

2019 SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

SB 2254

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2254
1/24/2019
Job Number 31367

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to liens and wind energy property rights.

Minutes:

4 attachments

Vice-Chair Kreun: Opened the hearing.

Sen. Kannianen, District 4 (0:25-2:50) Introduced the bill, please see attachments #1 for testimony and #2 for reference to century code.

Amy Shelton, Executive Director, Northwest Landowners Association (4:00-5:30) Testified in favor, please see attachment #3. Read testimony on behalf of Troy Coons.

Derrick Braaten, Attorney (6:10-9:30) Testified in support, please see attachment #4. This is an issue that has come up in North Dakota, it may be that it was prevented before liens were actually recorded, but as a private attorney, I have heard of this issue in North Dakota.

Senator Piepkorn: When it first came up, it didn't occur to me that the contractor would be placing the lien, rather whoever was financing behind the developer. Is it common for the contractor doing the work to put the lien on?

Derrick Braaten: Yes. My experience, it is usually the contractors working on project, and a dispute between them and the parent developer that creates one of these situations, and they end up being the one that files the lien.

Senator Piepkorn: In testimony, you are letting the landowners off the hook slightly, when you say 'many landowners sign a lease without a thorough review by an attorney with experience.' Ultimately that responsibility does go back to that landowner. If they choose not to rely on somebody like you, it sounds like we are trying to protect them, ultimately they are responsible.

Derrick Braaten: I agree, but one of the points I want to make is that even when I have both the cooperation of the wind developer and the landowner who's hired me to negotiate, I still can't fully protect that landowner.

No opposing or agency testimony.

Chair Unruh: closed the hearing

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2254
1/31/2019
Job Number 31917

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

Relating to liens and wind energy property rights.

Minutes:

No Attachments

Chair Unruh: The testimony was all in support, we had Senator Kannianen, Troy Coons with Northwest Landowners, and Mr. Braaten. This was concerns with liens being placed on landowner's property. Looks like it didn't happen a whole lot, but when it did it caused some problems.

Senator Cook: I move do pass.

Senator Roers: Second.

A roll call vote was taken.
Motion carries 6-0-0.

Senator Roers: Will carry.

Chair Unruh: Closed the meeting.

Date: 1/31
Roll Call Vote #: 1

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2254**

Senate Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen Cook Seconded By Sen. Roers

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh	<u>X</u>		Senator Jim Roers	<u>X</u>	
Senator Curt Kreun	<u>X</u>		Senator Merrill Piepkorn	<u>X</u>	
Senator Donald Schaible	<u>X</u>				
Senator Dwight Cook	<u>X</u>				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Roers

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2254: Energy and Natural Resources Committee (Sen. Unruh, Chairman)
recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
SB 2254 was placed on the Eleventh order on the calendar.

2019 HOUSE ENERGY AND NATURAL RESOURCES

SB 2254

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2254

3/15/2019

33776

☐ Subcommittee

☐ Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to liens and wind energy property rights

Minutes:

Attachment 1

Chairman Porter: opened the hearing on SB 2254.

Troy Coons, NW Landowners Association: presented Attachment 1.

6:00

Rep Bosch: Have we had this happen in ND where a lien has been put on a developer from a similar project where a landowner had a lien?

Troy Coons: They attempted to put them on but most of it has gone away but it is possible it can happen.

Rep Bosch: I have a little recollection of this happening in a construction project. Isn't the process pretty straight forward like it's relatively easy to get that taken off when you find out you really weren't a party to the project. You're almost an innocent bystander. Have you ever heard that's difficult to get that changed once a lien is put on for someone who's not involved in the project?

Troy Coons: The law firm we've worked with on this; it's becomes a process where they need to hire an attorney and go through the expense of that. They say it's not that hard to do but there are circumstances where it could be an ongoing thing and that's the concern, a large devastating effect on the property owner and their farm and ranch business.

Chairman Porter: I'm a little concerned in the language when we're talking in the broad base of electric conversion facility designed for or capable of generation exceeding .5 MWh of electricity. What happens if the landowner is doing the project themselves? Is the exclusion because it's an electric energy conversion facility? What if they're putting in technology advances and they put in a ¾ MWh tower on their land and sell back the excess energy to the REC? Then during that construction process, if they don't pay their bills on their private little wind tower, then the installation company can't put a lien on their property like a normal construction lien?

Troy Coons: The reason we used that terminology is because it comes out of the PSC so we were in line with their rules. When they do the private matches up to that language, it's the PSC language.

Chairman **Porter**: So if I do a private wind tower on my land that's $\frac{3}{4}$ MWh they can still put a construction lien on my property if I don't pay the bill?

Troy Coons: That's what I understand, yes.

Chairman Porter: ok. Well check into it to make sure what we're doing is commercial and not residential.

Troy Coons: The intent is for commercial operations. That's why we worked with the PSC on their language.

Chairman Porter: further support? Opposition? Closed the hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee

Coteau A Room, State Capitol

SB 2254

3/21/2019

34108

☐ Subcommittee

☐ Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to liens and wind energy property rights

Minutes:

Chairman Porter: opened the hearing on SB 2254. I had questions as to stating the size that's considered to be a facility. My discussion with the PSC, inside this section of land, that it is strictly related to commercial facilities; that if an individual were to put a residential type wind facility on their land and not pay the contractor, the contractor could still put a lien on their property for that work under the normal provisions of our contracting laws. This deals with the fact there have been instances where the wind farm owner has not paid the construction crews and when they put their construction liens on the wind farm, their also putting them on the innocent property owner to the nonpayment of the bill. This straightens that out; that they cannot do that any longer. That the property is free and clear.

Rep. Roers Jones: Do we know then for the subcontractors who would otherwise lien the land, what their recourse against nonpayment would be?

Chairman Porter: Their recourse is against the owner of the wind farm so they could put liens on the towers, on the improvements they do. They couldn't include the physical property the wind farm is on.

Rep. Zubke: I move a Do Pass on SB 2254.

Rep. Marschall: second.

Chairman Porter: I have a motion for a Do Pass and a second on SB 2254. Discussion?

Rep Bosch: I think there's already a process in place. I'm not sure the property owners are completely innocent. They signed up to have the developer on there. I think that comes part and parcel with having development on your land. This bill doesn't make much sense to me.

Chairman Porter: further discussion?

Roll call vote: 13 yes 1 no 0 absent. Motion carried. Rep. Zubke is carrier.

Date: 3-21-19
Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2254**

House Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Zubke Seconded By Marschall

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	✓		Rep. Marschall	✓	
Rep. Anderson	✓		Rep. Roers Jones	✓	
Rep. Bosch		✓	Rep. Ruby	✓	
Rep. Devlin	✓		Rep. Zubke	✓	
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog	✓	
			Rep. Eidson	✓	

Total (Yes) 13 No 1

Absent 0

Floor Assignment Zubke

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2254: Energy and Natural Resources Committee (Rep. Porter, Chairman)
recommends **DO PASS** (13 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING).
SB 2254 was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

SB 2254

Testimony on SB 2254

Senator Jordan Kannianen - District 4

To Chair Unruh, Vice-Chair Kreun, members of the Committee.

The purpose of this bill is to protect landowners from liens being attached to their real property in case of nonpayment by a wind energy conversion facility to a contractor. This bill specifies it must be a facility larger than one-half megawatt.

In 35-27-01, the definition of "Improvement" includes the language "permanent benefit". This bill, in stating that these facilities are not improvements, would remove the possibility of a lien being attached to the real property on which the wind facility resides.

I don't know of this happening in North Dakota, but there are cases in other states. This bill is therefore preemptive and will protect landowners from the possibility of a lien being attached to their real property in an agreement from which they are only receiving rent payments or royalties from a facility. My understanding is this would place wind facilities and oil well sites on the same standing in terms of not allowing a lien to attach to the real property on which it resides.

This change also benefits the wind energy conversion facility. By stating that it does not constitute improvements on the land it is therefore a trade fixture, meaning that the equipment, machinery, etc. still belong to the facility owners (instead of the land owner) at the time of salvage.

Lastly, contractors would still have recourse in the case of nonpayment through the project contract attached to the facility and trade fixture(s).

Please give this bill a Do Pass Recommendation. Thank you.

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**CHAPTER 35-27
CONSTRUCTION LIEN**

35-27-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Contract" means any agreement for improving real property, written or unwritten, express or implied.
2. "Improve" means to build, erect, place, make, alter, remove, repair, or demolish any improvement upon, connected with, or beneath the surface of any land, or excavate any land, or furnish materials for any of such purposes, or dig or construct any fences, wells, or drains upon such improvement, or perform any labor or services upon such improvement; or perform any architectural services, construction staking, engineering, land surveying, mapping, or soil testing upon or in connection with the improvement; or perform any labor or services or furnish any materials in laying upon the real estate or in the adjoining street or alley any pipes, wires, fences, curbs, gutters, paving, sewer pipes or conduit, or sidewalks, or in grading, seeding, sodding, or planting for landscaping purposes, or in equipping any such improvement with fixtures or permanent apparatus.
3. "Improvement" means any building, structure, erection, construction, alteration, repair, removal, demolition, excavation, landscaping, or any part thereof, existing, built, erected, improved, placed, made, or done on real estate for its permanent benefit.
4. "Materials" means materials or fixtures which are incorporated in the improvement and those which become normal wastage in construction operations, custom or specially fabricated materials for incorporation in the improvement, building materials used for construction, but not remaining in the improvement, subject to diminution by the salvage value of such materials, tools, appliances, or machinery, excluding hand tools, used in the construction of the improvement to the extent of the reasonable value for the period of actual use. The rental value shall not be determinable by the contract for rental unless the owner is a party thereto.
5. "Owner" means the legal or equitable owner and also every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors or other persons, and including any agent, trustee, contractor, or subcontractor of such owner.
6. "Person" means every natural person, fiduciary, association, corporation, or limited liability company.
7. "Subcontractor" means all persons contributing any skill, labor, or materials to the improvement except such as have contracts therefor directly with the owner; and, includes any person who enters into a contract with a subcontractor as above defined, for the performance of any part of such subcontractor's contract.

35-27-02. Persons entitled to construction lien - Notice.

Any person that improves real estate, whether under contract with the owner of such real estate or under contract with any agent, trustee, contractor, or subcontractor of the owner, has a lien upon the improvement and upon the land on which the improvement is situated or to which the improvement may be removed for the price or value of such contribution. Provided, however, that the amount of the lien is only for the difference between the price paid by the owner or agent and the price or value of the contribution. If the owner or agent has paid the full price or value of the contribution, no lien is allowed. Provided further that if the owner or an agent of the owner has received a waiver of lien signed by the person that improves the real estate, a lien is not allowed.

Any person that extends credit or makes a contract with any agent, trustee, contractor, or subcontractor of the owner for the improvement of real estate, upon demand, has the right to request and secure evidence of the legal description of the real estate upon which the improvement is located, including the name of the title owner of the real estate. Written notice that a lien will be claimed must be given to the owner of the real estate by certified mail at least ten days before the recording of the construction lien.

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Troy Coons
Northwest Landowners Association
Senate Energy and Natural Resources Committee
Testimony for SB 2254
January 24, 2019

Good morning, Madam Chairman Unruh and members of the committee, thank you for taking my testimony into consideration today.

My name is Troy Coons, and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents over 525 farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am an unpaid lobbyist.

Northwest Landowners Association is in favor of SB 2254 in order to protect landowners from liens that they have no control over.

We are aware that there is a concern with liens being placed on a landowner's property when a contractor does not get paid by the wind developer. I have attached a copy of an article from an economist at NDSU discussing these concerns. These liens can be larger than the land is even worth, and this has been in the news nationwide. It is difficult or impossible for a landowner to prevent this, even in their own lease, because the lien is filed by a third party. The language in this Bill makes it clear that wind towers from large wind projects are not permanent improvements to the land.

Thank you for taking the time to consider our comments. I am available for any questions.

Sincerely,



Troy Coons, Chairman

Northwest Landowners Association

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New Energy Economics: Liens on Wind Property Create Landowner Credit Problems

Landowners contemplating a wind project should review carefully the financial records of the developer and those firms aligned with the project.

By Cole Gustafson,
Biofuels Economist

NDSU Extension Service

Landowners who are contemplating signing either options or easements for wind development have to be especially careful during these periods of turbulence in our nation's financial markets.

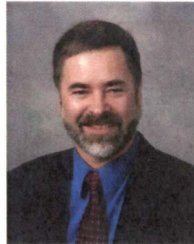
In a surprising move, creditors for Noble Environmental Power filed more than \$3 million worth of liens against the property of 43 landowners who previously signed land easements with the developer in New York.

While the problem is unfolding miles away on the East Coast, Midwest landowners need to monitor their agreements carefully and the financial health of developers they have signed up with.

The New York creditors include two locals of the International Brotherhood of Electrical Workers and the electrical contractor Stuart C. Irby Co. of Jackson, Miss. The company actually filing the liens is Aristeo Construction, a Michigan-based company that laid the roads and foundations and erected Noble's towers in Franklin County, N.Y. In total, 43 liens were filed, which is one for each of the 43 land parcels that the towers stand on.

Placement of these liens on properties jeopardizes the financial well-being of the people

Images



Cole Gustafson,
NDSU Biofuels
Economist

columns

[Spotlight on Economics: Spotlight on Economics: Trade is Good for the Environment](#) (2019-01-09) Years of liberalized international trade have increased incomes and led to improved environmental quality in many regions of the world. [FULL STORY](#)

[Prairie Fare: Prairie Fare: Avoid Sitting Too Much](#) (2019-01-17) Too much sitting can lead to health issues. [FULL STORY](#)

use of releases

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involved. Most landowners simply expect a new wind development to provide them with a new source of income. They fail to realize the financial obligations and risks involved when signing project options and agreements.

Liens filed against a landowner's property become part of the landowner's financial record and most likely will lower his or her credit scores. Credit scores now are widely used by lenders to determine credit worthiness for a new loan and by merchants who are evaluating someone's ability to buy a large item on store credit.

Many insurance companies also utilize credit scores in their premium rating process. Customers with higher scores are deemed to have higher character and less likely to defraud the company. In the current recession, many people are struggling to maintain their credit scores, even without the complications of liens being filed against their property.

Landowners contemplating a wind project should review carefully the financial records of the developer and those firms aligned with the project that potentially could provide equipment or construction services. A strong record of past performance and a strong balance sheet, especially with high levels of equity and cash flow, are two indicators of financial strength.

Moreover, potential wind investors need to evaluate which developers they are going to be partnering with very carefully. Even signing an option locks a person in and precludes him or her from participating in unforeseen projects that may become available later that are more attractive. The whole process is not without risk.

Landowners should consult with an attorney who specializes in wind contracts. These attorneys are professionals and know which contract clauses are most onerous. Landowners always will face some investment risk, but a competent attorney can guide and advise them if potential risks equate with returns that are expected to accrue.

NDSU Agriculture Communication

source:	Cole Gustafson, (701) 231-7096, cole.gustafson@ndsu.edu
editor:	Rich Mattern, (701) 231-6136, richard.mattern@ndsu.edu

Testimony of Derrick Braaten in Support of
SENATE BILL NO. 2254
Senate Energy and Natural Resources Committee
January 24, 2019

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My name is Derrick Braaten, and I am an attorney in Bismarck and owner of Braaten Law Firm. My law practice is focused on representing landowners, and I practice in the areas of agricultural law, energy law, natural resources law, and eminent domain. I am here to testify on my own behalf in support of Senate Bill 2254 because I believe it a very important issue for landowners, and in my practice, I have often been unable to find ways to completely protect my own clients when it comes to potential liens on wind projects for which they may sign a lease.

I have reviewed and negotiated numerous wind leases with various developers, and I am almost always able to negotiate for some protections related to the possibility of liens being placed on landowner's property as a result of the wind project. I am aware of this having happened all over the country, and I have heard concerns from landowners around North Dakota. I have also heard of this issue in North Dakota.

Even when I am able to negotiate for protections, however, it does not fully resolve the problem for a landowner. Usually wind developers will agree to "bond around" any potential future liens, which means that under N.D.C.C. ch. 35-21, they will file an undertaking of some kind that requires release of a lien pending resolution of the underlying dispute. In my experience, liens are used in two situations: 1) there is a legitimate dispute between the wind developer and a contractor regarding payment for certain goods or services, or 2) the wind developer is unable to make payment because it is insolvent. Bonding around a lien will usually be sufficient protection in the first instance, although I will note that in my experience many, many landowners sign wind leases without a thorough review by an attorney with experience with these leases, and those landowners do not have this protection. Even if the wind developer has agreed to bond around liens, this is not helpful if the wind developer has not paid a contractor because it is insolvent. In these situations, it is likely the wind developer simply cannot afford to bond around the lien either.

I would also note that this concern can arise even with the larger developers. In many circumstances, leases are signed with newly formed subsidiaries of the actual developer, so even if the parent company is solvent, it is possible for the subsidiary to become insolvent. I suspect this is one of the reasons these subsidiary companies are created.

Finally, I cannot speak for the wind industry, but in my experience wind developers agree that liens are not properly filed against landowners for disputes with the developer. This is because the wind facilities are most appropriately characterized as trade fixtures rather than as permanent real estate improvements. This does not, however, prevent a contractor from filing a lien and arguing otherwise. For the reasons outlined here, I urge a **do pass** on SB 2254.

Thank you,



Derrick Braaten

Troy Coons
Northwest Landowners Association
House Energy and Natural Resources Committee
Testimony for SB 2254
March 15, 2019

Good morning, Chairman Porter and members of the committee, thank you for taking my testimony into consideration today.

My name is Troy Coons, and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents over 525 farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am an unpaid lobbyist.

Northwest Landowners Association is in favor of SB 2254 in order to protect landowners from liens that they have no control over.

We are aware that there is a concern with liens being placed on a landowner's property when a contractor does not get paid by the wind developer. I have attached a copy of an article from an economist at NDSU discussing these concerns. These liens can be larger than the land is even worth, and this has been in the news nationwide. It is difficult or impossible for a landowner to prevent this, even in their own lease, because the lien is filed by a third party. The language in this Bill makes it clear that wind towers from large wind projects are not permanent improvements to the land.

Thank you for taking the time to consider our comments. I am available for any questions.

Sincerely,



Troy Coons, Chairman

Northwest Landowners Association



Private wind development and SB 2254's language

Pursuant to N.D.C.C. § 49-22-03(5), "Electric energy conversion facility" as applied to wind energy means "any plant, addition, or combination of plant and addition, designed for or capable of...[g]eneration by wind energy conversion exceeding one-half megawatt of electricity." This is the threshold for facilities that are under the jurisdiction of the North Dakota Public Service Commission and the Energy Conversion and Transmission Facility Siting Act (NDCC ch. 49-22) ("Siting Act"). In 2011, the Siting Act was amended to ensure that all commercial wind facilities were covered. Prior to these amendments, any wind farms under 60 Megawatt in capacity fell outside the PSC's jurisdiction. The Megawatt threshold for wind conversion facilities was lowered to ½ MW with the specific intent of making sure to cover all commercial wind development projects, but also to leave out small, private wind development.

The following exchange explains the thinking of the PSC.

Pat Fahn: Director of the Compliance and competitive Markets Division at the Public Service Commission. The ½ megawatt turbine size is the smallest size to effectively include all noncommercial wind farms. Any commercial wind farm will be at least a large single turbine or several turbines the turbines range from 1 to 2 megawatts. The ½ megawatt turbine will probably be a hobby turbine generator.

Committee Member: The concern when we were talking about the bill when it was introduced was differentiating between commercial and noncommercial so if you have a dairy farm that uses a lot of electricity would they ever be above that ½ megawatt?

Pat Fahn: We do not think that they would be above that level. We will have a set of rules that would apply to the smaller size wind farms.

See Legislative History for SB 2196, Testimony before House Energy and Natural Resources Committee, 3/04/2011 (available at <https://www.legis.nd.gov/files/resource/62-2011/library/sb2196.pdf>).

Any wind development for private use will be much smaller in size and output than the minimum threshold in the Siting Act. For example, "A small wind system of 100 kW could generate enough electricity to meet the demand for most farms." See Trends in U.S. Agriculture's Consumption and Production of Energy: Renewable Power, Shale Energy, and Cellulosic Biomass (USDA Publication, available at https://ageconsearch.umn.edu/record/262140/files/60128_eib159.pdf).

The language in SB 2254 specifically applies only to an "electric energy conversion facility designed for or capable of generation by wind energy conversion exceeding one - half megawatt" specifically to ensure that smaller developers and private developers are still able to utilize liens pursuant to N.D.C.C. ch. 35-27. By use of this language, it is only large commercial wind developers subject to the PSC's Siting Act and siting regulations that are not allowed to utilize the lien provisions in Chapter 35-27.

For more information contact Troy Coons at 701-721-4258 or troy.coons22@gmail.com.