

# Dirt Alert

June 14, 2013 • David C. Levy, Editor

**BAIRD HOLM<sup>LLP</sup>**  
ATTORNEYS AT LAW

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

The first session of the 103rd Nebraska Legislature adjourned sine die on June 5, 2013. Lawmakers passed 214 of the 661 bills introduced in this 90-day session. Below is our final update on the bills we tracked this session related to real property, renewable energy and municipal law.

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Bill	Summary	Introducer	Committee	Hearing Date	Current Status
Approved by the Governor					
LB 3	Change filing provisions related to nonconsensual liens	Krist	Judiciary	1/24/13	Approved by the Governor 5/16/13
LB 66	Authorize annexation of noncontiguous property and change provisions relating to the extension of city services	Schilz	Urban Affairs	1/29/13	Approved by the Governor 5/29/13
LB 90	Change sales and use taxes on the furnishing of electricity services	Haar	Revenue	3/7/13	Approved by the Governor 6/05/13
LB 97	Adopt Nebraska Municipal Land Bank Act	Mello	Revenue	2/13/13	Approved by the Governor 6/04/13
LB 104	Provide tax incentives for renewable energy projects	Lathrop	Revenue	2/14/13	Approved by the Governor 6/04/13

<b>Bill</b>	<b>Summary</b>	<b>Introducer</b>	<b>Committee</b>	<b>Hearing Date</b>	<b>Current Status</b>
LB 140	Provide airport hazard area dimensions, zoning regulations, penalties and appeal procedures	Krist	Government Military & Veterans Affairs	1/25/13	Approved by the Governor 5/29/13
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	Approved by the Governor 4/24/13
LB 340	Change hearing requirements for Power Review Board	Natural Resources Committee	Natural Resources Committee	2/6/13	Approved by the Governor 4/03/13
LB 388	Provide for construction of electronic transmission lines by incumbent owner	Natural Resources Committee	Natural Resources	2/1/13	Approved by the Governor 4/24/13
LB 442	Change provisions relating to homeowners' associations and the Nebraska Condominium Act	Schumacher	Banking, Commerce & Insurance	3/4/13	Approved by Governor 5/07/13
LB 13	Require radon resistant construction and radon mitigation statements for residential real property	Krist	Human Services	1/23/13	Approved by the Governor 4/03/13
<b>Placed on General File</b>					
LB 191	Adopt the Nebraska Job Creation and Mainstreet Revitalization Act	Nordquist	Revenue	2/13/13	Placed on General File with AM707; Senator Nordquist Priority Bill
LB 348	Change assessment of rent-restricted housing projects	Harr	Revenue	3/1/13	Placed on General File with AM642; AM1248; MO89 pending; Speaker Priority Bill
LB 373	Change and eliminate provisions of Nebraska Prompt Pay Act	Mello	Business & Labor	2/11/13	Placed on General File with AM1550
LR 29CA	Constitutional amendment to change provisions relating to redevelopment projects	Adams	Urban Affairs	2/12/13	Placed on General File with AM273; Committee Priority Resolution

<b>Bill</b>	<b>Summary</b>	<b>Introducer</b>	<b>Committee</b>	<b>Hearing Date</b>	<b>Current Status</b>
Placed on Select File					
LB 402	Change provisions relating to power purchase agreements	Mello	Natural Resources	3/1/13	Placed on Select File with ER92; AM1237 and AM1364 filed
Held by Committee					
LB 43	Change provisions relating to property tax exemption for charitable organizations	Cook	Revenue	3/1/13	Held by committee
LB 101	Change valuation of agricultural and horticultural land	Watermeier	Revenue	2/28/13	Held by committee
LB 145	Change valuation of agricultural and horticultural land	Brasch	Revenue	2/28/13	Held by 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	Held by committee
LB 237	Change provisions relating to property tax exemption to add retirement community	Karpisek	Revenue	3/1/13	Held by committee
LB 411	Change to renewable energy tax credit	Nordquist	Revenue	3/6/13	Held by committee
LB 419	Change Nameplate Capacity Tax provisions	Hadley	Revenue	3/6/13	Held by committee
LB 482	Prohibit state and political subdivisions from adopting certain policy recommendations	Kintner	Judiciary	2/13/13	Held by 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	Held by committee
LB 516	Adopt Nebraska Water Legacy Act	Carlson	Revenue	3/15/13	Held by committee
LB 529	Change requirements for approval of redevelopment plans	Dubas	Urban Affairs	2/12/13	Held by committee

Bill	Summary	Introducer	Committee	Hearing Date	Current Status
LB 557	Provide for community solar gardens	McGill	Natural Resources	3/5/13	Held by committee
LB 567	Change provisions relating to approval of facilities and lines	Haar	Natural Resources	3/1/13	Held by committee
LB 571	Adopt Community Enhancement Financing Assistance Act	Harr	Revenue	2/13/13	Held by committee
LB 598	Change provisions relating to net metering	Larson	Natural Resources	3/5/13	Held by committee
LB 622	Change provisions relating to research and conservation report	Haar	Natural Resources	2/6/13	Held by committee
Indefinitely Postponed					
LB 289	Change duration of a real estate improvement contract lien	Lathrop	Judiciary	2/1/13	Indefinitely postponed

Copies of the bills and information regarding the final status of the bills 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. ■

David C. Levy  
Amy L. Lawrenson

## Nebraska Legislature Adopts Sales Tax Incentive for Renewable Energy Projects

Renewable energy played its most prominent role yet in the Nebraska Legislature in 2013. This culminated in the Legislature passing Legislative Bill 104, which provides a sales tax refund to a renewable energy project that entails at least \$20,000,000 of investment. This puts Nebraska relatively even with neighboring states that offer sales tax exemptions or refunds, but it still leaves Nebraska behind states that offer additional incentives. It also misses an opportunity that another bill, Legislative Bill 402, offered. That bill also provided sales tax relief for renewable energy projects, but

it required qualification through the use of certain, gradually increasing levels of Nebraska inputs and investment. By encouraging Nebraska inputs and investment, LB 402 doubled the benefits of LB 104 in that it would incentivize the renewable energy project while also incentivizing the growth of the support industries that would serve the local input and investment function. Not surprisingly, a broad coalition of large wind developers, landowners, Nebraska businesses and public power supported LB 402. An effort to replace LB 104 with LB 402 late in the legislative session fell four

votes short, however. Regardless of legislative maneuvering, LB 104 is a significant step forward for Nebraska’s ability to compete with its neighbors for renewable energy development. ■

David C. Levy

*LB 104 is a significant step forward for Nebraska’s ability to compete with its neighbors for renewable energy development.*

## Nebraska Mainstreet Revitalization and Job Creation Act

Legislative Bill 191 would create a credit against Nebraska income tax for investment in the rehabilitation of a historic building or a building that contributes to a historic district. Baird Holm developed this legislation and lobbied for it pro bono in 2012. We continued working on this effort in 2013, supported by a committed and generous group of interested developers and financial institutions.

State historic tax credits are proven mechanisms for driving historic preservation and economic development in large and small communities. Over 30 states offer such credits, including most states surrounding Nebraska.

Near the end of the recently-completed legislative session, the Revenue Committee of the Nebraska Legislature advanced an amended version of LB 191 to General File. General File is the first of three “readings” by the entire Legislature. A bill must receive 25 votes on General File to advance to Select File, and again on Select File to advance to Final Reading. With 25 votes on Final Reading, a bill moves to the Governor for approval or veto. The Revenue Committee’s amendment limits the 20 percent income tax credit to the first \$5,000,000 of qualified rehabilitation expenses.

Unfortunately, with only four legislative days left after the committee advanced the bill, there was not enough time for the Legislature to advance the bill further this year. Because this is the first year of the two-year biennium, however, the Legislature can take up the bill at the beginning of next year’s session in January 2014. This will avoid going back to committee and will allow the full body to immediately take the bill up on the floor, before new bills advance out of committee.

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We may seek to add an emergency clause to the bill as well. An emergency clause means a bill takes effect upon the Governor’s signature, rather than 90 days after the Legislature adjourns for the year. It also means a bill needs 33 votes to advance, instead of the typical 25 votes. With the emergency clause, the bill could become law next spring. The State Historic Preservation Office may start accepting applications prior to that date, but they would not be able to approve them until the law takes effect. ■

David C. Levy

## Nebraska Legislature Adopts Land Bank Act

Governor Heineman signed the Nebraska Municipal Land Bank Act into law on June 4, 2013. The Land Bank Act authorizes municipalities to establish land banks to acquire tax delinquent properties. A land bank may acquire abandoned, unproductive properties and properties subject to burdensome tax liabilities from both private landowners and through tax and foreclosure sales. A land bank has authority to extinguish liens for delinquent taxes, sell the properties, and place them back in productive use.

A land bank will receive funding in various ways. Half of the property tax revenue from all properties the bank resells will remit to the land bank for five years after each sale. A land bank is also eligible for grants, may issue bonds and receive loans from both public and private entities, and may invest its finances. Pursuant to the express terms of the legislation, the effective date of the Land Bank Act is October 1, 2013. ■

Amy L. Lawrenson

# Iowa Enacts Significant Property Tax Reform

On June 12, 2013, Iowa Governor Branstad signed into law Senate File 295, a significant tax reform bill. SF295, among other things:

- establishes a “business property tax credit fund” to incentivize small business growth in Iowa;
- rolls back the taxable value of certain commercial, industrial, and railroad property in Iowa;
- creates a new class of “multiresidential” property; and
- rolls back the taxable value of multiresidential property.

## Background of Iowa Property Tax.

Iowa imposes a property tax on the “actual value” of real estate located within Iowa. For residential and agricultural property, the growth in the actual value of residential and agricultural properties subject to property tax is statutorily limited and cannot exceed 4 percent. As a result, residential and agricultural classes of property with actual values that have increased more quickly than 4 percent enjoy a “rollback” of property tax. The Director of Revenue expresses the rollback as a percentage. For 2012, residential real estate received a rollback of about 47 percent from actual value, and agricultural property received a rollback of about 40 percent from actual value. Commercial and industrial

property received no rollback for property tax purposes.

## Business Property Tax Credit.

To encourage economic growth in Iowa, SF295 establishes a property tax credit for Iowa businesses that pay property tax. Property classified as commercial, industrial, or railroad property (“CIR property”) is eligible for the credit. Property owners must apply to the Department of Revenue to receive the credit. While the calculation of the amount of the credit depends on a number of factors, it has been estimated that by 2017, CIR property will receive a credit equal to:

- the tax imposed at actual value; minus
- the amount that would have been imposed if the first \$145,000 of CIR property was taxed as residential.

Low-income housing tax-credit property, mobile home parks, manufactured home communities, land-leased communities, and assisted living facilities are not eligible for the credit. The tax credit takes effect for property taxes due and payable in fiscal years beginning on or after July 1, 2014.

**Rollback for CIR Property.** In addition to the property tax credit, SF295 provides a limited rollback for CIR property. The rollback is 5 percent for fiscal year 2014 and 10 percent after that. Therefore, Iowa will eventually tax CIR Property at 90 percent of its actual value.

## Rollback for Multi-Family Housing.

SF295 also establishes a new class of property for Iowa property tax purposes—“multiresidential” property. Multi-family residential property generally consists of property having three or more separate living quarters, with at least 75 percent of the space being residential. The Bill affords favorable property tax treatment to multiresidential property in the form of a 13.75 percent rollback from actual value that takes effect in 2015. The rollback increases to 37.25 percent from actual value for property assessed in 2021. After 2021, identical rollbacks will apply to both residential and multiresidential property.

Business clients, and in particular multiresidential property owners who pay property tax, should be aware of the new tax changes and should consult with their tax advisor about taking advantage of the changes. ■

Jesse D. Sitz

*Jesse Sitz is a member of the Firm's Business, Tax and Estate Planning Section. He represents clients with respect to general corporate matters, estate planning and probate matters, federal and state tax planning issues, and tax exempt matters.*

## Nebraska Supreme Court Holds Probate Recording Preserves Mineral Rights

With the expansion of oil, gas, and mineral exploration, understanding mineral rights and claims is ever more important. A “severed” mineral interest occurs where the owner of the surface of the land is different from the owner of the minerals within the land. In such instances, Nebraska’s Dormant Mineral Statutes seek to maximize the use of land and to incentivize the exercise of mineral rights for the betterment of communities and the economy. Neb. Rev. Stat. sections 57-228 to 57-231.

Nebraska’s Dormant Mineral Statutes require owners of severed mineral interests to publicly exercise their rights within a period of twenty-three years. If they fail to do so, the surface owner may sue to regain the mineral estate.

Mineral owners may exercise their rights by: 1) acquiring, selling, leasing, encumbering, or transferring a mineral interest or any part thereof by an instrument which is properly recorded; 2) extracting the minerals or otherwise using the belowground space in a manner consistent with ownership in the mineral interest; or 3) recording a verified claim of ownership in the county where the land is located.

The Nebraska Supreme Court recently held that mineral owners may exercise their ownership by recording their interest in public records other than the register of

deeds. *Gibbs Cattle Co. v. Bixler*, 285 Neb. 971 (2013). In *Gibbs*, the owner of a severed mineral estate died in 1996, leaving the interest to his wife by will. The wife recorded the will in probate but did not record the estate transfer in the register of deeds. In 2010, the surface owner of the land sued to reclaim the mineral estate. The surface owner argued that the deceased husband, still listed as the interest holder in the register of deeds, failed to exercise his mineral rights within twenty three years.

The Supreme Court disagreed, holding that the decedent’s wife publicly exercised the mineral rights when she recorded the will in probate. The Supreme Court reasoned that, because the Dormant Mineral Statutes broadly define “record owner,” a recording in probate satisfies the Statutes’ purpose, to protect interest owners while providing surface owners and the public with sufficient notice of transfers. As such, recording the will in probate reset the twenty-three year clock and secured the wife’s interest.

The Supreme Court’s decision provides two useful lessons for protecting and challenging mineral interests. First, mineral owners should frequently provide public notice to preserve their mineral interests. Second, prior to seeking to regain a mineral interest, it is important to check all public records, including the register of deeds and probate records, to verify if the mineral owner publically exercised their rights. ■

Amy L. Lawrenson

## Nebraska Court of Appeals Affirms Finding for Breach of Implied Warranty

The Nebraska Court of Appeals recently affirmed a district court holding that flawed construction caused water damage to a home and breached an implied warranty to perform in a workmanlike manner. *Oettinger v. Hiatt*, 2013 Neb. Ct. App. Lexis 17.

In 2004, the Hiatts constructed a house in North Platte that they sold to the Oettingers in 2006. A few months after the sale, the Oettingers found water in the basement, they approached the Hiatts, and the Hiatts agreed to replace the septic lift. Water continued to seep into the basement and the parties took extensive remedial measures in 2009. Water issues increased in 2010 and the Oettingers suffered significant damages.

The Oettingers filed suit against the Hiatts in 2011 claiming breach of implied warranty to perform in a workmanlike manner. The Hiatts argued that the Oettingers’ landscaping caused the water problems. At trial, both parties presented substantial evidence and expert testimony.

The Lincoln County Court held that the Hiatts breached an implied warranty because they did not construct the home in a workmanlike manner and the home was not reasonably fit for its intended use. In its finding, the County Court noted it relied on testimony that the Hiatts’ construction caused the water to enter the basement. The Hiatts appealed.

The District Court of Lincoln County affirmed. The District Court held that the expert testimony supported a breach of implied warranty. The Hiatts appealed again.

The Nebraska Court of Appeals affirmed. The Court of Appeals explained that, in Nebraska, a builder impliedly warrants they will erect a building in a workmanlike manner, in accordance with good usage and accepted practices, and reasonably fit for its intended purpose. The Court of Appeals held that the record contained sufficient evidence to support the conclusion that the Haitts' faulty construction design allowed water to infiltrate the Oettingers' basement, causing the Oettingers to suffer damages. ■

Amy L. Lawrenson

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