SO YOU DON'T OWN THE MINERALS

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I. INTRODUCTION

A. Scope

This paper begins by presenting the Texas practitioner with issues to consider when advising clients purchasing real estate. The paper then provides the practitioner with information regarding the rights of surface owners vis-a-vis mineral owners. Finally, the paper presents factors that may allow the surface owner to restrict use of the surface for the purpose of developing the mineral estate.

B. Disclaimer

This paper is limited to information regarding Texas law and practice. Oil and Gas law is very state-specific. Texas certainly possesses the greatest wealth of common law on oil and gas subjects. In many cases, other states follow Texas law with slight modifications. In other instances, less enlightened states take a completely contrary approach.

C. Background

Real property may be horizontally severed such that title to the surface estate is vested in one or more parties and title to the mineral estate is vested in one or more separate parties. Such a severance may be accomplished by way of a mineral reservation, a mineral conveyance or an oil gas and mineral lease (more precisely, a conveyance in fee simple determinable). In the case of such a severance, two separate and distinct estates are created - the mineral estate and the surface estate. *Harris v. Currie*, 176 S.W. 2D 302, (Tex. 1943). The owner of each estate has certain ownership rights regarding the estate owned.

Ownership of oil and gas has been likened to bundle of sticks. A party who owns the minerals owns the development right, the executive right (right to execute leases), and the right to receive economic benefits under a lease (bonus, delay rentals, royalties, shut-in payments). In exercising those rights, especially the development right, the interests of the mineral owner may become adverse to those of the surface owner.

Without the ability to extract and use the minerals, the mineral owner's estate would be of little value. While it is sometimes possible to explore for and extract oil and gas without making use of the surface estate directly overlying the minerals, as in the case of horizontal drilling, developing the mineral estate usually entails some use of the surface. In order to maximize the value of the mineral estate, Texas courts have consistently held that the mineral owner may use as much of the surface estate as is *reasonably necessary* to produce the minerals. *Placid Oil Co. v. Lee*, 243 S.W. 2D 860 (Tex. App. 1951). In other words, the mineral estate is the dominant estate and the surface estate is the servient estate. In exercising the right to make reasonable use of the surface estate, the mineral owner must act with due regard for the rights of the surface owner, and may not wantonly, willfully or negligently injure the surface estate *General Crude Oil Co. v. Aiken*, 344 S.W. 2d 668, 671 (Tex. 1961). Review of the case law will reveal that the mineral estate's status as the dominant estate greatly reduces the amount of "due regard" owed by the mineral owner. *Id.* Likewise, Courts have been reluctant to impose much of a duty on the mineral owner when dealing with the surface owner. *Id.*

Making *reasonable use* of the surface estate to explore for, drill for, extract, produce and transport oil and gas can negatively impact the surface estate and make it unsuitable for certain uses. Making reasonable use of the surface can include building locations and erecting drilling rigs (*Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex.Civ.App. 1919)), conducting seismic operations (*Yates v. Gulf Oil Corp.*, 182 F.2d 286 (5th Cir.Tex.1950)), building permanent storage tanks and other structures on the surface (*Gregg v. Caldwell-Guadalupe Pick-up Stations*, 286 S.W. 1083 (Tex.Com.App. 1926)), and a multitude of other activities. The noise of drilling operations can disturb home owners. The site of production equipment several yards off the balcony might dampen the romantic atmosphere of outdoor dining at an exclusive restaurant. A pumping unit in the middle of the eighteenth fairway would almost certainly reduce a golf course's revenues. These are issues that should be considered when advising owners and purchasers of real estate in Texas.

II. CONSIDERATIONS PRIOR TO PURCHASE

A. The Contract

Those practitioners fortunate enough to become involved in a transaction from the beginning should consider the mineral situation from the inception. Historically, mineral ownership was a minor issue in many areas throughout the State. Some places were considered devoid of oil and gas. Urban areas were considered unlikely candidates for mineral production because of the cost associated with such operations. In others places, the oil and gas were exploited decades earlier and thought to be depleted. In each case, it was thought that the surface owner risked little interference from those seeking to exploit the mineral estate.

New technology, increased demand, and record high prices have forced surface owners and those representing them to reconsider the possibility of mineral development and the impact it will have on their use and enjoyment of the surface estate.

The first opportunity for the practitioner to consider the mineral estate and its relationship to the surface is likely the earnest money contract. In a perfect world, the client will ask the practitioner to draft or review the earnest money contract before signing it. Usually, the attorney representing a buyer will not have a title policy, title run, abstract, or other materials to review when the contract is first presented to him or her. While mineral provisions may appear anywhere in the earnest money contract, they typically appear in one or more of three sections in the standard TREC / TAR contracts.

1. Reservations

The most obvious provisions to review are the proposed reservations. These are rights or property interests the seller will reserve when conveying the property. Often the seller, seller's agent, or attorney will include a statement like "Seller reserves all minerals", or "Seller reserves oil and gas but conveys all surface rights". Unless the practitioner is seeking to create ambiguity, such broad statements open to interpretation should be avoided in favor exact language that will appear in the deed. The Texas Real Estate Forms Manual suggests language such as: "*For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of all oil, gas and other minerals in and under and that may be produced from the Property. If the mineral estate is subject to existing production or an existing lease, this reservation includes the production, the lease, and all benefits from it*.". If it is desirable for the seller to waive the right to use the surface (assuming the seller is capable of doing so), the Forms Manual suggests that the reservation continue as follows: "Grantor waives and conveys to Grantee the right of ingress and egress to and from the surface of the Property relating to the portion of the mineral estate owned by Grantor. *Nothing herein, however, restricts or prohibits the pooling or unitization of the portion of the mineral estate owned by Grantor with land other than the Property; or the exploration or production of the oil, gas, and other minerals by means of wells that are drilled or mines that are opened on land other than the Property but enter or bottom under the Property, provided that these operations in no manner interfere with the surface or subsurface support of any improvements constructed or to be constructed on the Property*.".

While it is beyond the scope of this paper to undertake to provide analysis of or instruction on drafting or negotiating techniques, a few simple observations are in order. First, the practitioner should consider being as precise as possible when drafting or reviewing the proposed reservation for the contract. Vague or ambiguous contract provisions often result in later arguments, terminated contracts, and / or litigation. Second, sellers will often offer to waive the use of the surface (or "convey all surface rights" - whatever that means) when they own less than the entire mineral estate. Obviously, the seller cannot convey what he does not own. Another mineral owner under a previous mineral conveyance or reservation might have the right to make use of the surface to exploit his / her mineral estate (see Paragraph III C. below). Accordingly, the practitioner should not derive a high level of comfort from such language in a proposed reservation in the earnest money contract prior to reviewing the title commitment and determining if there are other mineral owners who might have the right to make use of the surface.

2. Permitted Exceptions

From the buyer's perspective, the earnest money contract should allow the buyer to object to matters that would negatively impact the proposed use of the surface after review of the title commitment. In the event of such objection, the seller can cure the matter; or, if the matter cannot be cured, the buyer may cancel the transaction. Many form contracts provide a space entitled "Permitted Exceptions" or "Exception Documents" or otherwise allow for the disclosure of matters known by the seller which, because they are disclosed in the contract, will not form the basis for the buyer's objection. It has become common for sellers or their representatives to insert "those of record" or "as shown by title commitment" in the space provided. Including such a statement results in a contract provision that the buyer will not object to any matters of record or any matters shown in the title commitment. Obviously, the buyer's attorney will want to object to any prior mineral reservation or conveyance revealed by the title commitment that would allow a mineral owner to make "reasonable use" of the surface to develop the mineral estate when such development would be inconsistent with the buyer's intended use of the surface. For example, trucks removing salt water from on-site storage tanks twenty-four hours a day would be inconsistent with using the surface of the property as a retirement center. Therefore, the practitioner is encouraged to preserve his / her right to object to prior mineral reservations or conveyances by limiting the permitted exceptions allowed by the earnest money contract.

3. Special Provisions / Others

Many form contracts have a paragraph entitled "Special Provisions". It also common to find provisions by which the seller proposes to reserve oil and gas in these paragraphs. In cases where the seller's attorney has prepared the contract and a standard form has not been used, proposed mineral reservations and permitted encumbrances might appear anywhere. In any event, care should be taken in reviewing the contract.

Regardless of where they appear in the contract, the buyer's attorney should probably object to vague or broad mineral reservations. He or she should consider whether or not development of the mineral estate is inconsistent with the buyer's proposed use of the surface. Statements that seller will waive the right to use the surface should not be taken at face value. Finally, the practitioner should take care not to waive any objections to prior mineral reservations, conveyances or leases revealed by the title commitment.

B. Title Commitment

Reviewing the title commitment provides the practitioner with another opportunity to consider the mineral situation, whether it affects the proposed surface use, and to what extent. The practitioner should make certain that the mineral estate is not excepted from coverage by exclusion from the property description or by general exception. Some title companies attempt to exclude the mineral estate from coverage by describing the property as "THE SURFACE ESTATE ONLY IN AND TO THE FOLLOWING PROPERTY...". Using such a description implies that the company will not insure against any claims associated with the mineral estate. To accomplish the same purpose, some title companies also incorporate an exception to the effect of "Company excepts to does not insure any oil, gas or other minerals associated with the Property and the rights of owner(s) of the said interest(s)." Both practices were the subject of a recent bulletin by the Commissioner of Insurance (B-0013-08, dated April 10, 2008). In the bulletin, the Deputy Commissioner states that the practices are prohibited and can be the grounds for sanctions against the agency or direct operation. At the time this paper was written, the matter was the subject of objections by the title insurance industry and the Bulletin was under review by the Department of Insurance. The Bulletin was withdrawn in its entirety on June 4, 2008; however, public hearings have been scheduled to resolve the matter.

Even if the Department ultimately affirms the position stated in Bulletin B-0013-08, a case could be made that such general exceptions are effective to negate or reduce contractual title insurance coverage despite their prohibition by the Department. The more prudent practice would be to request amendment of the description or removal of the exception. If the title insurance company declines to take the requested action, a different title insurance provider should be sought.

Provided the property is described without exclusion of the mineral estate and there is no general exception regarding oil, gas or other minerals, the practitioner can review the Schedule B for any mineral exceptions, conveyances or leases.

1. Mineral vs. Royalty

In the Paragraph entitled "background" above, the mineral estate was described as a bundle of sticks. One of the sticks in that bundle was the right to receive royalties if the minerals are produced. Accordingly, the royalties (i.e. - the right to receive royalty payments) is one of the rights associated with the mineral estate. The term "royalty" typically does not include other rights such as the executive right or the development right. A royalty interest may be reserved in a deed or conveyed to a third party separate from the surface estate or other mineral rights. An example of a royalty reservation is shown on the attached Exhibit "A".

Because the owner of a simple royalty interest does not have any right to execute a lease or develop the mineral estate, the royalty owner has no right to use the surface estate to exploit the minerals. A royalty interest, without more, is only a right to receive payments. Often, a royalty-only interest is called a non-participating royalty interest (NPRI) to clarify that the royalty interest owner will not participate in making the lease or receiving bonus payments.

As distinguished from a royalty interest, a mineral interest typically includes the development right and executive right, including the right to receive the bonus money. It typically (but not necessarily) also includes the right to receive the royalties. An example of a mineral reservation, in contrast to a royalty reservation, is shown on the attached Exhibit "A". It is possible to have a situation in which one party in the chain of title reserves all the royalties, another party in the chain of title reserves all the minerals, and still another party owns the surface estate. In such a case, the party with the mineral interest can execute a lease and receive the bonus money without joinder of the others. The mineral owner's lessee can then make reasonable use of the surface of the property to exploit the minerals without joinder of the other parties. If oil and / or gas are produced from the well, the royalty owner would receive all the royalty payments.

Since the mineral owner has the right to execute leases, thereby conveying his development rights to the lessee, any mineral reservations or conveyances in the chain of title are of special interest to the buyer and his or her attorney. If the buyer intends to use the surface estate for a purpose incompatible with mineral development, the practitioner is advised to review the actual text of the reservation or conveyance to determine the nature and extent of the right conveyed or reserved.

2. Surface Waivers

The subject of surface waivers could be discussed in various places in this paper. The subject is included here arbitrarily. A surface waiver is the written agreement of the owner of the development right not to make use of the surface of the property in developing the minerals (no citation - author's made up definition, find a better one if you don't like it). An example of a mineral reservation with a surface waiver is included on Exhibit "A". A hypothetical is useful to begin the discussion:

Hypothetical Question - Suppose the earnest money contract states that the seller will reserve an undivided one-sixteenth of the oil, gas and other minerals but waive the use of the surface for the purpose of mining, exploring, drilling for and producing oil, gas and other minerals. Upon reviewing the title commitment on behalf of the buyer, the practitioner finds that one predecessor in title reserved one-half of the minerals, and another predecessor conveyed one-sixteenth of the minerals to her daughter. Is the surface waiver from the seller useful?

Hypothetical Answer - Not really. Without the prior reservation and conveyance, the surface waiver would give the owner of the surface estate the right to prohibit use of the surface estate in developing the minerals. In this case, however, the seller only owned 7/16ths of the minerals at the time he executed the earnest money contract. When the prior owner reserved one half of the minerals, and the other predecessor in title conveyed 1/16, they severed a portion of the executive right. As discussed below, any cotenant of the mineral estate has the right to develop the oil and gas without joinder of the other cotenant(s).

Of course, there are instances when a surface waiver would give the surface owner the right to prohibit the use of the surface to develop the mineral estate:

Hypothetical Question 2 - Suppose, as in the hypothetical above, the earnest money contract states that the seller will reserve an undivided one-sixteenth of the oil, gas and other minerals but waive the use of the surface for the purpose of mining, exploring, drilling for and producing oil, gas and other minerals. Upon reviewing the title commitment on behalf of the buyer, the practitioner finds that a predecessor in title reserved a 1/8 non-participating royalty interest. Is the surface waiver from the seller useful?

Hypothetical Answer 2 - Yes. As discussed in Paragraph II (B) (1) above, the prior *royalty* reservation does not involve any executive or development rights. When the seller reserves his mineral interest but waives the use of the surface to develop the minerals, no other party has the right to use the surface.

Often, the practitioner may find a situation similar to Hypothetical 2 above. In that instance, one or more predecessors may own mineral or royalty interests without either development rights or the right to use the surface for development of the oil and gas. In that case, one of the practitioner's final concerns would be the existence of oil, gas or mineral leases.

3. Leases

Unlike most other common leases (e.g. - residential, commercial, grazing, hunting, etc.), an oil and gas lease is a conveyance in fee simple determinable. The lessor actually conveys the minerals to the lessee for a certain primary term and as long thereafter as some condition exists (commonly as long as production continues in paying quantities). Therefore, while a lease is within its primary term or held in force by production or some substitute for production, *the lessee owns the minerals*.

Because the lessee in the oil and gas lease actually owns the minerals, any offer by the lessor to convey the minerals or waive the right to use the surface is ineffective as long as the lease is in force. Determining whether or not the primary term of the lease has expired can be accomplished by simply reading the terms of the lease. On the other hand, determining whether or not the lease is held by production can be somewhat challenging. If the property in question is in a pooled unit, production from any land in the unit can hold the lease in effect as to the property despite the fact that there are no signs of operations on the property itself. It is recommended that the practitioner identify any leases with expired primary terms on the title commitment and ask that they be removed. The title company should remove the expired lease(s) upon receipt of an affidavit of non-production. This instrument is a sworn statement by the seller and / or some other party with knowledge of the facts stating that the primary term of all leases has expired and the lease is not held by production or some substitute for production.

Most leases are drafted by lessees, and therefore do not, without modification, limit the lessee's rights as the owner of the oil and gas to use the surface of the property to develop the mineral estate. The lessor may negotiate certain provisions limiting or prohibiting the use of the surface estate. Some examples of these provisions are set-backs, drill-site designations and no drill clauses. The promulgated form lease will often provide that no operations will be conducted within a certain distance from improvements (usually 200 or 300 feet). The lessor may have negotiated some larger set-back area, especially if he or she owned the surface when the lease was executed. The lease may designate certain drill sites and prohibit drilling in other areas. Consideration should be given as to whether other operations (seismic activity, roads, pipelines) are also confined to specified areas. Sometimes, especially on smaller tracts, the lessor may negotiate a clause completely prohibiting any operations on the surface and limiting the lessee to production through slant drilling, horizontal drilling, pooling or unitization. For further review of this subject, the reader is encouraged to review, Stephen A. Boykin *Texas Oil and Gas Leasing, a Primer* presented at the State Bar of Texas 28th Annual Advanced Law Conference, June 2006. This scholarly work by a renowned author presents additional background and examples of such provisions.

In sum, the practitioner should carefully review all documents involving the mineral estate shown on the title commitment. First, be certain the title company has not excepted coverage of mineral-related items by exclusive description or general exception. Next, review the type of interest at issue. Unlike a mineral interest, a royalty interest typically does not involve the development or executive right. Third, if a surface waiver is involved, determine to what extent the party waiving the use of the surface actually has the right to do so. Finally, determine whether or not any leases of record are expired and have them removed from the title commitment. If they are not expired, determine to what degree the lessor may make use of the surface of the property.

III. POST CLOSING CONSIDERATIONS

Of course, all buyers consult their attorneys before actually purchasing property and provide their attorneys an opportunity to be involved from the beginning of the transaction. On the off chance that the attorney becomes involved after the owner actually takes title to the property, the attorney may be asked what rights other parties may have to use the surface of the property to exploit the oil and gas. This question may be posed by the surface owner prior to undertaking some development of the surface. Perhaps the client is a lender considering loaning the surface owner money to make certain improvements. Even more difficult is the situation where the surface owner has already expended funds to build improvements and gets notice that some other party plans to begin operations on the property to exploit the minerals. In determining what rights some other party has to use the surface in developing the minerals, the practitioner will likely begin by reviewing the title policy.

A review of the title policy and the exception documents identified on schedule B should allow the practitioner to determine what rights others may have to use the surface of the property to exploit the mineral estate. The practitioner may ask for a down date endorsement or title report to reveal any documents executed and / or recorded after the date of the policy - especially when the current surface owner took title long before the current review. Much like the review of the title commitment above, the practitioner should make certain the title company has not excepted the mineral estate by exclusion from the property description or by general exception. If the mineral estate is excepted, a separate search for instruments involving the mineral estate should be conducted. Provided the policy is in order, the practitioner can move on to determine what sort of interests have been reserved or conveyed (mineral v. royalty) and whether or not any surface waivers apply. Any current leases can also be reviewed and the rights of the lessor parsed out.

A. Surface Owner Owns All The Minerals

The practitioner may determine that the surface owner owns all the minerals. Provided there are no previous mineral reservations without surface waivers, no prior conveyance of any mineral interests that include development or executive rights, and no current leases within their primary term or held by production, the surface owner can conclude that no other party has the right to make use of the surface to develop the mineral estate. Complete ownership of the mineral estate provides the greatest degree of certainty that no party other than the surface owner can use the surface of the property to develop the oil and gas. Even if the surface owner is found to own all of the minerals, he / she should still be certain to negotiate the appropriate limitations on surface operations in any future oil and gas leases to avoid granting surface-use right to a third party.

B. Surface Owner Owns No Minerals

As discussed in the paragraph entitled "Background", when the mineral estate is severed from the surface estate, the mineral estate is dominant. The owner of the mineral estate can make reasonable use of the surface of the property to develop the oil and gas. *Placid Oil Co. v. Lee*, 243 S.W. 2d 860 (Tex. App. 1951). Reasonable use of the surface may include such activity as conducting seismic operations, surveying, building roads, erecting drilling equipment, drilling oil and / or wells, drilling water wells, using surface water or groundwater, storing produced minerals, building pipelines, transporting waste and / or minerals, etc. Obviously, the *reasonable use* of the surface by the mineral owner can be detrimental to the current or intended use of the surface by the surface estate owner. If the surface owner owns no minerals, he / she has no executive or development rights. The terms of any oil and gas lease are completely out of the surface owner's control - he / she has no opportunity to negotiate any provision limiting the use of the surface. As long as the mineral estate owner acts reasonably, the mineral estate owner may enter the property without notice or authority and may use the surface to exploit the minerals without compensation to the surface owner.

C. Surface Owner Owns Some Of The Minerals

So far, this paper has established that the mineral estate may be severed from the surface estate, that the mineral estate includes the executive and development right, and that the party with the development right has the right to make reasonable use of the surface estate to develop the minerals. It is a common misconception that if the surface owner owns a portion of the mineral interest, the surface owner can then prohibit others from using the surface to develop the minerals - the theory being that, as a co-owner of the minerals, the surface owner can direct the method of development. Those who rely on such a theory do so to their detriment.

The surface owner cannot prohibit reasonable use of the surface of the property simply because he / she owns a portion of the mineral estate. "It has long been the rule in Texas that a cotenant has the right to extract minerals from common property without first obtaining consent of his cotenants; however, he must account to them on the basis of the value of any minerals taken, less the necessary and reasonable cost of production and marketing.". *C.W. Byrom et al. v. Paul Pendley,* 717 S.W. 2d 602, 604 (Tex. 1986), citing *Cox v. Davison,* 397 S.W. 2d 200, 201 (Tex. 1965). *See also, Prairie Oil & Gas v. Allen, 2 F. 2d 566 (8th Cir. 1924).* In other words, any owner of the development right associated with the mineral estate, no matter how small the fractional interest, has the right to extract the minerals. As stated repeatedly above, the owner of the mineral estate can make reasonable use of the surface to develop the minerals. Therefore, *any* owner of any interest in the mineral estate has the legal right to make use of the surface to exploit the minerals.

The exercise of the legal right to extract the minerals is not always economical. As stated above, the cotenant who extracts the minerals must account to the other cotenant(s) for the minerals so extracted on the basis of the value of the minerals less the cost of extraction and production. Additional over-simplified hypotheticals may be useful here.

Hypothetical 1 - A owns the surface and 1% of the mineral estate. B owns none of the surface and 99% of the mineral estate. (Note that B may be the lessee under an oil, gas and mineral lease whose ownership is in fee simple determinable). If B drills a well at a cost of $1,000,000.00 with annual operating costs of $60,000.00 and sells the oil or gas produced for $4,500,000.00 in the first year, B owes A an accounting (however, if the well is not a commercial success B does not owe an accounting but cannot recover any of the costs of the well from A). At the end of the first year, B owes A the sum of $34,400.00 (1 percent of the net profit of the well) and keeps $3,405,600.00. Obviously, B would be willing to undertake the development under these circumstances

Hypothetical 2 - Assume the same facts as above; however A and B each own 50% of the minerals. In that event, B pays A $1,720,000 of the $3,440,000 profit. If B is a lessee under an oil and gas lease with a 1/5 royalty, he would also have to pay $344,000.00 to the lessor, keeping $1,376,000 as his profit .

Hypothetical 3 - A owns the surface and 75% of the minerals. B owns none of the surface and 25% of the minerals. B drills a well at a cost of $3,000,000.00 with an annual operating cost of $30,000.00 and sells the oil or gas produced for $1,500,000 in the first year, $1,200,000 in the second year and $1,000,000.00 in the third year, and $750,000 in the fourth year. There is no profit until year three, at which time B would pay $457,000.00 to A and keep $152,500.00. This return, if anticipated by B prior to commencement of development, would probably not be enough to entice B to undertake development of the mineral estate.

Despite the facts that these examples are greatly simplified, they show that, the greater the surface owner's interest in the mineral estate, the less economic benefit the mineral cotenant would derive from exploiting the minerals without the surface owner's joinder. They should also show (Hypothetical 2 in particular) that a mineral cotenant could economically exploit the oil and gas without the surface owner's participation, despite the fact the surface owner owns a substantial portion of the minerals.

D. The Accommodation Doctrine

The information presented above might lead the reader to determine that any owner of any share of the mineral estate has the *unrestricted* right to make use of the surface of the property to exploit the minerals. Without some limitation on that right, the surface owner could not make any improvements without risking that a mineral owner could destroy, remove, or interfere with the improvements in an effort to develop the oil and gas. For instance, without some limitation on the right to use the surface, the mineral owner could dig up a parking lot and drill in front of a shopping mall as long as such activity was "reasonable". The remainder of this paper will address limitations on the mineral owner's right to use the surface of the property to exploit the mineral estate.

Until recently, the requirement that the mineral owner make *reasonable* use of the surface was the surface owner's primary protection. Beginning in 1971, the Texas Supreme Court began interpreting "reasonable use" in such a manner as to place additional limits on the mineral owner's right to make use of the surface estate. In *Getty Oil v. Jones,* 470 S.W. 2d 618 (Tex. 1971), the Court established the accommodation doctrine. In *Getty Oil,* Jones had installed a center-pivot irrigation system on farm land. Getty Oil drilled two oil wells in the area irrigated by the pivot. To extract the oil, Getty had to use beam-type pumps that were tall enough to interfere with operation of the pivot. Jones sued Getty on the theory that the pump units could be placed in below-ground concrete cellars like other pumps on his property, such that they would not interfere with the pivot. The Court agreed with Jones, stating that where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee. *Id* at 622. *See also, Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No.* 1, 870 S.W. 2d 350, 353 (Tex. App. Waco 1994, no writ). The Court further held, on rehearing, that the reasonableness of the use made by the mineral estate owner should be measured by the usual, customary and reasonable practices in the industry under like circumstances of time, place, and servient estate uses; and that courts should first consider the type of use being made of the surface estate, and any other reasonable uses thereof in determining reasonableness.

The rule from *Getty*, then, is that the surface owner has the burden of proving (1) There is an existing use of the surface by the surface owner, (2) The mineral owner's (lessee's) proposed use of the surface prevents or impairs the existing use of the surface, and (3) the mineral owner (lessee) has reasonable alternative means of developing the minerals. Under *Getty,* the burden is on the surface owner, and the mineral owner may still pursue development of the mineral estate regardless of the impact on the surface if no reasonable alternatives exist.

In *Sun Oil Co.* v. *Whitaker*, 483 S.W. 2d 808 (Tex. 1972), the Court held that it was unreasonable to require the mineral owner to purchase water for recovery operations when the mineral owner could produce the water from the leased premises even though using water on the leased premises reduced the surface owner's supply by 20% and the off-site purchase was feasible. The Court reasoned that because the mineral estate is the dominant estate and its owner can make reasonable use of the surface estate, it is not sufficient for the surface owner to prove that the mineral owner has an alternative method available elsewhere. The language of Whitaker, then implies that the surface owner must prove that there is a reasonable alternative available on the leased premises itself.

More recently, the 10th Court of Appeals followed *Getty* in requiring that the surface owner prove that any alternative uses of the surface, other than the existing use by the surface owner, are impractical and unreasonable under the circumstances. *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No.* 1, 870 S.W. 2d 350, 353 (Tex. App. Waco 1994, no writ). As to the reasonableness of any alternative method of developing the oil and gas, the Court held that "… if the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended (especially when there is only one reasonable manner in which the surface may be used) and one which would preclude that use by the surface owner, the mineral owner *must* use the alternative that allows continued use by the surface owner." However,"…if a mineral owner has available several means of accessing the minerals, one of which will maximize the value of the mineral estate and the other alternative that, if used, will either totally destroy or reduce its value by three-fourths, one cannot rationally argue that the alternative methods provide *reasonable* access to the minerals. *Id.* Therefore, even if the surface owner proves that he / she has an existing use of the surface, that the mineral owner's proposed method of developing the oil and gas interfere with the surface use, and that other, less destructive methods of developing the mineral estate are available on the surface; the mineral owner will not be required to use those alternative methods if the methods would significantly reduce the value of the minerals.

In sum, the accommodation doctrine is a judicial, non-statutory concept that affords the owner of the surface estate the right to prohibit certain methods of developing the mineral estate when other reasonable alternative methods of exploiting the minerals are available. In employing the accommodation doctrine, the surface owner has the burden of proving (1) That the surface owner has an existing use of the surface and that other uses are impractical or unreasonable under the circumstances, (2) The mineral owner's proposed method of using the surface to develop the minerals impairs or precludes the existing use of the surface, and (3) The mineral owner has reasonable alternative means of developing the minerals on the property that do not significantly reduce the value of the mineral estate.

E. Surface Damage And Other Statutes

When the surface owner has an existing use and there are reasonable alternative methods of developing the oil and gas, the surface owner may employ the accommodation doctrine to prohibit or mitigate a proposed method of development of the oil and gas. Sometimes, however, the surface owner's use is only planned – not existing. In other instances, there are no other reasonable alternative methods of exploiting the oil and gas. In such cases, the surface owner cannot rely upon the accommodation doctrine to prevent or modify the use of the surface estate. Several states have enacted surface damage statutes to compensate surface owners for damage caused by the mineral owner in exploiting the mineral estate. At least eight other states, including Oklahoma, have enacted such statutes. Texas has NOT adopted a statute that mandates the mineral owner to pay for damages to the surface estate caused by reasonable use of the surface to exploit the oil and gas.

It is common in Texas for the mineral owner (typically as lessee under an oil and gas lease) to voluntarily negotiate and pay some surface damage amount prior to beginning operations. The oil and gas lessee will usually request a waiver / release / indemnity agreement upon payment of the surface damages. Because there is no surface damage statute in Texas compelling the mineral owner to pay to make reasonable use of the surface, this practice can be thought of as the mineral owner "buying his peace". The mineral owner has no legal responsibility to pay for any damages to the extent the mineral owner's use of the surface in exploiting the minerals is reasonable. One could theorize that any such pre-operational damage payments constitute the oil and gas lessee's purchase of the right to be unreasonable. The practitioner should carefully review any waiver or release tendered with a voluntary surface damage payment (beware of Greeks bearing gifts). While the surface owner may wish to accept certain money to release the mineral owner from liability associated with reasonable use of the surface, the surface owner should not waive any future claim or cause of action based on the mineral owner's negligence or intentionally unreasonable conduct prior to the completion of operations.

1. <u>Chapter 91 Texas Natural Resources Code</u>

In September 2007, the legislature enacted §91.701 through §91.705 of the Texas Natural Resources Code. A copy of the statute is included as Exhibit "B". The statute essentially requires the operator of an oil or gas well (commonly the lessee under an oil and gas lease) to give the surface owner written notice that a permit has been issued to drill or reenter a well. The statute is noteworthy for three reasons. First, assuming the operator does not begin operations immediately upon issuance of the permit, the notice provision affords the surface owner a chance to review the situation and seek injunctive relief prior to the commencement of operations if the accommodation doctrine or other factors so warrant. Second, many surface destruction statutes in other states contain some type of notice provision followed by an opportunity to negotiate a mutually-agreed damage amount. It is possible (though unlikely as explained below) that the legislature may move to enact some additional legislation in this area at a later date. Finally, §91.705 specifically states that mineral estate is dominant and that the statute in no way limits the right to develop the minerals. The language makes it obvious that, at least at this time, the legislature is not interested in modifying the historic common law rules establishing the mineral estate's dominance or affording the surface owner some statutory method to prohibit or restrict the use of the surface to exploit the oil and gas.

2. <u>Chapter 92 Texas Natural Resources Code</u>

While Texas has not enacted any surface damage statutes, certain state laws can assist surface owners in restricting mineral development operations on the surface – especially in more populous areas of the state. Chapter 92 of the Texas Natural Resources Code allows the surface owner(s) to create a subdivision and, after approval by the Railroad Commission, to designate certain operations sites to which operations are restricted. A copy of the statute is attached as Exhibit "C". The statute only applies to counties with a population over 400,000 or counties with a population over 140,000 that border counties with a population over 400,000. Accordingly, it does not benefit those outside the five or six largest metropolitan areas of the state. A list of relatively populous counties (and the cities therein) to which the statute does NOT apply based on population are: Angelina (Lufkin), Brazos (Bryan / College Station), Gregg / Harrison (Longview), Lubbock (Lubbock), Smith (Tyler), Tom Green (San Angelo), Wichita (Wichita Falls), and Victoria (Victoria).

Provided the property is within one of the most populous counties in the state or an adjoining county, the statute allows the surface owner(s) to form a subdivision and apply for a hearing before the Railroad Commission. The surface owner can designate certain "operations sites" of two or more acres within the subdivision, together with pipeline and road easements. The subdivision must contain at least one "operation site" for every eighty acres within the subdivision. After notice and a hearing, the Railroad Commission can approve, reject, or amend the application.

Since most large cities have some type of ordinance limiting the right to exploit the mineral estate, and the "operations site(s)" within any subdivision must be at least two acres, this statute applies primarily to relatively large tracts of land outside the incorporated area or extraterritorial jurisdiction of large cities in the most populous counties in the State.

F. Railroad Commission Rules

The Texas Railroad Commission regulates oil and gas exploration, production and transportation in Texas. According to the Railroad Commission's web site, its statutory role is to (1) prevent waste of the state's natural resources, (2) to protect the correlative rights of different interest owners, (3) to prevent pollution, and (4) to provide safety in matters such as hydrogen sulfide.

While the Railroad Commission Rules dealing with oil and gas (Codified in the Texas Administrative Code, Title 16, Part 1, Chapter 3) do provide some spacing requirements, their purpose is to prevent waste and protect the rights of mineral owners, not to control what use the mineral owner can make of the surface. The Railroad Commission rules regarding surface operations primarily deal with well spacing and density, not location. By regulating well spacing, density and production allowable, the Railroad Commission attempts to prevent waste by maximizing the amount of oil and gas recovered. The rules also attempt to give each owner of an interest in oil and gas the opportunity to produce the oil and gas while preventing waste. It is these "correlative rights" and not those of the surface owner that the Railroad Commission protects.

§3.37 (a.k.a Rule 37) mandates that wells be at least 1,200 feet apart and that they be at least 467 feet from any property line, lease line or subdivision line. Therefore, the surface owner of a relatively small tract of land essentially surrounded by wells might feel comfortable that these spacing requirements will negate the possibility of any operations on the tract in question. This is not necessarily the case. The bulk of Rule 37 sets forth exceptions to the general spacing rules. Since one role of the Railroad Commission is to protect the correlative rights of all mineral owners, Rule 37 exceptions are often granted to allow mineral owners to develop the oil and gas where the general spacing requirements would otherwise prevent drilling on the tract in question.

§3.21 (a.k.a. Rule 21) also contains a spacing requirement of sorts. It requires that storage tanks be at least 150' from any building. This does not prevent drilling operations closer than 150 feet with storage at a greater distance. The text of the rule also makes it clear that exceptions can be granted.

There exists a common misconception that the Railroad Commission rules establish some minimum distance from homes or other structures where operations are prohibited. This is not the case. As discussed above, the railroad commission rules are established to prevent waste and protect the rights of mineral owners. Provisions establishing some minimum distance from houses or buildings are most commonly found in oil and gas leases. To the degree the surface owner has some of the executive rights associated with the mineral estate, he / she may successfully negotiate such a "buffer zone" in the lease as discussed above, and should not look to the Railroad Commission Rules limit the mineral owner's use of the surface.

G. Ordinances

Most municipalities of any size in areas where mineral development has occurred have enacted some type of ordinance regulating operations to exploit oil and gas. To the extent that the property in question lies within a municipality (or, in many instances, the extraterritorial jurisdiction), ordinances may represent the surface owner's best opportunity, absent owning all or large portion of the mineral estate, to prohibit the use of the surface for the purpose of developing the oil and gas. Because of the degree of development of the Barnett Shale formation and the number of municipalities in the Dallas / Fort Worth area, this area seems to have the greatest number of drilling ordinances. Most larger municipalities make information regarding their ordinances available on-line.

While ordinances range in scope from the relatively simple to the extremely complex, their most notable benefit from the surface owner's standpoint is the prohibition of operations within a certain distance from homes or places of public assembly (school, church, shopping mall). This is sometimes coupled with a requirement that the property be properly zoned for mineral development. One of the more popular terms seems to be a prohibition on operations within 600' of a residence or place of public assemble, or 300' with approval of the surface owner(s).

In determining the degree to which the surface owner may rely upon an ordinance to protect use of the surface for development of the mineral estate, the practitioner should consider the enforceability of the ordinance, the applicability of the ordinance, and the permanence of the ordinance. Older, established ordinances in well-run municipalities that provide a fair opportunity for the mineral owner to develop the oil and gas can provide the surface owner a fair amount of protection. On the other hand, newer and untested ordinances, especially those that restrict operations in a way that essentially prevents the mineral owner from exploiting the oil and gas by any reasonable means, are likely to be challenged as unconstitutional takings. Even the best drafted ordinance is ineffective if the city council or other governing body chooses not to enforce it vigorously. Secondly, the ordinance must be applicable to the situation. An ordinance prohibiting operations near residences may apply to single-family residences only and not to multi-family situations. Finally, the surface owner should keep in mind that ordinances can change and property can be re-zoned. The governing authority can vote to amend ordinances after notice and a hearing. Just because a property is zoned for residential or commercial use today does not mean that all of the property, a portion of it, or some adjacent property will not be re-zoned to allow operations.

Despite their shortcomings, municipal ordinances may present the surface owner who does not own the mineral estate the best opportunity to limit or prohibit the use of the surface to develop the mineral estate.

IV. CONCLUSIONS

Because of the demand for oil and gas, record high prices, and advances in technology, Texas will likely see an expansion of oil and gas development for the foreseeable future. This development will expand into areas with no previous history of development. Real estate attorneys must consider the degree to which oil and gas development can impact their clients' intended and existing use of the surface of the property.

Once the mineral and surface estates are severed, the mineral estate is the dominant estate. The owner of all or part of the mineral estate may make reasonable use of the surface of the property to develop the minerals. Courts have traditionally held all sorts of disruptive and / or destructive uses to be reasonable.

The best time to consider the status of the mineral estate and the degree to which its development can impact the surface owner is prior to closing. The practitioner can protect the proposed purchaser of the surface estate by carefully drafting and reviewing the earnest money contract. The title commitment can reveal important information, as well. The practitioner should carefully consider the effect of all mineral severances and conveyances, including oil and gas leases.

Often, the practitioner becomes involved after the surface owner takes title to the surface with less than all of the mineral estate. In such a case, certain statutory and common law principals may afford the surface owner some opportunity to restrict the use of the surface for developing the mineral estate. The accommodation doctrine may require the mineral owner to use reasonable alternatives to methods of development that prevent or impede an existing use of the surface. The subdivision statute in the Chapter 92 of the Texas Natural Resources Code can provide a method by which surface owners in densely populated counties may limit mineral development to certain parts of the surface of the subdivision. Municipal drilling ordinances can protect surface owners in cities from oil and gas development operations in close proximity to existing structures.

The practitioner should keep in mind that Texas benefits greatly from oil and gas development. Courts and lawmakers historically favor allowing exploitation of the mineral estate, even when it significantly impacts the surface. Advanced planning is the best way to prevent future conflict between mineral and surface owners.

EXHIBIT A

ROYALTY RESERVATION (NPRI)

But it is expressly agreed and understood by and between all parties hereto that the said grantors herein reserve for themselves, their heirs and assigns an undivided one-half of the usual one-eighth non-participating royalty interest in and to all of the oil, gas and other minerals which may be produced from in and under the land and premises hereby conveyed with the right of ingress and egress for the purpose of saving such minerals; and by the term of "non participating"is meant that the said grantors herein, their heirs or assigns, shall not participate in any funds which may be paid for a lease on said premises nor the rentals paid to keep such lease alive nor shall their joinder be necessary in any lease that may be placed on said premises by said owners of said property.

MINERAL RESERVATION

AND IN ADDITION THERETO, THERE IS EXCEPTED AND RESERVED UNTO THEMSELVES, [redacted] AND [redacted] STONE, AS THEIR SEPARATE PROPERTY AND ESTATE, their heirs, successors and assigns, all of the oil, gas and other minerals which Grantors own on the date of this conveyance lying in, on, under and that might be produced from the hereinabove described real property together with the right of ingress and egress at all times for the purpose of mining, exploring and developing said land for oil, gas and other minerals, **IT BEING THE INTENTION OF THE GRANTORS TO CONVEY TO GRANTEE THE SURFACE TITLE ONLY.**

MINERAL RESERVATION WITH SURFACE WAIVER

Reservations from Conveyance and Warranty: SAVE AND EXCEPT and there is hereby reserved for Grantor and Grantor's heirs, administrators, successors or assigns, all the oil, gas and other minerals produced with oil and gas, **NOW OWNED BY GRANTOR** that are in and under the property and that may be produced from it, together with the associated interest in and to all lease bonus, royalty and leasing rights regarding such reserved mineral interest. Further, Grantor hereby waives, for themselves, their heirs, successors, and assigns, all rights of ingress, egress and regress in, on, and across the property for the purposes of exploration, mining, drilling, production and transporting any of the said minerals. If this interest is subject to an existing lease for oil, gas and other minerals produced with oil and gas, Grantor is entitled to receive the royalties and other benefits that are associated with the interest and payable under the lease.

EXHIBIT B

TEXAS NATURAL RESOURCES CODE

§ 91.701. DEFINITION. In this subchapter, "surface owner" means the first person who is shown on the appraisal roll of the appraisal district established for the county in which a tract of land is located as owning an interest in the surface estate of the land at the time notice is required to be given under this subchapter.

Added by Acts 2007, 80th Leg., R.S., Ch. 210, § 1, eff. September 1, 2007.

§ 91.702. APPLICABILITY. This subchapter applies only to the drilling of a new oil or gas well or the reentry of a plugged and abandoned oil or gas well. This subchapter does not apply to:

(1) the plugging back, reworking, sidetracking, or deepening of an existing oil or gas well that has not been plugged and abandoned; or

(2) the use of a surface location that is the site of an existing oil or gas well that has not been plugged and abandoned to drill a horizontal oil or gas well.

Added by Acts 2007, 80th Leg., R.S., Ch. 210, § 1, eff. September 1, 2007.

§ 91.703. NOTICE REQUIRED. (a) Not later than the 15th business day after the date the commission issues an oil or gas well operator a permit to drill a new oil or gas well or to reenter a plugged and abandoned oil or gas well, the operator shall give written notice of the issuance of the permit to the surface owner of

the tract of land on which the well is located or is proposed to be
located.

(b) An oil or gas well operator is not required to give notice under this subchapter to a surface owner if:

(1) the operator and the surface owner have entered into an agreement that contains alternative provisions regarding the operator's obligation to give notice of oil and gas operations;
or

(2) the surface owner has waived in writing the owner's
right to notice under this subchapter.

Added by Acts 2007, 80th Leg., R.S., Ch. 210, § 1, eff. September
1, 2007.

§ 91.704. ADDRESS FOR NOTICE. The notice must be given to the surface owner at the surface owner's address as shown by the
records of the county tax assessor-collector at the time the notice
is given.

Added by Acts 2007, 80th Leg., R.S., Ch. 210, § 1, eff. September
1, 2007.

§ 91.705. COMMISSION PERMITS AND RIGHTS OF OWNER OF MINERAL ESTATE NOT AFFECTED. (a) This subchapter does not affect
the status of any rule of law to the effect that the mineral estate
in land is dominant over the surface estate.

(b) Failure to give notice as required by this subchapter does not restrict, limit, work as a forfeiture of, or terminate any
existing or future permit issued by the commission or right to develop the mineral estate in land.

Added by Acts 2007, 80th Leg., R.S., Ch. 210, § 1, eff. September
1, 2007.

EXHIBIT C

NATURAL RESOURCES CODE

CHAPTER 92. MINERAL USE OF SUBDIVIDED LAND

Sec. 92.001. PURPOSE. It is the finding of the legislature that the rapidly expanding population and development of the cities and towns of this state and the concomitant need for adequate and affordable housing and suitable job opportunities call for full and efficient utilization and development of all the land resources of this state, as well as the full development of all the minerals of this state. In view of that finding, it is the intent of the legislature that the mineral resources of this state be fully and effectively exploited and that all land in this state be maintained and utilized to its fullest and most efficient use. It is the further finding of this legislature that it is necessary to exercise the authority of the legislature pursuant to Article XVI, Section 59, of the Constitution of the State of Texas to assure proper and orderly development of both the mineral and land resources of this state and that the enactment of this chapter will protect the rights and welfare of the citizens of this state.

Added by Acts 1983, 68th Leg., p. 4009, ch. 624, Sec. 1, eff. Aug. 29, 1983.

Sec. 92.002. DEFINITIONS. In this chapter:

(1) "Operations site" means a surface area of two or

more acres located in whole or in part within a qualified subdivision, designated on the subdivision plat, that an owner of a possessory mineral interest may use to explore for and produce minerals.

(2) "Possessory mineral interest" means a mineral interest that includes the right to use the land surface for exploration and production of minerals.

(3) "Qualified subdivision" means a tract of land of not more than 640 acres:

(A) that is located in a county having a population in excess of 400,000, or in a county having a population in excess of 140,000 that borders a county having a population in excess of 400,000 or located on a barrier island;

(B) that has been subdivided in a manner authorized by law by the surface owners for residential, commercial, or industrial use; and

(C) that contains an operations site for each separate 80 acres within the 640-acre tract and provisions for road and pipeline easements to allow use of the operations site.

(4) "Barrier island" means an island bordering on the Gulf of Mexico and entirely surrounded by water.

Added by Acts 1983, 68th Leg., p. 4009, ch. 624, Sec. 1, eff. Aug. 29, 1983. Amended by Acts 1987, 70th Leg., ch. 274, Sec. 1, eff. June 11, 1987.

Sec. 92.003. CREATION OF SUBDIVISION. The surface owners of a parcel of land may create a qualified subdivision on the land if a plat of the subdivision has been approved by the railroad commission and filed with the clerk of the county in which the subdivision is to be located.

Added by Acts 1983, 68th Leg., p. 4009, ch. 624, Sec. 1, eff. Aug. 29, 1983.

Sec. 92.004. HEARING AND ORDER BY RAILROAD COMMISSION. (a) The railroad commission shall adopt rules governing the contents of an application for a qualified subdivision. An application must be accompanied by a plat of the subdivision showing the applicant's proposed location of operations sites and road and pipeline easements.

(b) The railroad commission shall, on notice to the applicant and owners of possessory mineral interests, hold a hearing on the application at which the commission shall consider the adequacy of the number and location of operations sites and road and pipeline easements. At the hearing on the application, evidence may be presented by the applicant and the owners of possessory mineral interests. After considering the evidence, the commission shall approve, reject, or amend the application to ensure that the mineral resources of the subdivision are fully and effectively exploited. The applicant or the owner of the possessory mineral interest may appeal the order of the railroad commission as provided by law.

Added by Acts 1983, 68th Leg., p. 4009, ch. 624, Sec. 1, eff. Aug. 29, 1983. Amended by Acts 1987, 70th Leg., ch. 274, Sec. 2, eff. June 11, 1987.

Sec. 92.005. USE OF OPERATIONS SITE. (a) An owner of a possessory mineral interest within a qualified subdivision may use only the surface contained in designated operations sites for exploration, development, and production of minerals and the designated easements only as necessary to adequately use the operations sites.

(b) The owner of the possessory mineral interest may drill wells or extend well bores from an operations site or from a site outside of the qualified subdivision under the surface of other parts of the qualified subdivision if the operations do not unreasonably interfere with the use of the surface of the qualified subdivision outside the operations site.

(c) This section ceases to apply to a subdivision if, by the third anniversary of the date on which the order of the commission becomes final:

(1) the surface owner has not commenced actual construction of roads or utilities within the qualified subdivision; and

(2) a lot within the qualified subdivision has not been sold to a third party.

Added by Acts 1983, 68th Leg., p. 4009, ch. 624, Sec. 1, eff. Aug. 29, 1983. Amended by Acts, 1987, 70th Leg., ch. 274, Sec. 3, eff. June 11, 1987.

Sec. 92.006. AMENDMENT, REPLAT, OR ABANDONMENT. All or any portion of a qualified subdivision may be amended, replatted, or abandoned by the surface owner. An amendment or replat, however, may not alter, diminish, or impair the usefulness of an operations site or appurtenant road or pipeline easement unless the amendment or replat is approved by the commission in accordance with Section 92.003 of this code.

Added by Acts 1983, 68th Leg., p. 4009, ch. 624, Sec. 1, eff. Aug. 29, 1983. Amended by Acts 1987, 70th Leg., ch. 274, Sec. 4, eff. June 11, 1987.

Sec. 92.007. MUNICIPAL AUTHORITY. This chapter does not affect the authority of a municipality to require approval of subdivision plats or the authority of a home-rule city to regulate exploration and development of mineral interests within its boundaries.

Added by Acts 1983, 68th Leg., p. 4009, ch. 624, Sec. 1, eff. Aug. 29, 1983.

EXHIBIT D

Gas Drilling Ordinance Comparison

	Argyle	Arlington	Colleyville	Euless	Fort Worth	Granbury	Grapevine	Hurst	N. Richland Hills
Requires separate zoning	Yes	Yes	Yes	Yes	No	Yes (prohibited in residential)	Yes	Yes	No
Allows Drilling on Public Land	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Allows Drilling on Park Land	Yes	Yes	Yes	Yes	Yes (requires council approval)	Yes	Yes	Yes	Yes
Road repair agreement or contract required	Yes	Yes	No	Yes	Yes	Yes	No	Yes	Yes
Distance from place of Public Assembly (school, church, hospital etc) or a residence	600 ft (300 ft with approval from property owners)	600 ft (300 ft with approval from property owners)	1,000 ft	600 ft	600 ft for high impact drilling (never less than 200 ft with signed waivers from property owners)	600 ft (300 ft with approval from property owners)	1,000 ft	600 ft for high impact drilling (never less than 200 ft with signed waivers from property owners & 3/4 vote of city council)	600 ft (board can reduce to 300 ft, can be reduced to 150 ft with approval of all property owners)
Distance from a vent flame to a building	n/a	Yes	n/a	300 ft	300 ft	n/a	n/a	300 ft	n/a
Distance from a storage tank to a residence	n/a	600 ft (or 300 ft with resident approval)	n/a	300 ft	100 ft	n/a	1,000 ft	100 ft	n/a
Distance from a waste disposal tank to a residence	n/a	75 ft	n/a	300 ft	100 ft	n/a	n/a	100 ft	n/a
Distance from a public street, road, highway or right-of-way, railroad	n/a	75 ft	500 ft	75 ft	75 ft	200 ft	200 ft	75 ft	50 ft
Distance from a fresh water well	500 ft	200 ft	1,000 ft	200 ft	200 ft	n/a	1,000 ft	200 ft	100 ft

Gas Drilling Ordinance Comparison

	Argyle	Arlington	Colleyville	Euless	Fort Worth	Granbury	Grapevine	Hurst	N. Richland Hills
Distance from outer boundary of tract or lease	300 ft	25 ft	500 ft	25 ft	n/a	n/a	500 ft	25 ft	n/a
Distance from outer storage tank or source of ignition	500 ft	25 ft	500 ft	25 ft	25 ft	n/a	500 ft	n/a	25 ft
Distance from any building	n/a	100 ft	100 ft	100 ft	100 ft	n/a	100 ft	100 ft	n/a
Inspection Process	Fire marshal and gas well inspector	Building official/ designee including a 3rd party	Fire marshal and gas well inspector	City Manager designee including a 3rd party	City Manager designee including a 3rd party	3rd party retained by city	Fire marshal and gas well inspector	City Manager designee including a 3rd party	City Manager designee including a 3rd party
Permit Fee	$7,500	$1,500	$500 for first acre and $5 for each additional acre	$1,500	$3,000	$500	$500 for first acre and $25 for each additional acre	$3,000	$5,000 (discussing doubling fee)
Inspection Fee	Included in permit fee	Billed to cover actual costs	Billed monthly to recover cost of inspections	Up to a maximum of $5,000 cover actual cost of inspection and review	$500 annual fee for inspections	$5,000	No	Included in permit fee	Included in permit fee (discussing $2,000 annual inspection fee)
General liability, bodily injury and property damage	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000	$1,000,000
Automobile liability insurance	$1,000,000	$1,000,000	$500,000	$1,000,000	$1,000,000	$1,000,000	$500,000	$1,000,000	$1,000,000
Workers compensation	$100,000	$500,000	$100,000	$500,000	$500,000	$1,000,000	$100,000	$500,000	$500,000
Environmental pollution policy	n/a	$1,000,000	n/a	$1,000,000	$1,000,000	$1,000,000	n/a	$1,000,000	$1,000,000
Control of well policy	$5,000,000	$5,000,000	$5,000,000	$5,000,000	$5,000,000	$10,000,000	$5,000,000	$5,000,000	$5,000,000
Excess if operator has stand alone environmental pollution policy	n/a	$5,000,000	n/a	$5,000,000	$5,000,000	n/a	n/a	$5,000,000	$5,000,000

Gas Drilling Ordinance Comparison

	Argyle	Arlington	Colleyville	Euless	Fort Worth	Granbury	Grapevine	Hurst	N. Richland Hills
Excess if operator does not have a stand alone environmental pollution policy	n/a	$10,000,000	n/a	$10,000,000	$10,000,000	n/a	n/a	$10,000,000	$10,000,000
Excess liability insurance	n/a	n/a	$10,000,000	n/a	n/a	$10,000,000	$10,000,000	n/a	n/a