

Tulsa Law Review

Volume 19 | Number 3

Spring 1984

Municipal Development of Oil and Gas

David E. Pierce

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

David E. Pierce, *Municipal Development of Oil and Gas*, 19 Tulsa L. J. 337 (1984).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol19/iss3/2>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

MUNICIPAL DEVELOPMENT OF OIL AND GAS

David E. Pierce*

After reviewing the basic powers conferred upon municipalities, Mr. Pierce advances a proposal whereby cities can actively promote and develop oil and gas. To assist cities with such development the author advocates the use of certain model ordinances, resolutions, and lease provisions. The author also analyzes various legal problems confronting municipal development of oil and gas and concludes that municipalities have the proper tools to develop such resources and still accommodate all parties involved.

I. INTRODUCTION

Many cities in the United States may be located over geologic structures which could be developed for the production of oil and gas.¹ In most cases such geologic structures will not be fully explored and developed because municipal regulations have created excessive limitations or because the city lacks adequate regulation to facilitate orderly development. This Article examines how cities can use their regulatory powers to promote and control the development of oil and gas resources which may lie in or around municipal boundaries. Various business, economic, and public interests involved in the development of oil and gas resources will be considered. As will be demonstrated, cities can pursue their economic interests in oil and gas development without sacrificing the public well-being. However, the concepts discussed go beyond mere oil and gas regulation. Instead, model forms,

* Attorney, Shell Oil Company, Houston, Texas; City Attorney, City of Cherryvale, Kansas (1978-1981); B.A., 1974, Pittsburg State University; J.D., 1977, Washburn University School of Law; LL.M., 1982, University of Utah College of Law.

1. Many cases involving municipal regulation have been decided in Oklahoma due to the location of large reservoirs of oil and gas under various cities. See *Town of Reydon v. Anderson*, 649 P.2d 541 (Okla. 1982); *Clouser v. City of Norman*, 393 P.2d 827 (Okla. 1964); *Gruger v. Phillips Petroleum Co.*, 192 Okla. 259, 135 P.2d 485 (1943); *McClain v. Oklahoma City*, 192 Okla. 4, 133 P.2d 198 (1943); *Keaton v. Oklahoma City*, 187 Okla. 593, 102 P.2d 938, *cert. denied*, 311 U.S. 616 (1940).

lease clauses, and ordinances illustrate how cities can create programs to develop their oil and gas resources to benefit cities, individual land-owners, and the public at large.

Cities generally have the authority, and the opportunity, to take specific steps to promote the orderly development of oil and gas within their jurisdictions. Cities attempting to provide quality municipal services in the face of dwindling budgetary resources are constantly searching for new income sources. Oil and gas lease revenues constitute one source many cities may be able to develop. Yet cities have usually adopted a passive attitude toward oil and gas development, merely attempting to regulate the adverse effects and potential hazards associated with such development. Cities have often reacted to oil and gas development by passing ordinances which unduly burden the developer. Often such responses make operations impossible, impractical, or economically unfeasible. This Article suggests an alternative approach in which the city actively participates in the development process to maximize the economic value and conservation of these vital natural resources.

II. AUTHORITY TO PROMOTE AND CONTROL DEVELOPMENT

Before considering the steps cities can take to promote and control oil and gas development, it is necessary to establish a process to define the limits of a city's power to act on such matters. Use of an analytical procedure is mandatory since the source and scope of city powers vary substantially from state to state, and often even among cities within the same state.

The analysis begins by examining the constitution of the state in which the city is located. Some states, notably Oklahoma, have granted power to their cities through general constitutional mandates.² In contrast, many state constitutions merely provide for restrictions on the legislature's ability to affect city affairs. These states do not grant specific powers to the cities.³ Other states have recently amended their constitutions to provide for broad grants of power directly to cities.⁴ Therefore, it is difficult to draw meaningful analogies when determin-

2. OKLA. CONST. art. XVIII, § 3. The Oklahoma home rule concept is patterned after the approach set out in the Missouri Constitution of 1875. *See* MO. CONST. art. IX, § 16 (1875, amended 1971).

3. This is essentially the situation with non-charter cities in Oklahoma.

4. Kansas adopted municipal home rule provisions in 1961 by constitutional amendment. *See* KAN. CONST. art. XII, § 5 (1859, amended 1961).

ing whether actions by a city in one state would be permissible if taken by a city in another state. Instead, the suggested analysis must be applied in each state where development is contemplated. To demonstrate the analytical procedure, the states of Kansas and Oklahoma are examined.

The Oklahoma Constitution, since 1907, has provided for a measure of city autonomy, commonly called "home rule." Under Article 18, Section 3, cities are permitted to propose and adopt a municipal constitution called a "charter."⁵ The charter, once proposed and approved as required by law,⁶ becomes the organic law of the city which will supersede all conflicting laws of the state "in so far . . . as they attempt to regulate merely municipal affairs."⁷ Therefore, charter and non-charter cities with varying degrees of power may exist in Oklahoma. The non-charter city must rely upon the state's legislative authority to act, even as to strictly municipal affairs.⁸

The status of the non-charter city in Oklahoma is similar to the status held by all cities in Kansas prior to July 1, 1961.⁹ Until then, each city depended upon the state legislature for its powers. The prevalent common law concept of "Dillon's Rule" summarized the status of such cities, stating that they could exercise only those powers expressly granted by the legislature or those powers necessarily implied by the legislature's express grant.¹⁰ By constitutional amendment, cities in Kansas have repudiated Dillon's Rule and now exercise a substantial degree of self-government.¹¹

Cities in Kansas, however, have powers which are quite different

5. OKLA. CONST. art. XVIII, § 3.

6. *Id.* at § 3(a).

7. *Lackey v. State*, 29 Okla. 255, 262, 116 P. 913, 916 (1911). *See also* OKLA. STAT. tit. 11, § 13-109 (1981) (municipal charter prevails over state law). Section 1-102(1) of title 11 defines "charter municipality" and "municipality governed by a charter" as:

[A]ny municipality which has adopted a charter in accordance with the Constitution and laws of Oklahoma and, at the time of adoption of the charter, had a population of two thousand (2,000) inhabitants or more. Once a municipal charter has been adopted and approved, it becomes the organic law of the municipality in all matters pertaining to the local government of the municipality and prevails over state law on matters relating to purely municipal concern; . . ."

OKLA. STAT. tit. 11, § 1-102(1) (1981).

8. *See, e.g., Morehead v. Dyer*, 518 P.2d 1105 (Okla. 1973) (non-charter municipality could not provide for recall elections unless given such power by express legislative enactment or by a municipal charter adopted pursuant to the Oklahoma Constitution).

9. Prior to the amendment of KAN. CONST. art. XII, § 5, effective July 1, 1961, cities in Kansas relied on the legislature for authority to act.

10. 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th rev. ed. 1911).

11. KAN. CONST. art. XII, § 5 provides, in part:

from those conferred upon Oklahoma charter cities. Although both states exercise home rule powers, the constitutional provisions creating those powers are fundamentally different. In Kansas, for example, all cities have home rule powers, no charter or other formal election is required to vest such powers in the city.¹² Therefore, the charter/non-charter distinction does not exist. Cities in Kansas, subject to certain exceptions enumerated by the constitution,¹³ can act on any matter so long as the city ordinance does not conflict with the constitution or state statutes uniformly applicable to all cities.¹⁴ In contrast, Oklahoma home rule cities possess the power to act on any matter¹⁵ so long as a city ordinance does not conflict with the city's charter, the

(b) Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class: *Provided*, That the legislature may establish not to exceed four classes of cities for the purpose of imposing all such limitations or prohibitions. Cities shall exercise such determination by ordinance passed by the governing body with referendums only in such cases as prescribed by the legislature, subject only to enactments of the legislature of statewide concern applicable uniformly to all cities, to other enactments of the legislature applicable uniformly to all cities, to enactments of the legislature applicable uniformly to all cities of the same class limiting or prohibiting the levying of any tax, excise, fee, charge or other exaction, and to enactments of the legislature prescribing limits of indebtedness. All enactments relating to cities now in effect or hereafter enacted and as later amended and until repealed shall govern cities except as cities shall exempt themselves by charter ordinances as herein provided for in subsection (c).

(c) (1) Any city may by charter ordinance elect in the manner prescribed in this section that the whole or any part of any enactment of the legislature applying to such city, other than enactments of statewide concern applicable uniformly to all cities, other enactments applicable uniformly to all cities, and enactments prescribing limits of indebtedness, shall not apply to such city.

(2) A charter ordinance is an ordinance which exempts a city from the whole or any part of any enactment of the legislature as referred to in this section and which may provide substitute and additional provisions on the same subject

(4) Each charter ordinance enacted shall control and prevail over any prior or subsequent act of the governing body of the city and may be repealed or amended only by charter ordinance or by enactments of the legislature applicable to all cities.

(d) Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government.

12. The Kansas Constitution states "[c]ities are hereby empowered to determine their local affairs and government. . . ." *Id.* at § 5b.

13. The exceptions are stated at *id.* § 5(a)-(c).

14. *Id.* However, if the city desires to exempt itself from non-uniform state law it must follow the charter ordinance procedure set out at *id.* § 5(c).

15. If the city's charter does not expressly address a subject, the city must look to legislative grants to determine its authority to act on such matters. *See, e.g., Development Industr., Inc. v. City of Norman*, 412 P.2d 953 (Okla. 1966), where the Oklahoma Supreme Court noted: "[W]hile the City of Norman has a charter, the same is silent insofar as authorizing the City Commission to enact zoning ordinances. The City Charter not expressly providing for zoning ordinances, the power to enact such ordinances is derived from legislative enactments." *Id.* at 955.

If the city's charter addresses the subject, the city must follow charter provisions. *See, e.g., City of Ponca City v. Edwards*, 460 P.2d 418 (Okla. 1969) (city must obtain public approval for a

constitution, or statutes pertaining to general matters of the state and its government.¹⁶

The Kansas home rule approach attempts to avoid problems encountered in distinguishing between local and state affairs.¹⁷ However, under the Kansas provision, matters of municipal concern can be regulated by the state through legislation that uniformly applies to all cities.¹⁸ Yet, until the legislature acts uniformly, it is clear that the city has complete autonomy to enact whatever laws it deems expedient, subject only to state and federal constitutional limits. Oklahoma home rule cities must try to determine whether their exercise of legislative power concerns a local matter.¹⁹ They might also face situations where the legislature has failed to act on a matter arguably of state-wide concern.²⁰ The foregoing discussion demonstrates the varying degrees of power conferred on cities by state constitutions. The city official or developer must always ascertain the source and scope of a city's powers in order to evaluate its authority to enter into, or regulate, an activity.

The second step in the analysis is to identify state legislative enactments affecting the city's authority regarding a given activity. The previous examination of the Kansas and Oklahoma constitutions indicates the types of state legislative acts that will affect a city's powers. In Kansas, state legislative enactments uniformly applicable to all cities must be reviewed to identify restrictions placed on cities. Non-uniform enactments must also be considered unless the city has adopted a charter ordinance exempting it from such non-uniform legislation.²¹ In addition, any enactments made pursuant to express constitutional authority must be examined.²² In Oklahoma, for non-charter cities, all state legislative enactments must be reviewed since they form the basic grants of power to the city.²³ For charter cities, acts relating to matters of state-wide concern must be reviewed.²⁴ Additionally, enactments pur-

municipal parking facility using the procedures established by the city charter even though such procedures were not required by statute).

16. *Oliver v. City of Tulsa*, 654 P.2d 607, 609 (Okla. 1982); *Lackey v. State*, 29 Okla. 255, 116 P. 913 (1911).

17. See generally Merrill, *Constitutional Home Rule for Cities Oklahoma Version*, 5 OKLA. L. REV. 139, 159-79 (1952).

18. KAN. CONST. art. XII, § 5(b), (c)(1).

19. Merrill, *supra* note 17 at 159-62.

20. *Id.* at 196-198.

21. KAN. CONST. art. XII, § 5(b), & (c)(1).

22. *E.g., id.* at § 5(a). For a general discussion of home rule in Kansas, see Pierce, *Home Rule and Municipal Environmental Regulation in Kansas*, 26 KAN. L. REV. 535, 535-39 (1978).

23. *Morehead v. Dyer*, 518 P.2d 1105 (Okla. 1973).

24. Merrill, *supra* note 17 at 164-179.

suant to other state constitutional authority,²⁵ or permitted by the city's charter,²⁶ must be examined.²⁷

Constitutional provisions, or their absence, will determine the extent to which state statutory law can direct local affairs. Without constitutional authority to act, the city must rely upon grants of power from the state legislature.²⁸ State legislative grants of power, like constitutional grants, can be a general right of self-government subject to specific limitations,²⁹ or they can be specific grants of authority without any general power to act in the absence of specific legislative action.³⁰ Today most cities will have a mixture of general and specific state constitutional and statutory grants of power representing the evolution of local autonomy.³¹

The common law has not been a generous factor in developing the increasingly autonomous city. Recent constitutional and statutory home rule measures were passed in response to restrictive court interpretations of local powers under the rubric of Dillon's Rule.³² Today, the common law must be examined for interpretation of the limits on the constitutional and statutory grants of power to cities.³³ Once the source and extent of the city's powers have been defined, the specific act of the city must be examined to see if it falls within its granted authority. Section IV of this article considers the city's power to regulate oil and gas activities. The following section considers the possible role the city can play in facilitating orderly development of oil and gas resources.

III. PROMOTING DEVELOPMENT

The first question a city governing body might pose when considering oil and gas development is, Why get involved? Often the city has

25. *Id.* at 151-59, 162-64.

26. *City of Ponca City v. Edwards*, 460 P.2d 418 (Okla. 1969).

27. State authority, like municipal authority, will be subject to provisions of the federal constitution.

28. *E.g.*, KAN. STAT. ANN. § 19-101 (1981).

29. *Id.*

30. *E.g., id.* at § 19-110 (authorizing county to lease lands for oil, gas, or other minerals and specifying lease terms).

31. In Kansas, for example, there is a constitutional grant of home rule, KAN. CONST. art. 12, § 5; a statutory grant of home rule, KAN. STAT. ANN. § 12-101 (1982); and hundreds of specific statutes authorizing local action.

32. *See supra* note 10 and accompanying text.

33. *See, United States Elevator Corp. v. City of Tulsa*, 610 P.2d 791 (Okla. 1980); *Moore v. City of Lawrence*, 232 Kan. 353, 654 P.2d 445 (1982).

little choice in the matter. Once development is proposed, the city will have to become involved in some fashion. The city can take one of three general approaches to oil and gas development. First, the city can prohibit all development activity within its jurisdiction.³⁴ Such a prohibition will be upheld when it is reasonably related to protecting public health, safety, and welfare.³⁵ A second approach is to permit oil and gas development in certain zones of the city subject to numerous restrictions. The third approach requires the developer to comply with restrictions necessary to protect public health, safety, and welfare, but also enlists the city's active participation to package, market, and facilitate orderly development within its jurisdiction.

Regulation aside, the city may want to promote development in hopes of securing a new source of municipal income and improving the local economy. The city may obtain income through lease bonuses, delay rental payments, and payments based upon production, such as a royalty or a share in the working interest of a well. Other landowners in the city may also obtain income from development on, or attributable to, their property. The city may benefit indirectly through an increased property tax base created by development.

The city may also become involved in oil and gas development to protect its resources from being drained by operations outside the city's jurisdiction. Oil and gas will migrate within the reservoir towards areas of lower pressure.³⁶ Wells drilled in a reservoir on land located outside the city limits can drain oil or gas from parts of the reservoir which extend under the city. The rule of capture permits the operator outside the city to obtain title to all oil and gas which it can produce through wells bottomed in its lands, even though the oil or gas migrates

34. *K. & L. Oil Co. v. Oklahoma City*, 14 F. Supp. 492 (W. D. Okla. 1936). *See also* *Winkler v. Anderson*, 104 Kan. 1, 177 P. 521 (1919) (state statute upheld prohibiting oil or gas wells within 100 feet of a railway right of way).

35. *See, e.g., Clouser v. City of Norman*, 393 P.2d 827 (Okla. 1964) (zoning ordinance prohibiting drilling of oil and gas wells is arbitrary and void when it has no reasonable relation to public health, safety, morals, or general welfare); *Silva v. Township of Ada*, 330 N.W.2d 663 (Mich. 1982) (zoning regulations which prevent the extraction of natural resources are invalid unless "very serious consequences" will result from the proposed extraction).

36. The oil and gas reservoir, in its natural state, is under pressure. The reservoir pressure and the materials within the reservoir are static prior to drilling into the reservoir. Once the reservoir is breached, the oil and gas under pressure will move towards the low pressure zone created by the well. The permeable rock permits the oil and gas to migrate toward the well. Energy needed to push the oil and gas through the permeable rock can be provided by the force of gravity, expansion of gas in the reservoir, and water encroaching into the oil zone as oil and gas are removed. *See generally* A. LEVORSEN, *GEOLOGY OF PETROLEUM* 458-59 (2d ed. 1967).

from beneath property within the city.³⁷ Although the city may attempt to protect its oil and gas resources through spacing requirements,³⁸ the city's most effective remedy is to take affirmative action to capture the oil and gas before it migrates toward other wells.³⁹ The city may also choose to actively promote development in hopes of obtaining new energy resources at competitive prices. For example, development near the city may make new gas supplies available for the city to utilize at favorable prices.

A. *The Promotion Process*

If the governing body determines it will permit oil and gas development within the city, it must consider whether to take an active or passive approach to development. The passive approach merely creates a workable regulatory atmosphere, allowing development to occur without any encouragement by the city. The active approach goes beyond passive regulation and involves the city in promoting orderly development by creating interest in the area, making land available for development, and making it feasible for operators to acquire acreage and develop city prospects. The following discussion suggests the basic elements for a city program to promote oil and gas development.

1. Planning Development

Before the city embarks upon any sort of development program, it must first engage in careful planning to determine how development should proceed within the city. The end result of the planning process should be a workable oil and gas policy and ordinances designed to achieve the goals identified in the planning process. The planning

37. The rule of capture recognizes that oil and gas in the reservoir will move from areas of high pressure towards areas of lower pressure. The low pressure areas are created by opening the reservoir with a well. The rule of capture vests title in the developer to whatever is produced from wells bottomed in his land, even though some of the oil or gas has moved across surface boundary lines from adjoining lands not leased or owned by the developer. *See generally* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 204.4 (1981).

38. Spacing regulations require oil and gas wells to be located a minimum distance from lease lines, property boundary lines, or other producing wells. The primary goal of spacing is to promote orderly development and limit somewhat the economic and physical waste which would occur under unrestricted capture. *See generally*, 1 W. SUMMERS, THE LAW OF OIL AND GAS § 83 (1954).

39. Spacing laws and regulations, and related production limitations, offer some protection to undeveloped lands. However, the basic Kansas conservation system is set up to protect against "uncompensated" drainage from developed lands. KAN. ADMIN. REGS. § 82-3-101(a)(15)(1983). Thus, the only viable method for protecting undeveloped lands from drainage under a competitive capture property system is to drill wells.

stage should also include procedures to educate the public as to the city's goals and the methods it intends to use to achieve those goals. The city government should also educate itself during the process by consulting operators in the area to obtain their input on the proposed program. Other cities should be consulted to identify any problems they have encountered. Local residents should be given the opportunity to express their views on development and problems they anticipate in the event oil and gas operations are pursued. Public hearings will be helpful to discuss the advantages and disadvantages of oil and gas development. Potential hazards and land use problems associated with development can be identified and discussed. Informed determinations can then be made as to how to avoid or minimize such problems. Reference should be made to any existing comprehensive city plan addressing oil and gas development.

Once the city has completed the planning process and determined how it will regulate and promote development, it must attempt to educate the public as to how the program will work and how it will affect their interests. The education process is essential so that problems may be identified and solved before the development program begins. Spending the extra time to involve the public at the planning phase will help save time and minimize disputes during the development phase when time delays must be avoided. Once the city determines how it will direct development, it is then prepared to package and market its oil and gas resources.

2. Inventorying Lands Available For Development

Once the city decides to allow development, it will want to consider the development potential of any property it owns. This can be accomplished by conducting an inventory of all real property interests the city owns or controls. The city should then identify, for each piece of property, whether it could offer developers a lease or other type of development agreement. In many cases, the city will be the largest single landowner in the area, owning large blocks of land which are appealing to developers. The city may own property near an area already experiencing peripheral development which, consequently, may be very attractive to operators attempting to follow the reservoir. During the inventory stage, the city should begin to identify property it may be interested in offering for development.

Most cities possess a substantial amount of property which could

be made available for oil and gas development. When discussing property available for development, it must be remembered that a well does not have to be physically present on the property for that property to share in the economic benefits of production. For example, by using directional drilling techniques, oil and gas under a municipal building could be produced from wells drilled on adjoining lands. Directional drilling could also permit, in some cases, the removal of oil and gas from other areas in the city which, due to zoning or other considerations, will not permit the location of a well directly above the target formation.

Another way to obtain the economic benefits of oil or gas under a tract of land, without physically occupying the surface with a well, is to establish drilling units and "pool" all interests within the drilling unit.⁴⁰ A drilling unit is a specified area designated for the location of a single well. For example, the city may designate drilling units consisting of four contiguous city blocks and permit a single well to be drilled, as nearly as possible, on property located near the center of the drilling unit. To protect correlative rights,⁴¹ and to prevent waste,⁴² the city needs to provide for the consolidation or "pooling" of all lands within the drilling unit. Such pooling permits each mineral interest owner to share in production from the well on the drilling unit area in the proportion his mineral interest bears to all interests within the drilling unit. This would permit an equitable sharing of oil and gas produced from the drilling unit without each tract owner having to drill a well on his front yard to develop, and thereby protect, his mineral interest. It would also permit the city, and others, to share in production of oil and gas located under land which cannot be physically occupied by a well. Therefore, even though a city cannot have a well located on its property, it can still reap the economic benefits from acreage it owns attributable to a well in a drilling unit or which is developed through

40. Once a spacing or drilling unit is designated, the operator may have to include lands in addition to the leased acreage to meet the minimum acreage requirement for the spacing unit. For example, assume the spacing order calls for development on the basis of one well per drilling unit which is comprised of a governmental quarter quarter section (40 acres). The developer has a lease on city property located in the south half of the quarter quarter section (20 acres). The north half is unleased. Neither tract is entitled to a well. However, the north and south halves of the quarter quarter section can be "pooled" to form the required 40 acre spacing unit. In such a case, the owners in each half will be entitled to a 50% interest in production from the well. This process of combining interests necessary to create a spacing or drilling unit is referred to as "pooling." See generally, R. HEMMINGWAY, *THE LAW OF OIL AND GAS* § 7.13 at 395 (1983).

41. For a discussion of the doctrine of correlative rights and waste, see generally 1 H. WILLIAMS & C. MEYERS, *supra* note 37 at § 204.6. See also *infra* note 70.

42. See *supra* note 97 and accompanying text.

directional drilling. As a result, it is wise to consider all municipal property as capable of producing direct income if developed.

Although each conveyance to the city must be carefully reviewed to determine the city's interest in the property and to identify any restrictions on its use, the city may have many areas available for development. The types of municipal property that should be considered are parks, cemeteries, public buildings, streets, alleys, landfills, industrial parks, sewage treatment plants, water treatment plants, and all other real property owned by the city.

The city should conduct its own independent title examination on any property it controls to determine whether it has a sufficient ownership interest to authorize development. These critical tasks must be undertaken prior to offering any property for development. Conducting such reviews at the pre-development stage will save the city time and money and make the properties ultimately offered for development more attractive to the developer. For example, when the city elects to develop municipal property, whether it be streets, alleys, parks, or cemeteries, a number of title questions immediately arise. The city should not rely on the developer to sort out these problems. Before offering lands for development the city should ascertain whether the grant to the city will permit oil and gas activities. This requires a careful examination of the documents conveying, donating, or dedicating the property to the city. Consider a conveyance to the city of a tract of land for "park purposes only" which contains a right of reverter upon breach of the condition. Can the city develop the oil and gas underlying the park without breaching the condition?⁴³ Relevant case and statutory law must be consulted to determine the extent of restriction such a conveyance places on the city's authority to develop or lease the property for oil and gas exploration and production. If the city elects to permit development on a tract of land containing ambiguous donative conditions, case and statutory law may offer guidance as to what restrictions the city should impose to support its actions in the

43. See generally Annot., 144 A.L.R. 486 (1943). Compare *Keaton v. Oklahoma City*, 187 Okla. 593, 102 P.2d 938, cert. denied, 311 U.S. 616 (1940) (deed reservation requiring land to be used for public buildings and for a public park did not restrict use of land for oil and gas development) with *Cooper v. City of Great Bend*, 200 Kan. 590, 438 P.2d 102 (1968) (plat dedication setting aside lands for a "public park" prohibited use of park property for downtown business parking lot); *Connolly v. Frobenius*, 2 Kan. App. 2d 18, 574 P.2d 971 (1978) (mortuary constituted unauthorized use of lands dedicated for burial purposes). See also *Gage v. City of Topeka*, 205 Kan. 143, 468 P.2d 232 (1970); *State v. City of Manhattan*, 115 Kan. 794, 225 P.85 (1924); *Town of Reydon v. Anderson*, 649 P.2d 541, 544 (Okla. 1982); *Green v. City of Norman*, 455 P.2d 58, 59-60 (Okla. 1969).

event a reversion is alleged by the original donor, grantor, or their successors.

In *Central Land Co. v. Grand Rapids*,⁴⁴ the Michigan Supreme Court upheld a city's leasing of lands conveyed "solely for park, highway, street, or boulevard purposes."⁴⁵ The city had leased the park lands for oil and gas development and producing oil wells were completed on the park lands. The court found, among other things, the following factors to be significant in determining that the city had not violated the condition subsequent created by the deed: (1) the purpose of the grantor was not frustrated by the city's actions; (2) extraordinary care was taken by the city to ensure operations did not materially impair the use of the land for park purposes; (3) storage tanks were not maintained on the park lands, and other facilities, to the extent feasible, were located off of the park lands; (4) the city's lease required the developer to use care not to interfere with park facilities; and (5) all proceeds from production on the park lands had been earmarked by the city for park purposes.⁴⁶ If the city has already leased lands subject to conditions requiring special use, the factors discussed above may offer the city and affected developers an opportunity to establish a favorable factual base in the event the city's authority to lease the land is subsequently challenged.

A more basic title problem will arise when the city offers a lease on streets or alleys. In such cases the issue is not whether the city can use the streets or alleys for oil and gas development.⁴⁷ Rather, the issue is

44. 302 Mich. 105, 4 N.W.2d 485 (1942).

45. 4 N.W.2d at 486.

46. *Id.* at 487.

47. Although the most common disputes concerning park and other lands conveyed to the city relate to use restrictions imposed by the conveying instruments, such lands can also be subject to the same type of ownership problems encountered with streets and alleys. For example, the park property in *Cooper v. City of Great Bend*, 200 Kan. 590, 438 P.2d 102 (1968), was dedicated to the city by plat. A statutory dedication resulted under the statutes in force which provided that the plat vested the fee of such parcels of land "in the county in which such city or town or addition is situated, in trust and for the uses therein named, expressed or intended, and for no other use or purpose." 438 P.2d at 106. Kansas law specifically addresses the effect of a statutory dedication by map or plat on mineral rights underlying property dedicated for public purposes. Section 12-406 provides:

Such maps and plats of such cities and towns, and additions, made, acknowledged, certified, filed and recorded with the register, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named or intended for public uses in the county in which such city or town or addition is situated, in trust and for the uses therein named, expressed or intended, and for no other use or purpose, and the recording of such map or plat shall not constitute a conveyance of any interest in the oil, gas and other minerals underlying the avenues, streets, lanes, alleys, and other parcels therein named or intended for public uses. The provisions of this act shall apply to all maps or

who owns oil and gas beneath a street or alley.⁴⁸ Once again, the documents of conveyance, grant, or donation must be examined for express reservations, exceptions, and restrictions. However, it is normally the implied reservations created by statute and case law that create problems.⁴⁹ The issue in such cases is whether the city obtained a fee simple in the property, and therefore title to minerals, or merely obtained an easement in the property to the extent necessary to use it for the designated public purpose.⁵⁰ In *Town of Reydon v. Anderson*,⁵¹ the Oklahoma Supreme Court, interpreted a statutory dedication by plat, and held that the town had only received an easement to the streets and alleys set aside in the plat; the owners of the land abutting the streets and alleys were vested with ownership of the minerals.⁵² The court also discussed the effect of a common law dedication, noting that it creates only an easement in lands designated for public use.⁵³

plats, heretofore or hereafter made, acknowledged, certified, filed and recorded with any such register: Provided, however, That nothing herein contained shall be construed as granting any right to enter upon the surface of such parcels of land for purposes of exploring for or the extraction of such minerals, or in any other manner to interfere with the public uses named in such maps, plats and additions.

KAN. STAT. ANN. § 12-406 (1982).

48. *See generally*, Annot., 62 A.L.R. 2d 1311 (1958).

49. *E.g.*, OKLA. STAT. ANN. tit. 11, § 41-109 (West Supp. 1983-1984) which provides:

When the plat or map has been completed and certified, acknowledged, approved and recorded as required by Sections 41-104 through 41-108 of this title, every donation or grant to the public, or to any individual, any religious society, or to any corporation or body politic, marked or noted as such on the plat or map, shall be deemed in law and equity a sufficient conveyance to best [sic] the fee simple of the tract or parcel of land as expressed in the plat or map. Such conveyance shall be considered for all intents and purposes a general warranty against the donor, his heirs or representatives, to the donee or grantee, for his use for the uses and purposes named in the plat or map, expressed and intended, and no other use and purpose whatever. The land intended to be used for the streets, alleys, ways, commons or other public uses in any municipality or addition thereto shall be held in the municipality's corporate name in trust to and for the use and purposes set forth and expressed or intended.

In *Board of Trustees of Taloga v. Hadson Ohio Oil Co.*, 574 P.2d 1038, 1041 (Okla. 1978), the Oklahoma Supreme Court held dedications of streets and alleys made pursuant to OKLA. STAT. tit. 11, § 515 (1971) (the original version of tit. 11, § 41-109) conveyed only an easement to the city; the dedicator retains the fee, including the minerals, which pass to the dedicator's successors. However, the court noted that a statutory donation or grant of lands under OKLA. STAT. tit. 11, § 515 (1971), for public purposes other than streets and alleys, could convey a fee simple to the city. *Id.* at 1041 (citing *Langston City v. Gustin*, 191 Okla. 93, 127 P.2d 197 (1942)).

50. *Compare* *McClain v. Oklahoma City*, 192 Okla. 4, 133 P.2d 198 (1943) (city owns minerals in lands it purchased for street purposes) with *Oklahoma City v. State*, 193 Okla. 520, 145 P.2d 418 (1944) (statutory dedication by of lands for public parkways state to city conveyed only an easement to city; state retained title to minerals). *See also* *Miller-Carey Drilling Co. v. Shaffer*, 144 Kan. 508, 61 P.2d 1320 (1936).

51. 649 P.2d 541 (Okla. 1982).

52. The court relied upon OKLA. STAT. ANN. tit. 11, § 41-109 (West Supp. 1983-1984), and OKLA. STAT. tit. 69 § 1202 (1981), which provides: "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."

53. *Town of Reydon v. Anderson*, 649 P.2d at 543. *See also*, *Oklahoma City v. State*, 185

In addition to reviewing the conveyance terms and laws affecting their interpretation, the city and developer must ascertain whether any special statutes exist to restrict the city's use of certain types of property, such as cemetery lands. For example, Kansas law provides that:

(a) The governing body of any city or county which has established, acquired or otherwise assumed control of any cemetery or burial grounds shall prevent such cemetery or burial grounds from being used for dumping grounds, building sites, playgrounds, places of entertainment or amusement, public parks, athletic fields, parking grounds or any purpose other than for burial or other intended cemetery purposes.

(b) The fact that any tract of land has been set apart for burial purposes and that a part or all of such tract has been used for burial purposes shall be evidence that such grounds were set aside and used for burial purposes regardless of whether graves are visible on any part of the grounds. For the purposes of this act, the terms "cemetery" and "burial grounds" shall mean parcels of land set aside and used for the interment of human bodies.⁵⁴

This statute seems to prohibit surface use of cemetery lands which do not fall within the definition of "burial or other intended cemetery purposes." It is unclear what effect such a statute has on the city's ability to lease cemetery lands for oil and gas development where the developer is prohibited from using or occupying the surface of such lands. Arguably, if the lands can be developed without violating the terms of the conveyance to the city, and without disrupting their use for burial or cemetery purposes, the city should be able to lease the lands. In such situations, the city should pay particular attention to the factors cited above by the Michigan Supreme Court in the *Grand Rapids* case.⁵⁵

In summary, the city undertaking an inventory of lands available for oil and gas development must (1) identify property under its control; (2) determine whether the conveyance vests the city with title to oil and gas; (3) determine if development will be consistent with use restrictions contained in the conveyance; and (4) determine if develop-

Okla. 219, 90 P.2d 1064 (1939). The presumptions created at common law, and by statute, can be rebutted by specific language in the conveyance to the city stating the interest conveyed and the uses which the city can make of the property. Whenever possible, the city should participate in formulating and drafting such conveyances to ensure that the rights of the parties are not determined by statutory and common law presumptions inconsistent with their interest.

54. KAN. STAT. ANN. § 12-1441 (1982).

55. See *supra* note 46 and accompanying text.

ment will be consistent with use restrictions imposed by statute, ordinance, or regulation. Once the city has identified properties available for development through the inventory process it is ready to package the property for possible exploration.

3. Resource Packaging

When the inventory process is complete, and the city has identified property it would like to lease, it is ready to begin packaging the lands for possible development. Packaging the resources includes anything the city can do to make the lands more attractive to developers. If there is adjacent or past production in the area, the city should obtain all available information concerning past or present production and future potential. Much of the information can be obtained from the state oil and gas conservation authority and the state or federal geological surveys. However, in many cases a consulting geologist, geological engineer, or petroleum engineer may have to be retained to adequately address such matters.

The city should make preliminary title information available to prospective developers. Such information should include a frank discussion of any potential problems uncovered during the inventory process. Any questions or issues raised by the conveyance to the city, or any special statutory restrictions affecting the developer's ability to conduct operations on the property should be disclosed. Also, if artfully drafted, the city should be able to use their oil and gas ordinances as a selling point for the package. If developers clearly understand their obligations for operations within the city, they will be more likely to undertake the substantial capital investment required to drill wells. As will be demonstrated in Section IV of this Article, the city can use its regulatory authority to create a favorable development climate without sacrificing public health, safety, or welfare.

Time spent properly packaging lands for leasing will, in most cases, reward the city with greater income on the lease offerings and limit future misunderstandings between the city and the developer. The city's packaging efforts will normally be revealed prior to a lease sale as part of the bid information sheet which is sent to interested developers. Once the lands are packaged for offering, the next step in the promotion process is the lease sale.

4. The Lease Sale

The lease sale can be used for a variety of purposes. It can be used to offer lands for development under a competitive bidding system providing the city with the best offer on its property. Perhaps more important, in an undeveloped "wildcat" area, the mere offering of lands may generate interest in the area and the property being offered.

To have a successful lease sale, the city must have conducted the required planning, inventory, and packaging beforehand. The city must also provide all bidders with detailed information concerning regulatory burdens on municipal development. Bidders should know the conditions under which they will be required to operate. Any benefits which local regulations may offer the bidder should also be identified.

To more fully appreciate the lease sale process, consider the following sample documents contemplating the leasing of city property in Kansas:

ORDINANCE NO. 3562

AN ORDINANCE AUTHORIZING AND ESTABLISHING A PROCEDURE FOR THE SALE OF OIL AND GAS DEVELOPMENT CONTRACTS ON MUNICIPAL PROPERTY.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF GUSHER, KANSAS:

SECTION 1. CONTRACTS FOR DEVELOPMENT AUTHORIZED.

The governing body is authorized to enter into contracts granting to developers the right to explore, produce, and do all things incident to the development of oil, gas, and other minerals, from property owned or controlled by the City of Gusher. The decision to offer a particular tract of land for development, and the terms of the development contract, shall be determined by the governing body.

SECTION 2. RESOLUTION STATING METHOD OF OFFERING PROPERTY.

The governing body, by resolution, shall identify the property to be offered for development and specify

the process by which the city will seek contracts to develop such property.

SECTION 3. CONTRACTS SIGNED BY MAYOR.

All leases or other contracts authorized by Section 1 shall be executed on behalf of the city by the mayor and attested to by the city clerk.

SECTION 4. EFFECTIVE DATE.

This ordinance shall take effect and be in force from and after its publication in the official city newspaper.

Passed by the commission the ___ day of ___, 19___

Signed by the mayor the ___ day of ___, 19___

Mayor
ATTEST:

City Clerk

RESOLUTION NO. 1

A RESOLUTION AUTHORIZING THE SALE OF OIL AND GAS LEASES ON MUNICIPAL PROPERTY. BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF GUSHER, KANSAS:

SECTION 1. AUTHORITY.

Pursuant to City of Gusher, Kansas Ordinance No. 3562, the governing body desires to lease lands belonging to the city for the exploration and production of oil and gas. The governing body, in compliance with Section 2 of Ordinance No. 3562, has made this resolution to identify the property offered for lease and to specify the terms, conditions, and method by which such leases will be offered for sale.

SECTION 2. LANDS.

The following property shall be offered for lease under the terms of this resolution:

The North one-half (N½) of the Northwest quarter (NW¼) of the Southwest quarter (SW¼), of Section Ten (10), Township Thirty-Two (32) South, Range Seventeen (17) East, all in Montgomery County, Kansas.

The described land is known as the "Fairview Cemetery" and is currently used for burial purposes.

SECTION 3. RESTRICTIONS.

All operations on the offered property shall be subject to the zoning, oil and gas development, and other general ordinances of the City of Gusher, state and federal law, and the terms of the attached EXHIBIT A titled "Oil and Gas Lease."

SECTION 4. ZONING.

The offered property has been zoned to permit oil and gas operations.

SECTION 5. BIDDING PROCEDURE.

The land described in Section 2 of this resolution shall be offered for sale by sealed bid. The governing body shall cause notice of the sale to be published in the local newspaper and in any other publication the governing body believes will reach interested bidders. The frequency and content of lease sale notices shall be determined by the governing body. All bids should be in a sealed envelope addressed as follows: Bid-Oil and Gas Lease Sale No. 1, c/o City Clerk, 200 Main Street, Gusher, Kansas 66763. All bids will be opened at a designated time in the City Hall Building, which time and place shall be described in all lease sale notices.

Each bid offer shall be accompanied by a certified check or money order for the full amount of the lease bonus and first year rentals offered. The governing body shall promptly, and in any event within three (3) business days following announcement of the successful bidder, return all checks or money orders submitted by unsuccessful bidders.

SECTION 6. BID ACCEPTANCE.

The governing body shall have the right to reject any or all bids or to accept any bid which may, in their view, be in the best interest of the City of Gusher. All bid notices shall indicate the governing body's authority to reject all bids and accept any bid it deems proper. The governing body shall have a period of not to exceed fourteen (14) business days to review all bids and announce the successful bidder, or to reject all bids.

SECTION 7. BID PACKET.

The governing body shall cause a "bid packet" to be put together which contains a copy of the following documents:

- (1) Ordinance No. 3562.
- (2) Resolution No. 1.
- (3) Ordinance No. 1510 (Regulating oil and gas development).
- (4) All applicable orders of the Kansas Corporation Commission affecting the land offered.
- (5) Ordinance No. 3520 (Rezoning property for oil and gas development).
- (6) Oil and Gas Lease.
- (7) Bid Offer Sheet.
- (8) Bid Envelope.
- (9) Bid Information Sheet.
- (10) Bid Instruction Sheet.

Upon request, the city clerk shall provide each interested bidder with a bid packet. The availability of such bid packets shall be noted in all lease sale notices.

This resolution shall take effect upon its passage by the governing body.

Passed by the Commission the ___ day of ____, 19___. Signed by the mayor the ___ day of ____, 19__.

 Mayor
 ATTEST:

 City Clerk

Section 7 of the foregoing resolution should serve as a checklist for items to consider when planning a lease sale. The bid offer sheet should accompany the "Oil and Gas Lease" and the certified check or money order. The bid offer sheet may be arranged as follows:

On this _____ day of _____, 19___, _____, located at _____, offers the following bid for a lease on the land described in City of Gusher Resolution No. 1 dated _____, 19___, subject to the terms stated in Resolution No. 1 and in the Oil and Gas Lease attached to said resolution as Exhibit A:

BONUS: \$_____
 ANNUAL RENTALS: \$_____.

In the event this bid is accepted by the City of Gusher, bidder agrees to comply fully with all terms, conditions, and requirements specified in Resolution No. 1 and the referenced "Oil and Gas Lease" which has been executed by bidder and submitted with this bid offer sheet and a certified check or money order for the total bonus bid and the first year delay rental payment.

Bidder acknowledges that the City has the right to reject any or all bids, or to accept any bid which may, in the sole discretion of the city governing body, be in the best interest of the City of Gusher.

(authorized signature of bidder)

(title)

The "Bid Information Sheet" should contain any relevant data pertaining to the offered lands. This gives the city an opportunity to discuss development procedures within the city, to address potential title questions, and to draw specific attention to any beneficial aspects associated with the lands offered for development. The information sheet can also be used to alert bidders to collateral requirements which may not be specified elsewhere in the bid packet. For example, the city may want to alert potential bidders to special statutory requirements which will affect operations on the offered lands. Consider the situation created by a Kansas statute which provides, in part, "[t]hat no oil or gas well shall be drilled or located within one hundred (100) feet of . . . lands actually used for burial purposes."⁵⁶ Although a developer conceivably could work in compliance with such a statute, another Kansas statute⁵⁷ seems to prohibit any surface occupancy of lands dedicated for cemetery purposes. The city will want to give bidders advance notice of the restrictions it intends to impose on the developer to comply with these statutory limitations. The appropriate technique for imposing any required special restrictions will be to write them into the oil and gas lease. The basic contracts the city can use to govern the specific aspects of developing its lands are considered in the following sections.

B. *Development Contracts*

The most common development contract the city will encounter is the oil and gas lease. Under such an agreement the city grants the developer the exclusive right to explore for and produce oil and gas from city property for a specified period of time which may be extended by production of oil or gas in commercial quantities. The city will normally be paid a lump sum consideration for entering into the lease,

56. KAN. STAT. ANN. § 55-211a (1983).

57. *Id.* at § 12-1441 (1982).

called a bonus, plus annual rentals during the term of the lease. If the developer obtains commercial production from the leased land, rental payments normally cease and the city is paid a sum equal to the value of a stated percentage of total production from the lease, free of development and operation costs.

In some cases the city may prefer to forego bonus, rents, and royalties in return for a larger share of production from the well in the event it is completed as a commercial producer. The type of development contract used in such cases is called a "farmout" because the city is, in effect, "farming out" its property to a third party for development.

As with the oil and gas lease, the farmout can have many unique terms. The terms ultimately placed in development contracts normally reflect the relative bargaining positions of the contracting parties. Within this practical limitation, the only limits are the imagination of the parties, and public policy expressed by statute, regulation, or judicial opinion. However, there are provisions which, through industry practice, are commonly found in oil and gas leases and farmouts. This section will examine the provisions of these common development contracts which are of primary concern to the city.

1. The Oil and Gas Lease

For the city the major consideration when drafting an oil and gas lease is to make it workable. Regardless of how interested a developer may be in certain property, if the lease offered makes operations impractical, developers will spend their time, effort, and money elsewhere. This does not mean, however, that the city must give everything to the developer; the lease must only allow prudent and economically efficient operators to recover whatever oil and gas might be under the leased lands.

The city will have to weigh its bargaining position in each case to determine the lease terms, or type of development contract, it will be able to require. For example, if the city is in an undeveloped "wildcat" area, it will be interested in terms that encourage exploratory drilling. If successful development is occurring around the city, it may be in a position to insist upon terms which will maximize income to the city. The discussion which follows addresses some of the variations in lease terms available to the city under wildcat and developing conditions.⁵⁸

58. For a comprehensive discussion on negotiating and drafting oil and gas leases on behalf of the lessor (city), see the following articles: Anderson, *David v. Goliath: Negotiating the "Lessor's*

Depending upon the demand for leases in the area, the city may be able to require an up front cash payment as consideration for entering into a lease with the developer. Such payments are called lease bonuses. Normally, the oil and gas lease will not address the issue of bonus since it varies considerably depending upon the bargaining position of the lessor.

The first matter the parties must consider in drafting or entering into an oil and gas lease is the scope of the rights granted to the developer in the leased lands. These matters are normally stated in the granting clause of the lease which addresses the following items: (1) What lands are covered by the lease? (2) Is the developer given the exclusive right to explore for and produce substances from the leased lands? (3) What substances are covered by the lease? (4) Can the developer use the leased lands for activities related to extraction of the leased substances?

Consider the following granting clause:

CITY OF GUSHER, KANSAS

NO. 7
LEASE DATE January 5, 1984

THIS LEASE is made between the City of Gusher, Kansas, hereinafter called "CITY," and X,Y,Z DEVELOPER, hereinafter called "LESSEE."

IN CONSIDERATION of the mutual promises made between CITY and LESSEE, and the payment of the rentals and royalties provided for in this LEASE, CITY grants, demises, leases, and lets exclusively to LESSEE, for the sole purpose of mining and operating for oil and gas, and the building or laying of tanks and other structures necessary for the production, handling,

88" and *Representing Lessors and Surface Owners in Oil and Gas Lease Plays*, 27 ROCKY MTN. MIN. L. INST. 1029 (1982); Nickum, *Negotiating and Drafting a Modern Oil and Gas Lease on Behalf of Lessor*, 13 TEX. TECH. L. REV. 1401 (1982); Lowe, *Representing The Landowner in Oil and Gas Leasing Transactions*, 31 OKLA. L. REV. 257 (1978). See also Nordling, *Landowners' Viewpoints in Pipeline Right-of-Way and Oil and Gas Lease Negotiations*, 52 J. KAN. B.A. 35 (1983).

The city may also wish to review leases negotiated by entities which have been actively involved in the oil and gas business as lessors. Cities might consider lease provisions in forms used by the various state land boards to lease state lands for oil and gas development. Federal and Indian oil and gas lease forms may also be helpful. In addition, consider leases negotiated by large private landowners, such as railroads.

and removal of oil and gas produced from this LEASE, all the following described lands within the City of Gusher, Montgomery County, Kansas:

TOWNSHIP 32 SOUTH, RANGE 17 EAST
SECTION 10: N½ of the NW¼ of the SW¼

SUBJECT TO the following terms and conditions. . . .

The sample granting clause gives lessee the "exclusive" right to explore for and produce "oil and gas" from any depth on the described twenty acre tract of land. The lessee is also given the right to set tanks and other production-related structures on the leased land. However, all rights granted are "subject to" the other terms and conditions contained in the lease. Since the leased lands are "cemetery lands" the city will want to limit surface use of the property granted.

The city may also want to clarify the meaning of the term "gas" in the granting clause. If the lessee discovers a commercial quantity of carbon dioxide, a non-hydrocarbon "gas," will it be entitled to produce and market such substances pursuant to its "oil and gas" lease with the city? Or, is this a substance retained by the city because "gas" only refers to hydrocarbon gas? To the extent such issues are possible and foreseeable, the parties should insist upon language specifying their exact interest in such substances.⁵⁹

The next variable term normally contained in the oil and gas lease will be its duration. The duration of the lease will usually be stated as a set "primary term" subject to extension by operation of a "habendum clause." The lease duration will also be affected by other contingencies specified in the lease which may cause the lease to terminate, or be extended. The primary term is usually stated as a specified number of years. The habendum clause extends the lease beyond the primary term when a stated event occurs, such as production of oil or gas in paying quantities. A typical lease would provide:

1. LEASE DURATION. This LEASE shall remain in force for a Primary Term of — years from the Lease Date indicated above, and so long thereafter as oil or gas is produced from the leased premises in paying quantities, unless

59. See generally McRae, *Granting Clauses in Oil and Gas Leases: Including Mother Hubbard Clauses*, 2 INST. ON OIL & GAS L. & TAX'N 43 (1951).

otherwise terminated or extended by other provisions of this LEASE.

The length of the primary term is often dictated by the type of activity in the area. If producing wells are already in the immediate area, a short primary term of one or two years may be sufficient. If the area constitutes wildcat acreage, a longer primary term may be required to attract a developer. However, the primary term is often limited by other clauses requiring wells to be drilled within a certain period of time to prevent a lessee from acquiring acreage solely for speculation.

It is also customary to make the lessee pay delay rentals for the privilege of holding the lease without engaging in active development during the primary term. A sample delay rentals clause follows:

2. DELAY RENTALS. This LEASE shall terminate one year from the Lease Date unless, on or before said date, either: (1) operations for the drilling of a well for oil and gas on the leased premises have commenced and are being diligently pursued, or (2) LESSEE pays to CITY the sum of _____ Dollars (\$_____) as a rental which shall extend for one year from the Lease Date the time within which drilling operations may be commenced. In the event a well is completed as a dry hole during the Primary Term, or production from a well ceases during the Primary Term, LESSEE can pay the delay rental provided for by this Section and extend the lease the same as if no well had been commenced during the rental period. Upon payment of rentals in like manner and amount on or before the extended Lease Date, the time for commencing drilling operations can be further delayed for successive periods of one year each, but in no event shall any rental payment extend this LEASE beyond the Primary Term.

The amount and frequency of delay rentals is subject to negotiation. However, the developer will normally want to keep the amount of such payments consistent with other leases it has taken in the area.

The major consideration for most landowners entering into an oil and gas lease is the expectation of royalty income. Royalty is usually expressed as a fraction or percentage of all oil and gas produced and saved from the lease or lands with which the lease is pooled or unitized.⁶⁰ For example, the city may contract for 1/8 of 8/8 of all oil and

60. The difference between a "royalty" interest and a "working" interest is that the working

gas produced from the lease, free of any costs of drilling or production. Usually, the royalty clause will vary depending, once again, on the nature of the property and the bargaining position and prowess of the lessor. A sample royalty clause might include the following provisions:

3. ROYALTY. LESSEE shall remit to CITY, out of production from or attributable to the leased premises, royalties calculated as follows:

a. CITY'S SHARE OF PRODUCTION. CITY is entitled to 12.50% of 100% of the oil, gas, casinghead gas, condensate, and all other valuable substances, or products manufactured or separated from such substances, produced by LESSEE pursuant to this LEASE.

b. COSTS. CITY's royalty shall not be subject to reduction for any expenses or charges relating to drilling for, producing, operating, treating, gathering, transporting, processing, or marketing production. CITY's royalty shall be calculated on total gross production prior to deducting such expenses or charges.

c. TAXES. CITY shall be responsible for paying, or reimbursing the party making payment, all properly assessed taxes levied against CITY's royalty share of production.

d. OPTION TO TAKE IN KIND. CITY may, from time to time, elect to take its share of production reserved by this SECTION in kind by giving LESSEE notice at least thirty (30) days prior to CITY's exercise of its right to take in kind. Similar notice shall be given in the event CITY elects to discontinue taking in kind. In the event CITY elects to take oil or other liquid hydrocarbons in kind, it shall have the option to require LESSEE to deliver such substances to CITY, free of cost, in the pipe lines, tanks, or manufacturing plant tailgate, to which wells on the leased premises may be connected. In the event CITY elects to take gas, casinghead gas, condensate, or other gaseous substances in kind, it shall have the option to require LESSEE to deliver all such substances to CITY, free of cost, in the pipe lines, separator, or manufactur-

interest constitutes a *net* interest in production; the working interest owner must pay a share of the costs of drilling and production equal to the percentage working interest owned in the lease. The royalty interest is calculated on *gross* production before drilling and production costs are deducted. For a discussion of royalty and working interest, see 1 H. WILLIAMS & C. MEYERS, *supra* note 37, at § 302 (royalty interest defined); and 2 *id.* at §§ 401-403 (working interest defined).

ing plant tailgate to which wells on the leases premises may be connected.

e. **GROSS PROCEEDS/MARKET VALUE.** As to substances CITY does not elect to take in kind pursuant to SECTION 3.d., LESSEE shall pay CITY an amount equal to the greater of: (1) the gross proceeds from the sale of such substance; or (2) an amount equal to the maximum lawful price or highest posted price, plus any premiums, being offered or paid for the substance in the general area where produced at the time of production. In the event there is no posted or maximum lawful price for the substance produced and sold, then CITY's royalty shall be paid on the market value of such substance at the pipe lines, tanks, separator, or manufacturing plant tailgate to which wells on the leased premises could be connected. As to gas or casinghead gas, if LESSEE contracts for the resale of such gas and casinghead gas at the wellhead, after obtaining CITY's written consent to commit its share of production, such payment shall be based upon the proceeds accruing to LESSEE at the wellhead under such contract.

f. **PAYMENT.** All royalties shall be due and payable no later than ninety (90) days after first production and thereafter no later than fifteen (15) days following the month in which settlement was made with the production purchaser. Where production is used off the leased premises by LESSEE, payment of royalties shall be made within fifteen (15) days following the month of production.

Besides merely addressing the percentage share of production credited to the royalty owner, the royalty clause may address a number of matters which will affect the total amount received by the city. For example, the city may wish to provide for a higher percentage share of production in the event production from the lease exceeds a stated quantity, such as 250 barrels per day of oil.⁶¹ The royalty clause should

61. The State of Montana has provided, in some of its oil and gas leases on state lands, for the following graduated royalty on oil:

3. The lessee shall pay in money or in kind to the lessor at its option as hereinafter provided during the full term of this lease in addition to the annual money rental hereinabove stated, a royalty, free of all costs and deductions, on the average production of the oil from the producing wells under this lease for each calendar month as follows:

A. On that portion of the average production of oil or casing-head gasoline for each producing well not exceeding 3,000 barrels for the calendar month, twelve and one-half percentum (12½%).

B. On that portion of the average production of oil or casing-head gasoline for

also state how royalties will be calculated when the operator is involved in marketing the city's share of production. Will the city's share be calculated as a percentage of the proceeds received from a sale of all production, or will its share be calculated on the market value of the production sold regardless of the amount of proceeds actually received by the operator?⁶²

Other considerations are the costs, subsequent to production, which the royalty interest owner may have to cover in order to market production. For example, if production from the lease must be treated, processed, compressed, or transported before being sold to a purchaser, must the gross value of production be reduced by these marketing expenses before the city's royalty share is calculated? If the city retains the right to receive its share of production "in kind," what obligations are to be imposed on the operator to provide tanks and other services to collect and store the city's royalty share of production? How frequently must the lessee pay the city for its share of production which is not taken in kind? All of these matters should be addressed by the lease royalty clause.⁶³

Even though the lessee drills a well capable of production, it may be unable to find a market for such production. This is often the case with natural gas. Gas, unlike oil, cannot be economically placed in a tank and hauled to a market. Instead, gas requires an extensive capital investment in a pipeline to carry it to the ultimate purchaser. In many cases, it may be years before a field is sufficiently developed to justify the expense of building a pipeline. Under current gas surplus conditions there may be a pipeline available to transport the gas produced but no market to which it can be transported and sold. During this period the lessee has a well capable of production, but unable to produce. The habendum clause provides the lease will be extended beyond the primary term "so long . . . as oil or gas is produced from the leased premises in paying quantities." Since the well cannot be pro-

each producing well exceeding 3,000 barrels but not exceeding 6,000 barrels for the calendar month, seventeen and one-half percentum (17½%).

C. On that portion of the average production of oil or casing-head gasoline for each producing well exceeding 6,000 barrels for the calendar month, twenty-five percentum (25%).

62. See generally La Grone, *Calculating The Landowner's Royalty*, 28 ROCKY MTN. MIN. L. INST. 803 (1983); Harmon, *Gas Royalty—Vela, Middleton and Weatherford*, 33 INST. ON OIL & GAS & TAX'N 65 (1982); Annot., 10 A.L.R. 4th 732 (1981).

63. For a discussion on royalty clauses, see McDermott, *Fee Oil and Gas Lease Royalty—Variations and Problems*, 28 ROCKY MTN. MIN. L. INST. 1171 (1983); Ashabranner, *The Oil and Gas Lease Royalty Clause—One-Eighth of What?*, 20 ROCKY MTN. MIN. L. INST. 163 (1975).

duced for lack of a purchaser, the lessee will require the lease to provide for this contingency in the form of a shut-in gas royalty clause. A sample clause follows:

4. SHUT-IN GAS ROYALTY. On a well or wells capable of producing gas only in paying quantities, or having a gas-oil ratio such that the well cannot be operated without the use or sale of gas, and gas is not being used off the premises or marketed therefrom, and this LEASE is not then being maintained by other production or drilling operations, this LEASE shall nevertheless remain in full force and effect for a period of sixty (60) days after production or operations cease if LESSEE gives CITY written notice of the date production or operations cease and, on or before the expiration of said sixty-day period, pays to CITY a sum equal to the annual rental specified in Section 2 of this LEASE or _____ Dollars (\$_____) per well, whichever is greater. Such payment shall be in lieu of rentals and shall maintain the LEASE in full force and effect for a period of six (6) months from the expiration of said sixty-day period. Thereafter, semiannually in like manner, at six-month intervals from the expiration of said sixty-day period, upon like payments, this LEASE will continue in force and effect for successive periods of six (6) months each so long as such payments are made, but not, however, exceeding _____ (____) such successive periods beyond the Primary Term of the lease. So long as such payments are made, it shall be considered that gas is being produced under the lease in paying quantities and such payments shall have the same effect as the production of gas for all purposes of the LEASE. Such payments shall be deemed royalty payments and shall be distributed to those entitled to royalties from the leased acreage.

Another contingency the developer will want to provide for is the extension of the lease when production ceases, a dry hole is completed, or when drilling or other development operations are being diligently pursued. The developer will require provisions in the lease to protect its interests in the event a well is completed as a dry hole after the primary lease term has expired or operations initiated during the primary term have not been completed but are being actively pursued at the expiration of the primary term. A sample clause follows:

5. DRILLING OPERATIONS. If, at the expiration of the Primary Term of this LEASE, oil or gas is not being pro-

duced from the LEASE premises, but LESSEE is engaged in drilling or reworking operations thereon, then this LEASE shall continue in force so long as drilling or reworking operations are being continuously conducted on the LEASE or on a drilling unit which includes all or a part of this LEASE. Drilling or reworking operations shall be considered to be continuously conducted if not more than sixty (60) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling or reworking of another well. If oil or gas shall be discovered or produced from any such well or wells drilled, being drilled, or reworked at or after the expiration of the Primary Term of this LEASE, this LEASE shall continue in force so long as oil or gas is produced from the leased premises or from any drilling unit to the extent it includes lands covered by this LEASE.

In most lease forms provided by developers, the lessor will warrant its title and right to lease the described property. However, the city may want to avoid giving a warranty and instead provide the developer with the following title protection:

6. CITY'S TITLE. To the extent CITY owns or is entitled to the benefits of a lesser interest in the leased land than the entire and undivided mineral interest, the royalties and rentals herein provided shall be paid to the CITY only in the proportion which its interest bears to the whole and undivided mineral interest.

CITY makes no warranty of its title to the leased premises but agrees that in the event the failure of CITY's title be finally determined by a court of record, and in consequence thereof LESSEE is required to account to third parties for oil or gas produced from the CITY's land, CITY shall reimburse LESSEE, without interest, for rentals, royalties, and bonuses paid to CITY in respect to the acreage or interest to which CITY's title may fail.

Such a provision protects the developer's interests without making the city liable for breach of warranty and consequential damages which could arise from a breach. Most developers will readily waive the warranty requirement so long as they are able to obtain reimbursement from the city for any bonus, rentals, or royalty paid in excess of the city's actual interest in the leased lands.

In Kansas, lessees will always want a pooling clause in their leases

to provide for the consolidation of interests into drilling or proration units. This is especially important since Kansas does not have statutory pooling provisions.⁶⁴ However, the lease form being used in this example contemplates that the City of Gusher is taking an active approach to oil and gas development and therefore has enacted a compulsory pooling ordinance.

7. **POOLING.** All or any part of this LEASE may be pooled with other lands to form drilling units pursuant to the Ordinances of the City of Gusher, or the laws of Kansas. Operations on or production from a well located on any lands included in such drilling unit shall serve to maintain this LEASE in force as to that portion of the leased premises included in or attributed to such drilling unit, but shall not maintain, beyond the Primary Term of this lease, any leased lands outside such drilling unit, unless otherwise extended by the terms of this LEASE.

Note that the "Pugh clause" is drafted into the pooling provision.⁶⁵ Such a clause is used to prevent the lessee from holding an entire piece of acreage while the lessor only receives income based on a smaller portion committed to the drilling unit. However, the Pugh clause in this example operates only after the expiration of the primary term of the lease. In the municipal development situation, if the area concerned has been spaced in a reasonable manner, and leasing conducted in accordance with such spacing, the Pugh clause should not be objectionable to the lessee.

Another provision of interest to the developer is an assignment clause. The lessee will want the ability to readily assign interests in the lease, especially where it is relying on direct investor capital for development. However, the city should be careful to control some aspects of the assignment, in order to prevent, to the extent possible, the lessee

64. Although some authorities believe that the Kansas pooling situation has been solved with the enactment of the Kansas Unitization Statute, KAN. STAT. ANN. §§ 55-1301-1315 (1983), these statutes were created to permit field wide unitization and do not address the consolidation of interests within a spacing unit. See *Mobil Oil Corp. v. State Corp. Comm'n*, 227 Kan. 594, 608 P.2d 1325 (1980) where Chief Justice Schroeder, in his dissenting opinion, indicated that the unitization statute offers the operator some relief when interest owners within a spacing or proration unit refuse to voluntarily pool their interests so their acreage will be attributable to the well for determining its allowable. 608 P.2d at 1337 (Schroeder, C.J., dissenting).

65. For a discussion of problems arising from the use of Pugh clauses, see generally 4 H. WILLIAMS & C. MEYERS, *supra* note 37, at § 670.4. See also Oklahoma's statutory Pugh clause at OKLA. STAT. tit. 52, § 87.1(b) (Supp. 1983).

from escaping responsibility under the lease. A suggested provision follows:

8. **ASSIGNMENT.** Either party may assign any interest in this LEASE without enlarging the existing obligations of either CITY or LESSEE under this LEASE. However, before any assignment of a working interest by LESSEE can be effective, LESSEE must give CITY written notice of the proposed assignment and a description of the proposed assignee, and obtain the written consent of the CITY to the proposed assignment. CITY shall readily give its consent to any assignment so long as LESSEE is currently in compliance with all lease terms, or the CITY elects to waive lease obligations to permit assignment to the designated assignee. LESSEE shall not be released from its obligations under this LEASE until its assignee has obtained all required permits, bonds, insurance, and otherwise completed the necessary requirements to assume responsibility for the interest being assigned.

The city should also provide for a clause stating what will happen if the lessee fails to comply with its lease obligations to the city:

9. **DEFAULT.** If LESSEE fails to keep or perform any LEASE term, condition, stipulation, or other covenant, express or implied, with which it is obligated to comply, CITY shall have the option to terminate this LEASE. Provided, CITY shall be required to give LESSEE written notice identifying the breach and provide LESSEE with fifteen (15) days from the date such notice is received to remedy the breach. Provided, however, as to the breach of an implied covenant, LESSEE shall have sixty (60) days from the date such notice is received to remedy the breach.

The primary provisions in the lease which will protect the city and its inhabitants from the potential negative effects of development are the "Applicable Law" and "Special Lease Stipulations" sections of the lease. The first clause, incorporates the oil and gas development, zoning, environmental control, and all other city ordinances which may relate to oil and gas activities. State and federal law are similarly incorporated. A sample clause could be drafted as follows:

10. **APPLICABLE LAW.** LESSEE shall comply with all applicable laws, rules, and regulations which were effective as of the Lease Date. LESSEE shall comply with all applica-

ble laws, rules, and regulations which may, from time to time, be adopted and which do not impair the obligations of this contract nor deprive LESSEE of an existing property right recognized by law.

The city should have its major oil and gas regulatory ordinances in place and effective before the lease is signed. The second provision, titled "Special Lease Stipulations," gives the city an opportunity to spell out specific site restrictions pertaining to the lands being leased. In the cemetery example, the city would want to add a stipulation prohibiting any surface occupancy of the leased lands. Arguably, such a stipulation is necessitated by Kansas law.⁶⁶ A sample lease stipulation clause follows:

11. SPECIAL LEASE STIPULATIONS. In addition to the other provisions of this LEASE, LESSEE shall comply with all special lease stipulations listed in EXHIBIT A attached to this lease.

Depending upon the intensity of development activity in the immediate area, the city may be in a position to obtain more than the standard royalty or rentals customarily offered by developers. If the city has in the past prohibited or severely limited development it may be sitting on highly desirable acreage. In such cases, it may be able to demand a better deal without discouraging developers.

In addition to negotiating lease bonus, rental, and royalty provisions, the city may attempt to specify the lessee's development obligations. This is normally accomplished through a development or continuous development clause which requires the lessee to drill the lease to a stated well density within a specified time or give up the portions of the leased lands which are not developed. For example, imagine a ten-acre lease which, under the applicable spacing rules, could be divided into four drilling units of 2.5 acres each. The following clause might be used to require development of the lease to its maximum density in a stated period of time:

12. CONTINUOUS DEVELOPMENT. LESSEE shall drill and complete a well on each drilling unit within the leased premises with the first well to be commenced not later than six (6) months from the Lease Date and thereafter LESSEE shall commence a subsequent well within one hun-

66. KAN. STAT. ANN. § 12-1441 (1982) (city prohibited from using cemetery land for any purpose other than burial or other intended cemetery purpose).

dred twenty (120) days of completing the previous well until all designated drilling units on the leased premises have at least one well producing in paying quantities. If LESSEE fails to commence the initial well or any subsequent well within the stated time period, this LEASE, at the CITY's option, shall terminate as to all drilling units within the leased premises which do not have a well producing in paying quantities. All operations commenced by LESSEE pursuant to this Section shall be diligently conducted.

The city may also desire to limit the lessee's rights to those depths the lessee has explored through drilling operations. For example, in the granting clause, the city could provide that:

This grant is limited to cover only formations above and including the deepest formation tested by any well during the Primary Term, or commenced before the end of the Primary Term and completed thereafter in compliance with the terms of this LEASE. LESSEE agrees, on demand, to execute and record such instruments as necessary to establish of record such deeper formation or formations as do not continue subject to this LEASE.

Similar restrictions could be placed on formations above the formation currently being held by production. Such provisions require the lessee to drill, test, and produce from all possible formations or have them revert to the city at the end of the primary term. Further, interest on royalties not paid in a timely manner may be required by the lease. Many states specify by statute when royalties must be paid and provide for interest and penalties for late payment.⁶⁷

The city may require a lessee to provide information to allow the city to verify that it is receiving a fair price on production from which royalties are calculated. Some lessors even require access to all processed data from seismic, exploration, and drilling operations on the leased lands. Such data could aid the city in determining the terms it might require in leases of other acreage in the area.

Many other types of lease provisions can be used; the city is only limited by the imagination of its city attorney and governing body. However, in most cases the practical limitation will be finding a lessee willing to accept the city's terms. Once again, this will depend upon the

67. See MONT. CODE ANN. § 82-10-103 (1983); N.D. CENT. CODE § 47-16-39.1 (Supp. 1983); OKLA. STAT. ANN. tit. 52, § 540 (West Supp. 1983-1984).

value of the acreage and the willingness of the lessee to make special concessions to obtain such acreage. In a municipal development situation many subjects otherwise addressed by the lease will be covered by specific ordinances. Such matters as bonding, insurance, surface damages, operation requirements, and reclamation should normally be addressed by a general ordinance incorporated into leases under the "Applicable Law" clause.

The city may want to consider alternatives to the oil and gas lease for developing its lands. The basic development contract the city might use is the "farmout agreement."

2. Farmout and Joint Operation

Instead of merely retaining a royalty interest in development, the city may want to have the opportunity to obtain a working interest and operate the developed lease jointly with the developer. This can be accomplished if the city "farms out" acreage to the developer. Normally the developer will not pay any bonus or rentals, but instead will be required to commence a well within a stated period of time. If the well produces in paying quantities the developer will "earn" a stated percentage in the drill site acreage and, in some cases, designated acreage outside the drill site.

The city will retain a royalty interest in the drill site until the well "pays out." Payout occurs when the developer recovers, from his after-tax share of production, an amount equal to the cost of drilling, testing, completing, and equipping the well, plus operating expenses. At payout, the city will have the option to convert its royalty interest to a specified working interest.⁶⁸ Subsequent operations would thereafter be conducted under the terms of a joint operating agreement.

The benefit to the city in using a farmout agreement is the prospect of greater income from the well. Even if the city elects not to join in joint operations, it may want to convert its royalty interest to the larger working interest and then sell the working interest. Since a working interest owner is responsible for its share of production costs, the city may want to make a special provision in the joint operating agreement to have all of its costs taken only from its share of the production pro-

68. Although the working interest is charged with operating costs in proportion to which each working interest bears to the entire working interest in the well, conversion of the royalty interest, usually a 12.5% cost-free share of production, to a working interest, possibly a 50% cost bearing share, will in most cases result in greater net income to the landowner.

ceeds realized from the well. Otherwise, the city may be required to budget funds to cover its share of costs in joint operations.⁶⁹

IV. CONTROLLING DEVELOPMENT

Once the city has decided to actively pursue the development of oil and gas, it must develop a regulatory regime that will permit development without adversely affecting public health, safety, and welfare. Before considering the city's authority to regulate oil and gas operations, it is necessary to consider the problems associated with oil and gas development. Oil and gas exploration and production often conflict with surrounding land uses. Land alteration with earth moving equipment is necessary to prepare a drilling site and create pits for drilling fluid circulation. Access to the drill site requires roads for moving heavy equipment. Once a drilling rig is on site the operator will want to drill on a twenty-four hour basis to minimize rental expenses. When the well is completed a pumping unit is usually installed and storage tanks brought on site whenever pipeline transportation is not available. Large trucks will be moving in and out of the area throughout the life of the well to haul petroleum production. If drilling is close to residential housing, it may create aesthetic, noise, odor, traffic, and safety problems. If the well is unproductive, or ceases to produce, abandonment of the site without proper plugging and reclamation may adversely affect surrounding properties.

Aside from the physical effects, production operations may raise property rights issues involving other land owners in the area. If a lessee is permitted to drill in one area but not another, owners of the undeveloped properties may claim that their correlative rights are being violated.⁷⁰ Local governments have taken widely varying roles as to the extent they will attempt to police private interests in oil and gas

69. For additional background information on farmout and joint operating agreements, see generally Klein & Burke, *The Farmout Agreement: Its Form and Substance*, 24 ROCKY MTN. MIN. L. INST. 479 (1978); Wigley, *AAPL Form 610—1977 Model Form Operating Agreement*, 24 ROCKY MTN. MIN. L. INST. 693 (1978); Lamb, *Farmout Agreements—Problems of Negotiation and Drafting*, 8 ROCKY MTN. MIN. L. INST. 139 (1963); Young, *Oil and Gas Operating Agreements: Producers 88 Operating Agreements, Selected Problems and Suggested Solutions*, 20 ROCKY MTN. MIN. L. INST. 197 (1975). For a discussion on convertible royalties, see 2 H. WILLIAMS & C. MEYERS, supra note 37, at § 426.

70. See *Braly v. Board of Fire Comm'rs*, 157 Cal. App. 2d 608, 321 P.2d 504 (1958); *Sindell v. Smutz*, 100 Cal. App. 2d 10, 222 P.2d 903 (1950). But see *Friel v. County of Los Angeles*, 172 Cal. App. 2d 142, 342 P.2d 374 (1959) and *Adkins v. City of West Frankfort*, 51 F. Supp. 532 (E.D. Ill. 1943).

The correlative rights doctrine recognizes the connected nature of the oil and gas reservoir and that a person operating a well properly located on their land can significantly affect the rights

resources.⁷¹ In all instances where the local government is actively involved in regulating oil and gas development, it must take action to prevent potential tort liability it may incur for failing to properly direct and supervise permitted operations. Developer insurance and bonding requirements are routinely imposed to protect the local entity and to insure the financial responsibility of the developer.⁷²

Local governments can use one of three general approaches to regulate oil and gas exploration and production. First, the local entity can prohibit oil and gas development within its political boundaries when such a prohibition is reasonably related to protecting public health, safety, and welfare.⁷³ Second, oil and gas activity can be prohibited in some areas and permitted in others pursuant to zoning ordinances.⁷⁴ A third approach is to regulate the activity directly by local law specifying permit, operation, bonding, insurance, reclamation, and other require-

of other property owners in the same reservoir. Professor Kuntz has identified four basic rights of owners overlying a common reservoir; they include:

1. [T]he right against waste of extracted substances,
2. the right against spoilage of the common source of supply,
3. the right against malicious depletion of the common source of supply,
4. the right to a fair opportunity to extract oil or gas.

Kuntz, *Correlative Rights in Oil and Gas*, 30 MISS. L.J. 1, 2 (1958). See also, Pierce, *Coordinated Reservoir Development—An Alternative to the Rule of Capture for the Ownership and Development of Oil and Gas: Part I*, 4 J. ENERGY L. & POL'Y 1, 50 (1983) [hereinafter cited as *Coordinated Reservoir Development I*].

The Conservation Division of the Kansas Corporation Commission defines "correlative rights" as follows:

- (15) Correlative rights means that each owner or producer in a common source of supply is privileged to produce from that supply only in a manner or amount that will not injure the reservoir to the detriment of others, take an undue proportion of the obtainable oil or gas, or cause undue drainage between developed leases.

KAN. ADMIN. REGS. § 82-3-101(a)(15) (1983).

Cities, in directing oil and gas development, must consider the effect of their regulations on the correlative rights of mineral interest owners within the city's jurisdiction. The main problem within the city will be establishing a program which will give mineral interest owners a fair opportunity to extract oil or gas. However, correlative rights can be subordinated to protection of the public health, safety, and welfare. See generally *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir.), cert. denied, 280 U.S. 573 (1929). See also *Marrs v. City of Oxford*, 24 F.2d 541 (D. Kan. 1928) (same case at district court level); *Helmerich & Payne v. Roxana Petroleum Corp.*, 136 Kan. 254, 14 P.2d 663 (1932).

71. In *Bohrer v. Ramsey Petroleum Co.*, 141 Kan. 781, 44 P.2d 239 (1935), the Kansas Supreme Court upheld a city ordinance which limited the number of wells to one per city block and required payment of proportionate royalties to all lot owners in the block. The ordinance was held to supersede any existing lease or contract to the extent necessary to give the ordinance effect.

72. *Gant v. Oklahoma City*, 289 U.S. 98 (1933) (court found "peculiar dangers" involved in drilling and operating oil or gas wells and upheld city ordinance requiring a surety bond from a bonding or indemnity company).

73. See *supra* note 34.

74. *Gruger v. Phillips Petroleum Co.*, 192 Okla. 259, 135 P.2d 485 (1943); *Keaton v. Oklahoma City*, 187 Okla. 593, 102 P.2d 938, cert. denied, 311 U.S. 616 (1940).

ments.⁷⁵ The direct regulatory approach may be used in addition to, or in lieu of, the zoning approach. Regardless of the approach used by a local government, it must be able to justify the regulation as a legitimate use of its police power. Courts generally give great deference to a local government's perceived need for regulation to promote and protect public interests.⁷⁶ However, local entity abuse of its broad powers may result in retaliatory state and federal legislation restricting local regulation of vital energy resources.⁷⁷

Direct local regulation can be divided into three general categories: taxation, public protection, and allocation of rights in the resource. Public protection is the easiest to justify under the city's police power.⁷⁸ Local power to allocate rights in the resource is derived more indirectly from the police power. Ordinances establishing minimum royalty payments and other lease requirements are included in the allocation of rights category.⁷⁹ Taxation of the resource will occur pursuant to express state constitutional or statutory delegation of the taxing power to the entity.⁸⁰

Nearly all aspects of oil and gas development are subject to local regulation. However, regulation may be substantially restricted in some states depending on the extent local entities are delegated authority to act. Many times the courts will determine whether grants of local authority are to be strictly or liberally construed.⁸¹ Cities generally

75. *Ptak v. City of Oklahoma City*, 204 Okla. 336, 229 P.2d 567 (1951).

76. Ordinances enacted under the guise of police power are presumed valid. The party attacking the ordinance must clearly demonstrate that it is an arbitrary or irrational exercise of the police power having no relation to public health, morals, safety, or general welfare. Courts generally will not evaluate the wisdom of local legislative action. *Blancett v. Montgomery*, 398 S.W.2d 877 (Ky. 1966); *Adkins v. City of West Frankfort*, 51 F. Supp. 532 (D.C. Ill. 1943); *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir.), *cert. denied*, 280 U.S. 573 (1929).

77. State action may be in the form of comprehensive legislation to preempt local authority in the area. *See, e.g.*, *Union Nat'l Bank & Trust Co. v. Board of Supervisors of Kendall County*, 65 Ill. App. 3d 1004, 382 N.E.2d 1382 (1978) (strip mining regulation). Federal action may result from state and local permitting delays of major energy resource development projects. Consider, *Fischer, Allocating Decisionmaking in the Field of Energy Resource Development: Some Questions and Suggestions*, 22 ARIZ. L. REV. 785 (1980), which reviews the Priority Energy Project Act of 1980 and the Energy Mobilization Board.

78. *Adkins v. City of West Frankfort*, 51 F. Supp. 532 (D.C. Ill. 1943) (city can adopt necessary ordinances to protect public from fire hazards associated with oil and gas wells).

79. *Marrs v. City of Oxford*, 32 F.2d 134 (8th Cir.), *cert. denied*, 280 U.S. 573 (1929) (ordinance upheld establishing minimum royalty and allocation of the royalty among surface owners).

80. Oklahoma, by statute, prohibits a municipality from imposing any production tax on the oil and gas operation. *See City of Hartshorne v. Marathon Oil Co.*, 593 P.2d 97 (Okla. 1979) (construing OKLA. STAT. tit. 11, § 651 (1971) & *id.* tit. 68, § 1001 (1971)).

81. KAN. CONST. art. XII, § 5(d) makes it clear that the court must interpret the powers and authority granted Kansas cities liberally "for the purpose of giving to cities the largest measure of self-government."

have the power to regulate where drilling will occur,⁸² production practices,⁸³ post production practices,⁸⁴ pooling of interests,⁸⁵ permit and inspection fees,⁸⁶ bond requirements,⁸⁷ insurance requirements,⁸⁸ traffic flow,⁸⁹ and other aspects of the activity that may adversely affect the local community.⁹⁰ However, when regulating mineral extraction, additional care must be taken by the governmental entity to justify its action as a legitimate exercise of the police power. If one desires to locate a mobile home in a certain place, but is prohibited from doing so by existing zoning laws, the home can be located in another zone or outside the corporate limits. Unlike a mobile home, geological structures cannot be relocated.⁹¹ Courts will therefore carefully scrutinize local mineral extraction regulations to determine if they are reasonably related to protecting the public health, safety, and welfare.⁹² In Michigan, for example, the courts have upheld zoning regulations which prevent the extraction of natural resources only when "very serious consequences" will result from the proposed extraction.⁹³

After the city has identified the potential adverse impacts development may create, and selected the regulatory approach it desires to follow, it will be prepared to draft its oil and gas development ordinance. The city's oil and gas ordinance should be broad enough to cover all

82. *Friel v. County of Los Angeles*, 172 Cal. App. 2d 142, 342 P.2d 374 (1959). *See generally* Annot., 10 A.L.R. 3d 1226 (1966).

83. *Adkins v. City of West Frankfort*, 51 F. Supp. 532 (E.D. Ill. 1943).

84. *C. C. Julian Oil & Royalties Co. v. City of Oklahoma City*, 167 Okla. 384, 29 P.2d 952 (1934).

85. *Bohrer v. Ramsey Petroleum Co.*, 141 Kan. 781, 44 P.2d 239 (1935).

86. *Ptak v. City of Oklahoma City*, 204 Okla. 336, 229 P.2d 567 (1951).

87. *Gant v. Oklahoma City*, 289 U.S. 98 (1933).

88. *City of Hartshorne v. Marathon Oil Co.*, 593 P.2d 97 (Okla. 1979).

89. Traffic considerations must be reasonably related to public safety, health, and welfare. *See, e.g., Pure Oil Div. of Union Oil Co. v. City of Brook Park*, 26 Ohio App. 2d 153, 269 N.E.2d 853 (1971) (traffic patterns may be considered in zoning decisions but it is improper to use zoning laws primarily to regulate traffic). *But see Gowl v. Atlantic Richfield Co.*, 27 Md. App. 410, 341 A.2d 832 (1975) (traffic impact is a sufficient basis to deny a zoning or special exception application).

90. In *Marrs v. City of Oxford*, 32 F.2d 134, 139-40 (8th Cir.), *cert. denied*, 280 U.S. 573 (1929), the court noted that "There will be annoyance from unsightly structures, disquieting noises of machinery, the immediate and constant presence of numbers of workmen and the persistent thought of impending danger from explosion . . . Such a situation calls for some governmental restriction and control."

91. *Union Pac. R.R. Co. v. City of Los Angeles*, 53 Cal. App. 2d 825, 128 P.2d 408 (1942), considers the problems slant drilling can cause for local regulators.

92. *Clouser v. City of Norman*, 393 P.2d 827 (Okla. 1964). *See generally* Gill, *Intergovernmental Restraints on Oil and Gas Developments*, 16 LAND & WATER L. REV. 457, 466-67 (1981).

93. *Silva v. Township of Ada*, 416 Mich. 153, 330 N.W.2d 663 (Mich. 1982); *Certain-Teed Prods. Corp. v. Paris Township*, 351 Mich. 434, 88 N.W.2d 705 (1958); *City of North Muskegon v. Miller*, 249 Mich. 52, 227 N.W. 743 (1929).

activities relating to oil and gas operations. Mere references to oil and gas "drilling" are insufficient. Instead, a broad phrase should be used such as "drilling, reworking, deepening, plugging back, repressuring, or otherwise conducting operations on property for the exploration or production of oil or gas." The standard approach is to prohibit all such activity unless a permit is obtained and all operations are conducted pursuant to the terms of the ordinance. A typical provision might read:

OPERATIONS RESTRICTED. The drilling, reworking, deepening, plugging back, repressuring, or other operations for the exploration or production of oil, gas, or similar substances, within the City of Gusher, Kansas, is unlawful, except as provided by the subsequent provisions of this ordinance.

This provision is normally followed by a permit section which sets out the application fees, permit procedure, and special permit requirements. The permit application is usually accompanied by information indicating the proposed location of well sites and proof of the developer's legal right to enter and conduct operations on the well site acreage.

Given the lack of adequate statutory pooling provisions in Kansas,⁹⁴ and the existence of case law requiring a lessee to excessively develop lands in order to comply with the implied covenants to develop and protect against drainage,⁹⁵ it is imperative that cities consider spacing acreage available for development into drilling units. Such an ordinance should provide for the automatic pooling of separately owned acreage located within each drilling unit. The easiest approach is to identify areas within the city's jurisdiction which can be developed and then designate a logical spacing pattern for all lands within that area. When considering a spacing pattern, applicable orders of the state oil and gas conservation authority must be examined.⁹⁶ The city should coordinate its efforts with the conservation authority and obtain advice from its personnel concerning the proposed spacing program. For example, many counties and areas within a state may be subject to special

94. Kansas, unlike the vast majority of other oil and gas producing states, does not have statutory provisions requiring the compulsory pooling of separately-owned interests within a designated drilling, spacing, or proration unit. See OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1983).

95. See *Rush v. King Oil Co.*, 220 Kan. 616, 556 P.2d 431 (1976); *Renner v. Monsanto Chem. Co.*, 187 Kan. 158, 354 P.2d 326 (1960).

96. In Kansas, the agency controlling oil and gas conservation matters is the Kansas Corporation Commission. The Oklahoma Corporation Commission administers the oil and gas conservation program in Oklahoma.

well set-back requirements established by the state conservation authority. If the city's proposed spacing plan does not coincide with the state's rule, the city should request a hearing before the state conservation authority to present its program and attempt to obtain a special order adopting the city's spacing program. The overriding consideration of the conservation authority will be to prevent waste and protect correlative rights.⁹⁷ If the city goes to the effort of spacing an area, the developer will not normally be required to go before the state conservation authority for a special exception for each well drilled within the city.

Once the city has divided the target area into designated drilling units, it must limit development to one well per drilling unit.⁹⁸ All land and interest owners within a drilling unit should be permitted to share in production from the unit well in the proportion their respective interest bears to all interests encompassed by the drilling unit. Within cities this allocation is usually calculated on a surface acreage, square footage basis. The process can be more fully appreciated by considering the following sample clauses:

DRILLING UNITS. The city shall designate drilling units which shall consist of the maximum area which the city, in its discretion, determines can be orderly developed by a single well so as not to cause waste or interfere with correlative rights or public health, safety, and welfare. All wells located within the city's jurisdiction shall be located on a designated drilling unit. There shall be no more than one well in a single drilling unit producing from the same formation.

POOLING. All separately owned tracts of land, or interests in such land, embraced within a city-designated drilling unit, are hereby pooled for the purpose of oil and gas devel-

97. For statutory definitions of "waste" in Kansas *see* KAN. STAT. ANN. § 55-602 (1983) (oil); § 55-702 (gas). In Oklahoma *see* OKLA. STAT. tit. 52, § 86.2 (1981) (oil); *id.* § 86.3 (gas). For a detailed discussion of the waste concept, *see Coordinated Reservoir Development I, supra* note 70, at 56-62.

98. When spacing an area the city must consider, in addition to health, safety, and welfare matters, the effect its development program will have on the conservation of oil and gas and the prevention of waste. Generally, a drill site spacing unit will encompass acreage representing the maximum area which can be physically and economically drained by a single well. Consultation with the state oil and gas conservation authority will be most helpful in defining appropriate drilling unit size for conservation purposes. The city will then have to determine whether the suggested drilling unit size is compatible with the city's health, safety, and welfare considerations. The city will also need to consider the effect drilling unit size will have on development.

opment. All operations for oil or gas within the drilling unit shall be deemed for all purposes to have been conducted upon each tract within the drilling unit. For the purposes of determining the share of production due persons owning interests in the pooled oil or gas, such production shall be allocated to the respective tracts within the unit in the proportion the surface square footage included within each tract bears to the total surface square footage included in the drilling unit. The portion of production allocated to the owner of each tract or interest included in a drilling unit pursuant to this section, when produced, shall be considered to have been produced from the separately owned tract by a well drilled on such tract.

If the interest of any owner of an unleased mineral interest is pooled by virtue of this section, seven-eighths of such interest shall be considered a working interest and one-eighth shall be considered a royalty interest, and such owner shall, in any event, be paid a cost free one-eighth of all production from the drilling unit creditable to their proportionate interest. Any unleased mineral interest owner may pay his proportionate share of costs, in advance, for the development and operation of a well on the drilling unit. Such costs shall be limited to the actual expenditures for such purpose and, in any event, shall not exceed what are reasonable costs. However, such costs shall include a reasonable charge for supervision. If any owner elects not to pay his proportionate share of costs in advance, the owners paying costs in advance shall be entitled to a pro rata reimbursement, solely out of production attributable to the unleased mineral interest owner's working interest from the well, for their costs in drilling and completing the well. However, in addition to the costs provided for by this section, the owners paying costs in advance shall be entitled to and may charge and collect, as a cost for the risk involved in drilling such well, three hundred percent (300%) of the nonconsenting working interest owner's pro rata share of the cost of drilling and completing the well.

The need for workable spacing and pooling provisions at the municipal level is critical since the area included within a single drill site spacing unit will usually encompass many subdivided, separately-owned, tracts of land. This is one instance when artfully drawn ordinances can make it possible for a developer to conduct operations within the city when it would otherwise be impossible or impractical to

informally coordinate development among all interest owners in the affected area. By establishing workable spacing and pooling provisions the city can save the developer time and eliminate a number of other potential problems while actually promoting public health, safety, and welfare through the orderly development of natural resources beneath the city.

The sample drilling unit clause permits the city to space acreage within the city for development and designate the basic acreage unit which will be used for determining rights in wells located on each drilling unit. The pooling clause recognizes that in most cases the drilling unit will be made up of many diversely owned tracts of land. To avoid the economic and physical waste often created by competitive drilling on separately owned properties, and to minimize the adverse and undesirable effects of excessive and unnecessary development within the city, the interests of property owners within a drilling unit are "pooled." The legal effect of pooling is that each owner will share in the benefits of the permitted well in proportion to their respective interests in the drilling unit. Such an approach permits orderly development while fairly dealing with the interests of the parties affected. Although Oklahoma has had a progressive compulsory pooling statute for many years,⁹⁹ Kansas has failed to create a workable system to effect pooling of interests for drill site development.¹⁰⁰ However, during its 1983 session, the Kansas Legislature passed a law expressly giving cities the power to divide the city into drilling units and force pool the interests encompassed by a drilling unit.¹⁰¹ The statute, however, appears to be unnecessary since cities in Kansas, by judicial decision¹⁰²

99. OKLA. STAT. tit. 52, § 87.1(e) (Supp. 1983).

100. See *supra* note 92.

101. House Bill No. 2418 provides:

Section 1. When used in this act:

(a) "Minerals" mean oil and gas; and

(b) "city" means any city located within the state of Kansas.

Sec. 2. Whenever the governing body of any city authorizes the development of minerals within the corporate limits of the city, it may adopt an ordinance dividing the city into drilling units for the production of those minerals. The ordinance shall require any persons having the right to produce minerals in a drilling unit to pool their rights for the production of such minerals.

Sec. 3. Nothing in this act shall be construed as prohibiting the governing body of any city from adopting any other ordinance which does not conflict with any state law or rule or regulation providing for the protection of the public health, safety or welfare in relation to the production of minerals within the corporate limits of the city.

Sec. 4. The provisions of this act shall not apply to any drilling unit in which there is a producing well or wells.

1983 Kan. Sess. Laws 447.

102. *Bohrer v. Ramsey Petroleum Co.*, 141 Kan. 781, 44 P.2d 239 (1935).

and constitutional grant,¹⁰³ already possessed such powers.

In some cases the city spacing ordinance may arguably conflict with spacing requirements established by the state oil and gas conservation authority. For example, suppose the city spacing ordinance permits one well per acre of land, and the state spacing regulations permits only one well per ten acre tract of land. The correlative rights of mineral owners outside the city may be adversely affected if wells within the city are producing from the same formation as wells located outside the city. In such a case it would appear that the city's spacing program permits developers within the city to produce an "undue proportion of the obtainable oil or gas, or cause[s] undue drainage between developed leases."¹⁰⁴ The city's spacing regulation may also cause undue waste of oil and gas or the economic resources required to capture such substances.¹⁰⁵ The city must therefore act in a prudent and fair manner to ensure its spacing program does not conflict with the state's efforts to conserve oil and gas resources and properly allocate correlative rights in these resources.¹⁰⁶

103. KAN. CONST. art. XII, § 5(b).

104. KAN. ADMIN. REGS. § 82-3-101(a)(15) (1983). *See also supra* note 70.

105. *See supra* note 97.

106. In Kansas, the Kansas Corporation Commission could possibly attack the city's program as a violation of uniformly applicable state law. Kansas Statutes Annotated, § 55-211a (1976), authorizes cities to enter into oil and gas leases covering municipal lands, and contains the following condition: "Provided, That any such lease shall contain provisions for spacing of producing wells in accordance with rules and regulations of the state corporation commission as provided by law." *Id.* However, the purported grant of spacing and pooling authority contained in House Bill No. 2418, 1983 Kan. Sess. Laws 447, seems to give the city unrestricted authority to establish drilling units. The only limitation is, in the section concerning "other" city ordinances, to protect the public health, safety, or welfare in relation to oil and gas operations, which are permissible so long as they do not conflict with any state law, rule, or regulation.

Oklahoma law provides:

Nothing in this Act [the oil and gas conservation act] is intended to limit or restrict the rights of cities and towns governmental corporate powers to prevent oil or gas drilling therein nor under its police powers to provide its own rules and regulations with reference to well-spacing units or drilling or production which they may have at this time under the general laws of the State of Oklahoma.

OKLA. STAT. tit. 52, § 137 (1981). Regardless of these seemingly broad grants of authority to cities, the city governing body should always coordinate their efforts on spacing matters with the appropriate conservation authority. It is doubtful, under any form of city home rule, that a state supreme court would allow a city to engage in a course of action contrary to the state's goal of conserving oil and gas and protecting correlative rights.

Therefore, the city should attempt to obtain orders from the state conservation authorities adopting the city's spacing program for the affected area within the city. This will also eliminate the developer's doubts concerning the city's spacing program and should result in a program which deals fairly with the rights of mineral owners contiguous to the city but outside its jurisdictional boundaries. The city will find their state conservation authorities to be very helpful in providing information and guidance required to establish a workable city well spacing program. The state oil and gas conservation agency should be consulted early in the city's planning process.

In an effort to maximize conservation of oil and gas resources and to prevent unnecessary development, the city may consider consolidating drilling units which are completed in, or believed to lie over, a common reservoir of oil or gas. Unit operation, or unitization, is the operation of a reservoir as a single unit. The reservoir is developed as a unit to maximize its productive capacity and minimize physical or economic waste. Surface boundaries are used only to calculate each party's share in the total production from the reservoir. The rule of capture is nullified and each owner is compensated for the recoverable oil and gas beneath his property. Unitization is the most efficient method of recovering oil and gas.¹⁰⁷

Instead of developing the reservoir on the basis of competitive drilling, all mineral owners overlying the delineated unit are permitted to share in production from the reservoir; they are not required to have a well on their property. Unit operation thus permits the developer to produce the reservoir by drilling only such wells as are necessary to recover the oil or gas, in the most efficient manner possible, without regard to any particular spacing pattern.¹⁰⁸ The city is benefited through unit operation because fewer wells are required to recover the oil or gas, and in most cases unit operation will result in greater ultimate recovery of the resource. Although unit operation at the state level is usually hindered by restrictive state statutes requiring a substantial percentage of all affected interest owners to voluntarily agree,¹⁰⁹ the city should be able, by ordinance, to compel unitization if it can demonstrate a reasonable relationship between the ordinance and the need to protect public health, safety, and welfare.

Once the city has established the ground rules for development, its next task will be to address specific operation requirements such as fencing well sites, drilling times, abandoning wells, and site reclamation. To ensure that the operator is able to perform its obligations under applicable ordinances, a performance bond should be obtained

107. See generally, *Coordinated Reservoir Development I*, *supra* note 70, at 76-77. See also, Pierce, *Coordinated Reservoir Development—An Alternative to the Rule of Capture for the Ownership and Development of Oil and Gas: Part II*, 4 J. ENERGY L. & POL'Y 129, 160-62 (1983).

108. Although spacing was developed as a "conservation" measure to restrict some of the adverse impacts of the rule of capture, spacing is not the most efficient means of developing reservoirs. See *Coordinated Reservoir Development I*, *supra* note 70, at 74-76.

109. OFFICE OF TECHNOLOGY ASSESSMENT, ENHANCED OIL RECOVERY POTENTIAL IN THE UNITED STATES 87 (1978). See generally Smith, *The Kansas Unitization Statute: Part I*, 16 U. KAN. L. REV. 567 (1968); Smith, *The Kansas Unitization Statute: Part II*, 17 U. KAN. L. REV. 133 (1968).

to secure the interests of the city and its inhabitants. Similarly, the ordinance should provide for liability insurance.

The city will also want to address how oil and gas will be treated under its zoning laws. The preferable approach would be to allow oil and gas operations in all zones of the city when the operator has obtained the required permits.¹¹⁰ The public's health, safety, and welfare could be evaluated and considered as part of the oil and gas well licensing process. This would eliminate the need to obtain zoning changes or special use permits for each well. Likewise, the specific oil and gas permit should eliminate the need for any sort of building permit. Existing zoning ordinances should be examined to determine whether they require amendment to accommodate this type of a one-step licensing process.¹¹¹ In the oil and gas permit the city should retain the authority to make requirements in addition to those contained in the oil and gas ordinance whenever the governing body deems it necessary to protect persons or property within the city's jurisdiction. This will give the city flexibility to deal with extraordinary situations that are not adequately addressed by specific provisions of the ordinance.

V. CONCLUSION

Careful planning, consultation, and drafting by the city can result in an oil and gas development program which is workable for the developer, fair to the mineral interest owner, and acceptable to the governing body and inhabitants of the city. Oil and gas activities within the city present a number of unique legal and technical problems which require workable, practical solutions. Although such problems will inevitably arise as development progresses, the city should not forego development of its resources merely because the process may require special regulatory attention. Many problems can be anticipated and avoided through careful drafting of the basic oil and gas development ordinance. Cities today are generally vested with broad powers to de-

110. The governing body may elect to specifically address zoning in its oil and gas ordinance as follows:

ZONING. Drilling for oil or gas shall be a permissible activity in all zones of the city when the requirements of this article and of a board approved permit can be met.

111. If the governing body desires to permit oil and gas activities in all zones within a city, subject to the special requirements of a general ordinance regulating oil and gas operations, the city should treat such a provision as a general amendment to the city's zoning law. In Kansas, for such a provision to be valid, the notice, hearing, and recommendation requirements of KAN. STAT. ANN. § 12-708 (1982) should be followed to effect a general revision of the city's zoning ordinance.

termine and pursue their own destiny. It is hoped that this Article will aid cities in exercising such powers to expand their economic resources and, consequently, the natural resources available to the nation.