any other section of law shall be made with respect to any leased public property to which this section applies.

Tax Rate for Public Property subject to tax.

The tax rate for Public Property subject to tax is provided in *Neb. Rev. Stat. § 77-201* as follows:

(1) Except as provided in subsections (2) through (4) of this section, all real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value.

(2) Agricultural land and horticultural land as defined in section 77-1359 shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation, unless expressly exempt from taxation, and shall be valued at seventy-five percent of its actual value.

(3) Agricultural land and horticultural land actively devoted to agricultural or horticultural purposes which has value for purposes other than agricultural or horticultural uses and which meets the qualifications for special valuation under section 77-1344 shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation, and shall be valued for taxation at seventy-five percent of its special value as defined in section 77-1343.

* * * *

(5) Tangible personal property, not including motor vehicles registered for operation on the highways of this state, shall constitute a separate and distinct class of property for purposes of property taxation, shall be subject to taxation, unless expressly exempt from taxation, and shall be valued at its net book value. . .

CONCLUSION

In general, Public Property, whether real or personal, is exempt from taxation, unless it is not being used or developed for a public purpose. If Public Property is not being used or developed for a public purpose, it may still be exempt from taxation if such property is subject to in lieu of tax. However, Public Property that is leased to a private party is subject to tax unless such property is leased at fair market value for a public purpose. The tax rate for leased Public Property to a private party is fair market value for real property and net book value for personal property. The Nebraska Personal Property Return is attached for easy reference.

It should be noted that the leaseholder or owner of leased Public Property is required to file a tax return and pay the tax. If a PPD, for example, leases space on a communication tower to a private party for a non-public purpose (cell phone equipment), the owner of the equipment is responsible for paying the tax. The rent received by the PPD is not subject to tax. Nevertheless, it would be prudent for the PPD to notify the county where the Public Property is located, on or before May 1, and that a private party is leasing space on the communication tower.

Regarding the notice that the PPD in question received on the land where the communications tower is located, the issue is whether the land is being used for a public purpose. I understand that the primary purpose of the use of the land is for PPD communications, SCADA use and other PPD use, and an ancillary use is leasing space for private party use (cell phone antenna, etc.) The PPD has protested the notice of taxation and intends to prove that the use is for a public purpose. Clearly this real property is not subject to property tax since it is being used primarily for a public purpose.

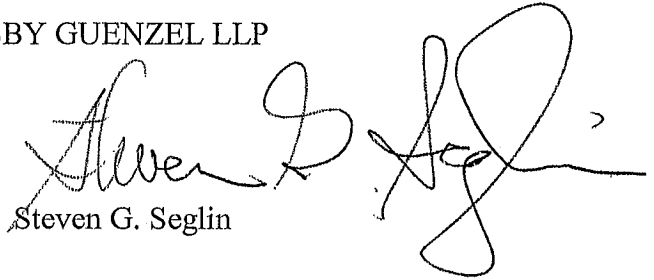
In talking with the Lancaster County Assessor, I was informed that not all counties are uniform in the treatment of taxing Public Property. Therefore, it is suggested that if a PPD has property which may be subject to tax or reporting, that it call the county assessor where the property is located and discuss the requirements, if any, which might apply.

Very truly yours,

CROSBY GUENZEL LLP

By

Steven G. Seglin

A handwritten signature in black ink, appearing to read "Steven G. Seglin", written over a horizontal line. The signature is stylized and cursive.

SGS:rrk