

THE NEW MINNESOTA LLC ACT

I. Forming a Minnesota LLC

A. Considerations in New Statute

1. What is the purpose of creating an LLC?
 - a) Limited liability
 - b) Most investors and lenders require a single asset entity
 - c) Most investors also require the GP to be a separate entity
 - d) Tax flexibility (ability to make entity taxable)
2. What liability is limited by creating an LLC?
 - a) Generally the members of an LLC are not liable for the obligations of the LLC
 - b) Uninsured liability
 - c) Disclosure and balance sheet issues
3. Non-Profit v. Regular LLC
 - a) Limited liability for unpaid directors – only available to NP
 - b) NP more restrictive
 - c) NP can only be Governor managed
 - d) Limitation on distribution of assets for NP
 - e) AG oversight of NP
4. Structure
 - a) Member Managed
 - b) Governor Managed
 - c) Manager Managed
5. If this becomes the new template moving forward, should you change the existing LLCs to it?
 - a) Yes. In fact, conversion is mandatory beginning in January 2018.
 - b) The new statute does not recognize member control agreements or bylaws, only Operating Agreements
6. With the recent changes to the LLC statutes Minnesota enacted can you move any Colorado LLCs to Minnesota?
 - a) Form Minnesota LLC and merge or use domestication/conversion
 - b) Cost
 - c) Convenience

- B. Steps for Forming Minnesota LLC
1. Determine if LLC is a direct owner or GP?
 2. Determine availability of name
 3. Decide ownership structure
 - a) Member Managed
 - b) Governor Managed
 - c) Manager Managed
 4. Prepare Articles of Organization (Do NOT use Minnesota Secretary of State Forms)
 - a) Determine who will sign (Organizer)
 - b) Have someone review
 - c) File Articles with Secretary of State
 5. Prepare Operating Agreement
 - a) Get assistance if it is not a single member LLC
 - b) Be consistent with name (commas, periods, etc.)
 - c) Insert name of Governors
 - d) Insert officers
 - e) Insert capital contribution on Schedule
 - f) Add MHFA provisions, if applicable
 - g) Add HUD provisions, if applicable
 - h) Add RD requirements, if applicable
 6. Determine if EIN is required
 - a) State
 - b) Federal
 7. Determine if 168(h)(6) election is appropriate (see Exhibit 1-1)
 8. Prepare Organizing Resolution
 9. Order EIN, if applicable (entity must be formed)
 10. Form LLC before it enters into any agreements, including LPA

EXHIBIT 1-1

WHAT IS A 168(h)(6) ELECTION AND WHY DO I CARE?

1. What is the problem with tax exempt entities?
 - (a) Allocations to tax-exempt entities can cause property to be tax-exempt use property. When (1) property is owned by a partnership which has both a tax-exempt entity and a person who is not a tax-exempt entity as partners, and (2) any allocation to the tax-exempt entity of partnership items is not a qualified allocation, then an amount equal to such tax-exempt entity's proportionate share of such property shall be treated as tax-exempt use property. (IRC 168(h)(6)(A))
 - (b) A tax-exempt entity is (i) the United States, any state or political subdivision thereof or any agency or instrumentality of any of the foregoing, (ii) an organization (other than a cooperative described in Section 521) which is exempt from federal income tax, and (iii) a foreign person or entity.
 - (i) A corporation is not treated as an instrumentality of the United States or of any state or local government if all the activities of the corporation are subject to federal income tax and the majority of the board of directors of the corporation is not selected by the United States or a state or local government.
 - (ii) Certain previously tax-exempt organizations are also treated as tax-exempt entities for five years after the date on which they first used the property in question. *See* Section 168(h)(2)(E).
 - (c) Any tax-exempt controlled entity is treated as a tax-exempt entity.
 - (d) A tax-exempt controlled entity means any corporation if 50% or more (in value) of the stock in such corporation is held by 1 or more tax-exempt entities.
 - (e) LLC's must elect to be taxed as a corporation using Form 8832 (see Exhibit D).
 - (f) For LIHTC projects, tax-exempt use property is only eligible for forty (40) year depreciation, rather than 27.5 year depreciation.
 - (i) This reduces investor's IRR (See Exhibit A).
 - (ii) What if property changes to tax-exempt (See Exhibit B).
 - (g) For historic properties, the problem is even greater because tax-exempt use property is not eligible for the historic credit. (IRC 47(c)(2)(B)(v))

2. Solutions

- (a) **Qualified Allocation.** If any tax allocation made to the tax-exempt entity of partnership tax items is not a “qualified allocation,” then an amount equal to the tax-exempt entity’s proportionate share of the property is treated as tax-exempt use property. Section 168(h)(6).
 - (i) **Qualified Allocations.** The term “qualified allocation” means any allocation to the tax-exempt entity which is consistent with that entity being allocated the same distributive share of each item of partnership income, gain, loss, deduction, credit and basis throughout the entire period in which the entity is a partner in the partnership and which has substantial economic effect under Section 704(b). For purposes of these rules, tax allocations under Section 704(c) (with respect to property contributed to a partnership) are not taken into account.
 - (ii) If the tax-exempt use property rules are triggered, a tax-exempt entity’s proportionate share of property owned by the partnership is determined on the basis of the entity’s share of partnership income or gain (excluding gain allocated under Section 704(c)), whichever results in the largest proportionate share. If a tax-exempt entity’s share of partnership items of income or gain (excluding gain allocated under Section 704(c)) may vary during the period in which such entity is a partner, its share shall be the highest share that the entity may receive.
- (b) **168(h)(6) Election.** A tax-exempt controlled entity can make an election under Section 168(h)(6).
 - (i) A tax-exempt controlled entity may elect out of the tax-exempt use property rules as they apply to partnerships. (Section 168(h)(6)(F))
 - (ii) If the tax-exempt controlled entity makes this election, the entity will not be treated as a tax-exempt entity for purposes of these rules and any gain recognized by a tax-exempt entity on any disposition of its interest in the tax-exempt controlled entity and any dividend or interest received or accrued by a tax-exempt entity from the tax-exempt controlled entity will be treated as unrelated business taxable income under Section 511.
 - (iii) Any election by a tax-exempt controlled entity is irrevocable and binding on all tax-exempt entities holding an interest in the tax-exempt controlled entity.

3. Ways to Make the Election

- (a) Treasury Regulations § 301.9100-7T provides the mechanics for making an election under Code section 168(h)(6)(F). Under that regulation, the Section 168(h)(6)(F) election is made by the tax-exempt controlled entity by filing an election statement with its timely filed return for the taxable year for which the

election is to be effective. A copy of the election statement must also be attached to the Federal tax returns of each of the tax-exempt shareholders or beneficiaries of the controlled entity. See Treas. Reg. § 301.9100-7T(a)(2)–(3). It is unclear how these requirements are applied if the required parties do not file federal tax returns.

- (b) There is no particular IRS form for making the Section 168(h)(6)(F) election. Rather, the content of the election statement is set forth in Treasury Regulations § 301.9100-7T(a)(3)(i). Unfortunately, that regulation is a broad regulation that applies to a wide variety of tax elections and does not provide specific directions for the content the Section 168(h)(6)(F) election. The regulation merely provides general classes of information that must be included.
- (c) Those classes are as follows:
 - (i) The name, address, and taxpayer identification number of the electing taxpayer;
 - (ii) An identification of the election being made;
 - (iii) The section of the Code (or, if the provision is not codified, the section of the Act) under which the election is being made;
 - (iv) The period for which the election is being made and/or the property or other items to which the election is to apply; and
 - (v) Any information required by the relevant statutory provisions and any information necessary to show that the taxpayer is entitled to make the election.
- (d) Sample prepared by Mahoney, Ulbrich Christiansen & Russ, PA (See Exhibit C)

EXHIBIT A

Compare regular depreciation to tax-exempt use depreciation

		Regular			Tax-exempt use		
Residential rental property		27.5	SL		40	SL	
Nonresidential rental property		39	SL		40	SL	
Appliances, carpet, furniture, equipment		5	MACRS		9	SL	
Landscaping, sidewalks, parking lots		15	MACRS		20	SL	

		Regular				Tax-exempt use				Difference
		27.5	5.0	15.0	Total	40	9.0	20.0	Total	
		years	years	years		years	years	years		
		Building	Appliances	Landscaping		Building	Appliances	Landscaping		
		1,000,000	25,000	25,000		1,000,000	25,000	25,000		
1	2013	36,364	5,000	1,250	42,614	25,000	1,390	625	27,015	(15,599)
2	2014	36,364	8,000	2,375	46,739	25,000	2,778	1,250	29,028	(17,711)
3	2015	36,364	4,800	2,138	43,301	25,000	2,778	1,250	29,028	(14,274)
4	2016	36,364	2,880	1,925	41,169	25,000	2,778	1,250	29,028	(12,141)
5	2017	36,364	2,880	1,733	40,976	25,000	2,778	1,250	29,028	(11,949)
6	2018	36,364	1,440	1,558	39,361	25,000	2,778	1,250	29,028	(10,334)
7	2019	36,364		1,475	37,839	25,000	2,778	1,250	29,028	(8,811)
8	2020	36,364		1,475	37,839	25,000	2,778	1,250	29,028	(8,811)
9	2021	36,364		1,478	37,841	25,000	2,778	1,250	29,028	(8,814)
10	2022	36,364		1,475	37,839	25,000	1,390	1,250	27,640	(10,199)
11	2023	36,364		1,478	37,841	25,000		1,250	26,250	(11,591)
12	2024	36,364		1,475	37,839	25,000		1,250	26,250	(11,589)
13	2025	36,364		1,478	37,841	25,000		1,250	26,250	(11,591)
14	2026	36,364		1,475	37,839	25,000		1,250	26,250	(11,589)
15	2027	36,364		1,478	37,841	25,000		1,250	26,250	(11,591)
16	2028	36,364		738	37,101	25,000		1,250	26,250	(10,851)
17	2029	36,364			36,364	25,000		1,250	26,250	(10,114)
18	2030	36,364			36,364	25,000		1,250	26,250	(10,114)
19	2031	36,364			36,364	25,000		1,250	26,250	(10,114)
20	2032	36,364			36,364	25,000		1,250	26,250	(10,114)
21	2033	36,364			36,364	25,000		625	25,625	(10,739)
22	2034	36,364			36,364	25,000			25,000	(11,364)
23	2035	36,364			36,364	25,000			25,000	(11,364)
24	2036	36,364			36,364	25,000			25,000	(11,364)
25	2037	36,364			36,364	25,000			25,000	(11,364)
26	2038	36,364			36,364	25,000			25,000	(11,364)
27	2039	36,364			36,364	25,000			25,000	(11,364)
28	2040	18,182			18,182	25,000			25,000	6,818
29	2041				-	25,000			25,000	25,000
30	2042				-	25,000			25,000	25,000
31	2043				-	25,000			25,000	25,000
32	2044				-	25,000			25,000	25,000
33	2045				-	25,000			25,000	25,000
34	2046				-	25,000			25,000	25,000
35	2047				-	25,000			25,000	25,000
36	2048				-	25,000			25,000	25,000
37	2049				-	25,000			25,000	25,000
38	2050				-	25,000			25,000	25,000
39	2051				-	25,000			25,000	25,000
40	2052				-	25,000			25,000	25,000
					-					
		1,000,000	25,000	25,000	1,050,000	1,000,000	25,000	25,000	1,050,000	

NPV @ 5% =	537,112	21,865	17,461	576,438	428,977	19,274	15,207	463,458
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EXHIBIT B

What if property changed from regular to tax-exempt use?
Example

		27.5 years 1,000,000	40 years 1,000,000	Excess	Current	Excess	Total
1	2013	36,364	25,000	11,364	36,364		36,364
2	2014	36,364	25,000	11,364	36,364		36,364
3	2015	36,364	25,000	11,364	36,364		36,364
4	2016	36,364	25,000	11,364	36,364		36,364
5	2017	36,364	25,000	11,364	36,364		36,364
6	2018	36,364	25,000		25,000	(1,623)	23,377
7	2019	36,364	25,000		25,000	(1,623)	23,377
8	2020	36,364	25,000		25,000	(1,623)	23,377
9	2021	36,364	25,000		25,000	(1,623)	23,377
10	2022	36,364	25,000		25,000	(1,623)	23,377
11	2023	36,364	25,000		25,000	(1,623)	23,377
12	2024	36,364	25,000		25,000	(1,623)	23,377
13	2025	36,364	25,000		25,000	(1,623)	23,377
14	2026	36,364	25,000		25,000	(1,623)	23,377
15	2027	36,364	25,000		25,000	(1,623)	23,377
16	2028	36,364	25,000		25,000	(1,623)	23,377
17	2029	36,364	25,000		25,000	(1,623)	23,377
18	2030	36,364	25,000		25,000	(1,623)	23,377
19	2031	36,364	25,000		25,000	(1,623)	23,377
20	2032	36,364	25,000		25,000	(1,623)	23,377
21	2033	36,364	25,000		25,000	(1,623)	23,377
22	2034	36,364	25,000		25,000	(1,623)	23,377
23	2035	36,364	25,000		25,000	(1,623)	23,377
24	2036	36,364	25,000		25,000	(1,623)	23,377
25	2037	36,364	25,000		25,000	(1,623)	23,377
26	2038	36,364	25,000		25,000	(1,623)	23,377
27	2039	36,364	25,000		25,000	(1,623)	23,377
28	2040	18,182	25,000		25,000	(1,623)	23,377
29	2041		25,000		25,000	(1,623)	23,377
30	2042		25,000		25,000	(1,623)	23,377
31	2043		25,000		25,000	(1,623)	23,377
32	2044		25,000		25,000	(1,623)	23,377
33	2045		25,000		25,000	(1,623)	23,377
34	2046		25,000		25,000	(1,623)	23,377
35	2047		25,000		25,000	(1,623)	23,377
36	2048		25,000		25,000	(1,623)	23,377
37	2049		25,000		25,000	(1,623)	23,377
38	2050		25,000		25,000	(1,623)	23,377
39	2051		25,000		25,000	(1,623)	23,377
40	2052		25,000		25,000	(1,623)	23,377
		<u>1,000,000</u>	<u>1,000,000</u>	56,818	<u>1,056,818</u>	<u>(56,818)</u>	<u>1,000,000</u>
				35	35 yrs remaining		
				<u>1,623</u>			
NPV @ 5% =		<u>537,112</u>	<u>428,977</u>				<u>457,348</u>

EXHIBIT C

ABC Limited Partnership
c/o NP
XXX North Yth Street, Suite ZZZ
Minneapolis, MN 55401
Employer Identification Number: _____

Tax exempt controlled entity LLC
c/o NP
XXX North Yth Street, Suite ZZZ
Minneapolis, MN 55401
Employer Identification Number:

Election under Code Section 168(h)(6)(F)(ii)

Tax exempt controlled entity LLC, a tax-exempt controlled entity, which is a general partner of ABC Limited Partnership hereby elects, pursuant to IRC Section 168(h)(6)(F)(ii), not to be treated as a tax-exempt entity under the rules of Section 168(h)(6)(F) beginning with the tax year ending December 31, 20____.

Any gain recognized on the disposition by NP, the controlling tax-exempt entity, of its interest in Tax exempt controlled entity LLC or any dividend or interest received by NP from Tax exempt controlled entity LLC related to this investment will be treated as unrelated business taxable income for purposes of Section 511.

Accordingly, the residential rental property owned by ABC Limited Partnership will not be considered tax-exempt use property under Section 168(h).

Tax exempt controlled entity LLC
By: NP
Its: Sole Member

By: _____
John Doe
Its: President

Date

EXHIBIT D

Form 8832 (Rev. January 2012) Department of the Treasury Internal Revenue Service	Entity Classification Election	OMB No. 1545-1516
Type or Print	Name of eligible entity making election	Employer identification number
	Number, street, and room or suite no. If a P.O. box, see instructions.	
	City or town, state, and ZIP code. If a foreign address, enter city, province or state, postal code and country. Follow the country's practice for entering the postal code.	
▶ Check if: <input type="checkbox"/> Address change <input type="checkbox"/> Late classification relief sought under Revenue Procedure 2009-41 <input type="checkbox"/> Relief for a late change of entity classification election sought under Revenue Procedure 2010-32		
Part I Election Information		
1 Type of election (see instructions):		
a <input type="checkbox"/> Initial classification by a newly-formed entity. Skip lines 2a and 2b and go to line 3. b <input type="checkbox"/> Change in current classification. Go to line 2a.		
2a Has the eligible entity previously filed an entity election that had an effective date within the last 60 months?		
<input type="checkbox"/> Yes. Go to line 2b. <input type="checkbox"/> No. Skip line 2b and go to line 3.		
2b Was the eligible entity's prior election an initial classification election by a newly formed entity that was effective on the date of formation?		
<input type="checkbox"/> Yes. Go to line 3. <input type="checkbox"/> No. Stop here. You generally are not currently eligible to make the election (see instructions).		
3 Does the eligible entity have more than one owner?		
<input type="checkbox"/> Yes. You can elect to be classified as a partnership or an association taxable as a corporation. Skip line 4 and go to line 5. <input type="checkbox"/> No. You can elect to be classified as an association taxable as a corporation or to be disregarded as a separate entity. Go to line 4.		
4 If the eligible entity has only one owner, provide the following information:		
a Name of owner ▶ _____ b Identifying number of owner ▶ _____		
5 If the eligible entity is owned by one or more affiliated corporations that file a consolidated return, provide the name and employer identification number of the parent corporation:		
a Name of parent corporation ▶ _____ b Employer identification number ▶ _____		

For Paperwork Reduction Act Notice, see instructions.

Cat. No. 22598R

Form **8832** (Rev. 1-2012)

Part I Election Information (Continued)

6 Type of entity (see instructions):

- a ☐ A domestic eligible entity electing to be classified as an association taxable as a corporation.
- b ☐ A domestic eligible entity electing to be classified as a partnership.
- c ☐ A domestic eligible entity with a single owner electing to be disregarded as a separate entity.
- d ☐ A foreign eligible entity electing to be classified as an association taxable as a corporation.
- e ☐ A foreign eligible entity electing to be classified as a partnership.
- f ☐ A foreign eligible entity with a single owner electing to be disregarded as a separate entity.

7 If the eligible entity is created or organized in a foreign jurisdiction, provide the foreign country of organization ►

8 Election is to be effective beginning (month, day, year) (see instructions) ►

9 Name and title of contact person whom the IRS may call for more information

10 Contact person's telephone number

Consent Statement and Signature(s) (see instructions)

Under penalties of perjury, I (we) declare that I (we) consent to the election of the above-named entity to be classified as indicated above, and that I (we) have examined this election and consent statement, and to the best of my (our) knowledge and belief, this election and consent statement are true, correct, and complete. If I am an officer, manager, or member signing for the entity, I further declare under penalties of perjury that I am authorized to make the election on its behalf.

[illegible]

Part II Late Election Relief

11 Provide the explanation as to why the entity classification election was not filed on time (see instructions).

[illegible]

Under penalties of perjury, I (we) declare that I (we) have examined this election, including accompanying documents, and, to the best of my (our) knowledge and belief, the election contains all the relevant facts relating to the election, and such facts are true, correct, and complete. I (we) further declare that I (we) have personal knowledge of the facts and circumstances related to the election. I (we) further declare that the elements required for relief in Section 4.01 of Revenue Procedure 2009-41 have been satisfied.

[illegible]