

# STATE TAX AND SITE DEVELOPMENT

# ACTION GUIDE

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ATTORNEYS





*“Begin with the end in mind.”*

Best Selling “7 Habits”  
Author, Stephen Covey



**Dear Business Leaders, Company Legal Counsel, Tax Advisors and Business Development Professionals:**

The speed and the force at which business is changing today is unprecedented. We are in the midst of a rapidly accelerating “perfect storm” which is affecting the life of all organizations today.

In the midst of this, State business development, tax and incentive systems have become increasingly sophisticated and pervasive throughout the country. This has occurred largely due to the increasingly complex nature of business relationships, business models, technology and State fiscal needs.

This has led to an increasing degree of change and uncertainty, along with accompanying issues.

At the same time, States have been providing increasing opportunities to develop new business and to overcome state and local tax burdens and business expansion costs. This has been through the rise of competitive tax and other economic development incentive programs.

For over 50 years, our firm has been partnering with Business Leaders, Company Legal Counsel, Tax Advisors and Business Development Professionals to work together to accomplish the following:

**Reduce Taxes:** Determine and implement tax strategies to reduce state and local tax issues and tax costs.

**Grow Business:** Impact business growth thru site selection and development decisions and tax and other incentive opportunities.

**Resolve Disputes:** Defend and resolve state and local tax audits, claims and appeals.

**Improve Laws:** Work with state and local government officials and the business community to change the tax and incentive statutes, regulations and rulings to improve the business climate and economic development opportunities.

This Action Guide is intended to provide a brief summary of several of the opportunities and pitfalls existing in the state and local business climate, tax and incentive arenas being encountered today.

Sincerely,

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# REDUCE TAXES

Throughout the life of a company, business transactions, expansions, contracts and other actions often have hidden or ignored State Tax impacts and opportunities. These are almost always best handled up front at the time that the transaction, expansion, contract or other matter is being designed, drafted and implemented.

Below is a selection of the State Tax impacts and opportunities available which need to be addressed in common business situations during the life of a company.

## 1. Designing Your Business

- **Entity Selection:** Have you selected and designed the proper entity (e.g. corporation, LLC) to optimize sales and income tax results?
- **Business Model:** Did you consider state tax impacts when designing the nine components of your business model?

## 7. Expansion Projects

- **Site Selection:** Have you chosen the best tax location for your expansion?
- **Incentives:** Have you designed your expansion to qualify for and optimize your tax and nontax incentives?
- **Tax Increment Financing:** Have you explored tax increment or other tax preferred financing opportunities?

## 2. Hiring Employees

- **Withholding:** Have you ensured that you are withholding taxes for the correct jurisdiction?
- **Classification:** Are your personnel properly classified as employees or contractors?
- **E-Verify For Incentives:** Have you E-verified the status of your new employees to meet state tax and incentive requirements?

## 8. Growing Your Business

- **Physical / Economic Nexus:** Have you designed your expansion to avoid unexpected sales and income taxation in other states?
- **Apportionment:** Have you designed your expansion to allow you the most favorable income tax apportionment?

## 3. Buying and Leasing Assets

- **Asset Classification For Property Taxes:** Have you properly classified your assets as real or personal property for property tax purposes to avoid double tax?
- **Purchase Design For Sales Taxes:** Have you overpaid or underpaid sales taxes on your purchases by not properly designing the purchase?

## 9. Acquiring Businesses

- **Tax On Purchased Assets:** Have you determined whether sales tax is due on the purchase of the business or whether you can design the transaction to be exempt?
- **Exposure For Tax Liabilities:** Have you designed your transaction to minimize the risk that you will be liable for unpaid tax liabilities of a prior owner?

## 4. Purchasing Services

- **Bundled Transactions:** Have you designed your service purchases to avoid "bundled transaction" rules, which can cause nontaxable services to be taxable?
- **Contract Terms:** Where both property and services are provided, are your contracts designed to position your purchases as nontaxable services rather than taxable property?

## 10. Technology & E-Commerce

- **Software Development:** Have you designed this to be a nontaxable service purchase?
- **Affiliate / Economic Nexus:** Have your activities subjected you to tax in other states?
- **Cloud Computing:** Will your cloud computing usage subject you to tax?

## 5. Marketing and Selling

- **Tax Collection:** Are you collecting the required taxes for each proper jurisdiction?
- **Taxable Product/Service:** For each product or service, have you made a determination whether you have a tax collection obligation based on the nature of that product or service?
- **Nexus:** Have your marketing / selling activities inadvertently exposed you to sales and income taxation in other states?

## 11. Resolving Tax Disputes

- **Procedural Requirements:** Have you taken the required steps to avoid incorrect positions during the audit, to protest a tax assessment, to timely express and preserve all potential legal defenses and to build the necessary factual record?
- **Refund Claims:** Have you inadvertently waived your right for a full administrative hearing?
- **CPA / Tax Attorney:** Do you know when to engage a CPA and/or state tax legal counsel to challenge, defend, or resolve an audit, claim or assessment?

## 6. Additional Capital/Partners

- **Tax Benefits For Investment:** Have you determined whether tax credits or benefits may be available to the investor based on the investment?
- **Incentive Eligibility:** Have you ensured that your company's new ownership won't jeopardize state tax incentives or other tax benefits after the transaction?

## 12. Selling Your Company

- **Capital Gains Exclusion:** Have you designed your corporation and sale to qualify for applicable special capital gains exclusions or properly changed your residency to minimize state tax obligations?
- **Tax Exposure Relief:** Have you designed the sale to address if the buyer assumes pre-sale tax exposures?



# GROW BUSINESS

Critical to the growth of most companies is to be in the right business location at the right time operating under the right circumstances. This is accomplished across the U.S. through the site selection and development process.

Site selection and development normally follows a well thought out methodology which brings all of the relevant business, financial and legal factors into a thorough decision making process. This can be effectively illustrated many ways. One example is shown below.

## Site Selection & Development



Key to success is team play and collaboration. Depending on the team which the company has already established, we are typically involved in either all of the above steps or just selected steps as appropriate to accomplish company objectives.



## Nebraska Advantage Incentive Program Highlights

### Available Incentives

(depending upon Tier & Business Activity)

- Sales Tax Refund.
- Investment Tax Credit. (10 - 15%).
- Wage Tax Credit (3 - 10%).
- Property Tax Exemption on Certain Personal Property.
- Real Property Tax Refund (Tier 6).

### Advantage Tiers

Tier 1:	\$1 Million & 10 FTE
Tier 2:	\$3 Million & 30 FTE
Tier 2 LDC:	\$200 Million & 30 FTE
Tier 3:	30 FTE
Tier 4:	\$11 Million & 100 FTE
Tier 5:	\$35 Million
Tier 6:	\$10 Million & 75 FTE or \$103 Million & 50 FTE

### Qualified Business Activities

- R & D
- Scientific Testing
- Data Processing
- Telecommunications
- Insurance
- Financial Services
- Manufacturing
- Distribution
- Internet Web Portal
- Data Center
- Electricity Generation w/ Renewable Energy
- Storage / Warehousing
- Transportation
- Headquarters (administrative)
- Targeted Export Services (75% of sales)
  - Software development
  - Computer systems design
  - Product testing services
  - Guidance or surveillance systems
  - Technology licensing
- Retail sales of TPP if:
  - 20% is at wholesale, manufactured, or to someone else in qualified business.
  - 75% or more of sales are outside of Nebraska.



# RESOLVE DISPUTES

## Avoiding State Tax Defense Pitfalls

To optimize results in a State Tax audit, refund claim or appeal, certain specific steps need to be carefully taken before, during and after the tax audit or claim. Based on recent developments and our experience, below are some of the tax procedure pitfalls in Nebraska for companies and their advisors to be aware of and avoid.

### 1. Income/Sales Tax Appeals

- **Protest Requirements:** The protest to a Nebraska tax audit assessment must be filed within 60 days and include certain required statements addressing the defenses.
- **Income Tax:** Taxpayers cannot appeal a Nebraska income tax audit by paying the tax and filing a refund claim.
- **Legal Pleading:** The protest petition is actually the initial legal pleading. It should properly express the facts and legal grounds, to best enable settlement and offer the best result if the case goes to Court.
- **Legal Representation:** Audit appeal representation of a company by non-lawyers (including company employees) is limited by Department regulations.

### 2. Property Tax Appeals

- **Proper Court:** Depending on the nature of the property tax appeal, the appeal may be proper to the state District Court, the County Board of Equalization, or the Tax Equalization and Review Commission.

### 3. Statute Extensions

- **Extension Signed Before Expiration:** The Department cannot resurrect an expired statute of limitations. An extension must be executed before the expiration.
- **Ongoing Renewal:** Ongoing renewal of extensions must be considered even during pendency of the tax appeal or claim.

### 4. Sales Tax Refund Claims

- **Requirements:** Sales and use tax refund claims must request a hearing and detail the nature and legal specifics of the claim. Failure to do so may result in the loss of the ability to establish certain legal grounds and to have an administrative hearing to make a full and fair factual record.

### 5. Administrative Hearings

- **Hearing Request:** An administrative hearing with the Department's Hearing Officer must be timely requested. The hearing essentially functions as a trial court.
- **The Issue:** The precise legal issue needs to be clearly stated.
- **Failure To Hold Hearing:** Failure to hold a hearing will result in loss of ability to make a full fact record of the necessary facts.
- **Rules Of Evidence:** The taxpayer or Department can elect to follow the formal rules of evidence – an option that must be carefully weighed.
- **District Court:** Appeals are based on the factual record developed at the hearing.

### 6. Post-Audit Practices

- **Adjustment After Audit:** Changing business practices to reduce tax exposure for later years should be structured so as not to constitute an admission of liability in the pending assessment.

## Resolving Nebraska Advantage Incentives Issues

Business moves and expansions are often eligible for significant tax and nontax incentives by most states and communities. These normally need to be pre-planned for, properly applied for and negotiated in advance of the move or expansion. The Nebraska Advantage Act incentive program (addressed below) contains several issues that need to be carefully addressed, before the Application is filed, to optimize its benefits.

### 1. Application Issues

- **Project Entities:** The company needs to meet the eligible entity requirements.
- **Qualified Business:** The project must be for one or more "qualified business" activities.
- **Project Activities Description:** This needs to be carefully addressed to achieve eligibility.
- **Tier Commitment:** The company needs to commit to reaching a level of new employment and investment by selecting a tier of benefits. This decision will impact the company's maximum incentives and future options.

### 5. Qualified Property

- **Eligible Property:** Property must meet certain project use tests and be located at a project location.
- **Relevant Dates:** New property is eligible only if "acquired" after the Application date and before the end of the entitlement period.
- **Software As Eligible Asset:** To constitute qualified property for Nebraska incentive purposes, the company must have specific terms in its agreement with the software provider and must have received a nonexclusive license for use of the software.

### 2. Multiple Locations

- **Locations:** The scope of the project needs to be determined up front to optimize results.
- **Interdependence:** For separate locations to qualify as one project, specific interdependence factors must exist.

### 6. Real Property Construction

- **Contract Terms:** Certain contract requirements need to be met regarding the purchasing agent appointment, the general contractor certification, and specific language in the construction contract relating to tax obligations. This includes build-to-suit leases.
- **Record Keeping:** Specific, detailed documentation will need to be kept to obtain the available sales tax incentives.

### 3. Contract With State

- **Binding Contract:** The State will issue a binding incentive agreement to the company. This agreement legally incorporates into the contract all of the wording in the application (including in the preprinted form). So, the application should be drafted and reviewed for legal considerations like all other contracts.

### 7. Statutory Limits

- **Prohibited Actions:** Nebraska law restricts incentive benefits for certain transactions and activities, which needs to be understood in advance.

### 4. Claiming Benefits

- **Refund Claims:** Refund claims should include specific statutory grounds and include a backup hearing request.

### 8. Resolving Issues

- **Project Issues:** Special procedures and time limits apply to challenging the Department of Revenue.



# IMPROVE LAWS

## Legislation to Improve Nebraska's Business Climate

Important to knowing how to design and improve a State's business climate and economic development program is to be involved in actual business development projects.

The McGrath North team has been engaged by the Nebraska business community and by national and local companies to seek and obtain changes to Nebraska's statutes and regulations when needed to improve Nebraska's business climate overall and for specific projects.



## State Tax, Incentive and Development Legislation

McGrath North has designed and drafted much of Nebraska's tax and tax incentive legislation. Nick Niemann was the principal designer and drafter of the following Nebraska tax, tax incentive and site development programs:

- LB 312 - Nebraska Advantage Act (2005)
- LB 775 - Employment and Investment Growth Act (1987)
- LB 829 - Quality Jobs Act (1995)
- LB 775 - Nebraska Employee Capital Gain Exclusion (1987)
- LB 830 - Nebraska Redevelopment Act (1995)
- LB 620 - Invest Nebraska Act (2001)
- LB 312 - Nebraska Manufacturing Sales Tax Exemption (2005)
- LB 772 - Single Factor Sales Corporate Income Tax Formula (1987)
- LB 427 - Nebraska Job Training Fund (2005)
- LB 559 - Corporate Income Tax Throwback Repeal (1995)
- LB 1063 - Accelerated Depreciation Equipment Property Tax (1992)
- LR 219 CA—Constitutional Amendment to fix the property tax equalization and exemption provisions (1992)

Some of these were developed in response to specific needs. LB 775 and LB 772 were in response to the 1987 ConAgra challenge to Nebraska to become competitive throughout the country's job producing business sectors. LB 829 and LB 830 were to attract higher paying jobs and to redevelop certain areas, such as the Aksarben area. LB 620 was to land large projects, such as the U.P. headquarters. LB 312 and LB 427 were to update and upgrade Nebraska's overall competitiveness. LB 1063 and LR 219 CA were to fix the threat to Nebraska's property tax system due to certain Federal court discrimination rulings.

Nick was also a co-designer and co-drafter of various other tax legislation, such as LB 895 (2008) which added Tier 6 to the Nebraska Advantage Act, LB 872 (2012) which adopted the market state apportionment rule for business services income, LB 343 (2007) which extended the capital gain exclusion to extraordinary dividends and LB 161 (2017) which extended the tax incentive benefit carry forward period for Tier 6 projects. Nick has also worked with Nebraska's business community and lobbyists to defend legislative attempts to repeal or reduce these programs.

The above incentive programs have created over 100,000 new jobs and \$30 billion of capital investment in over 850 business expansions throughout Nebraska.

## Economic Development Policy

Nebraska's Governors and State Directors of Economic Development have consulted with Nick Niemann on economic development policy for over 30 years. He has also authored a number of studies for the business community outlining strategies to defend and improve Nebraska's business climate.



# OUR STATE TAX & SITE DEVELOPMENT PRACTICES

## Business Sectors

We have been engaged by national and local companies to work with their teams throughout many business sectors, including:

- Headquarters
- Data Centers
- Distribution Centers
- Health Care
- Consumer Product Manufacturing
- Leasing
- Technology Licensing
- Agribusiness
- Industrial Manufacturing
- Financial Services
- Renewable Energy
- Product Development
- Business Services
- Retail
- Transportation
- Education
- Food and Beverage
- Human Resources
- Data Processing
- Personal Services
- Construction
- Franchise
- Warehousing
- Insurance
- Consumer Services
- Security
- Telecommunications
- Banking
- Research & Development
- Professional
- IT Development
- Processing

## Selected Team Members

### State Taxation, Incentives and Site Development

- Site Selection and Development
- Incentives Planning and Negotiation
- Tax Planning
- Tax Defense and Resolution
- Tax Increment Financing
- Legislation



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### Real Estate and Construction

- Site Acquisition and Control
- Real Estate Development
- Land Use, Entitlements and Zoning
- Eminent Domain
- Construction



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### Energy and Environmental

- Energy Sourcing and Supply
- Resource Use
- Environmental Counseling, Permitting and Compliance
- Sustainability



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## McGrath North Law Firm

McGrath North is an Omaha-based national law firm. We offer our clients a comprehensive, nationwide legal practice built on integrity, personal attention and work ethic. We were founded over 50 years ago and now deploy over 70 attorneys working in over 80 Practice Areas throughout the U.S.

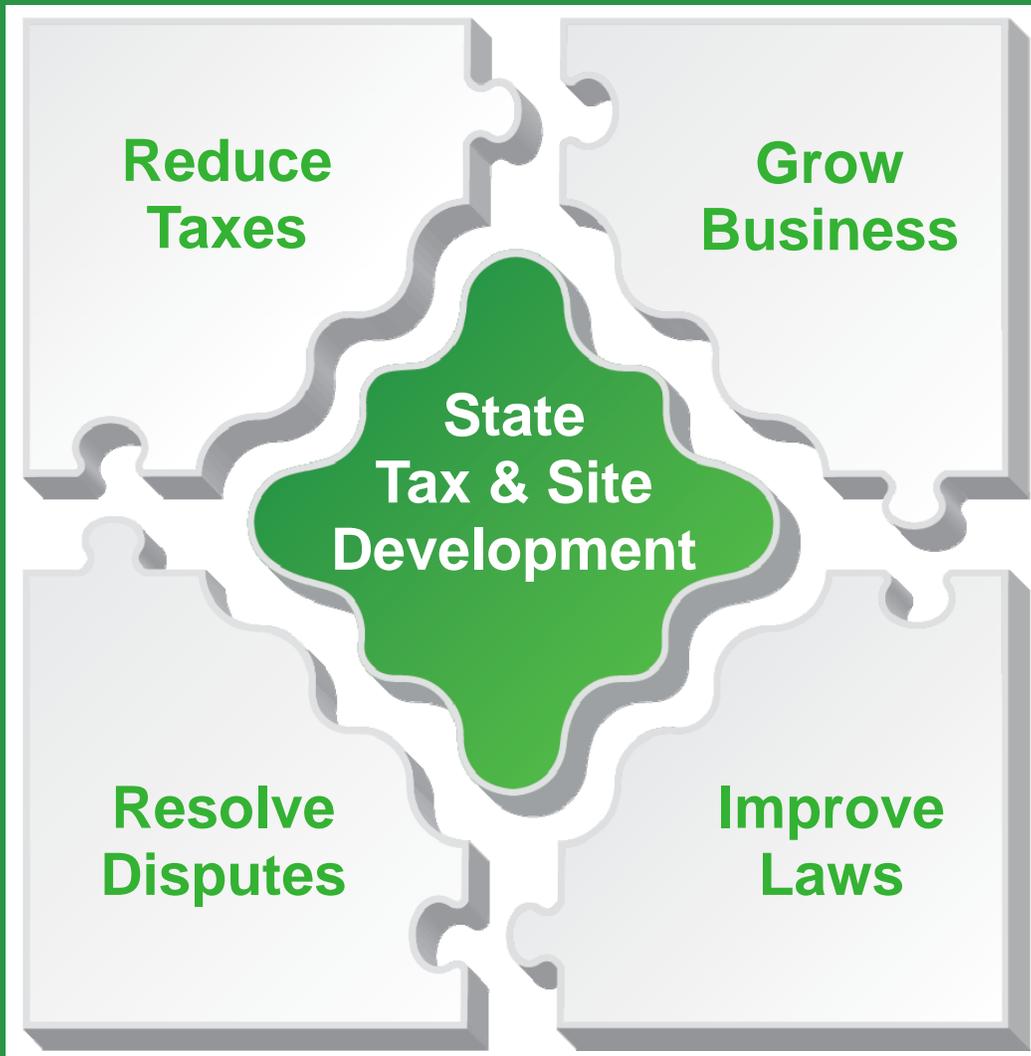
## Affiliations

Success in the areas covered in this Action Guide depends on a close working relationship and collaboration with the company, its team, business and economic development organizations, and state and local government officials. Over a period of decades, our team has developed the relationships necessary to achieve both short and long term success for the companies we work with, such as with:

- Greater Omaha Chamber of Commerce
- Council on State Taxation
- State and local agency leadership and staff
- Nebraska State Chamber of Commerce
- Vistage International
- Nebraska architect, excavation and construction firms
- County Economic Development Corporations
- CEO Space International
- Nebraska workforce leaders
- Nebraska Governor, Legislature and Lobbyists
- Nebraska Society of CPAs
- Nebraska infrastructure, logistics and energy providers

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