

Dirt Alert

April 8, 2013 • David C. Levy, Editor

BAIRD HOLM^{LLP}
ATTORNEYS AT LAW

Nebraska Supreme Court rules that property damage caused by sewer backup does not constitute inverse condemnation.

Henderson v. City of Columbus,
285 Neb. 482 (2013)

In the early hours of July 9, 2004, a heavy rainstorm hit the City of Columbus, Nebraska, causing a high volume of sewage in the city's sanitary sewer system. City employees responded to the storm by resetting circuit breakers and starting two pumps. That morning, James and Jamie Henderson found water and raw sewage in their basement. The Hendersons sued the City alleging damage to their property from the sewer backup as the result of City employees' negligence or a malfunction of the city-run sanitary sewer system. The Hendersons sought relief for negligence, inverse condemnation, nuisance and trespass. For their inverse condemnation claim, the Hendersons sought compensation for Columbus' taking of their property without compensation.

The District Court of Platte County dismissed the Hendersons' complaint. Regarding the inverse condemnation claim, the District Court found the Hendersons failed to prove what caused the backup or that the City's actions or inactions were the proximate

cause of their damages. The Hendersons appealed. The Court of Appeals affirmed the District Court's finding on negligence, but concluded the District Court erred regarding the Hendersons' inverse condemnation claim finding that reactivation of the pumps caused the backup and was the proximate cause of the damage to the Hendersons' property amounting in an inverse condemnation of their property. The Nebraska Supreme Court granted Columbus' petition for further review.

The Supreme Court reversed the Court of Appeals' decision on the Henderson's inverse condemnation claim and affirmed the decision rejecting the other theories of relief. The Supreme Court explained that inverse condemnation is a short hand description for a landowner suit to recover for a governmental taking of a landowner's property without due process of the law. The Supreme Court clarified that rights under the Nebraska takings clause are greater than those under the United States Constitution. The Nebraska Constitution includes compensation for property "taken or damaged" whereas the United

Also in this issue

- 2 103rd Nebraska Legislature, First Session: Real Estate, Renewable Energy and Municipal Law Update
- 5 Nebraska Supreme Court holds township may enact livestock waste regulations and may exercise control over public roads where county fails to exercise its authority over the same roads.
- 6 Nebraska Supreme Court affirms validity of annexation by City of La Vista.

States Constitution is limited to “taken” property. The Supreme Court held that both the District Court and Court of Appeals failed to address the threshold issue of a condemnation claim, namely, whether a government entity exercised its eminent domain power to take or damage property for a public use. To meet the threshold issue, the Supreme Court said the parties must show an intentional or foreseeable invasion of property by government actions. The Supreme Court explained that courts should only consider whether government actions were the proximate cause of damages or takings for public use after establishing a

compensable taking or damage. The Supreme Court held that the Hendersons failed to establish the threshold element that the City of Columbus damaged or took their property for public use. Therefore, the Hendersons failed to establish a compensable taking or damage under the Nebraska takings clause. Specifically, the Supreme Court cited the lack of evidence of reoccurring, permanent or chronic sewer backups or intent to cause damage. Further, the record reflected that when Columbus employees took similar actions in the past, sewage backups did not result. The Supreme Court summarized that the takings clause of the Nebraska

Constitution is not a source of compensation for every action or inaction by a governmental entity that causes damage to property. Instead, it provides compensation only for the taking or damaging of property that occurs as the result of an entity’s exercise of its right of eminent domain. ■

The Supreme Court held that the Hendersons failed to establish the threshold element that the City of Columbus damaged or took their property for public use.

103rd Nebraska Legislature, First Session: Real Estate, Renewable Energy and Municipal Law Update

The first session of the 103rd Nebraska Legislature is nearly two-thirds complete. The 90-day session is scheduled to conclude on June 5. Last week, lawmakers took on full-day debate, as committee hearings have largely concluded. Here is an update on the bills we are tracking related to real property, renewable energy and municipal law.

Bill	Summary	Introducer	Committee	Hearing Date	Current Status
LB 3	Change filing provisions related to nonconsensual liens	Krist	Judiciary	1/24/13	Placed on General File with AM351; Speaker Priority Bill
LB 13	Require radon resistant construction and radon mitigation statements for residential real property	Krist	Human Services	1/23/13	Placed on General File with AM260; AM920 filed
LB 43	Change provisions relating to property tax exemption for charitable organizations	Cook	Revenue	3/1/13	With committee
LB 66	Authorize annexation of noncontiguous property and change provisions relating to the extension of city services	Schilz	Urban Affairs	1/29/13	With committee; Committee Priority Bill
LB 90	Change sales and use taxes on the furnishing of electricity services	Haar	Revenue	3/7/13	Placed on General file; Speaker Priority Bill
LB 97	Adopt Nebraska Municipal Land Bank Act	Mello	Revenue	2/13/13	Placed on General File with AM572; FA39 adopted; FA42 filed

Bill	Summary	Introducer	Committee	Hearing Date	Current Status
LB 101	Change valuation of agricultural and horticultural land	Watermeier	Revenue	2/28/13	With committee
LB 104	Provide tax incentives for renewable energy projects	Lathrop	Revenue	2/14/13	Placed on General file with AM525
LB 140	Provide airport hazard area dimensions, zoning regulations, penalties and appeal procedures	Krist	Government Military & Veterans Affairs	1/25/13	Placed on General File with AM210; Senator Krist Priority Bill
LB 145	Change valuation of agricultural land and horticultural land	Brasch	Revenue	2/28/13	With committee
LB 150	Change provisions relating to retail sale of natural gas by metropolitan utilities districts to exempt sales and purchases of energy or fuel used in the compression of natural gas	Nordquist	Revenue	3/13/13	With committee
LB 153	Change provisions relating to Civic and Community Center Financing Act to allow use of funds for recreation centers and to change grant evaluation and report provisions	Dubas	Revenue	2/13/13	Advanced to Enrollment and Review for Engrossment
LB 191	Adopt the Nebraska Job Creation and Mainstreet Revitalization Act	Nordquist	Revenue	2/13/13	With committee; Senator Nordquist Priority Bill
LB 237	Change provisions relating to property tax exemption to add retirement community	Karpisek	Revenue	3/1/13	With committee
LB 289	Change duration of a real estate improvement contract lien	Lathrop	Judiciary	2/1/13	With committee
LB 340	Change hearing requirements for Power Review Board	Natural Resources Committee	Natural Resources Committee	2/6/13	Approved by the Governor on 4/3/13
LB 348	Change assessment of rent-restricted housing projects	Harr	Revenue	3/1/13	Placed on General File with AM642; Speaker Priority Bill
LB 373	Change and eliminate provisions of Nebraska Prompt Pay Act	Mello	Business & Labor	2/11/13	With committee
LB 388	Provide for construction of electronic transmission lines by incumbent owner	Natural Resources Committee	Natural Resources	2/1/13	Placed on Select File with ER37

Bill	Summary	Introducer	Committee	Hearing Date	Current Status
LB 402	Change provisions relating to power purchase agreements	Mello	Natural Resources	3/1/13	Placed on General File with AM684
LB 411	Change to renewable energy tax credit	Nordquist	Revenue	3/6/13	With committee
LB 419	Change Nameplate Capacity Tax provisions	Hadley	Revenue	3/6/13	With committee
LB 442	Change provisions relating to homeowners' associations and the Nebraska Condominium Act	Schumacher	Banking, Commerce & Insurance	3/4/13	Placed on General File with AM570
LB 482	Prohibit state and political subdivisions from adopting certain policy recommendations	Kintner	Judiciary	2/13/13	With committee
LB 501	Change to redefine a term regarding production of electricity by using one or more sources of renewable energy to produce electricity for sale	Hadley	Revenue	2/14/13	With committee
LB 516	Adopt Nebraska Water Legacy Act	Carlson	Revenue	3/15/13	With committee
LB 529	Change requirements for approval of redevelopment plans	Dubas	Urban Affairs	2/12/13	With committee
LB 557	Provide for community solar gardens	McGill	Natural Resources	3/5/13	With committee
LB 567	Change provisions relating to approval of facilities and lines	Haar	Natural Resources	3/1/13	With committee
LB 571	Adopt Community Enhancement Financing Assistance Act	Harr	Revenue	2/13/13	With committee
LB 598	Change provisions relating to net metering	Larson	Natural Resources	3/5/13	With committee
LB 622	Change provisions relating to research and conservation report	Haar	Natural Resources	2/6/13	With committee
LR 29CA	Constitutional amendment to change provisions relate to redevelopment projects	Adams	Urban Affairs	2/12/13	Placed on General File with AM273; Committee Priority Resolution

Copies of the bills and information regarding bill status and committee hearings can be found on the Nebraska Legislature's website at <http://www.nebraskalegislature.gov/bills/>. Please do not hesitate to contact us if you have any questions about any of these bills or want more information. ■

Nebraska Supreme Court holds township may enact livestock waste regulations and may exercise control over public roads where county declines to exercise authority over the same roads.

Butler County Dairy, L.L.C. v. Butler County, Nebraska, 285 Neb. 408 (2013)

In 2007, Butler County Dairy, L.L.C., applied for permits with Butler County, Nebraska and Read Township, Butler County, Nebraska, to install a pipeline to move liquid livestock manure from a livestock waste facility to crop ground. The Dairy planned to install the pipeline under a public road located entirely in Butler County and partially in Read Township. Prior to applying for the county or township permits, the Dairy obtained a permit from the Nebraska Department of Environmental Quality (“NDEQ”) for the construction and operation of a livestock waste facility pursuant to the Livestock Waste Management Act (the “Act”).

On September 20, 2007, Read Township denied the permit based on a regulation enacted one week earlier at the Read Township annual townhall meeting. The regulation prohibited the placement of any pipeline carrying liquid livestock waste on, over, or under township property including town roads, right-of ways, or ditches. On February 17, 2009, the

Butler County Board of Supervisors refused to override Read Township’s decision and denied the permit in Butler County citing the County’s policy of deferring matters relating to public roads to townships.

The Dairy sued challenging the validity of the pipeline regulation and a second Read Township regulation that implemented minimum setback requirements for large livestock confinement facilities and an annual demonstration that a 25-year storm would not carry livestock waste onto township property. The Dairy alleged the regulations exceeded the scope of the township’s authority and that the Act and NDEQ regulations preempted township regulations concerning livestock waste. The Dairy also asked the court to find that Butler County had exclusive authority over placement of a pipeline under the public road.

The District Court held Read Township had statutory authority to enact the pipeline regulations and said regulations were not preempted by state law. Specifically, the District Court concluded the regulation of animal waste from large livestock waste facilities was a proper exercise of Read Township’s statutory authority to prevent the exposure or deposit of offensive or injurious substances within township limits. Further, the pipeline ban was valid based on Read Township’s statutory authority to supervise road and culvert work and to construct and repair township roads and bridges. With regard to preemption, the District Court found the Nebraska Legislature did not prohibit regulation of livestock waste by other entities when it

enacted the Act, rather, the Act requires applicants to follow more stringent local requirements where they exist. Finally, the District Court held that Butler County zoning law did not preempt the township regulations and noted Butler County had no county zoning regulations with which the township regulations could conflict. The Dairy appealed and the Nebraska Supreme Court moved the case to their docket.

The Supreme Court affirmed. The Supreme Court held that counties and townships have concurrent authority over public roads located within a township. However, given the hierarchy of Nebraska political subdivisions, a county’s exercise of authority over township roads supersedes a township’s authority over the same roads. Still, as in the case at hand, where the county fails to exercise its authority over the roads within the township, the township has authority over the roads. As such, the Supreme Court concluded that Read Township did not act outside of its authority when it enacted regulations governing livestock facilities. The Supreme Court further affirmed the District Court’s findings that neither the Act nor NDEQ regulations preempted Read Township’s pipeline regulations by express preemption, field preemption, or conflict preemption. ■

Nebraska Supreme Court affirms validity of annexation by City of La Vista.

United States Cold Storage, Inc. v. City of La Vista, 285 Neb. 579 (2013)

In 1971, United States Cold Storage, Inc., built a public refrigeration warehouse in Sarpy County, Nebraska. Cold Storage constructed the facility in an area designated by Sarpy County as an “industrial area” and within Sanitary and Improvement District 59. On December 1, 2009, the City of La Vista, Nebraska approved an ordinance to annex SID 59. Annexation of SID 59 meant SID 59 would become subject to taxation by La Vista.

Cold Storage filed a class action suit against La Vista and SID 59 challenging the validity of the ordinance. Cold storage alleged that La Vista annexed SID 59 for revenue purposes only in violation of state law. In addition, Cold Storage claimed state law prohibited the annexation of the industrial area in SID 59 because the owners did not consent to the annexation. For this claim, Cold Storage pointed to a version of a statute that existed prior to a 1991 amendment which removed the consent requirement. Cold Storage claimed a vested right under the pre-amended version of the statute which Cold Storage claims it relied on to require it and the other owners’ consent prior to annexation.

The District Court for Sarpy County found for the City of La Vista on all claims. The District Court found sufficient evidence that La Vista considered several factors in addition to revenue in its decision to annex including fire and police response time and sewer and street expenses. Further, the District Court held current state law did not prohibit the annexation of industrial areas without owner consent and Cold Storage did not have a vested right under the prior statutory scheme. Cold Storage and SID 59 appealed and the Nebraska Supreme Court granted SID 59’s petition to bypass the Court of Appeals.

The Supreme Court affirmed. The Supreme Court clarified that the Legislature is free to create and abolish rights so long as no vested rights are disturbed. For a right to be vested, the right must be something more than a mere expectation based upon an anticipated continuance of an existing law; it must be fixed, absolute and not contingent upon anything. The Supreme Court explained that, although vested rights can be created by statute, it is presumed that a statutory scheme is not intended to create vested rights unless vested rights are clearly set forth by the Legislature when enacting the legislation. Here, the Supreme Court found no legislative intent to create vested rights under the prior statute which required industrial area owner consent for annexation. As such, the Supreme Court held current Nebraska law applied and La Vista validly annexed SID 59. ■

David C. Levy
Amy L. Lawrenson
Ben M. Klocke

DEVELOPMENT, CONSTRUCTION, ENVIRONMENTAL, REAL ESTATE, RENEWABLE ENERGY AND RELATED SERVICES

Jude J. Beller (5)
Jon E. Blumenthal (1)
P. Scott Dye
John P. Heil (2)
Ben M. Klocke (1)
Lawrence E. Kritenbrink
Amy L. Lawrenson (1)
David C. Levy (4)
Jacqueline A. Pueppke (3)

All attorneys are admitted to practice in Nebraska unless otherwise noted.

(1) Also admitted to practice in Iowa

(2) Also admitted to practice in Florida

(3) Also admitted to practice in Kansas

(4) Also admitted to practice in California and Iowa

(5) Also admitted to practice in Illinois and Missouri

Dirt Alert is intended for distribution to our clients and to others who have asked to be on our distribution list. If you wish to be removed from the distribution list, please notify dirtalert@bairdholm.com.

For more information contact David Levy, Chair, Real Estate Section: dlevy@bairdholm.com; 402.636.8310



Baird Holm

1500 Woodmen Tower
1700 Farnam St
Omaha, NE 68102
402.344.0500
402.344.0588
www.bairdholm.com