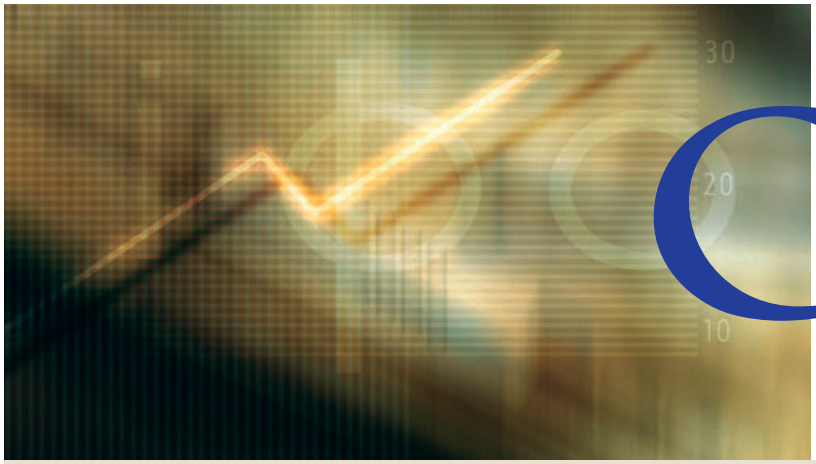

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Drilling Ordinances Impact Exploration in the Barnett Shale

By Josh Imhoff

On December 16, 2008, the Fort Worth City Council unanimously approved significant revisions to its drilling ordinance for oil and gas wells. Meanwhile, the City of Dallas's drilling ordinance is undergoing perhaps its first real road test as exploration in the Barnett Shale ebbs across the Dallas County line.

The Barnett Shale is one of the largest unconventional natural gas "plays" in North America and, until recently, the high price of natural gas drove rapid exploration within the area, which generally underlies Tarrant County and areas to the north, west and south. Fort Worth alone has issued over 1,000 well permits within its city limits and, following a year-long review, revised its drilling ordinance effective January 1 for the second time since 2006. Notable changes include:

- Increasing minimum setbacks for wells near protected uses, public buildings, and places of assembly from 200 feet to 300 feet; except that a waiver from property owners or the Fort Worth City Council is required for drilling closer than 600 feet to residences, schools, churches, hospitals, and parks;
- Expanding the definition of "residence" to include hotels, motels, and similar uses, the characterization of which was previously unclear;
- Amending the measurement for setbacks from schools to run between the well-bore and the school property boundary, instead of the normal measure for setbacks, which runs between the well-bore and the building;
- Revising environmental provisions to reduce emissions from wells and trucks;
- Requiring approval of noise management plans prior to drilling and subjecting lift compressors to noise standards similar to wells;
- Imposing notification and permitting requirements for pipelines affecting residential areas or traversing under city streets; and
- Implementing stricter guidelines for surface restoration and completion of landscaping.

The Fort Worth City Council postponed decisions on two issues sought by some residents, however. First, with the emergence of horizontal drilling technology, an increasing number of well sites include multiple wells. After considering whether to require that the setback from such sites be measured from the property line rather the well bore (as is required for single-well sites), the Council deferred out of concern that such a requirement could result in a greater overall number of well sites. In addition, the Council delayed a decision whether to require separate permits for each well at a multiple well site based on similar concerns.

In terms of profitably producing areas, the precise eastern boundary of the Barnett Shale is unclear, although some speculate that it lies at approximately the location of Stemmons Freeway. In February 2008, the City of Dallas leased a substantial amount of city-owned acreage for gas exploration and development, but by March 2008, only three Specific Use Permits had been approved permitting gas wells in Dallas.

Although the fall in natural gas prices has hindered private development in Dallas, the City of Dallas has recently been confronted with certain issues that have emerged through its gas well permitting process. For example, the Dallas drilling ordinance provides for a 300-foot setback from the well bore to a protected use such as a residence, religious institution, public building, hospital, school, or public park. The language of the ordinance states that "[s]pacing is measured from the center of the well bore . . . to the closest point of the *use, structure,* or *feature* creating the space requirement." (emphasis added) Where property has been zoned for a protected use but no structure has been erected, a question arises whether the setback should be measured to the boundary of the zoned property, which would place the well-bore a greater distance away from the property than if it had been improved with a residence.

These and other issues will be examined over the next several months as Dallas officials and staff grapple with the application of its drilling ordinance to increasing development in Dallas.

How The Texas Foreclosure Process Works

By Tesa Hinkley Yepez

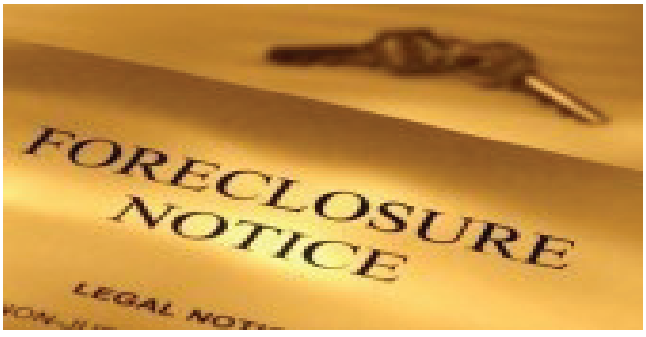
With the recent economic turmoil, many people and businesses are now confronted for the first time with some facet of the foreclosure process with little to no knowledge of how it works. Although foreclosure is available through the court, the vast majority of foreclosures in Texas are conducted by private, or non-judicial, sale. Once commenced, a non-judicial foreclosure may be complete in less than sixty days for residential property, and in less than thirty days for commercial property.

A typical instrument creating a lien on real property – usually called a "deed of trust" – contains a "power of sale" clause, which authorizes a designated trustee to sell the property to satisfy the underlying debt in the event of a default. Though most borrower defaults generally result from non-payment, there are also non-monetary reasons for default, such as failure to maintain the property or pay ad valorem taxes. Most notes and deeds of trust securing the notes allow the lender, upon default, to declare the entire principal balance immediately due and payable.

Foreclosure sales are conducted by auction on the first Tuesday of every month (including holidays), between 10:00 a.m. and 4:00 p.m. The sale must take place at the county courthouse in the county where the property is located, in the specific area designated by the commissioners court. To begin foreclosure, the lender may first have to send the borrower a notice of default – often referred to as a "demand letter" – explaining the nature of the default and giving the borrower some agreed-upon time period in which to cure. The underlying loan documents contain the lender's obligation, if any, to send a demand letter and provide a cure period. Although demand can be contractually waived for commercial loans, lenders often send a formal demand to the borrower unless there is a good reason not to do so. If the property is the borrower's residence, however, the lender is statutorily obligated to send demand and allow at least twenty days to cure. Any attempted waiver of this obligation is ineffective.

Once the applicable demand period (if any) has expired, the lender must (i) post a notice of trustee's sale at the courthouse door in the county where the land is located no later than twenty-one days prior to the date of sale; (ii) file the notice with the county clerk; and (iii) send the notice to the borrower and any other obligors on the debt (*i.e.*, guarantors or co-signers). The notice must state the earliest time the sale will begin, and the sale must be conducted at that stated time or within three hours following it. The lender may, in accordance with the loan documents, appoint a substitute trustee to conduct the sale (even if not required, the lender may also file the appointment with the county clerk). The posted notice of sale must provide the name and address of the trustee, or the substitute trustee if one has been appointed at the time of posting.

A common challenge for lenders is providing the requisite notice to all necessary parties, whether by proper form, content, or time. The loan documents typically identify all parties requiring notice and their proper addresses (which may be updated by any notices of change in address properly filed with the lender or mortgage servicer). All notices to the borrower and any obligors must be sent in writing by certified mail, and the clock begins to run when the notice is deposited in the mail, unless the loan documents declare otherwise. The demand period includes the day on which the notice is sent, but may not include the day that the notice of sale is later posted. Similarly,



computation of the 21-day time period between posting and the date of sale may include the date of posting but must exclude the date of sale.

On the day of foreclosure, the trustee auctions the property to the highest bidder and delivers title to the property by a "Trustee's Deed." The lender is also eligible to bid and may receive a credit for its bid for any amount less than or equal to the outstanding indebtedness. If the final sale price is less than the unpaid debt, the lender may file suit against the borrower and any obligor for a deficiency judgment for the remaining balance. This is where many issues may arise, which will be the subject of a later article.

Texas, unlike some states, does not provide a statutory period following foreclosure in which the borrower may pay the outstanding debt and "redeem" the property. Once the foreclosure sale is completed, it is final. At this point, the borrower's remaining right is to either challenge any subsequent deficiency action or file suit contesting validity of the sale. Foreclosures, though relatively simple, are governed by specific statutory provisions and must also comply with the specific provisions in the deed of trust, so careful attention must be paid at each step along the way.

When it Comes to Names and the UCC, You Need to Sweat the Small Stuff

By Don Hanmer

A lender/creditor ("Secured Party") may want to obtain a security interest in personal property of a debtor/borrower ("Debtor") to secure a variety of obligations including a loan, rent payments under a real or personal property lease, or the purchase price of goods, inventory, or equipment bought on an open account. In each case, in order to maintain the priority of its security interest and to protect against the right of a debtor in possession or a trustee in bankruptcy to set aside a security interest, it is necessary to file a UCC-1 financing statement in the appropriate records.

The UCC filing system is a debtor name search system which relies on filings having the correct name of the Debtor so they can be searched. The Debtor's name on the UCC-1 financing statement must be accurate and getting it right can be harder than it would seem.

Section 9.503(a) of the UCC contains the test for stating the Debtor's name correctly and it must be strictly complied with. If the name is not in strict compliance with § 9.503(a), it may still be sufficient if a search of the correct Debtor name using standard search logic employed in the appropriate jurisdiction would disclose the financing statement. However, the search logic employed in many jurisdictions is often very literal and it is best to make the extra effort to ensure that the Debtor's name is correct.

Texas has amended the name requirement and its UCC now says the financing statement should provide the name of the Debtor indicated on the Debtor's formation documents that are filed as a public record.

Courts in various jurisdictions have invalidated financing statements based on technical discrepancies in the Debtor's name because the search logic in the relevant jurisdiction did not pick up a financing statement containing what would seem to be innocuous errors, such as including an extra space in the name, the omission of "Inc." at the end of the name, errors in punctuation, or adding extraneous information in the blank on the form for the name. For example, stating a name as ABC, Inc., a Texas corporation, in the name line on the form could invalidate the filing because "a Texas corporation," is not part of the name. Also, it would be inappropriate to list the name as ABC, Inc. d/b/a ABC because "d/b/a ABC" is not a part of the official name.

With respect to organizations that are registered in a given state, the UCC in most jurisdictions says that the name is sufficient only if the financing statement provides the name indicated on the public record in the Debtor's jurisdiction of organization. Therefore, a Secured Party should check the public records in the state of the Debtor's organization (in Texas it would be necessary to check with the Secretary of State) and make sure that the name listed in the financing statement conforms exactly to that name including commas, periods, spaces, capitalization, etc. However, a Secured Party should not rely on a business entity database maintained by the state, which is not an official record.

Texas has amended the name requirement and its UCC now says the financing statement should provide the name of the Debtor indicated on the Debtor's formation documents that are filed as a public record. Of course, this amendment in Texas is not uniform for all states. To be safe it is recommended that a Secured Party file both in the name shown in the official records of the state in which the Debtor is organized and in the name reflected on the Debtor's formation documents filed as a public record if they differ in even the slightest respect.

With respect to individual Debtors, the UCC says that the financing statement should provide the individual name. The provision in effect in most states does not designate a document that can be relied upon as giving the correct

name. Again it is important not to include any additional information in the space for the Debtor's name, such as "doing business as" or "sole proprietor." Descriptive information such as titles should also be omitted, including "Jr.," unless it is an official part of the Debtor's name. There have been some troubling cases involving the misspelling of names, including spelling the name "Roger" when it should be "Rodger." Also there can be problems with middle names and middle initials. Because of the lack of clarity under the UCC as it exists in most states, secured parties often file using variations of the Debtor's name to make sure that they have one that is correct. Also Secured Parties often ask for multiple sources of identification to check for variations in the name.

Texas has clarified this situation by adopting a non-uniform provision in § 9.503(a)(4) that says a financing statement is sufficient if it provides the Debtor's name shown on the individual's driver's license or identification certificate issued by the individual's state of residence. So, it is essential in Texas that the lender get a copy of the Debtor's driver's license or official identification and use that name verbatim in the UCC-1.

There are further complications involved with estates, trusts, and special entities. *See* Current Revised Article 9 Search and Filing Issues by Susan E. Collins and Paul Holdenfield in Vol. 42, No. 975 of the *Texas Journal of Business Law* for a more detailed discussion of the problems in naming estates, trusts, and other entities.

In conclusion, it is possible to get a properly executed security agreement, file a UCC-1 financing statement in the proper place, and find out that the Secured Party's interest is primed by another security interest, or judgment creditor, or subject to challenge by a debtor in possession or a trustee in bankruptcy because of what would appear to most people to be an insignificant discrepancy in the name of the Debtor on the UCC-1.

Over 65 and Thinking of Downsizing?

By Mike Peterson

Did you know that state law protects your over-65 school district tax ceiling if you move? You are probably aware that once you reach age 65, your school taxes may not be increased, despite increases in value or tax rates, unless you make improvements to your property that increase its value. As you get older that "ceiling" may become more and more valuable as values and tax rates increase. Many elderly feel that the tax savings from the "ceiling" is a strong incentive to stay in their homes. However, Section 11.26(g) of the Texas Property Code provides that your "ceiling" is transferable to a new home, based upon the percentage of tax that was excluded in your old home due to the "ceiling." The Texas Comptroller gives an example of how this "ceiling transfer" works: "The ceiling on the new home would be calculated to give you the same percentage of tax paid as the ceiling on the original home. For example, if you currently have a tax ceiling of $100, but would pay $400 without the ceiling, the percentage of tax paid is 25 percent. If you move to another home and the taxes on the new homestead would normally be $1,000 in the first year, the new tax ceiling would be $250, or 25 percent of $1,000." That would also be true if you moved to a smaller, less expensive home. Under the same facts as above, if the taxes on the new home would normally have been $300 in the first year, then you would only pay 25% of that or $75 and that would become your new tax "ceiling." Appraisal Districts in Texas are required to provide you with a transfer certificate showing the percentage you pay. You should order that certificate when you move and provide it to the new appraisal district when you apply for your homestead exemption in that district.

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