

# Nebraska Regional Officials Council All-Staff Retreat

Community Development and  
Tax Increment Finance Law

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# LAND USE

# Land Use Law Fundamentals

- Nuisance Prevention
- The “Police Power” - Public Health, Safety, Welfare and Morals
- Hierarchy of Land Use

# Dillon's Rule

Municipalities only have powers state has expressly delegated to them

- Merrill v. Monticello, 138 U.S. 673 (1891)
- Clinton v. Cedar Rapids & M.R.R. Co., 24 Iowa 455 (1868)

# Typical Players in Zoning Matters

- Zoning Administrator
- Planning Commission
- Board of Adjustment / Zoning Board of Appeals
- City Council/Board of Supervisors/County Commission

# Other Considerations

- Nebraska statutes differ depending on size of city and status as city or county
- Differences as to specific procedures

# Comprehensive Plan

- Requirements include:
  - Pattern and intensity of land use
  - Public facilities, including transportation and other governmental services
  - The effective development and utilization of human and natural resources
  - Evaluation of housing, employment, education, and health and the formulation of programs to meet such needs
  - Surveys of structures and sites determined to be of historic, cultural, archaeological, or architectural significance or value
  - Long-range plans for physical and fiscal plans for governmental policies and action
  - Coordination of all related plans and activities of the state and local governments and agencies concerned
- Legal force
- Legal consistency
- Amendment and adoption

# Land Subdivision

- Land subdivision requirements often form the basis for land development – as much as zoning in some cases
- Subdivision regulations subject to same basic requirements as zoning
- Dillon’s Rule
- Comprehensive plan consistency
- Important part of “city planning”



# Appeals – Protect Your Rights

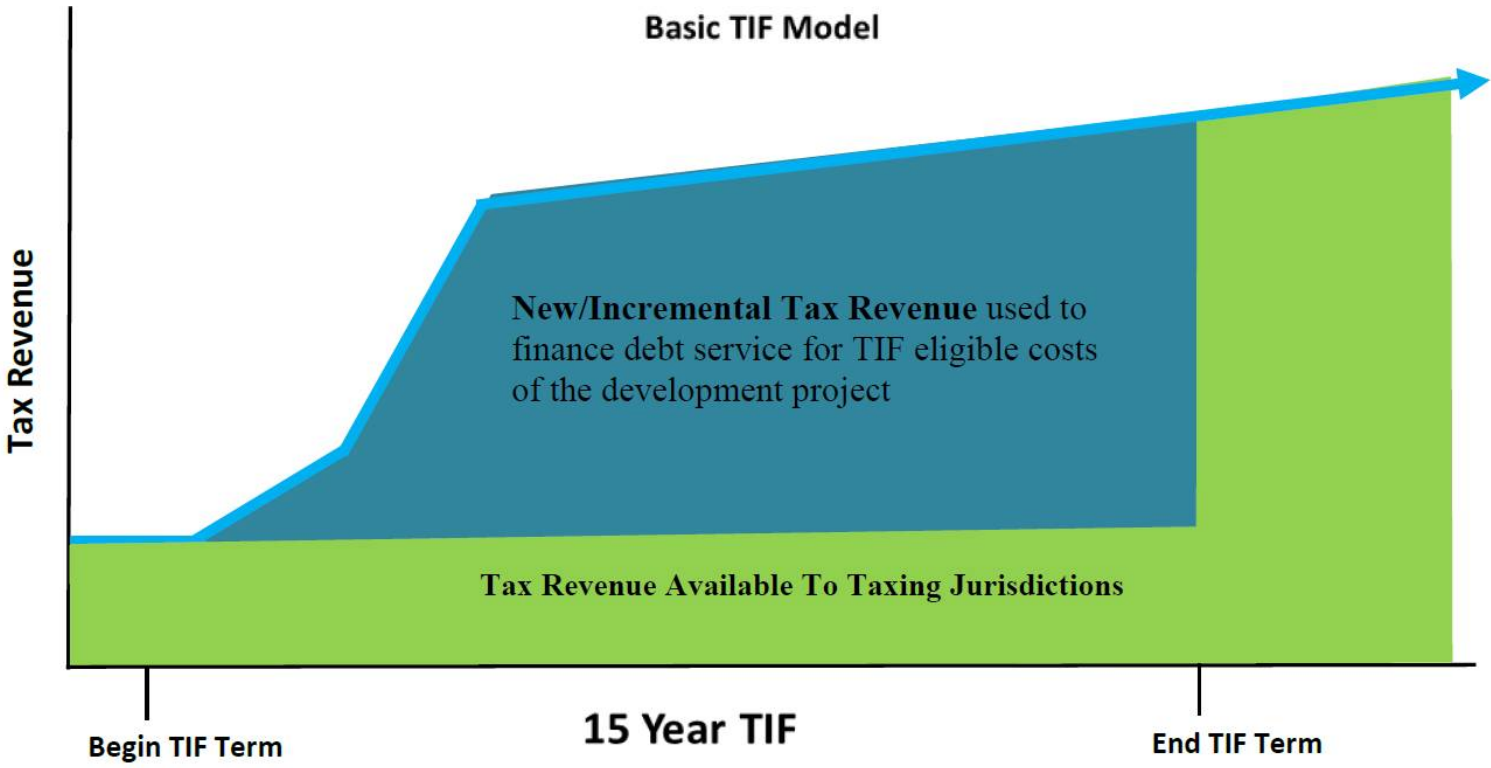
- Reconsideration – on the spot request
- Exhaustion of administrative remedies
- Preserve issues for appeal
- Know the proper court and pleadings for appeals and challenges
- Statutes of limitations are short
- Be realistic – courts defer to municipalities

# Environmental Permitting

- Potential environmental issues:
  - Wetlands and other waters (Section 404 permit)
  - Take of listed species (generally birds), including displacement of habitat
  - Stormwater runoff (NPDES permit)
  - Phase I environmental site assessment
  - Archaeology and Native American issues
  - Water supply and dewatering

# TAX INCREMENT FINANCING (TIF)

# What is TIF?



# General Development Plan

## What's Included

- Pattern and intensity of land use,
- Provision of public facilities,
- Effective development and utilization of human and natural resources,
- Identification and evaluation of area needs including housing, employment, education, and health and the formulation of programs to meet such needs,
- Surveys of structures and sites of historic, cultural, archaeological, or architectural significance or value,
- Long-range physical and fiscal plans for governmental policies and action, and
- Coordination of plans and activities between state and local governments.
- The plan, with the accompanying maps, plats, charts and descriptive and explanatory materials, shall show the recommendations concerning the physical development pattern of the city and land outside its boundaries as well as acquisition, extension, widening, narrowing, removal, vacation, abandonment, sale, and other actions affecting public improvements.

# Community Redevelopment Authority Governance

- An Authority has all the powers necessary or convenient to carry out and effectuate the purposes of the Community Development Law.
  - Levy property taxes (up to 2.6 cents), occupation taxes (enhanced employment areas) and special assessments
- Any action requires a majority of vote of the authority.
- Each authority must maintain an accurate account of all its activities, receipts and disbursements, and annually report on those activities, receipts, and disbursements to the governing body of the city.
  - Authority must segregate funds.
  - The governing body of the municipality must periodically audit all books and records of the authority.

# Community Redevelopment Area

## Substandard Defined

- An area in which there is a predominance of buildings or improvements which by reason of dilapidation, deterioration, age or obsolescence, inadequate provision for ventilation, light, air, sanitation, or open spaces, high density of population and overcrowding, or the existence of conditions which endanger life or property, is conducive to ill health, transmission of disease, infant mortality, juvenile delinquency, and crime, and is detrimental to the public health, safety, morals, or welfare.

# Redevelopment Contracts

## Application Process

- Developer locates a property in a CRA.
- Each City has its own TIF Application.
- Developer provides a City with an outline of proposed the project, project costs, infrastructure improvements, and summary of “But For” Analysis.



# Bond Issuance

- Resolution of Authority
  - Notice, meeting minutes, etc.
- Copy of Bond
- Certificate by City , Authority Officers, Planning Commission
- Notice to Divide for Community Redevelopment Project
- Auditor Filings
- Redevelopment Contract and Closing Certificate
- Receipt of Treasurer of Authority, Bond Purchaser
- Investor Letter
- Sources and Uses
- Accounting

# Failure to Comply

In considering a challenge to actions taken by a community redevelopment authority pursuant to the Community Development Law, a district court may disturb the decision of the community redevelopment authority only if it determines that the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong. *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998).

# NEBRASKA HISTORIC TAX CREDITS

# Nebraska Historic Tax Credit Overview

- Nebraska Job Creation and Main Street Revitalization Act authorized what is commonly called the Nebraska Historic Tax Credit program
- The program is administered by the Nebraska State Historical Society's State Historic Preservation Office (SHPO) and the Nebraska Department of Revenue.
- Goal: revitalize historic Nebraska buildings and districts and create jobs in those communities
- 20% tax credit for qualified expenditures in rehabilitating a qualified historic structure
- Partially transferable – real estate financing tool
- May carry forward to subsequent tax years
- Applicants may obtain both state and federal credit

# Eligible Expenditure

- "Any cost incurred"
- "For the improvement of"
- "Historically significant real property"
- "If in conformance with the standards"

Broader than the federal program

# Nebraska Historic Tax Credit Legislative History

- Baird Holm brought concept forward in late 2011
- LB 888 (Cornett) in 2012 – did not advance
- Revenue Committee advanced LB 191 (Nordquist) at the end of the 2013 session
- Senator Johnson Priority Bill 2014
- Legislature passed 45-0 in April 2014
- Program commenced January 1, 2015

# Nebraska Historic Tax Credit Timing and Program Caps

- \$15,000,000 in tax credits available annually for five years (through 2019), unused credits carry forward
- \$1,000,000 maximum credit per project
- \$15,000,000 in credits leverages a minimum of \$75,000,000 in rehabilitation projects
- First come, first served, up to available credits
- Certain pre-application expenses may be eligible

# Nebraska Historic Tax Credit Transferability

- Transferability is critical. Allows monetization of credits.
  - Half of the credits are freely transferable; remainder must be used or syndicated.
  - Credits accrue to the entity incurring expenses.
  - Non-profits and political subdivisions can freely transfer all credits.
  - Syndication is complex and expensive.
  - Syndication can be done with other credits.



# Economic Benefits

- State historic tax credits have accounted for billions in investment
- \$60 million in leveraged investment creates approximately 1,350 FTE jobs
- Missouri's credit has generated \$2.9 billion in investment and 43,105 jobs since 1998
- Not just historic preservation, but significant economic development and contributions to the property tax base
- Nebraska's 2015 credits will generate over \$110,000,000 in private investment

# Federal Historic Tax Credits

- Two types of credits: 20 percent and 10 percent
  - 20 percent credit for rehabilitation of “certified historic structure” (National Register listed or contributing to National Register District)
  - 10 percent credit for rehabilitation of buildings constructed prior to 1936, but not “certified”

# Federal Historic Tax Credits

- Very successful program – quietly a significant player in real estate and development
- Responsible for over \$90 billion in development, at a cost of only \$17.5 billion, over 35+ years
- Can be difficult to use
- Not transferable, so must use complex syndication schemes to monetize
- Income-producing properties only (and non-residential for 10 percent credit)

# Qualified Historic Properties

## “Historically Significant Real Property”

- Listed individually in the National Register of Historic Places or in the process of listing.
- Located within a district listed in the National Register of Historic Places and is historically associated with the district or in the process of listing.
- Designated individually under an approved local preservation ordinance or resolution or pending designation.
- Located within a historic district designated under an approved local preservation ordinance or resolution and historically associated with the district or pending designation.



# Rehabilitation Standards

## Secretary of the Interior's "Standards for the Treatment of Historic Properties"

The Secretary of the Interior's "Standards" are generally-accepted preservation standards promulgated by the U.S. Department of the Interior. They consist of:

- **"Rehabilitation"** acknowledges the need to alter or add to a historic property to meet continuing or changing uses while retaining the property's historic character. In practice, these standards will guide most projects.
- **"Restoration"** focuses on restoring a property to a particular period of time in its history.
- **"Preservation"** includes a focus on the maintenance and repair of existing historic materials and the prevention and avoidance of further deterioration of a historic building or structure.
- **"Reconstruction"** applies to recreating vanished or non-surviving portions of a property.

**Local preservation standards adopted by ordinance or resolution must be approved by the SHPO.**

# Part 1

## Historic Structure Certification

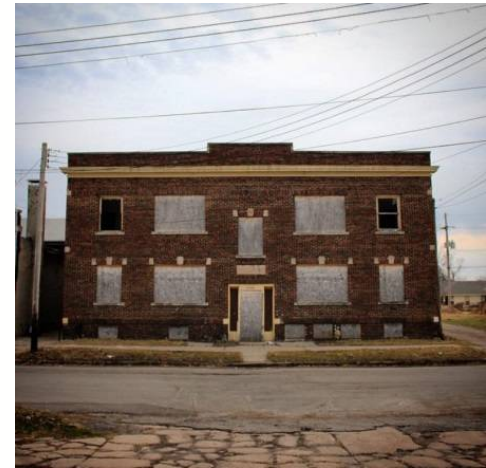
- Part 1 “Historic Structure Certification” is required to determine that the building meets the qualification as “historically significant real property.”
- Submission of a Part 1 only does not constitute a complete application for purpose of allocating credits.
- Part 1 can be submitted at any time.



# Part 2

## Rehabilitation Certification

- Prior to commencing work a Part 2 application must be filed.
- The SHPO reviews the application for completeness including but not limited to, plans and specifications prepared by a licensed architect, licensed engineer or licensed contractor. Photographs of existing conditions are required. Applicants must carefully follow the instructions on the form. Applications that are incomplete are not considered and must reapply.
- Part 2 is required to describe proposed rehabilitation work. A complete application must be submitted to the SHPO prior to commencing work on the historic building.
- All work must meet the “Secretary of the Interior’s Standards for the Treatment of Historic Properties” or approved local standards.
- As work progresses it is critical that the applicant conforms to the work that is proposed in the Part 2. However, the Part 2 can be amended if changes are proposed.



## Part 3

# Completed Rehabilitation Certification

### **Final Application and Completion of the Process**

- The applicant completes the project, and seeks and obtains final approval of the work from the SHPO.
- Part 3 (Completed Rehabilitation Certification) is submitted upon completion of the project to certify the work.
- Upon approval, the SHPO will forward a certificate of completed work to the Nebraska Department of Revenue.
- With issuance of the SHPO's certificate the Nebraska Department of Revenue will calculate the credit and issue a tax credit certificate or certificates to the applicant.
- The applicant must file within 12 months of placing the building into service (for example, obtaining a certificate of occupancy).



# Priority Status

- Applications begin to be received the first business day of the calendar year.
- Each is reviewed for “completeness” within 21 days. “Complete” applications will be given “priority” status based on the date received. Incomplete applications are not assigned a priority status and must resubmit.
- Each complete application is then reviewed under the “Secretary of the Interior’s Standards” (or local standards) within 30 days. Approved applications are given an allocation of credits based on their priority date. Denied applications will lose their priority status.
- When \$15,000,000 is reached the SHPO suspends new applications. Those not allocated before the suspension will retain their priority status for the next calendar year.

# LAND USE AND RENEWABLE ENERGY

# A Growing Industry

- Nebraska has a wind resource that some estimate to be the fourth best in the nation along with an abundance of farmland on which to situate wind turbines and develop wind energy generation projects.
- As of 2017, there were approximately seven hundred thirty-nine wind turbines operating in Nebraska with a total capacity of approximately one thousand three hundred eighty-six megawatts. By comparison, in 2007, there were approximately fifty turbines operating in Nebraska with the total capacity of approximately seventy-three megawatts.
- Certain tax incentives, political pressure, and America's desire to increase renewable sources of energy make Nebraska a fertile territory for renewable energy development.

# C-BED – Community Based Energy Development and Other Incentives

- State tax credits
- Exemption from state sales tax for a project
- Exemption from local property taxes
- Exemption from income taxes
- Low-interest or interest-free loans for solar projects

# Nebraska Community-Based Energy Development Statute

- At least twenty-five 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.”
- 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.

# Developers and Landowners

- Critical to specify the property description
- Perform any necessary due diligence to verify clean title
- Encumbrances to the property which could be foreclosed and affect the desired option, or impede the developer's intended use of the property
- Leasehold title insurance policies insuring the leasehold which is created

# Relationship to Outstanding Liens

Subordination and non-disturbance agreements from any lienholders or crop lessees

# State Specific Laws

Nebraska as an example: Legal description must contain a description of the dimensions of the wind energy or solar easement sufficient to determine:

- the horizontal space across and
- the vertical space above the burdened property that must remain unobstructed



# State Specific Laws (continued)

- Leases and easements to be recorded
- Wind leases and easements are automatically terminated after 10 years if construction has not commenced
- Limits the term of wind leases and easements in Nebraska to 40 years, subject to renewal

# Other Easements/Purchases

- Determine delivery routes ahead of time, and obtain easements from landowners who will have their corners “cut”
- Transmission lines
- Construction, repair, removal and/or replacement of wind turbine components
- Corollary equipment to be maintained, such as meteorological tower siting
- Substation siting

# Compensation

- Per megawatt, per year basis
- Percentage of revenues available to the developer
- Verify the formula

# Other Issues

- Crop damage
- Removal of turbines and equipment
- Restoration of roads and other municipal infrastructure

# Zoning, Permitting and Environmental Issues

- Migrating birds and Prairie chickens.
- Create and use “leks” for mating dances and other rituals. These 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.
- Survey sites for active leks and try to set turbines back from active leks by a quarter mile or more.
- Whooping crane.

# Typical Permitting Agencies

- United States Army Corps of Engineers
- United States Fish and Wildlife Service
- Federal Aviation Administration
- State Game and Parks Commission
- State Historic Preservation Office
- Local Municipalities

# Questions?

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