

AGRI-BUSINESS NEWSLETTER

November 2009

MDA PUBLISHES GUIDELINES REGARDING WIND TURBINES ON LAND ENROLLED IN THE MICHIGAN FARMLAND PRESERVATION PROGRAM

By: Anthony J. Quarto, Attorney

Until recently, farmers and rural landowners who had land enrolled in the Michigan Farmland Preservation Program and who wanted to place wind turbines on property encompassed by the program, lacked guidance as to whether placement of wind turbines on program property would violate the provisions of that program.

The Preservation Program (commonly known as PA 116) restricts non-agricultural uses of farmland, in return for various tax benefits and assessment exemptions. With the advent of wind development, farmers and landowners were concerned that, if wind turbines were placed on program property, they would lose the program benefits, and perhaps, be required to repay tax credits they had received under the program.

In October 2008, the Michigan Department of Agriculture (MDA), which oversees implementation of the Farmland Preservation Program, issued a statement clarifying the permitted uses of wind turbines on program property. In that statement, the MDA set forth the following guidelines for placement of wind turbines on PA 116 Property:

Wind Turbines may be placed on land currently enrolled in PA 116 provided that specific conditions are met. Options are available for farm ownership of wind turbines, second party ownership, and for withdrawal of the land from PA 116 for public utilities.

- 1) Personal Ownership: A wind turbine for “personal use” by the farmer or by a person considered to be essential to the farming operation may be placed on enrolled farmland. The wind turbine would be considered part of the farming operation and permitted as such. A wind turbine is considered to be for personal use if its installation and operation meets any of the three following conditions:
 - a. the wind turbine is not connected to the public utility system and produces energy solely for use on the farm, or
 - b. the landowner maintains a valid interconnection agreement with a participating public utility, but the primary use of the turbine is for self-service,
 - c. the landowner maintains a valid interconnection agreement with a participating utility, and the landowner is participating in a net metering program that is approved by the Michigan Public Service Commission.
- 2) Second Party Ownership: Wind turbines may be placed on the enrolled land by persons other than the landowner via an easement or lease if the following four conditions are met:

- a. The wind turbine must be placed by a public utility or the turbine owner must maintain a valid interconnect agreement with a public utility to connect to the public utility system, and
 - b. The Michigan Department of Agriculture must find that the location of the facility, and ground changing features associated with the wind generator, do not substantially hinder the farming operation, and
 - c. The facility and placement of the wind turbine must be approved by the unit of government having zoning authority, and
 - d. The landowner/PA 116 Agreement holder must agree with the placement of the facility.
- 3) Withdrawal: The land being used for a wind turbine may be removed from the program if:
- a. The wind turbine is being constructed by a public utility or the wind turbine owner has an interconnect agreement with a public utility, and
 - b. The landowner has submitted an application for removal of the land from the PA 116 program to the local unit of government having zoning authority and the application has been approved by both the local government and Michigan Department of Agriculture, and
 - c. The portion of the last seven years of PA 116 tax credits attributable to the parcel being released have been repaid to the Department.

For commercial-sized wind turbines, the pertinent portion of the guidelines involves “second party ownership.” In this situation, a wind development company is usually the “second party owner”, and seeks either an easement or a lease of the land

owner’s PA 116 property. Among other things, Section 2(b) of the guidelines indicates that the MDA must determine that the location of the facility, and ground changing features associated with the wind generator, do not substantially hinder the farming operation. How does the MDA make that determination? The MDA has advised that they do not send a representative of the department to view the property. Instead, the MDA requires that a site plan, setting forth the details of the wind turbine placement, be submitted for their review. An MDA representative reviews the site plan to insure that such things as access roads and the “footprint” of the turbines are appropriate. The site plan generally is submitted to the MDA by the wind development company.

The MDA guidelines also provide that the PA 116 landowner agree with the placement of the facility. During negotiations of wind contracts, the wind development company and landowner may disagree about the particular location of wind turbines on the property. By ensuring that the landowner agrees with the placement of the wind facility, Section 2(d) provides the landowner with some additional leverage in negotiations with the wind development company concerning the specific location of wind turbines on the property.

Since the issuance of the October 2008 guidelines, the MDA has approved properly submitted proposals for placement of wind turbines on PA 116 property. Landowners need to be sure, however, that they fully comply with the guideline provisions, so that placement of wind turbines on their farmland does not violate the provisions of the Preservation Program, and jeopardize benefits that they either have received, or anticipate receiving, under the program.

The Smith Haughey agri-business team will continue to monitor legislative and regulatory developments to provide updated information and recommendations affecting the interests of agricultural landowners.

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PIERCING THE CORPORATE VEIL:

Protecting an Agri-Business and Personal Assets in a Struggling Economic Environment

By: Todd Millar, Attorney

In today's tough economic climate, businesses and their owners face increased risk of being sued. Given the increased risk, farm owners and other agri-businesses should do all that they can to minimize exposure of their personal assets in these lawsuits. Incorporating an agri-business is a traditional and effective means of isolating a business owner's personal assets from exposure to claims in lawsuits against the business.

However, the simple act of incorporation alone will not protect personal assets if the business has not complied with formalities and requirements that the law requires of a corporation. When the business owner has neglected those legal requirements, courts sometimes "pierce the corporate veil", allowing the business owner's personal assets to be exposed to claims against the business. When the veil is pierced, the business owner has lost the protection of the corporate form.

What is Piercing the Corporate Veil?

This commonly-used term refers to situations where the law treats the business and its owner as a single entity, making the owner's personal assets vulnerable to liabilities incurred by the company. In those situations, the corporation is seen as a mere alter ego of the business owner.

Michigan courts look to the following three prerequisites needed for a claim to pierce the corporate veil:

- 1) Is the corporate entity operating as a mere instrumentality of another entity or individual, meaning the business is being used in furtherance of another purpose, rather than its stated mission?
- 2) Is the corporate entity being used to commit fraud or wrongdoing?
- 3) Has the plaintiff suffered an unjust loss or

injury if recovery is limited only to the business, and cannot extend to the owner's personal assets?

Under Michigan law, only extraordinary circumstances justify a disregard of a corporate entity exposing the owner to personal liability; however, that is not to say that the owner and business will never be subjected to such a claim.

What Factors Do the Courts Consider?

To evaluate the three prerequisites, Michigan courts have considered a number of factors to decide whether they have been met and that the corporate veil should be pierced. The court looks to whether the corporation is undercapitalized; whether separate books have, or have not, been maintained; whether there is a separation between individual and corporate finances; whether the corporation is used to support fraud or illegality; whether corporate formalities have been honored; whether the corporation has paid excessive dividends; and whether the corporation is being used as a mere sham to avoid the business owner having personal liability. Where the court decides that the plaintiff's claim meets the prerequisites to pierce the corporation, the court will find an abuse of the corporate form. This allows a claim against the corporation to pass through and attach to the business owner's personal assets.

What Can You Do to Protect Yourself?

An agri-business owner can take several precautions to ensure viability of the corporate entity, and to protect his or her personal assets from liability claims against the business. Almost all of these steps are quite simple.

First, always keep personal and business assets separate from one another. This can be done by using separate bank accounts and books for

personal expenses and for the separate expenses of the business.

Second, always observe and follow corporate legal formalities, such as holding the required number of meetings, keeping track of the minutes, and retaining a comprehensive stock ledger.

Third, an owner of a closely-held corporation will be an officer, agent, or employee of the corporation. In business dealings on behalf of the corporation, that owner must always portray himself or herself as dealing in the role of officer, agent, or employee of the business. When the business enters into transactions or agreements with any outside party, that person must be made to understand that he or she is transacting business with a corporation, and not with the business owner personally.

Finally, abide by all state and federal regulations, as well as the corporation's bylaws. The corporation should not pay excessive dividends, nor should it sell business assets to shareholders or

owners for below-market value. Transactions that appear to be self-dealing will always raise a red flag for the court. It is necessary for the business to maintain itself, in "good faith," as a separate entity from its owner or owners.

Conclusion

In a period of economic hardship, it is ever more important that farmers and other agri-business owners legitimately capitalize on all liability protections afforded to them and their business, under the law. In this economic environment, people with claims against businesses are often more willing to go the extra mile to make a claim for piercing the corporation to obtain a judgment against the business owner's personal assets. If you would like to have a liability audit, or discuss your liability exposure, please contact Smith Haughey Rice & Roegge for assistance.

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SMITH HAUGHEY AGRIBUSINESS INDUSTRY TEAM NEWS & SUCCESS

Pat Geary, Dale Hebert, and Kristen Ray achieved significant results for our client, a retail grocer, in a case brought against it by the receiver for insurance in the U.S. District Court for the Eastern District of Michigan. First, we moved to dismiss or to transfer venue to the Western District, arguing that venue was improper in the Eastern District. The Court agreed and ordered the case transferred to the Western District. Thereafter, we were able to negotiate a substantial reduction in plaintiff's original offer to settle the case, much to the satisfaction of our client.

Jeff Wonacott assisted northern Michigan families on three occasions this year in preserving the family farm and facilitating the transfer of farm operations and property to the next generation of family farmers. For example, Jeff assisted one client in a multi-faceted business and real estate transaction that involved

the formation and capitalization of two separate and limited liability companies that were designed to acquire the farm properties and equipment, and included the subsequent gift and sale of those entities from parents to some of the children who were interested in preserving the family farm for their own families and the next generation as well. The transaction was structured in a way that minimized gift and estate taxes for the parents, preserved the "cap" on the taxable value of the various parcels of real estate for the children, and provided the parents with a predictable and consistent income into retirement, as the reins (and cherry shakers) were passed to the next generation of farmers.

Jeff is a member of the American Agricultural Law Association, the only national professional organization focusing on the legal needs of the agricultural community.

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