



Ways to Qualify for Tax Exemption on Electricity Sales

Separate meters one of many requisites

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Q: I am a property manager for a gated community. Our only common area is a guardhouse with two gates and street lights on the main boulevard. I have a resident who thinks that the Association can save thousands of dollars each year with the sales tax exemption on utilities used in common areas of community associations. I have been having a difficult time in finding a good explanation of exactly what is required to qualify for the exemption. **(K.W. via e-mail)**

A: Generally, the sale of electric power or energy by an electric utility is subject to sales tax. However, pursuant to Section 212.08(7)(j), of the Florida Statutes, certain sales are exempt from taxation provided that they meet two qualifications. First the sale must be to a residential household. Secondly, only “exempt transactions” are included.

To satisfy the first requirement, the Florida Department of Revenue has determined that the electricity need not be used solely inside a residence. Rather, as provided in Section 12A-1.053 of the Florida Administrative Code, electricity used in common areas in a residential development may also qualify under the residential household exemption. The Florida Department of Revenue, in its Technical Assistance Advisement 9A-004, defined “common areas” to include “any portion of a development that is not included within the private living quarters. Therefore, in a residential development, the common area could

include roads within the development, parks, area pools, playgrounds, and the like. The area does not have to be contiguous to each residential unit or space to qualify as a common area.”

Additionally, the exempt use must be metered separately from non-exempt operations so as to qualify for the exemption under the second requirement. If separate meters are not installed, and a part of the electric power or energy is used for a “commercial purpose”, the entire sale is subject to taxation. For purposes of distinguishing between exempt and non-exempt operations, the Association must establish that the common area is intended for the exclusive use of the owners, tenants, and guests and is not held out for use by the public. Also, owners, tenants, and guests must not be charged a fee for the use of the common area in order for the exemption to apply. Regular assessments paid to the Association which are used for maintenance of the common area, do not act to disqualify the Association from applying for the exemption.

In its Technical Assistance Advisement 92A-061, the Department of Revenue provided useful examples of exempt and non-exempt sales. For example, coin-operated laundries and vending machines do not qualify for the residential exemption since these types of systems and uses represent a commercial use of the electricity. Common areas for which the residential exemption

for use of electricity would apply include lighting for parking lots, swimming pools, common rooms (such as a lounge or recreation hall), and hallways and stairwells for access to the units.

As applied to your question, the guardhouse, the two gates, and the streetlights on the main boulevard should be exempt from taxation provided that all are located on Association common areas, are reserved for the exclusive use of subdivision residents without change, and are metered separately from non-exempt uses.

Before the exemption will apply, the Association must file a writing or document with the appropriate utility company which demonstrates that the electric power or energy is being purchased for residential household use. The Association will need to contact the applicable utility company to determine if the provider has forms it supplies for this purpose.

Q: My community finds itself in a situation that I imagine is fairly common these days. Specifically, our developer was caught in the real estate downturn and is unable to sell out the remainder of the community. Therefore the association has not been turned over to the owners yet, and probably will not be in the near future. But there are many owners who are anxious to become involved and start taking actions to better the community. We want to form committees including social committees and a neighborhood watch committee. We are even willing to form a beautification committee and collect contributions from owners if necessary. There are people who live on cul de sacs who would be willing to donate some of their own money to make the cul de sac islands look better. Is there any legal prohibition to owners forming committees and taking action

while the developer is still in control? **H.P. (via e-mail)**

A: Unfortunately, your situation is more common today than ever before. I am aware of many associations that are still under developer control with little hope of sufficient sales in the near future to trigger turnover of association operations to the homeowners.

First, I would suggest you approach the developer with your ideas for forming committees. The committees you have identified are all beneficial to a community and the developer should be receptive to assisting you, if not formally authorizing and empowering your proposed committees.

Even if the developer is not cooperative, certain “committees” may be formed without its permission. When living in a deed restricted community governed by an association, you do not forfeit any of your rights to freely associate with others. However, any committees that are not formed by the association must be careful not to hold themselves out as being part of the association.

For example, a “beautification committee” would not be entitled to alter, even if for the better, the landscaping or other common areas of the association without express approval from the association. However, you could certainly still have a social committee and a neighborhood watch group regardless of the developer’s cooperation or lack thereof. You should contact your local law enforcement agency for guidelines and resources regarding neighborhood watch programs.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners’ associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm’s Naples and Ft. Myers offices.

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