

# Recent Changes in Real Estate Law in Kansas

## 2010 Kansas Legislation and Recent Case Law



Prepared by the Real Estate Group of

ADAMS  JONES  
LAW FIRM, P.A.

June 2010

# Adams Jones Attorneys



Philip Bowman



Mert Buckley



Michael Cannady



Kenneth Gale



Patrick Hughes



Roger Hughey



Dixie Madden



Sabrina Standifer



Bradley Stout



Monte Vines

## Recognitions

The current Chambers USA directory again listed Adams Jones in the first tier of leading firms for real estate in Kansas. Those attorneys selected from the firm in the area of real estate include **Mert Buckley**, **Roger Hughey** and **Sabrina Standifer**. The rankings were compiled from interviews with clients and attorneys by a team of full-time researchers. **Bradley Stout** and **Monte Vines** were selected for general commercial litigation in Kansas.



**Philip Bowman**, **Mert Buckley**, **Kenneth Gale**, **Roger Hughey** and **Monte Vines** were selected for the 2010 Edition of The Best Lawyers in America in the area of Real Estate; **Bradley Stout** was selected for Eminent Domain and Condemnation; **Patrick Hughes** was selected for Commercial Litigation and Land Use & Zoning; and **Dixie Madden** for Corporate Law and Healthcare Law. The Best Lawyers lists, representing 80 specialties in all 50 states and Washington, DC, are compiled through an exhaustive peer-review survey in which thousands of the top lawyers in the U.S. confidentially evaluate their professional peers.

Selection to the most recent Missouri & Kansas Super Lawyers included **Mert Buckley**, **Roger Hughey** and **Kenneth Gale** in the area of Real Estate; **Bradley Stout** in the area of Eminent Domain; **Monte Vines** in the area of Business Litigation; and **Philip Bowman** in Alternative Dispute Resolution. **Sabrina Standifer** was selected for the Missouri & Kansas Rising Stars in the area of Real Estate.

# Overview

This summary of recent changes in Kansas Real Estate Law was prepared by the Real Estate Group at Adams Jones. Our real estate attorneys continually monitor Kansas case decisions and legislation so we remain current on developments in real estate law in Kansas. We feel this up-to-date knowledge prepares us to address client needs more quickly and efficiently because our “research” is often already done when a question arises.

Annually, **Philip Bowman**, **Mert Buckley**, and **Sabrina Standifer** co-author a chapter in the Kansas Annual Survey for the Kansas Bar Association consisting of commentary on recent real estate cases and statutes. Attorneys in the real estate group regularly present real estate seminars for the Wichita and Kansas Bar Associations.

*This publication is intended for information purposes only and should not be construed as legal advice for a particular matter. Portions of this material are derivative works of copyrighted material reprinted with permission of the Kansas Bar Association.*

## Table of Contents (Legislation & Regulations)

<b>Abandonment of Water Rights for Nonuse; Exception</b> /2010 House Sub. for Sen. Bill 316-Due and sufficient cause to avoid abandonment of water right. _____	1
<b>Appraisals — Home Valuation Code of Conduct</b> -Rules governing appraisals of single-family residence loans sold to Freddie Mac effective May 1, 2009. _____	1
<b>Community Improvement District (CID) — City of Wichita Policy</b> -City adopts criteria to qualify CID applicants. _____	1
<b>Fraudulent Liens — Fines and Other Remedies</b> /2010 Sen. Bill 537-Courts can now impose fines and enjoin persons from filing fraudulent liens. _____	3
<b>Historic Tax Credits</b> /2010 Sen. Bill 430-Cap removed on historic tax credits. _____	3
<b>Home Inspectors</b> /K.A.R. 130-1-1, 130-1-4, 130-1-5-Regulations adopted for Home Inspectors. _____	3
<b>Homebuyer Tax Credit</b> -The Worker, Homeownership, and Business Assistance Act of 2009 extends the first-time homebuyer tax credit. _____	3
<b>Kansas Indoor Clean Air Act — Smoking Ban</b> /2010 House Bill 2221-New smoking ban imposes obligations on property owners, managers and employers. _____	4
<b>Lead-Safe Work Practices Regulations</b> -New licensing and training rules for persons working on housing and child-occupied facilities built before 1978. Notice requirements to owners and occupants. _____	5
<b>Mortgage Debt Forgiveness</b> -The Economic Stabilization Act allows for up to \$2 million in residential mortgage debt forgiveness to be excluded from gross income. _____	6
<b>Range Burning</b> /2010 Sen. Concurrent Resolution 1623-Legislature asks Congress to exclude range burning from EPA air quality standards. _____	6
<b>Uniform Common Interest Owners’ Bill of Rights Act</b> /2010 House Bill 2472-Requirements for owners’ associations; prohibition against requiring residential sprinklers. _____	6

## (Cases and Attorney General Opinions)

<b>Annexation — Consent of County</b> -County lacks standing to challenge city’s annexation of adjoining tracts. _____	7
<b>Appraisals — Valuing Separate Parcels as One Tract</b> -Appraiser must refrain from valuing whole property by adding the values of separate tracts together. _____	7
<b>Bankruptcy — Homestead — Mortgage Payments</b> -Court denied debtor’s transfer of \$240,000 to pay down homestead mortgage prior to filing bankruptcy. _____	7
<b>Bankruptcy — Homestead Exemption</b> -Married debtor living apart from family home could still claim exemption for his one-half ownership in the homestead. _____	8
<b>Bankruptcy — Joint Tenancy Deed — Bona Fide Purchaser — Inquiry Notice</b> -Trustee in bankruptcy could claim debtor’s one-third interest in property even though the interest was titled in debtor as co-tenant for estate planning purposes. _____	9
<b>Bankruptcy — Manufactured Homes — Lien</b> -Certificate of title to manufactured home wasn’t eliminated due to failure to record Application for Elimination of Title with County Register of Deeds; mortgage lender unperfected. _____	9
<b>Broker — Commission — “Ready, Willing and Able Buyer”</b> - A Broker did not earn a commission merely by showing a property to a prospective purchaser; it also had to be the procuring cause of a sale. Seller may not avoid liability for a commission by refusing to accept a purchase offer if it does so in breach of a duty of good faith and fair dealing. _____	10

<b>Certificate of Title — Negligent Search</b> -Abstract company liable for negligence for failure to list mineral owner of property in certificate of title.	11
<b>Condemnation — Lost Profits — Fair Market Value</b> -A claim for loss of profits on a real estate development taken by condemnation must be linked to fair market value.	12
<b>Contracts — Fraud Claims</b> -Exculpatory provision in contract does not protect seller against fraud claims based upon written representations.	12
<b>Deeds — Reformation — Mutual Mistake — Merger</b> -Deed reformed when legal description contained additional land by mistake. Doctrine of merger rejected.	13
<b>Deeds — Reformation — Statute of Limitations</b> -"Rule of accrual at execution" limited to deeds and not extended to executory contracts.	14
<b>Easements — Implied — Necessary Use</b> -An implied easement may include access for a use not being enjoyed at time of the easement's creation, and may include an easement for utilities if necessary to the enjoyment of property.	14
<b>Easement — Mandatory Injunction</b> -Landowner obtained mandatory injunction requiring company to remove pipeline installed without an easement.	15
<b>Equitable Mortgage — Forgery</b> -Lender granted equitable mortgage after wife's signature forged on mortgage.	15
<b>Eminent Domain — De Novo Review</b> -De novo review of the record without new evidence is the standard for district court appeal of administrative decision of relocation benefits under Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act.	16
<b>Eminent Domain — Inverse Condemnation</b> -Owner entitled to compensation for inverse condemnation when the property was incidentally damaged in the course of an improvement project. City also liable for attorneys' fees and expenses where the project was funded in part by the federal government.	16
<b>Home Inspections — Mediation</b> -Liability release and limited liability provisions in home inspection agreement valid. Claims against seller and seller's realtor dismissed when buyer did not pursue mediation before filing suit.	17
<b>Homestead — Abandonment — Intent to Return</b> -Homestead not abandoned when owners rent and occupy an apartment in another city if they still show an "intent to return" to the homestead.	17
<b>Judgment Liens</b> -Child support judgments don't become dormant but cease to be a lien on real estate on the date the judgment would otherwise become dormant.	18
<b>Judgment Liens — Retroactive Legislation</b> -Retroactive legislation invalidating judgment lien against cemetery property held unconstitutional.	18
<b>Land Use -- Historic Preservation Act</b> -Opponents to project covered by Historic Preservation Act had to show more than just proposed alternatives were feasible and prudent.	18
<b>Mechanic's Liens — Identity of Contractor</b> -Mechanic's lien invalid for naming wrong general contractor.	19
<b>Mineral Interests</b> -Saltwater disposal lease was considered part of surface estate and wasn't retained by owner who sold property but retained mineral interests.	19
<b>Mortgage Foreclosure — Assignment — Necessary Parties</b> -A mortgagee acting only as a nominee is not a contingently-necessary party to an action to foreclose a prior mortgage.	19
<b>Mortgage Foreclosure — Disposal of Personal Property</b> -Proper notice required to dispose of personal property removed from foreclosed residence.	20
<b>Mortgage Foreclosure — Standing of Purchaser — Title Defect</b> -A purchaser at a sheriff's sale is not entitled to damages arising from faulty title if the purchaser failed to examine the title before the sale.	20
<b>Mortgages — Fixture Filing</b> -Register of Deeds cannot refuse to file a mortgage as a fixture filing for failure to attach the mortgage to a UCC-1 Financing Statement and a UCC Addendum.	21
<b>Mortgages — Legal Description</b> -Mortgage recorded with wrong lot number did not impart notice, but other documents of record provided ample notice of the existence of the mortgage to put a purchaser on notice of the mortgage and thus, was not avoidable by bankruptcy trustee.	21
<b>Mortgages — Prepayment Charges</b> -The reasonableness of prepayment charges is considered under circumstances at the time loan is made, not at time of enforcement.	22
<b>Premises Liability</b> -Standard of care for parking lot maintenance is reasonable care under all circumstances; slight-defect rule rejected for parking lots.	22
<b>Prescriptive Easement</b> -Pipeline granted prescriptive easement after recording 1917 easement in 2008.	23
<b>Property Value — Annexation of Water District</b> -Compensation for taking of territory in water district may include "going concern" value.	23
<b>Railroad Right-of-Way — Abandonment — Reversion</b> -Abandonment of railroad right-of-way does not occur and there is no reversion unless the Surface Transportation Board has entered an abandonment order.	24
<b>Road — Vacating</b> -County may vacate a county road regardless of objection from property owner who does not adjoin the road. Only adjoining owners eligible for damages.	24
<b>Tax Increment Financing — Four Questions Answered</b> -The Attorney General responded to four questions regarding the Tax Increment Finance Act.	24
<b>Taxation — Exemption</b> -Tax exemption granted for housing of non-profit's clients.	25
<b>Water Rights — Burden of Proof for Abandonment of Water Right</b> -Water right terminated for nonuse without sufficient reason for nonuse.	25
<b>Zoning</b> -Prohibition of commercial wind farms throughout the county determined reasonable.	26

# LEGISLATION & REGULATIONS

## Abandonment of Water Rights for Nonuse; Exception

2010 House Sub. for Sen. Bill 316. Permits those holding groundwater rights meeting certain criteria to claim “due and sufficient cause for nonuse” to avoid having water right deemed abandoned. That cause is the water right must have as its local supply an aquifer area that has been closed to new appropriations (by rule, regulation, or order of the Chief Engineer), and where means of diversion are available to put water to a beneficial use within a reasonable time. Effective date: July 1, 2010.

## Appraisals — Home Valuation Code of Conduct

**Rules governing appraisals of single-family residence loans sold to Freddie Mac effective May 1, 2009. Exemption for seller banks of less than \$250 million in assets.**

The Home Valuation Code of Conduct (the “Code”) was implemented to “enhance the independence and accuracy of the appraisal process.” Freddie Mac will not purchase single-family mortgage loans after May 1, 2009 from sellers who have not adopted the Code. It is fairly lengthy and can be found at [www.FreddieMac.com](http://www.FreddieMac.com), Publication Number 746. Here is an overview.

- Lenders must represent and warrant they have in place the structure, policies and procedures to comply with the Code.
- Lenders and third parties are prohibited from “influencing or attempting to influence the development, result or review of an appraisal report.”
- Lenders are prohibited from using appraisers selected, retained or compensated by the mortgage broker or the real estate agent.
- Lender can use appraisal prepared for a different lender if certain conditions are met.
- In-house appraisals are permitted if certain procedures are followed, including:
  - ◇ Appraiser must report to a function of the lender independent of sales and loan production, and sales and loan production have no input in the appraisal process
  - ◇ Sales and loan production have no substantive communication with in-house appraiser relative to valuation
  - ◇ Appraiser’s compensation is not dependent on the estimate of value or whether the loan closes

- Lender must have written policies and procedures to implement the Code.
- Lender’s appraisal functions are audited annually and adverse findings reported to Freddie Mac.
- In-house staff appraisers may also perform other functions:
  - ◇ Order appraisals
  - ◇ Appraisal reviews and quality control
  - ◇ Internal automated valuation models
  - ◇ Prepare appraisals for transactions other than mortgage loan originations, such as workouts
- Lenders must randomly test 10% of appraisals for quality control and report adverse findings.
- Lender may contact the appraiser to correct a factual error or problem in the appraisal.
- Communication between the Lender and appraiser over access to the property or the location are permissible; but “[c]onversations that relate to or have an impact on valuation, however, are not permitted under the Code.”
- Requires “absolute independence” between the appraisal function and the loan production function inside a lender’s organization, limiting communication with the appraiser. Loan production side cannot participate in selection of the appraiser or have any “substantive communications” with the appraiser about valuation.
- Appraisers must be certified or licensed in the state, familiar with the local market, competent and have access to data sources needed for a credible appraisal.
- Lenders or third parties specifically authorized by the lenders are responsible for selecting, retaining and paying appraisers.
- Lenders must assure that borrowers are provided with a copy of the appraisal report no less than three business days before closing, unless the borrower waives the requirement. The borrower can be charged for the cost of the appraisal but not for the copy.
- Seller banks with an asset size of less than \$250 million are exempt as a “small bank” but, to qualify for the exemption, must represent and warrant that they have appropriate policies in place to “prevent undue appraiser influence.”
- The Code does not address appraisal standards; only the relationship between the lender and the appraiser.

This requires a detailed study for anyone working in the area.

## Community Improvement District (CID) — City of Wichita Policy

The Act. The 2009 Kansas Legislature enacted the Community Improvement District Act (“Act”) which allows a city or

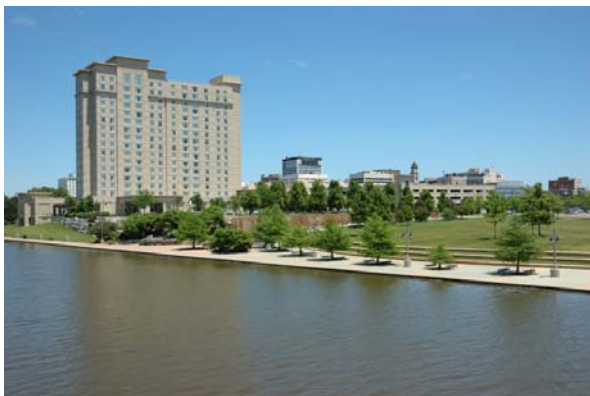


county to create CID districts for certain public and private improvements. The Act permits a wide variety of improvements to be paid from CID funds. Projects may be funded by special obligation bonds, full faith and credit bonds, or on a "pay-as-you-go" basis (where the property owner pays the costs and seeks reimbursement). It is codified at K.S.A. 12-6a26 through 12-6a36.

City Policy. The City of Wichita established a Community Improvement District Policy on April 6, 2010. The Policy establishes criteria which the City will use to decide whether or not to approve a proposed property for a CID. The Policy terms are more restrictive than the statutory requirements established by the legislature.

Local Eligibility Criteria. The project should satisfy all of the following criteria (summarized):

- 1) Will attract development which would enhance the economic climate of the City or otherwise benefit the City or its residents;
- 2) Will result in construction of public or private property improvements and infrastructure, or the provision of ongoing services, that would otherwise not be financially feasible;
- 3) Will promote redevelopment or rejuvenation of properties within the City which would otherwise be unlikely to happen. Special consideration to Neighborhood Revitalization Area, Central Business District or area with a



- neighborhood plan, corridor plan or redevelopment plan;
- 4) Will be used to assist development of commercial, industrial and mixed-use projects.
  - 5) Not used for projects incompatible with the neighborhood; and
  - 6) Not less than \$2,000,000 for bonded projects or \$500,000 for pay-as-you-go.

Petitioning Owners. The Act requires at least 55% of owners of the total land area to sign a petition to form a CID district. City Policy requires 100%.

#### Funding Sources.

Bonds. The Act permits funding from general obligation bonds and special obligation bonds. City Policy is to only issue special obligation bonds. The City Urban Development Office will work with petitioners to calculate the estimated revenue that can be generated to pay the bonds (either a specials tax on the property or a special sales tax). A minimum 1.2 debt-service ratio is required.

Pay-As-You-Go. Landowners pay expenses and are then reimbursed. The City establishes a separate account for this purpose. "Preference will be given" to pay-as-you-go projects.

Eligible Costs. City funds may only be used to pay eligible costs up to the maximum amount identified in the petition; and will only reimburse capital costs incurred not earlier than one year prior to City Council action initiating the establishment of the CID.

#### Approval Process.

- Landowner submits draft of CID Petition to City Manager, Director of Urban Development and any other Staff Designated by City Manager
- Pre-petition meeting with 10 days
- Landowner submits a petition with information required by the Act
- City Council adopts a resolution giving notice of public hearing to consider advisability of creating the CID
- Publication once each week for two weeks
- City Council approval
- Ordinance becomes effective upon publication
- Ordinance recorded with Register of Deeds.

Development Agreement. Required "concurrently with, or prior to" creation of the CID.

GAP Financing Requirement. Will not be approved without showing that the project "would not otherwise be possible without the use of CID funding." Cost-benefit analysis required, at the expense of the applicant, showing 1.3 to one ratio of benefits to costs. Gap financing should not exceed 30% of total project costs. Note: GAP analysis not required for pay-as-you-go projects.

Background Check. All CID applicants and their partners are required to furnish the City with personal and business information needed for a background check.

Fees. The Act provides for the State to collect a fee of 2% of the amount collected, not to exceed \$60,000 to the state fund in any year. The City has added its own fee of 5%. There is a non-refundable \$5,000 filing fee.

Standard Design Guidelines. Normal City laws govern. In addition, plans and renderings must be reviewed by the City Design Council and suggestions incorporated into the project unless expressly overruled by the City Manager.

Financial Reporting. Owner must provide a certified annual accounting to the City on the amount and use of CID funds to pay CID costs. City has right to audit.

Termination of CID. When eligible projects costs have been paid, subject to terms of the development agreement.

Waiver of Policy. City Council may waive the Policy by majority vote if the Policy is "inappropriate" for a particular application.

## **Fraudulent Liens — Fines and Other Remedies**

**Courts can now impose fines and enjoin persons from filing fraudulent liens.**

2010 Sen. Bill 537. This statute addresses the problem that can arise when radical groups or individuals file bogus liens against properties, often as a means of intimidation or for political purposes. It amends K.S.A. 58-4301, which Kansas passed several years ago to provide an expedited process of releasing these menacing liens. Current law only provides a method for releasing the liens; it does not have any consequences. This amendment creates those consequences.

Under the new law, after the court has determined that a lien is fraudulent (as defined in the statute), the aggrieved person may bring a civil action for damages and an injunction against the offender. The court must find by a preponderance of evidence (the burden of proof is on the aggrieved person) that the person filing the lien "knew or should have known that the documents filed or recorded" were in violation of the statute. If the court finds a violation, then it:

- May award attorneys' fees to the prevailing party
- May order actual and liquidated damages up to \$10,000, or more if actual damages exceed \$10,000
- May enjoin the defendant from filing any future liens or claims against persons specified or with any filing officer without prior court approval
- May enjoin the defendant from filing any future liens or claims that would violate the statute.

Each violation of a court order is considered contempt of court, punishable by a fine not to exceed \$1,000, up to 120 days in jail, or both. Effective date: July 1, 2010.

## **Historic Tax Credits**

**Cap removed on historic tax credits.**

2010 Sen. Bill 430. Last year the legislature surprised developers and cities by capping historic tax credits at \$3,750,000 for fiscal years 2010 and 2011. This bill removes that cap for 2011. Effective date: After publication in the Kansas Register.

## **Home Inspectors**

K.A.R. 130-1-1, 130-1-4, 130-1-5. These regulations were issued under the Kansas Home Inspectors Professional Competence and Financial Responsibility Act which was enacted in 2008. They concern the registration, renewal and charge of fees for applicants to become licensed as home inspectors. Effective date: January 4, 2010.

## **Homebuyer Tax Credit**

**The Worker, Homeownership, and Business Assistance Act of 2009 extends the first-time homebuyer tax credit.**

The stimulus package included an up-to-\$8,000 tax credit for first-time homebuyers. This credit was scheduled to expire on November 30, 2009. The new law extends and expands the first-time homebuyer credit by extending deadlines for purchasing and closing on a home. Under the 2009 Assistance Act, an eligible taxpayer must buy, or enter into a binding contract to buy, a principal residence on or before April 30, 2010 and close on the home by June 30, 2010. For qualifying purchases in 2010, taxpayers have the option of claiming the credit on either their 2009 or 2010 return.



For the first time, long-time homeowners who buy a replacement principal residence may also claim a homebuyer credit of up to \$6,500 (up to \$3,250 for a married individual filing

separately). They must have lived in the same principal residence for any five-consecutive-year period during the eight-year period that ended on the date the replacement home is purchased.

The new law also raises the income limits for homes purchased after November 6, 2009. The credit phases out for individual taxpayers with modified adjusted gross income between \$125,000 and \$145,000, or between \$225,000 and \$245,000 for joint filers.

## Kansas Indoor Clean Air Act — Smoking Ban

2010 House Bill 2221. As most people are aware, the Kansas legislature has banned smoking in public places, except its own casinos. But there's more to it than that.



### Where smoking is banned:

- Public places
- Taxicabs and limousines
- Restrooms, lobbies, hallways and other common areas in public and private buildings, condominiums and other multi-residential facilities
- Restrooms, lobbies and other common areas in hotels and motels and in at least 80% of guest sleeping quarters
- Access points (10 feet) of all buildings and facilities unless exempted
- Any place of employment.

"Enclosed Area:" Smoking is banned in an "enclosed area." This is defined as: "all space between a floor and ceiling which is enclosed on all sides by solid walls, windows or doorways which extend from the floor to the ceiling, including all space therein screened by partitions which do not extend to the ceiling or are not solid or similar structures."

General Exemptions: The following are not "enclosed areas" and exempt:

- Rooms or areas, enclosed by walls, windows or doorways, having neither a ceiling nor a roof and which are completely open to the elements and weather at all times
- Rooms or areas, enclosed by walls, fences, windows or doorways and a roof or ceiling, having openings that are permanently open to the elements and weather and which comprise an area that is at least 30% of the total perimeter wall area of such room or area.

### Special exemptions:

- Outdoor areas beyond the 10-foot access points of the

building or facility

- Private homes or residences, except when used as a daycare home
- Up to 20% of hotel or motel sleeping rooms
- Gaming floor of a lottery gaming facility or racetrack gaming facility
- That portion of an adult care home designated for smoking and fully enclosed and ventilated
- That portion of long-term care unit of a medical care facility designated for smoking and fully enclosed and ventilated
- Tobacco shops (65% of gross receipts must be from sale of tobacco)
- Class A or Class B clubs which held licenses as of January 1, 2009 and which notify Secretary of Health and Environment they wish to allow smoking
- Private clubs in designated areas where minors are prohibited. (Note: Substantial dues are required and can't be "considered nominal and implemented to otherwise avoid or evade restrictions of a statewide ban on smoking.")

Posting Required. Proprietor or "other person in charge of the premises of a public place" where smoking is prohibited is required to post signs displaying international no-smoking symbol clearly stating that smoking is prohibited by state law.

### Employer Requirements.

- Provide a smoke-free workplace
- Adopt and maintain a written smoking policy that prohibits smoking without exception
- Communicate the written policy to all employees within one week after adoption and to all new employees upon hire
- Provide a copy of the written policy to all employees and prospective employees upon request
- Cannot retaliate against someone for reporting or attempting to report a violation.

Enforcement. Unlawful for "any person who owns, manages, operates or otherwise controls the use of any public place, or other area where smoking is prohibited, to allow smoking to occur where prohibited by law."

### Penalties.

- Not exceeding \$100 for first violation
- Not exceeding \$200 for a second violation within one year after the first
- Not exceeding \$500 for third or subsequent violation within one year after the first



- Each individual allowed to smoke is considered a separate violation.

Effective date: July 1, 2010.

## Lead-Safe Work Practices Regulations

**New licensing and training rules for persons working on housing and child-occupied facilities built before 1978. Notice requirements to owners and occupants.**

The Kansas Department of Health and Environment (KDHE) issued new rules implementing revised regulations of the U.S. Environmental Protection Agency (EPA) -- Renovation, Repair and Painting (RRP) rules. The rules establish new requirements for **firms** and **individuals** who work on housing and child-occupied facilities (e.g., schools and daycare facilities). They also require notice to owners and occupants of target properties before work is performed. **Owners** and **property managers** have responsibilities under the regulations.

Individuals must complete a one-day training course in lead-safe work practices to be a certified renovator. Firms must submit an application and fee to KDHE to become licensed. The application must certify they will only employ certified employees to conduct lead-based paint activities, and that the firm will ensure their employees follow work practice standards for lead-based paint activities as specified in the new regulations.

What's Covered. Generally, any activity that disturbs more than 6 square feet of paint interior and 20 square feet of



paint exterior in pre-1978 housing and child-occupied facilities. Includes: remodeling, repair and maintenance, electrical work, plumbing, carpentry and window replacement.

What's Excluded. Housing built after 1978. Housing for elderly or disabled unless children under the age of 6 reside or are expected to reside there. Zero-bedroom dwellings (studio apartments, dormitories). Housing declared lead-free by a certified inspector or risk assessor. Minor repair and maintenance that disturbs under 6 square feet of paint inside or 20 square feet outside. Note: minor repair and maintenance activities do not include replacement of windows, demolition or prohibited practices.

Who's Covered. Generally, anyone paid to perform work that disturbs paint in housing and child-occupied facilities built before 1978. This may include, but is not limited to:

- Residential rental property owners/managers
- General contractors
- Special trade contractors such as painters, plumbers, carpenters and electricians.

Notice Requirements Before Work Begins. Contractors, property managers and others who perform renovations covered by the regulations are required to distribute an EPA pamphlet, "Renovate Right," before work starts. The pamphlet must be distributed to:

- Owner and occupants
- In a child-occupied facility, to the Owner or an adult representative of the child-occupied facility
- For work in common areas of multi-family housing or child-occupied facilities: to tenants or parents/guardians of children attending the child-occupied facility, or post informational signs about the renovation or repair job. Signs must describe nature, locations, dates of renovation and be in primary language of occupants.

Prior to beginning the work, those persons required to distribute the pamphlet must obtain confirmation of receipt of the pamphlet from the owner, adult representative, or occupants or a certificate of mailing from the post office.

Renovation Requirements. Renovation work requires compliance with specific safety procedures for removal and disposal of lead paint, such as plastic sheeting over vents, removal of paint chips in bags, and closing doors and windows during work.

Post-Renovation Visual Inspection and Notice After the Job. After the job is completed, the Licensed Renovator Firm can either hire a third party to perform post-renovation clearance sampling, or self-perform visual inspection and cleaning verification. For all jobs, the Certified Renovator must perform an inspection after the job (Cleaning Verification Record) and provide a copy to the owner/occupants. Pictures must be taken and retained.

The regulations and procedures for compliance are posted by KDHE at [www.kshealthyhomes.org](http://www.kshealthyhomes.org). The "Renovate Right" pamphlet is also available on the website. K.A.R. 28-72-1 to 28-72-54.

Effective date: April 9, 2010.

## Mortgage Debt Forgiveness

The Economic Stabilization Act allows for up to \$2 million in residential mortgage debt forgiveness to be excluded from gross income.

Generally, if a taxpayer has not filed for bankruptcy protection, but nevertheless has had a debt forgiven (such as is the case with many short sales), the taxpayer will realize income equal to the amount of the debt forgiven. There is currently, however, an exception to that realization of income in relation to mortgage debt on a principal residence. The Economic Stabilization Act, effective for indebtedness discharged on or after Jan. 1, 2007 and before Jan. 1, 2013, generally allows taxpayers to exclude up to \$2 million of



mortgage debt forgiveness on their principal residence. However, the debt must have been incurred to acquire, construct, or substantially improve the taxpayer's principal residence and must have been secured by that residence.

A principal residence is the home where the taxpayer ordinarily lives most of the time. A taxpayer can have only one principal residence at a time. The exclusion doesn't apply to debt forgiven on second homes, business property, or rental property. It also doesn't apply to credit cards or auto loans. The exclusion is claimed by filling out Form 982, Reduction of Tax Attributes Due to Discharge of Indebtedness, and attaching it to the taxpayer's applicable income tax return.

## Range Burning



2010 Sen. Concurrent Resolution 1623. Concurrent resolution urging the United States Congress to require the Environmental Protection Agency to exclude emissions

from prairie burning in the tallgrass prairie in the Flint Hills in determining air quality standards.

## Uniform Common Interest Owners' Bill of Rights Act

**Requirements for owners' associations; prohibition against requiring residential sprinklers.**

2010 House Bill 2472. This bill establishes a new act for "common interest communities" and addresses the heavily-debated topic of whether fire sprinklers should be required in residences.



The new act is the Kansas Uniform Common Interest Owners' Bill of Rights Act. It creates a uniform set of rules for unit owners and associations in all forms of "common interest communities," meaning "real estate described in a declaration with respect to which a person, by virtue of the person's ownership of a unit, is obligated to pay for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements, other units, or other real estate described in that declaration."

The Act establishes uniform rules for: standard of care for directors, amendments of declarations, amendments of bylaws, meeting requirements, record keeping, voting, budgets, quorums, removal of board members, and authority to bring court action, among other things.

The uniformity of the Act will preempt the terms of existing declarations: "Except as expressly provided in this act," the requirements of the Act apply "notwithstanding contrary provisions in the declaration or bylaws of a common interest community and shall not be varied or waived by agreement."

Effective date: January 1, 2011.

Comment: HB #2472 also prohibits any city or county from adopting or enforcing any law requiring the installation of a fire sprinkler system in a residential structure. The Act does not prohibit anyone from voluntarily installing a fire sprinkler system in a residence.

The effective date of this sprinkler provision begins on July 1, 2010 and expires July 1, 2011.

## CASES

### Annexation — Consent of County

**County lacks standing to challenge city's annexation of adjoining tracts.**

*Board of Sumner Co. Comm's v. City of Mulvane*, \_\_ Kan. App.2d \_\_, 227 P.3d 997 (2010). The City of Mulvane sought to annex the proposed site of a casino that was five miles away from the boundaries of the City. Obviously, this would have required an "island annexation." Instead, the City annexed a 100-foot wide strip of land 5 miles long in order to connect the City to the proposed casino site, with the consent of the landowners, by a series of "step-by-step" annexations. The district court concluded the annexations were void in lawsuits filed by the Board of County Commissioners of Sumner County. The Court of Appeals reversed.

The Court of Appeals held that the County did not have standing to challenge annexation; the State acting through a proper officer may challenge a city's annexation ordinances, but not the County. Furthermore, the legislature has given "only landowners and qualified cities standing to challenge a city's annexations" [under certain specified statutes]. No such authority exists for "any party to challenge consent annexations under K.S.A. 12-520(a)(7)." The Court of Appeals remanded the case to the District Court with an order dismissing the County's appeal in favor of the City's annexation.

### Appraisals — Valuing Separate Parcels as One Tract

**Appraiser must refrain from valuing whole property by adding the values of separate tracts together.**

*In re Protests of City of Hutchinson/Dillon Stores for Taxes Paid for 2001 and 2002 in Reno County, Kansas*, 221 P.3d 598 (Kan. App. 2009). This tax appeal concerns a Dillon's



retail grocery distribution center consisting of 10 separate contiguous buildings. The county's appraiser valued the property at \$7,900,000;

the taxpayer's appraisers' values ranged between \$4,400,000 and \$4,910,000.

The Board of Tax Appeals ("BOTA," now the "Court of Tax Appeals") rejected the county appraisal because it violated the Uniform Standards of Professional Appraisal Practice Rule ("USPAP") 1-4(e)(2001) which restricts appraisals of whole properties that simply add the values of individual tracts:

An appraiser must analyze the effect on value, if any, of the assemblage of the various estates or component parts of a property and *refrain from valuing the whole solely by adding together the individual values of the various estates or component parts*.

The District Court reversed BOTA. But in this decision, the Court of Appeals sided with BOTA, rejected the County appraisal and reversed the District Court. Moreover, the Court of Appeals noted that K.S.A. 79-505 and 79-506 require the appraisal practice in Kansas to be governed by USPAP.

Comment: An appraiser should analyze the effect of value of the assemblage of various estates or component parts of a property, rather than adding the value of individual estates or component parts.

### Bankruptcy — Homestead — Mortgage Payments

**Court denied debtor's transfer of \$240,000 to pay down homestead mortgage prior to filing bankruptcy.**

*Parks v. Anderson (In re Anderson)*, 406 B.R. 79 (D. Kan. 2009). Three months before filing personal bankruptcy, Debtor paid \$240,000 on his home mortgage loan. Creditors and the bankruptcy trustee (Trustee) all objected under different provisions of the Bankruptcy Code (the "Code") to Debtor's homestead exemption to the extent of the \$240,000 payment. In separate proceedings, the Bankruptcy Court upheld the full exemption and Creditors and Trustee appealed. The United States District Court reversed the Bankruptcy Court as to Trustee's objection under Section 522(p) (regarding acquiring an interest) but affirmed the Bankruptcy Court as to Creditors' objections under Section 522(o) (regarding fraudulent transfers).



Section 522(p)(1) of the Code restricts debtors from exempting "any amount of interest" which exceeds an aggregate of \$125,000 "acquired by the debtor" within 1215 days of filing the bankruptcy. Debtor purchased his homestead out-



side of the 1215-day period, but made the \$240,000 lump sum payment against his mortgage three months before filing bankruptcy. Trustee claimed this mortgage payment was subject to the limitation in Section 522(p)(1) because Debtor's increased equity in the homestead was an "interest" "acquired" within the 1215-day period. The Bankruptcy Court rejected Trustee's argument, finding the "interest" referenced in Section 522(p)(1) only applied to acquiring title or ownership of a property, not to increasing a debtor's equity in a property.

In its *de novo* review, the District Court reviewed other cases which found an interest could include an increase in a debtor's equity. In considering the plain language of the statute, the Court focused on the phrase "any amount of interest" and stated "[a]mount implies value, and if Congress had intended to restrict this term to refer to only title" it would have excluded the words "any amount of" preceding the term "interest." The Court also considered the definition of "acquire" which is "to gain possession or control of" or "to get or obtain" in rejecting Debtor's argument that equity can't be acquired. In finding Section 522(p) applied to equity, the Court noted this interpretation was consistent with Section 522(p)(2)(B), which allows a debtor to transfer his or her "interest" in an existing homestead into a new homestead if both homesteads are located in the same state. As pointed out by the Trustee, it's not possible to transfer a title from one homestead to another but it is possible to transfer equity.

Debtor also argued if Section 522(p) applied to equity then Section 522(o) regarding fraudulent transfers "would be superfluous." Section 522(o) provides that "a transfer of any amount 'shall be reduced to the extent that such value is attributable to any portion of any property that the debtor disposed of' 10 years prior to filing the bankruptcy 'with the intent to hinder, delay, or defraud a creditor.'" The Court found no conflict between Sections 522(p) and 522(o) since Section 522(o) applies to any amount and requires a finding of fraudulent intent by the debtor. The Court reversed the Bankruptcy Court on the Trustee's claim and found Debtor could not convert \$240,000 of non-exempt assets into exempt assets by increasing the equity in his homestead in an amount in excess of \$125,000 in the aggregate.

Creditors argued the \$240,000 payment was a fraudulent transfer subject to Section 522(o). Although the Bankruptcy Court found three of the eight factors considered under the discharge objection proceedings in Section 727(a) and three of the 11 factors considered under actions to recover fraudulent transfers in 548(a), it concluded there was an absence of evidence demonstrating Debtor's fraudulent intent. The Court reviewed the record and under the clearly erroneous

standard of review, concluded the Bankruptcy Court's ruling was "supported by the evidence" and affirmed the Bankruptcy Court's holding.

## Bankruptcy — Homestead Exemption

**Married debtor living apart from family home could still claim exemption for his one-half ownership in the homestead.**

*Williamson v. Hall (In re Hall)*, 2009 WL 4456542 (B.A.P. 10th Cir. 2009). Debtors owned a tract of land with a house occupied by the wife and children and a mobile home occupied by the husband. The Bankruptcy Court had previously found the Debtors, who were married, could each claim a separate homestead. It also found that the husband had abandoned the house.



The issue raised by the Trustee was whether the husband could still elect to exempt the house when it was occupied by his family, but not by him. The Bankruptcy Appellate Panel (BAP) held that he could claim the house as an exemption, but not both the house and the mobile home.

The BAP noted Kansas historically favors exemptions. It said the Kansas homestead statute, K.S.A. 60-2301, allows a debtor to claim as a homestead a residence occupied "by the owner *or by the family of the owner*, or by both the owner and family" (emphasis added) as support for the husband's ability to claim a homestead exemption for his one-half ownership in the house - since it was occupied by his family. He could also claim an exemption in the mobile home where he resided. But the exemption statute says "or" and "mandates only one exemption" and the BAP said he could only claim one or the other, but not both as an exemption. Likewise, the wife could claim a homestead exemption for the mobile home since it was occupied by her family - the husband; or she could claim the house where she lived, but not both. The ruling of the Bankruptcy Court was affirmed.

Comment: This is an unusual set of facts – a married couple living apart in two separate residences on the same land. The court found both could claim either residence as their respective homestead – but they could not each claim both residences as homesteads.

## Bankruptcy — Joint Tenancy Deed — Bona Fide Purchaser — Inquiry Notice

**Trustee in bankruptcy could claim debtor's one-third interest in property even though the interest was titled in debtor as co-tenant for estate planning purposes.**

*Morris v. Kasperek (In re Kasperek)*, 2010 WL 1270341 (B.A.P. 10th Cir. 2010). Debtor, his brother and his father owned farm property as joint tenants with a right of survivorship. When Debtor filed for bankruptcy, Bankruptcy Trustee claimed Debtor's one-third interest in the property as property of the bankruptcy estate and sought to have it sold.

The evidence showed that the father provided all funds for the purchase of the property but placed his sons' names on the deed for estate planning purposes. The father had collected all income by renting it on a crop-share basis, and paid all of landlord's share of expenses.

Trustee argued the father failed to rebut the presumption of equal ownership since the father and his sons were named as joint tenants on the deed. Trustee also argued that as a hypothetical bona fide purchaser of Debtor's one-third presumptive share, Trustee wouldn't have any notice that Debtor held his interest pursuant to an actual or implied trust benefiting his father.

The 10th Circuit Bankruptcy Appellate Panel (BAP) found no express trust existed since there wasn't any written instrument stating Debtor held his interest in trust for his father. The evidence regarding the purchase of the land and the crop-share lease indicated the Debtor held his interest pursuant to an implied trust, but neither an express or implied trust will defeat a bona fide purchaser who buys property without notice of the trust. The BAP held that mere joint ownership does not put one on suspicion that some ownership other than the presumed equal ownership exists. There must be some duty on the purchaser to inquire. The BAP was not moved by the fact the tenant farming the land contracted only with the father and paid the rent only to him.

While Kansas law would impose a duty on a prospective purchaser to inquire about the status of title in a case such as this where the tenant was the party in possession of the property but the property was titled in the name of Debtor, his father and brother, once the prospective purchaser determined the tenant didn't have a claim adverse to the property owners, then there wouldn't be any further inquiry required.

Further, the BAP said it was not necessary for a prospective purchaser to confront the other co-owners to determine the exact nature of their ownership, as that would impose "an

undue burden on purchasers, and impair[] the reliability of record title." Trustee has all the rights of a bona fide purchaser and thus could claim Debtor's one-third interest in the property.

## Bankruptcy — Manufactured Homes — Lien

**Certificate of title to manufactured home wasn't eliminated due to failure to record Application for Elimination of Title with County Register of Deeds; mortgage lender unperfected.**

*Morris v. PHH Mortgage Serv. (In re Phillips)*, 420 B.R. 530 (D. Kan. 2009). Lender took a mortgage with collateral consisting of real property and a manufactured home. The



manufactured home had a certificate of title but Lender was never listed as a lienholder on the certificate of title, and Lender never filed a Notice of Security Interest in the home with the Kansas Department of Revenue. Debtors filed bankruptcy and the bankruptcy trustee sought to avoid Lender's lien on the home on the basis that the lien was unperfected. In Kansas, notation of a security interest on a manufactured home's certificate of title is the sole method for perfection unless the certificate of title has been eliminated in accordance with K.S.A. 58-4214.

K.S.A. 58-4214 contains the procedure for eliminating a certificate of title for a manufactured or mobile home that is placed on a foundation. An application must be filed with the Kansas Department of Revenue Division of Vehicles ("DOV"). Once the application is approved it must then be recorded with the Register of Deeds in the county where the real property is located.

An application to eliminate the certificate of title for the Debtors' home had been submitted to the DOV and approved. However, the approved application wasn't ever recorded with the Sedgwick County Register of Deeds' office.

The Court noted the instructions provided by DOV with the



application to be submitted states "TITLE IS NOT ELIMINATED UNTIL THIS AFFIDAVIT IS RECORDED IN THE REGISTER OF DEEDS OFFICE." The Court found the certificate of title wasn't eliminated since the approved application wasn't ever recorded with the Sedgwick County Register of Deeds' office. Therefore, the security interest in the Debtors' manufactured home was unperfected and the bankruptcy trustee could avoid the Lender's lien on the home.

### **Broker — Commission — "Ready, Willing and Able Buyer"**

**A Broker did not earn a commission merely by showing a property to a prospective purchaser; it also had to be the**



**procuring cause of a sale. Seller may not avoid liability for a commission by refusing to accept a purchase offer if it does so in breach of a duty of good faith and fair dealing.**

*Premier Realty, LLC v. I.T.J. Inv., Inc.*, 42 Kan. App. 2d 148, 209 P.3d 741 (2009). Seller listed two newly-constructed homes for sale with Broker under an "exclusive right to sell" listing agreement.

#### 12518 W. Binter Court ("12518")

Seller's principal, Jacoby, was friends with his accountant of 40 years. The accountant looked at 12518 with Broker. Before the end of the listing agreement, Seller told Broker to pull 12518 from the market because his accountant was going to live there, saying the accountant was going to "get that house." Further, he said he was "just kind of giving it away" and that he was "not making any money on it." No deed was given the accountant and the home was neither sold nor leased to him. Seller also remarked that if the accountant should die, his wife could continue living there.

Broker demanded a commission on 12518 and when Seller refused to pay, sued, claiming it had produced a "ready, willing and able buyer" for 12518.

Broker claimed he had produced a "ready, willing and able buyer" when he showed 12518 to the accountant. A broker need not actually bring a buyer to a seller in order to earn a commission. The broker only needs to be the procuring cause of a purchase. But there was no evidence that the Broker was the first to show the accountant 12518, or that the price, financing, etc. was discussed. Nor was there evidence that the Broker caused the accountant to move into 12518. Instead, the Court said the reason the accountant moved into 12518 was the long-standing relationship he had with Seller. Thus Broker failed to establish he was the "procuring" cause of the transaction, whatever the transaction was.

The Broker might have recovered under the terms of the listing agreement for any transfer of the property made within 90 days of the termination of the listing agreement to anyone to whom the agent had exposed the property during the listing period. But this failed because the Broker did not identify the accountant as a prospective purchaser as required by the listing agreement.

#### 12534 W. Binter Court ("12534")

This is a separate house owned by the same Seller involving the same Broker. Plummers (Buyers) signed the guest book at an open house at 12534 conducted by Broker during the listing period. At that time, Broker induced Buyers to enter into an Exclusive Buyer Agreement. Under the terms of the agreement, Broker was obligated to promote the interest of Buyers with "utmost good faith, loyalty, and fidelity." Broker also obtained Buyers' (but not Seller's) signature on a Transaction Broker Addendum. Buyers signed a purchase contract at a price that had previously been set by Seller. When Seller objected to the price, Broker, apparently without consulting Buyers, raised the price by \$2,900. The contract contained a clause making the purchase contingent upon Buyers' sale of their home. Still, Seller would not sign. After the listing agreement expired, Seller listed the property with another broker through whom 12534 was sold to the same Buyers.

Broker sued for a commission on the sale of 12534. The trial court granted summary judgment in favor of Seller as to this property also. Broker appealed, relying upon a "protection clause" in the listing agreement which entitled Broker to a commission if the property was sold within 90 days after the listing expired to someone with whom Broker had negotiated.

Seller countered with three points. First, he pointed out the protection period clause also provided that Seller would not be obligated for a commission if the property was sold during the 90-day period by another licensed broker with whom

Seller had entered into an exclusive listing. Also, he argued he wasn't obligated to accept a contract that was contingent upon the sale of Buyer's home. Lastly, he contended Broker wasn't entitled to a commission because it breached its fiduciary duty to him and violated the Brokerage Relationships in Real Estate Transactions Act (BRRETA).

Broker responded that Seller had breached its duty of good faith and fair dealing by refusing to accept the offer it tendered. Apparently, Broker was, by this time, pressing Seller for a commission on 12518. Broker's evidence was that Seller said he wouldn't sign the contract on 12534 as long as Broker was demanding a commission on 12518 and hadn't raised an issue about the contingency clause nor even seen it, as the clause was on the last page of the contract and the Seller only looked at the cover page of the contract. Moreover, the contract Seller signed with the second broker also had a contingency clause. The Court of Appeals held Seller couldn't frustrate Broker's right to a commission by acting to prevent a sale, and that the trial court erred when it granted summary judgment. It said whether Seller breached his duty of good faith and fair dealing was a question of fact for the jury and remanded the case for trial on this issue.

The trial court had also determined Broker violated BRRETA when it entered into an exclusive buyer-agent agreement. BRRETA provides brokers may not act as dual agents, but there is an exception for a "transaction broker" arrangement. Under such an arrangement the Broker is not the agent of either party and acts essentially as only a "go-between." A broker may convert to a transaction broker status if the listing agreement warns of such a possibility and the parties agree to it. In this case, the listing agreement provided Broker could become a transaction broker and Buyer's offer included an addendum consenting to Broker acting as a transaction broker. Since Seller hadn't accepted the contract, the transaction broker addendum wasn't agreed to and Broker's attempt to become a transaction broker failed. The Court concluded that Broker merely failed in an attempt to do something allowed by BRRETA — convert an agency relationship into a transaction broker relationship. Court of Appeals found no BRRETA violation occurred and the trial court reversed on this issue.

Comments: 12518. The Seller's situation with the accountant was unusual, but apparently the Broker could have protected its commission by naming the accountant as a prospective purchaser under the 90-day reserve clause of the listing agreement.

12534. Seller refused to consider this contract offer because it came from the same Broker with whom the Seller had an ongoing dispute over the property at 12518. The Court said

that dispute didn't matter; the Seller couldn't frustrate the Broker's right to a commission by acting to prevent a sale.

## Certificate of Title — Negligent Search

**Abstract company liable for negligence for failure to list mineral owner of property in certificate of title.**

*Southwind Exploration, LLC v. Street Abstract Co., Inc.*, 42 Kan. App. 2d 122, 209 P.3d 728 (2009). Oil Company ordered a title opinion from an attorney to make sure its oil and gas lease on a piece of property was with all of the mineral interest owners. The attorney hired an abstract company to provide him with a certificate of title ("Certificate") to use in conjunction with his title opinion. The Certificate listed the Mitchells as the only owners of the mineral interests in the property.

Oil Company spent over \$180,000 drilling four gas wells and offered the oil and gas lease as collateral to its lender. Lender hired a different abstract company to provide it with a certificate of title, and its certificate of title listed the Mitchells as the owners of only 50% of the mineral interests with Union Central Life Insurance Company ("Union Central") owning the other 50%. Since Oil Company's lease didn't include Union Central as a party, it had to pay half of its "net production" to Union Central. Oil Company sued the attorney and the abstract company for negligence and the jury found the attorney 30% at fault and the abstract company 70% at fault. Abstract company appealed, arguing Oil Company's claim should have been based on breach of contract rather than negligence.



The Restatement (Second) of Torts requires the exercise of "reasonable care or competence" by a person with a pecuniary interest in a transaction who provides information to another, and if the information provided is false, that person is liable for losses sustained as a result of the other person's justifiable reliance on the false information. The Court of Appeals relied upon the Restatement and prior Kansas cases to extend the obligation of the abstract company beyond the attorney who hired the abstract company to other parties to whom the abstract company knows the attorney will supply the information, such as the oil company.

The abstract company argued the Certificate contained a disclaimer stating it had “not examined all instruments and proceedings in the chain of title” and it wouldn’t “be liable for defects in the title.” The Court rejected this argument since the Certificate contained a representation by the abstract company certifying “we have examined the records in the office of the Register of Deeds, County Treasurer and District Court ” so it should have discovered that Union Central was paying taxes on its mineral interest in the property in the County Treasurer’s records.

The abstract company also argued the Certificate wasn’t the same as a title abstract, and while there are statutes governing the records to be reviewed in preparing an abstract there aren’t any in preparing a certificate of title. The Court also rejected this argument, again citing the evidence of Union Central’s mineral interest in the county records. The Court affirmed the judgment for the Oil Company.

## Condemnation — Lost Profits — Fair Market Value

**A claim for loss of profits on a real estate development taken by condemnation must be linked to fair market value.**

*Unified Sch. Dist. No. 232 v. CWD Inv., LLC*, 288 Kan. 536, 205 P.3d 1245 (2009). Unified School District No. 232



(“District”) took part of land being planned for residential development. Landowner sought to recover, as part of its damages for the taking

of its land, profits it would have made by selling lots in the anticipated subdivision. District moved to exclude Landowner’s evidence of lost profits on the lots being taken. The trial judge ruled that profits from lot sales “*per se*” would not be considered, although such evidence could be considered in determining the value of the land if lost profits were a “driving factor in increasing the market value” of the land being taken.

The general rule in Kansas is to deny recovery of lost profits in eminent domain proceedings. The “profits of a business are too uncertain, and depend on too many contingencies safely to be accepted as any evidence of the usable value of the property upon which the business is carried on.”

The Supreme Court ruled against the Landowner, saying the

uncontested facts showed Landowner had no evidence linking a claimed loss of profits to the property’s fair market value.

## Contracts — Fraud Claims

**Exculpatory provision in contract does not protect seller against fraud claims based upon written representations.**

*Stechschulte v. Jennings*, 222 P.3d 507 (Kan. App. 2010), *petition for review pending*. Less than a month after purchasing their Kansas City home, Buyers found extensive water problems in the house the day after heavy rains fell in the area. They asked Seller to rescind the sale and he refused. They consulted a builder, had other inspections performed, and found many defects that predated their purchase, none of which had been disclosed by Seller. They sued Seller, his wife (who was also Seller’s real estate agent) and his broker, for whom his wife worked. The suit alleged fraud, negligent misrepresentation and consumer protection violations.

The trial judge granted summary judgment against Buyers in favor of all defendants, and this appeal followed. The Court of Appeals reversed summary judgment in favor of Seller, but affirmed all other rulings.

The essential issue concerned one of the contract documents - a property condition report - that defendants argued barred the claims. The report was signed by Seller and purported to state what he knew about the property. Below Seller’s signature, Buyers signed a section titled “Buyer’s Acknowledgment and Agreement.” This section acknowledged Seller needed only to make an honest effort to fully reveal the information requested in the form, that the property was sold without warranties or guaranties, Buyers agreed to verify Seller’s information, acknowledged Seller and the broker weren’t experts at “detecting or repairing physical defects in the property,” and most importantly that Buyers:

[S]pecifically represent that there are no important representations concerning the condition or value of the property made by SELLER or BROKER on which I am relying except as may be fully set forth in writing and signed by them.

Buyers submitted evidence of substantial preexisting problems known to Seller, virtually none of which were disclosed in the condition report.

Three prior Court of Appeals cases denied claims of buyers who had signed identical acknowledgments. Those decisions held that buyers would have to set forth in a separate writing



the particular representations on which they were relying. Having failed to do so, they were barred in their claims for fraud or negligent misrepresentation. Buyers represented that they weren't relying on any written representations by the seller, so they could not show justifiable reliance, a necessary element of a fraud case.

In this case, the Court followed a recent decision by yet another Court of Appeals panel that disagreed with the three prior cases. In that case (review pending before the Supreme Court) the panel ruled Seller's statements in the condition report were "a writing that is signed by the seller, and there is no requirement for a separate, second document signed by the seller." *Osterhaus v. Toth*, 39 Kan. App. 2d 999, 187 P.3d 126 (2008). Thus, Buyers could use the statements in the condition report as the basis for reliance and satisfy that element of a fraud claim.

The Court also found support for this ruling in the Kansas Supreme Court's decision in *Alires v. McGehee*, 277 Kan. 398, 85 P.3d 1191 (2004). There, the buyers hadn't made a separate writing of representations on which they were relying. The Court said "this write-in section was for representations not mentioned in the 'above' section of the contract" where the seller had disclosed the cause of one basement leakage but not others. The buyers in *Alires* still lost due to the terms of their contract whereby they waived defects which would have been discovered had they done an inspection, which they hadn't.

The Court upheld summary judgment in favor of Seller's wife and the broker. Neither had signed the condition report and thus, there were no written representations on which Buyers could show reliance.

Comment: *Osterhaus* and this case have been appealed to the Supreme Court so the outcome may change.

## Deeds – Reformation — Mutual Mistake – Merger

**Deed reformed when legal description contained additional land by mistake. Doctrine of merger rejected.**

*Unified Gov't of Wyandotte County/Kansas City, Kansas v. Trans World Transp. Serv., L.L.C.*, 2010 WL 1136206 (Kan. App. 2010). Here, the Court reformed (corrected) a deed when the parties mistakenly deeded more land than they intended. But not until after they went through a fight.

Unified Government of Wyandotte County/Kansas City, Kansas (WyCo) owned an 8.95-acre parcel of land. They built a fire station on 2.58 acres of it and rented a building on the remaining 6.45 acres to Trans World Transportation

Services, L.L.C. (Trans World). The 8.95-acre parcel was never subdivided by deed or plat.

WyCo sued Trans World over a lease dispute which was eventually settled. As part of the settlement, WyCo agreed to sell Trans World the property which Trans World leased. The problem arose when the title report mistakenly referred to the entire 8.95-acre tract (including the fire station). The



deed was prepared from the title report's legal description and WyCo mistakenly conveyed its fire station to Trans World. "[I]n [a] classic display of chutzpah, [Trans World] demanded that [WyCo] either negotiate a lease of the fire station or tell its firefighters to pack their bags and move out within 30 days." WyCo sued and the court granted judgment to reform the deed to exclude the fire station tract.

The Court of Appeals relied upon established Kansas common law for the elements of mutual mistake:

[A] party must show by clear and convincing evidence: (1) an antecedent agreement that the written instrument undertakes to evidence; (2) that a mistake occurred in drafting the instrument and not the antecedent agreement it undertakes to evidence; and (3) when there is no fraud or inequitable conduct by a party, that the mistake is mutual.

Applying those elements to the facts, the Court of Appeals found: (1) the antecedent settlement agreement intended to convey only the leased property and not the fire station; (2) the "mistake occurred in drafting the deed, not in drafting the settlement agreement;" and (3) the mistake was mutual, neither party believed the property being conveyed included the fire station.

Trans World also argued WyCo was precluded from judgment because the terms of the settlement agreement merged into the deed. This argument failed because merger

“depends on the intent of the parties” and in this case the deed did not reflect the intention of the parties as described in the settlement agreement.

Comment: Mutual mistake is sometimes a fuzzy concept to apply. These facts present a clear example of how a deed can be reformed to correct a mistake.

## Deeds — Reformation — Statute of Limitations

**“Rule of accrual at execution” limited to deeds and not extended to executory contracts.**

*Law v. Law Co. Bldg. Assoc.*, 42 Kan. App. 2d 278, 210 P.3d 676 (2009). This involves an attempt to reform an executory contract 20 years after it was signed by the parties. Margaret Law held an equity interest in a building owned by Law Company Building Associates (Partnership). She obtained the interest through a divorce over 30 years ago from a founder of the Partnership. The Partnership entered into a 1984 Financing Agreement which was the subject of this dispute. In the event of certain conditions, including expiration of the Partnership, Ms. Law was to be paid for her equity interest. In 2002, officers of the Partnership extended the Partnership’s term to 2024 and Ms. Law objected, claiming this deprived her of the ability to realize her equity value in the building since she was 80 years old. She argued that the extension was contrary to the intent of the 1984 Financing Agreement and that the Agreement should be reformed. (Other arguments were raised which will not be discussed here.)



The issue was whether the statute of limitations barred her reformation claim. The Court of Appeals ruled that reformation claims accrue upon execution of deeds and other instruments of conveyance that are placed of record, but does not begin to accrue on executory contracts as to claims made during the term of performance, even if the contracts are recorded. The reason for the rule (statute of limitation for instruments of record affecting ownership of land accrues upon execution) is to “set a maximum time period in which to bring an action and to give security to the possession and ownership of land as against those who have failed to bring their action within the prescribed period.” The rule promotes marketable titles. But the Court said “these beneficial effects of the rule” do not apply to executory contracts “where an essential aspect of the agreement for performance, after 20

years, has allegedly been frustrated if not destroyed by one of the parties.” It reversed the district court’s decision that the reformation claim was barred by the five-year statute of limitations.

Comment: The case involves ownership of a building through a partnership and a disputed financing agreement. We included it for the instructive discussion on reformation of deeds and other instruments of record affecting real estate.

## Easements — Implied — Necessary Use

**An implied easement may include access for a use not being enjoyed at time of the easement’s creation, and may include an easement for utilities if necessary to the enjoyment of property.**

*Stroda v. Joice Holdings*, 288 Kan. 718, 207 P.3d 223 (2009). The purchaser of a quarter section of farmland which included a residence was allowed an access easement over an adjacent quarter section. Later, the purchaser acquired the adjacent quarter, which resulted in an extinguishment of the easement under the doctrine of merger.



Subsequently, the two quarter sections fell into separate ownership, again creating an implied easement for access. At the time of the change in ownership, the residential use had ceased but access was used for farming. There were additional later changes in ownership of the two properties and when the current owner (Stroda) decided to use the easement for access to the property as well as for housing and for utilities, the owner (Joice) objected, claiming the implied easement was only available to allow access for agricultural purposes. Stroda brought suit for declaratory judgment.

The Supreme Court addressed two issues, ruling for Stroda on both. The first issue was whether the implied easement could be used for residential purposes. The Court held it could. The access allowed under such an implied easement was not only the use being made at the time of the conveyance, but also those future uses the parties might have reasonably expected at the time. Here, the residence was still present at the time of conveyance, even though it was unoccupied.



The second issue was whether the implied easement included utility access. Apparently, the original residence had none. The Court said the implied easement included an easement by necessity for utilities as utilities were necessary to the enjoyment of the purpose of the easement: “allowing an implied easement for residential purposes without also allowing utility access to the [property] would practically be denying residential use of the property.”

## Easement — Mandatory Injunction

### Landowner obtained mandatory injunction requiring company to remove pipeline installed without an easement.

*Friess v. Quest Cherokee, L.L.C.*, 42 Kan. App. 2d 60, 209 P.3d 722 (2009), review granted (Dec. 30, 2009). Friess Trust owned a farm. Quest wanted to install a pipeline and hired a company to obtain easements from all of the property owners. Friess rejected the initial amount offered for the easement, and also demanded a gas production lease in addition to money for the easement. Despite negotiations, a gas production lease was never executed, Friess never executed an easement and never cashed the check sent to them for the original amount offered. Friess discovered Quest had installed a pipeline across the farm anyway and after the parties couldn't reach a settlement, Friess sued for injunctive relief. The Court of Appeals affirmed a mandatory injunction requiring Quest to remove its pipeline.

Quest argued injunctive relief wasn't necessary as a monetary payment for the easement offered Friess an adequate remedy at law and the damages to Quest to remove the pipeline outweighed the damages suffered by Friess. The Court discussed a mandatory injunction which requires the “performance of an act” and is an “extraordinary remedy,” reluctantly granted by the courts. The Court said the four elements necessary for obtaining a mandatory injunction (which are the same as the elements for a preventive or prohibitory injunction) are:

- (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing parties; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

An exception to the balancing of the damages suffered by each party required by element (3) above applies, however,

if “the party seeking the injunction has ‘clearly defined rights . . . that are recognized and protected by law.’”

In rejecting Quest's argument that paying Friess for the easement was sufficient, the Court noted building on another's property without permission is a continuing violation that can't be compensated with monetary damages. The general principle is that legal remedies are not sufficient to redress continuing violations.

The Court also found the balancing of the damages suffered by each party required by element (3) “is reserved for the innocent defendant who proceeds without knowledge or warning that he is encroaching upon another's property rights.” In this case, Quest was in the pipeline business and was well aware of the requirement to obtain easement agreements from the property owners. Quest was “either foolish or negligent” in installing the pipeline without permission.

## Equitable Mortgage — Forgery

### Lender granted equitable mortgage after wife's signature forged on mortgage.

*Cox v. Countrywide Home Loans, Inc. (In re Cox)*, 408 B.R. 407 (D. Kan. 2009). Husband and wife sought a loan to

refinance their home to pay down \$100,000 of credit card debt incurred by the wife. The loan documents were drawn in the husband's name and executed only by him because of



the wife's poor credit. After the closing, the wife signed the settlement statement which identified the loan, named the husband and wife as the borrowers, and itemized the proceeds from the refinancing. The loan proceeds check was made payable to both wife and the husband and endorsed by the wife. A mortgage was filed containing a forged signature of the wife and the loan was eventually assigned to Countrywide.

The husband and wife later filed bankruptcy and sought to invalidate the mortgage based upon the forged signature. The Court found the mortgage failed due to the forgery but Countrywide was entitled to an equitable mortgage.

What is an equitable mortgage? Under Kansas law, “[a]n equitable mortgage will be imposed if an intention to place a

lien on the real estate is shown but for some reason the intended purpose was not accomplished.” Husband and wife “signed the settlement statement, endorsed the check, and made payments for 11 months.” The Court found they were estopped [prevented from denying] the transaction and invalidating the lien. The wife had consented to the mortgage and the Court reasoned the “[s]tatutes of frauds are to prevent frauds, not to enable a person to undo a promise.”

But the “real issue” was whether to allow the equitable mortgage because of the forgery. The Court looked at the equities and noted that the identity of the forger was never known and that Countrywide was an innocent party. Husband and wife would receive a windfall if the mortgage was invalidated and Countrywide would be punished. As the Court noted, “the forgery caused no harm to [husband and wife]” and they were “not cheated.” They got the loan they sought and they intended to mortgage the property.

Comment: Forgery is usually not a good idea, even when signing for an absent spouse. It would be interesting to see what the result might have been if the identity of the forger was known.

## Eminent Domain — *De Novo* Review

*De novo* review of the record without new evidence is the standard for district court appeal of administrative decision of relocation benefits under Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act.

*Frick v. City of Salina*, 289 Kan. 1, 208 P.3d 739 (2009). As part of an eminent domain proceeding, the property owners (“Owners”) were advised that they were eligible for relocation assistance. Owners disagreed with the amount



the City paid them for relocation expenses and appealed, seeking an administrative hearing. The administrative hearing officer reviewed and upheld the amounts awarded by the City. Owners appealed the administrative hearing officer’s decisions to the district court.

The City argued the district court’s review was limited to the administrative record while the Owners argued it should be a trial *de novo*. The district court agreed with the City, limiting its review to the administrative record in affirming the hearing officer’s decisions. Owners appealed.

K.S.A. 58-3509(a) provides the appeal of the relocation expenses to the district court “shall be a trial *de novo* only on the issue of relocation benefits.” Owners argued this language entitled them to present additional witnesses and evidence to the district court.

The Supreme Court ruled the Owners were not allowed to present new evidence to the district court. Although the statute provides a trial *de novo* the Court cited *Nurge v. University of Kansas Medical Center*, 234 Kan. 309, 674 P.2d 459 (1983) as precedent that this language only provides for an independent review of the record and does not allow new evidence to be introduced unless specifically allowed by the statute. The Court reversed and remanded to the district court, instructing the district court to make “independent findings of fact and conclusions of law” based on the record.

## Eminent Domain — Inverse Condemnation

Owner entitled to compensation for inverse condemnation when the property was incidentally damaged in the course of an improvement project. City also liable for attorneys’ fees and expenses where the project was funded in part by the federal government.

*Estate of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 215 P.3d 561 (2009). Owner’s property sat on a corner of an intersection where the City decided to install a roundabout.



The City took permanent and temporary rights-of-way from Owner as part of its street improvement. Owner did not appeal from the award for the

takings. Owner’s basement began flooding and he eventually discovered it was due to the improvement project which caused water to drain onto his property. Owner brought suit under the Kansas Tort Claims Act (“KTCA”) alleging damage to his property from the change of grade and disruption of the natural underground water barriers. The trial court ruled City wasn’t liable under a negligence theory, but that it was liable for damage to the landowner’s property on an eminent

domain theory. Landowner was also awarded attorneys' fees and expenses.

The Kansas Supreme Court agreed with the trial court. It recognized that the Kansas Eminent Domain Procedure Act (EDPA) specifically provides for compensation where property is taken or *damaged*: "[p]rivate property shall not be taken or *damaged* for public use without just compensation." In order to be compensable, the Court ruled that "damage must be substantial and must be the planned or inevitable result of government action undertaken for public benefit."

The Court also upheld the award of attorneys' fees. Under federal law, when a public project is funded by federal money, as it was here, the entity using the funds must agree to compensate landowners who prevail in inverse condemnation actions for their attorneys' fees. 42 U.S.C. § 4654(c) (2006). Under Kansas law, reimbursement for attorneys' fees in litigation is recoverable only where provided for by "statute or agreement." Here the federal statute does not directly impose a liability for attorneys' fees. But the Court said by using federal funds, the City "agreed" to pay attorneys' fees, thus being liable for them "by agreement."

Comment: The Supreme Court said that private property which is damaged as part of a governmental action taken for public benefit can be compensable under the Eminent Domain Procedure Act.

## Home Inspections — Mediation

**Liability release and limited liability provisions in home inspection agreement valid. Claims against seller and seller's realtor dismissed when buyer did not pursue mediation before filing suit.**

*Santana v. Olguin*, 41 Kan. App. 2d 1086, 208 P.3d 328 (2009). Buyer of residential property discovered defects in the property after closing and sued Seller, Seller's realtor and Buyer's property inspection company ("Inspection Company") for negligence, fraud and violations of the Kansas Consumer Protection Act.

Buyer's agreement with the Inspection Company contained a provision releasing the Inspection Company "from all liability and responsibility" related to "any unreported defect or deficiency." Another provision limited the liability of the Inspection Company to the amount paid for the inspection in the event the Inspection Company was



"found liable due to breach of contract, breach of warranty, negligence, negligent misrepresentation, negligent hiring or any other theory of liability." The Court of Appeals granted summary judgment to Inspection Company, finding the liability limitation provision applied to any liability while the release provision applied to unreported defects or deficiencies.

Buyer also argued the agreement was unconscionable. The Court rejected this argument, finding Buyer failed to present any evidence such as inequality of the parties' bargaining power or hidden language in the agreement to establish unconscionability.

The Court also affirmed dismissal of Buyer's claims against Seller and Seller's realtor. The real estate purchase contract contained a mediation clause which stated "[a]ny dispute or claim arising out of or relating to this Contract, the breach of this Contract or the services provided in relation to this Contract, shall be submitted to mediation." Buyer filed suit instead of submitting her claims to mediation. The Court found mediation was "a condition precedent to litigation" even though the clause didn't specifically require mediation prior to litigation.

Comment: This case shows the importance of first following the requirements of any mediation clauses in a contract when a dispute arises before bringing a lawsuit.

## Homestead – Abandonment – Intent to Return

**Homestead not abandoned when owners rent and occupy an apartment in another city if they still show an "intent to return" to the homestead.**

*In re Curry*, 2009 WL 5198294 (Bankr. D. Kan. 2009). Kansas law allows a person only one homestead. A Bankruptcy Trustee objected to Debtors' homestead exemption because Debtors owned a homestead in one town but rented an apartment in another city, spending most of the year at the apartment.

The wife grew up in, and eventually inherited, a homestead in Pleasanton, Kansas. Husband and wife lived in the house together, but then the husband rented an apartment in Topeka in order to find work as a bus driver for eight months of each year. The wife joined him most of the year in Topeka and they conducted many life activities in Topeka (church, medical care, voting). Trustee claimed Debtors had abandoned their homestead in Pleasanton by establishing Topeka residency.

The Bankruptcy Court reviewed Kansas law on homestead abandonment and concluded the cases have "one common



element: the trier of fact believed the debtors when they indicated an intent to return to the homestead.” Here, Debtors maintained their home in Pleasanton, insured it, didn’t rent it out, kept utilities on part of the time, and returned from time to time. The Court concluded Debtors showed an intent to return and did not abandon the homestead.

Comment: This is a basic rule; the difficulty is for a court to determine whether or not a person has an intent to return to the homestead.

## Judgment Liens

**Child support judgments don’t become dormant but cease to be a lien on real estate on the date the judgment would otherwise become dormant.**



*State of Kansas v. Cleland*, 42 Kan. App. 2d 482, 213 P.3d 1091 (2009). In an agreed journal entry setting forth changes to prior custody and child support arrangements, Dad agreed he owed almost \$10,000 for past due child support. K.S.A. 60-2403 (a) provides judgments become dormant after five years and cease to be “a lien on the real

estate of the judgment debtor” unless a renewal affidavit is filed or an execution is issued. K.S.A. 60-2403 (b) was amended in 2007 to provide that child support judgments don’t become dormant but can cease to be a lien on real estate if the judgment would otherwise become dormant under K.S.A. 60-2403(a) (in other words, after five years unless a renewal affidavit is filed or an execution is issued). In this case, Mom began proceedings to enforce the child support judgment approximately four years and ten months after the date the agreed journal entry was entered (which was approximately six weeks prior to expiration of the five-year period) so the judgment was still a lien on any real estate owned by Dad.

## Judgment Liens — Retroactive Legislation

**Retroactive legislation invalidating judgment lien against cemetery property held unconstitutional.**

*State ex rel. v. Mike W. Graham & Assoc., LLC*, 42 Kan. App. 2d 1030, 220 P.3d 1105 (2009). Heinsohn had a judgment lien for unpaid work he did as caretaker for an abandoned cemetery that was taken over by the State. After Heinsohn’s judgment, the legislature amended an existing



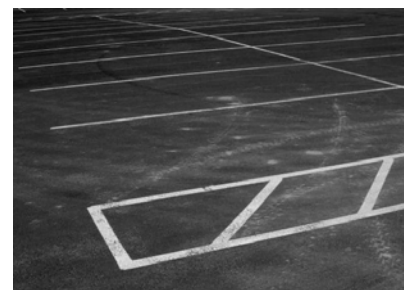
cemetery corporation governance law to invalidate all liens in existence when the State dissolves an abandoned cemetery corporation. The legislation was retroactive to January 1, 2003, which nullified Heinsohn’s lien.

The Court of Appeals said it was “clear beyond a substantial or reasonable doubt” that the retroactive legislation was “unconstitutionally applied to defeat [Heinsohn’s] preexisting lien rights, thus infringing upon due process of law.”

## Land Use — Historic Preservation Act

**Opponents to project covered by Historic Preservation Act had to show more than just proposed alternatives were feasible and prudent.**

*Friends of the Bethany Place, Inc. v. City of Topeka*, \_\_\_\_ Kan. App. 2d \_\_\_\_, \_\_\_\_ P.2d \_\_\_\_ (2010). When the Topeka City Council voted to approve an application by a church to build a parking lot on land listed in the Register of Historic Kansas Places, a community group that had formed to oppose the parking lot appealed the decision, arguing that there were a number of feasible and prudent alternatives to the proposed lot. Under the law, the lot could be built if the church showed there were no feasible and prudent alternatives, and the church had taken all possible planning to minimize the impact from the project.



The court held that the feasibility and prudence of an alternative must address technical, design, and economic issues, as well as the project’s relationship to any community-wide plan. Further, there should be evidence on these factors with respect to a suggested alternative before the church would have to prove that the suggested alternative was unfeasible or imprudent.

The court ruled that its role in determining whether the project should be permitted was very limited. As long as the City's decision was supported by substantial evidence and was not arbitrary, or capricious, it had to be affirmed.

Comment: The important implication of this case is that opponents to a project to which the Historic Preservation Act applies may need to do more than propose alternatives that might be feasible and prudent, and should go the extra step of presenting a detailed analysis of how and why the alternatives they identify are feasible and prudent.

## Mechanic's Liens — Identity of Contractor

**Mechanic's lien invalid for naming wrong general contractor.**

*National Restoration Co. v. Merit Gen. Contractors, Inc.*, 41 Kan. App. 2d 1010, 208 P.3d 755 (2009). A \$97,029 mechanic's lien was invalid because the claimant named the general contractor as "Merit Construction Company, Inc." when, in fact, the general contractor was "Merit General Contractors, Inc." The Court followed existing law, which recognizes that Kansas statutes require a lien statement to name the contractor of the owner of the property (K.S.A. 60-1103(a)(1)).

## Mineral Interests

**Saltwater disposal lease was considered part of surface estate and wasn't retained by owner who sold property but retained mineral interests.**

*Dick Properties, LLC v. Paul H. Bowman Trust*, 221 P.3d 618 (2010). Real property was subject to an oil and gas lease



and the oil company lessee and the property owner ("Owner") entered into a saltwater disposal lease (the "Lease").

Owner then sold the property but retained the mineral interests. The oil company began making rental payments under the Lease to the buyers and eventually entered into a new saltwater disposal lease with the buyers. Owner sued, arguing it was still entitled to rental payments under the Lease and it was required to be a party to any new saltwater disposal lease.

The Court of Appeals found the buyers could enter into a new saltwater disposal lease without the Owner's consent.

Kansas law allows the mineral interests in land to be severed from the real estate. A mineral interest owner has the right to "make reasonable use of the land in order to explore and develop the mineral estate." In addition, a lessee under an oil and gas lease has "the right to drill and operate a saltwater disposal well on the leased premises and dispose of on-lease water." In this case, a saltwater disposal lease was necessary because the oil company lessee was disposing of water from additional wells located on other properties, which went beyond its rights under the oil and gas lease.

While the Owner retained the mineral rights to the property, it had transferred its rights to explore and drill for oil and gas to the oil company lessee under the oil and gas lease. The Owner didn't reserve any rights other than the mineral interests in its deed to the buyers so the Court found the rights to the Lease "ran with the land" and passed to the buyers.

## Mortgage Foreclosure — Assignment — Necessary Parties

**A mortgagee acting only as a nominee is not a contingently-necessary party to an action to foreclose a prior mortgage.**

*Landmark Nat'l Bank v Kesler*, 289 Kan. 528, 216 P.3d 158 (2009). A second mortgage identified Millennia as "Lender" but named Mortgage Electronic Registration Systems, Inc. ("MERS") as mortgagee. It also stated MERS was designated "solely as nominee for Lender." Millennia apparently sold this second mortgage to Sovereign Bank but Sovereign never recorded an assignment of the second mortgage.

Landmark held a first mortgage on the property and filed suit to foreclose. In doing so, it named only the borrower and Millennia as defendants. Default judgment was entered when neither defendant responded. After the foreclosure sale, Sovereign moved to intervene, asserting it held title to the second mortgage and seeking to set aside the judgment. MERS moved to set aside the judgment, claiming it held legal title to the mortgage and was a necessary party to the case. The district court denied both motions. It said MERS wasn't "a real party in interest" and Landmark wasn't required to join it in the foreclosure case. Further, it said since Sovereign hadn't recorded an assignment of the mortgage, it couldn't assert its rights after judgment was obtained.

MERS and Sovereign appealed, and the Court of Appeals (see 40 Kan. App. 2d 325, 192 P.3d 177 (2008)) and the Supreme Court affirmed.



Observing this was a matter of first impression, the Supreme Court reviewed decisions in other states. The Court said the crux of the matter was whether MERS, if it had been joined as a defendant, “would have had a meritorious defense” and a reasonable possibility of a different outcome. The Court concluded it would not. It looked to the position of MERS in the mortgage being foreclosed. The mortgage identified MERS “solely as nominee” for Lender (Millennia) and stated it was given to secure payment to Lender (Millennia). It went on to state the parties agreed “MERS holds only legal title to the interests granted by Borrower in this Mortgage; but, if necessary to comply with law or custom, MERS, (as nominee . . .) has the right to exercise any and all of those interests, including, but not limited to, the right to foreclose. . . .” The remainder of the mortgage provisions spoke in terms of protecting interests of Lender, not MERS. The Court declared the status of a nominee depended upon “the context of the relationship of the nominee to its principal.” Here it said MERS was “more akin to that of a straw man than to a party.” Ultimately the Court concluded MERS had no actual interest in the outcome of the case, and that it would suffer no prejudice from not being able to intervene.

The Court was not persuaded that MERS provided “a cost-efficient method of tracking mortgage transactions.” The Court observed the legislature had established a registration system for serving notice of litigation, and it was not the duty of the Court to criticize or substitute that legislatively-created system.

Comment: Fannie Mae has issued a servicing policy stating that “MERS must not be named as a plaintiff in any foreclosure action” in a Fannie Mae foreclosure. The Policy advises servicers to prepare a mortgage assignment from MERS to the servicer or from MERS to Fannie Mae before bringing the foreclosure. Announcement SVC-2010-05.

## Mortgage Foreclosure — Disposal of Personal Property

**Proper notice required to dispose of personal property removed from foreclosed residence.**

*Snider v. MidFirst Bank*, 42 Kan. App. 2d 265, 211 P.3d 179 (2009). Bank foreclosed on residential property owned by mother and son, and hired Safeguard to work with the sheriff in the eviction. Safeguard’s agent took possession of personal property based on a writ of assistance, and the property was placed into storage and eventually sold.

The mother filed suit for conversion against the Bank and the Agent, including the conversion claims of her son which he

had assigned to her. The district court entered summary judgment in favor of the Bank and the Agent on all claims and the mother appealed.

The Court of Appeals held that the son’s conversion claim could not be assigned because in Kansas an intentional tort claim is not assignable. Thus, the mother was not the real party in interest with regard to her son’s claims, and the Court remanded the case to allow a reasonable time for her son to be joined in the lawsuit.

The Court of Appeals also found summary judgment should not have been granted on the claim of conversion because the uncontroverted facts, when viewed in the light most favorable to the mother, did not establish that proper notices were given. Notices were given at the foreclosed property address which was known to be vacant and was not the last known address of the mother and son; the writ of assistance was not served in compliance with K.S.A. 60-303 and it didn’t authorize the sale of the property; and the letter sent prior to the sale of the personal property did not comply with Kansas law regarding property to be sold to enforce a warehousemen’s lien under K.S.A. 84-7-210(b).

Comment: It’s often difficult and sometimes burdensome to find and serve defendants properly in a foreclosure case. This case demonstrates the importance of complying with the strict requirements for service and notice in these proceedings.

## Mortgage Foreclosure — Standing of Purchaser — Title Defect

**A purchaser at a sheriff’s sale is not entitled to damages arising from faulty title if the purchaser failed to examine the title before the sale.**

*First Nat’l Bank and Trust Co. in Larned v. Wetzel*, 42 Kan. App. 2d 924, 219 P. 3d 819 (2009). Plaintiff Bank brought a foreclosure action and Wetzels, third parties, purchased



the property at the foreclosure sale. After the sale it was discovered there were other lienholders that had not been joined in the action. The

sheriff’s sale was set aside and Wetzels were refunded their purchase money. Wetzels then filed a motion seeking dam-

ages from Bank for the interest they incurred on the purchase money and lost.

The Court of Appeals first observed that a purchaser at a sheriff's sale receives only that which the defendant owner had, much like a quit-claim deed. It said such a purchaser is charged "with constructive notice of public records" and "bound to take notice of facts" in the public records. It also said a purchaser that did not first ascertain the facts shown by the records was negligent and had no remedy at law: "[e]quity cannot be invoked to relieve one from the consequences of his or her own negligence."

Wetzels countered that they had relied on the Bank because it had included in its petition a claim for funds expended for "title evidence." They argued this implied title work had been done on which they could rely. This was unavailing because this argument wasn't raised in the district court. Besides, the Court said this language "should not have reasonably induced the Wetzel Buyers from performing their own duty to check the public records" and thus they were negligent, barring their effort to recover on an equitable theory.

Comment: Buyers at a foreclosure sale cannot rely on the foreclosure sale to give them clear title. They need to do their own examination of the title.

## Mortgages — Fixture Filing

**Register of Deeds cannot refuse to file a mortgage as a fixture filing for failure to attach the mortgage to a UCC-1 Financing Statement and a UCC Addendum.**

*2009 Op. Att'y Gen. 19.* K.S.A. 84-9-502(c), which is part of the Kansas Uniform Commercial Code (UCC), allows a mortgage to be filed as a fixture filing if the mortgage contains certain language, meets the requirements for a financing statement and includes collateral which is or is to become fixtures.

The Kansas Attorney General opined that if a mortgage meets the statutory requirements for a fixture filing, a register of deeds cannot refuse to file the mortgage as a fixture filing for failure to attach the Mortgage or, alternatively, a description of the collateral to a UCC-1 Financing Statement and a UCC Addendum.

Comment: Mortgages and UCC filings are recorded in separate indexes. The original mortgage should be presented to the register of deeds with instructions to record it as a mortgage. A copy of the mortgage should be presented to the register of deeds with instructions to record it as a fixture

filing. Recording fees for mortgages are different than the recording fees for fixture filings so make sure to calculate and pay both fees.

## Mortgages — Legal Description

**Mortgage recorded with wrong lot number did not impart notice, but other documents of record provided ample notice of the existence of the mortgage to put a purchaser on notice of the mortgage and thus, was not avoidable by bankruptcy trustee.**

*Hamilton v. Washington Mut. Bank FA (In re Colon)*, 563 F.3d 1171 (10th Cir. 2009). Bank filed its mortgage with the wrong lot number: lot 29 instead of lot 79. The mortgage correctly identified the property by address and parcel identification number. A Subordination Agreement relating to the mortgage was recorded simultaneously and also referenced the wrong lot. The borrowers filed bankruptcy and the Bankruptcy Trustee sought to avoid the lien as a hypothetical lien creditor or bona fide purchaser ("BFP"). The bankruptcy judge held the mortgage did not provide constructive notice to the Trustee as a hypothetical BFP and could be avoided. The Bankruptcy Appellate Panel agreed and upheld the ruling (*See Hamilton v. Washington Mut. Bank FA (In re Colon)*, 376 B.R. 33 (B.A.P. 10th Cir. 2007)), but the Tenth Circuit reversed.



The Tenth Circuit said a BFP is deemed to have "'notice of the contents of all the prior recorded deeds and mortgages' in the grantor's chain of title." Records are indexed by grantor/grantee and a purchaser is required to examine all conveyances made by a grantor to determine if it affects the subject property. Although the Subordination Agreement had the wrong lot number, the Court said it was in the chain of title because it referenced the recording information for Debtors' second mortgage and the second mortgage contained the correct lot number. The Bank's mortgage would also be listed in the grantor/grantee index under the Debtors' name and having notice of the lot number discrepancies between the second mortgage, Subordination Agreement and the Bank's mortgage, a purchaser exercising prudence and diligence would have determined the lot number error and that the Bank had a mortgage on the property. Therefore, the Trustee could not avoid it. The Court also reversed the bankruptcy court's ruling that the Trustee could avoid the Bank's mortgage as a hypothetical lien creditor for the same reasons.

## Mortgages — Prepayment Charges

**The reasonableness of prepayment charges is considered under circumstances at the time loan is made, not at time of enforcement.**

*Santa Rosa KM Assoc, LTD., P.C. v. Principal Life Ins. Co.*, 41 Kan. App. 2d 840, 206 P.3d 40 (2009). Borrower assumed a 1991 loan when it purchased a shopping center in



1998. The loan contained a “make whole premium,” or prepayment charge, that amounted to \$1,636,268.96 when Borrower sought to prepay the loan in 2005. At that time, the principal balance was \$4,865,142.24. Borrower brought a declaratory judgment action challenging the prepayment charge. Lender counterclaimed to collect its attorneys’ fees. Borrower lost on both claims.

Prepayment Charges. The Court noted the “make whole premium” serves a valid economic purpose of avoiding a “heads I win, tails you lose” result. Without it, a borrower is in complete control, continuing to make payments when the market interest rate is greater than the contract amount, but choosing to prepay the loan when interest rates fall below the contract rate. The Court said the prepayment charge preserved the benefit of the bargain to Lender and committed Borrower to the bargain “independent of fortuitous fluctuations in interest rates.”

Borrower argued that the terms of the prepayment charge were unreasonable. The Court responded that its function was not to rewrite the parties’ contract, but to determine “whether its terms are so wide of the mark that to enforce them would violate the public policy of our state.” Here, the Court acknowledged that the make whole premium was not the best estimate of the anticipated loss from prepaying the loan, but said a review of these transactions must be made from the perspective of the circumstances at the time the loan was made, and not in hindsight. The Court found that the Borrower failed to show the formula was so unreasonable as to render it unenforceable. Moreover, the Court observed that Borrower did not believe the terms were onerous when it assumed and ratified the loan in 1998.

Borrower also claimed the make whole premium was uncon-

scionable. The Court considered the factors previously established by the Kansas Supreme Court in determining whether a contract is unconscionable, but found Borrower’s claim failed to meet this test. There were no uncontroverted facts to suggest unequal bargaining power and Borrower’s principal was an experienced commercial real estate investor/attorney who had negotiated the exclusion of prepayment charges in similar contracts in the past. Nor was there anything to indicate the make whole premium was a “take-it-or-leave-it or deal-breaker provision in the loan.”

Comment: This is another example of how Kansas courts tend to uphold agreements made in commercial contracts. The Supreme Court rejected the borrower’s claim that the prepayment charge was unreasonable.

## Premises Liability

**Standard of care for parking lot maintenance is reasonable care under all circumstances; slight-defect rule rejected for parking lots.**

*Elstun v. Spangles, Inc.*, 289 Kan. 754, 217 P. 3d 450 (2009). A woman sued Spangles for injuries resulting from a fall in its parking lot. She stepped into a two-inch-deep hole which was dark and covered by water, and broke her hip. The issue was the standard of care.



In 1935, the Kansas Supreme Court established the “slight-defect rule” for sidewalks. That rule generally says that property owners (usually cities) have no duty to repair slight defects in sidewalks. The rationale is the expense to maintain perfect sidewalks would exceed the benefit. Spangles wanted to expand the slight-defect rule to parking lots, but the Supreme Court said no, noting that while sidewalks are ordinarily open to the public, parking lots are usually “owned and maintained” by a business for its use. The Court said it saw no reason to revise current law of “reasonable care owed by an occupier of land to invitees and others lawfully on the owner’s land.” It remanded the case for trial based upon a reasonable care standard.



## Prescriptive Easement

### Pipeline granted prescriptive easement after recording 1917 easement in 2008.

*Southern Star Cent. Gas Pipeline, Inc. v. Greuel*, 2009 WL 1208065 (D. Kan. 2009). A pipeline company obtained a blanket easement in 1917, but the easement wasn't recorded until 2008 by its successor (referred to collectively as the "Pipeline Company"). The company installed a pipeline and along with its

successors, maintained and operated the pipeline since 1917. The evidence established open possession from 1958 "until

at least 1977" and continuous use from 1958 until the present. The Greuels purchased the property in 2007, before the 1917 easement was eventually recorded. They argued that they took the property free of the claimed easement according to K.S.A. 58-2223 (parties without notice not bound by unrecorded documents). But Pipeline Company prevailed, establishing a prescriptive easement as set forth in K.S.A. 60-503, which says:

No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years.

The court walked through the statutory requirements for a prescriptive easement, applying them to the facts:

- 1) Open Possession. Kansas courts have not ruled on what constitutes open use of an underground easement. Physical markings and certain usages are often the test for open possession. Here, the prior owner had accepted payments for damages caused by Pipeline Company's use of the easement and the court found this was sufficient to meet the standard of open possession, even though the current owners (the Greuels) were unaware of the prior payments.
- 2) Exclusive Possession. Pipeline Company had been in "exclusive operation, maintenance and transportation of

gas through the pipeline," which the Greuels did not refute. This established exclusive possession.

- 3) Continuous Possession. The evidence showed Pipeline Company "continually maintained the pipeline since 1958" and entered the property for numerous inspections and repairs which, as a matter of law, established continuous possession.
- 4) Belief of Ownership. Greuels claimed that payments made to previous owners were for a license and not an easement. Pipeline Company responded that the payments were for damages on the property. The court found the Greuels had not demonstrated an issue of material fact, and the Pipeline Company had demonstrated a good faith belief of ownership of the easement for the past 49 years.

The court also concluded there was no evidence that the easement had been terminated either by mutual agreement, abandonment, or by the prior owner adversely possessing the easement.

Comment: This case presents a good discussion of the elements for establishing a prescriptive easement.

## Property Value — Annexation of Water District

**Compensation for taking of territory in water district may include "going concern" value.**

*Rural Water District #2 v. City of Louisburg*, 288 Kan. 811, 207 P. 3d 1055 (2009). City annexed land located within rural water district (District). By statute, when this occurs the City must compensate the District for the "reasonable value of the property, facilities and improvements" taken. If the parties can't agree on the value, then the statute prescribes a procedure employing three appraisers, one chosen by each party who, in turn, select the third.

Here, two appraisers set the value at \$133,200 with the third refusing to join the decision because he believed the others failed to consider all the necessary elements. District petitioned the district court challenging the reasonableness of the award, and sought a trial *de novo*. The district court instead required only substantial evidence to support the award and placed the burden on the District to prove the award was unreasonable. The district court affirmed the award, District appealed and the Supreme Court reversed and remanded.





The Court found along with all other relevant factors in determining the reasonable value, the appraisers and district court should consider “going concern value” in arriving at the award.

The Court also held that the statute contemplated a trial *de novo* due to the language in K.S.A. 12-527(a)(3) permitting a party challenging the award to “institute an action in the district court,” which, in the normal procedure of any lawsuit, includes “discovery, exchange of expert reports, [and] the possibility of a jury.”

Finally, the Court found the District bears the burden of proof under a preponderance of the evidence standard rather than the substantial competent evidence standard used by the district court.

### **Railroad Right-of-Way — Abandonment — Reversion**

**Abandonment of railroad right-of-way does not occur and there is no reversion unless the Surface Transportation Board has entered an abandonment order.**

*Bitner v. Watco Companies, Inc.*, 226 P.3d 563 (Kan. App. 2010). Bitner owned property abutting lots that had been given by the City of Pittsburg to a railroad in 1889. The land was no longer being used for railroad purposes - the tracks were removed and a football field and track built on the property. Bitner sued the railroad contending it had abandoned its right-of-way and Bitner had a reversionary interest.



Under Kansas statutes and the Interstate Commerce Act, there is no abandonment unless the Surface Transportation Board (STB) issues an order of abandonment.

Comment: The Court observed that Bitner could initiate a proceeding to obtain an abandonment order from the STB.

### **Road — Vacating**

**County may vacate a county road regardless of objection from property owner who does not adjoin the road. Only adjoining owners eligible for damages.**

*2009 Op. Att’y Gen. 12.* The Attorney General addressed related questions, pertaining to statutes that allow a board of county commissioners to vacate county roads.

First, K.S.A. 68-102(a) requires notice to adjoining property owners when the county intends to vacate a road. The Attorney General opined that a road could be vacated by a county notwithstanding the objections of a property owner whose land did not adjoin the road. Secondly K.S.A. 68-102a provides for “payment for damage to property caused by such action.” The Attorney General said this language must be read in conjunction with the notice requirement in the statute to adjoining property owners and that therefore, under the language of the statute, the non-adjoining property owner could not have “damage to property caused by the action.”

### **Tax Increment Financing — Four Questions Answered**

**The Attorney General responded to four questions regarding the Tax Increment Finance Act.**

*2009 Op. Att’y Gen. 15.*

- 1) There is no requirement that accounts for each redevelopment project area be established within the special fund into which the tax increment raised in a redevelopment district is deposited.
- 2) A redevelopment project must be completed within 20 years of the date of adoption of the redevelopment project plan for the redevelopment project area in which the redevelopment project is located.
- 3) Revenues that are derived from or held in connection with the undertaking and carrying out of any redevelopment project and from a city's transient guest and local sales and use taxes collected from taxpayers doing business within a redevelopment project area may be used to pay bonds issued to finance a redevelopment project undertaken within the specific redevelopment project area. Revenues that may be used to pay bonds issued to finance a redevelopment project undertaken in any redevelopment project area within a redevelopment district include: revenues deposited in a city's special fund; revenues derived from private sources, contributions or other financial assistance from the state or federal government; revenues from franchise fees collected from utilities and other businesses using the public right-of-way within the redevelopment district; revenues received from a city's sales tax other than the sales tax described in subsection (a)(1)(B) of K.S.A. 2008 Supp. 12-1774; and, with the approval of the county, revenues received by the county from any transient guest, local sales and

use taxes collected from taxpayers doing business in the redevelopment district.

- 4) The legal description of each redevelopment project area is not a required component to be included in the ordinance through which a redevelopment district is established or amended or a redevelopment project plan is adopted.

## Taxation — Exemption

### Tax exemption granted for housing of non-profit's clients.

*In re Mental Health Ass'n of the Heartland*, 289 Kan. 1209, 221 P.3d 580 (2009). The Mental Health Association in Leavenworth County ("MHA") owns and runs residential housing for chronically homeless persons suffering severe



mental handicaps and physical disabilities. MHA sought to exempt the property from ad valorem real estate taxes under two alternate provisions of the exemption statute: K.S.A. 2008 Supp. 79-201 *Second* (benevolent or charitable purposes) or *Ninth* (providing humanitarian services). The county appraiser recommended that MHA receive the exemption, but the Board of Tax Appeals (now the Court of Tax Appeals, or "COTA") denied the application and the Court of Appeals agreed. The Supreme Court reversed, granting the exemption.

COTA and the Court of Appeals denied the exemption because, they reasoned, a more specific exemption applied to MHA for specialized uses of property under K.S.A. 2008 Supp. 79-201b *Fourth*. They concluded that statute should control under case law rulings which say a specific statute takes priority over a more general statute. When applying the more specific statute, MHA did not fit under all of its requirements. The Supreme Court said this was not a proper application of the rule. The plain language of the exemption statute showed that MHA was entitled to an exemption under either K.S.A. 2008 Supp. 79-201 *Second* or *Ninth*. The three statutes aren't in conflict with each other as each ad-

resses a different exemption available and therefore the specific statute rule didn't apply.

Comment: This decision may provide exemptions for similarly-operated housing facilities.

## Water Rights — Burden of Proof for Abandonment of Water Right

### Water right terminated for nonuse without sufficient reason for nonuse.

*Frick Farm Properties, L.P. v. State, Dep't of Agriculture, Div. of Water Res.*, 289 Kan. 690, 216 P.3d 170 (2009). Frick Farm purchased agricultural real estate which included a right to appropriate ground water. When Frick Farm wanted to sell some of the property, the prospective buyer wanted assurance the water right was valid. K.S.A. 82a-732 requires the owner of a water right to report the beneficial use of water each year. Water appropriation rights, as in the case here, can be terminated if there is no beneficial use of water without "due and sufficient cause" for at least five successive years. K.S.A. 82a-718(a).

For two periods of more than five years each, the prior owner of the Frick Farm water right reported no use of the water right or stated sufficient cause for non-use of the right. As a result, DWR initiated a hearing to determine if the water right had been abandoned. Following the hearing, DWR's chief engineer entered an order, which was approved by the Secretary of Agriculture, declaring the water right abandoned and terminated due to Frick Farm's failure to establish "due and sufficient cause for the non-use of water." The order was affirmed by the district court, Court of Appeals (see 40 Kan. App. 2d 132, 190 P.3d 983 (2008)) and Kansas Supreme Court.

Termination of a water right is subject to appeal under the Kansas Judicial Review Act. A verified report of DWR's chief engineer is considered *prima facie* evidence of abandonment. K.S.A. 82a-718(a). *Prima facie* evidence "is evidence which, if left unexplained or uncontradicted, would be sufficient to sustain a judgment on the issue which it supports, but it may be contradicted by other evidence."

The Court cited the evidence used by DWR in drafting the verified report and the extensive investigation (including studying past weather conditions and crop reports) conducted by DWR to locate information missing in the annual water use reports filed by the previous owner. The Court found DWR's evidence satisfied all of the elements in K.S.A. 82a-718(a) and the evidence supported terminating the water right.

Comment: This case illustrates the importance, when purchasing agricultural property with a water right, of reviewing not only the records at the office of the Register of Deeds, but also the water right file with DWR.

## Zoning

**Prohibition of commercial wind farms throughout the county determined reasonable.**

*Zimmerman v. Board of County Comm'rs*, 289 Kan. 926, 218 P.3d 400 (2009). The Wabaunsee County Commission,



using its zoning power, decided that there was no location in the county where commercial wind farms would be appropriate and amended the zoning code to explicitly disallow that land use. On a challenge of that decision by certain landowners, the Kansas Supreme Court ruled that the county commission had acted reasonably and had followed the law, even though the prohibition it adopted was at odds with the recommendation of the

county's planning commission. The Court also ruled that the prohibition was not precluded by state or federal statutes and did not violate the contract clause of the United States Constitution.

The plaintiffs also challenged the decision on the basis that it amounted to a taking of their property without compensation, and that it interfered with interstate commerce in a way that was prohibited under the Constitution of the United States. The Supreme Court did not decide those issues and instead asked the parties to provide additional written and oral arguments about them. Those arguments have been presented to the Court and a decision may be issued at any time.

# Real Estate Services of Adams Jones

**Bankruptcy.** Represent commercial creditors and financial institutions in protecting and recovering assets and property in bankruptcy proceedings in Kansas.

**Brokers and Salespersons.** Advise licensees of responsibilities under Kansas law, including the Real Estate Brokers' and Salespersons' License Act and the Brokerage Relationships in Real Estate Transactions Act.

**Commercial Leasing.** Work with a variety of commercial leases including office, warehouse, retail, and ground leases for commercial landlords and tenants.

**Commercial Sales.** Assist clients in completing real estate transactions through contract preparation, due diligence review, title examinations, and environmental review.

**Condemnation.** Represent landowners and condemning authorities in condemnation actions.

**Construction Law.** Prepare and enforce mechanic's liens and claims against payment and performance bonds. Prepare and review construction contracts. Represent owners, contractors and subcontractors in disputes.

**Financing.** Prepare and review loan documents and security instruments for lenders and borrowers.

**Landlord/Tenant.** Represent landlords and tenants in lease disputes and evictions.

**Land Use/Zoning.** Appear before the Board of Zoning Appeals and appellate bodies on land use issues for landowners and governmental entities.

**Like-Kind Exchanges.** Document and oversee 1031 like-kind exchanges for compliance with tax statutes and regulations.

**Litigation/Alternative Dispute Resolution.** Resolve disputes for clients in the most appropriate forum available for their controversy, including negotiation, mediation, arbitration, and litigation. Cases have included enforcement of contracts, boundary disputes, nuisances, brokerage commission claims, broker/salesperson liability claims, and claims of fraud or misrepresentation. We also serve as mediators and arbitrators of real estate disputes, and have been selected as expert witnesses in real estate cases brought by other attorneys.

**Mortgage Foreclosures.** Represent lenders in foreclosure of commercial properties, appointment of receivers, and collection of rents.

**Tax Appeals.** Prepare and process appeals of real estate tax valuations and assessments.

**Title Insurance.** Represent title insurance companies in claims. Assist purchasers and lenders in securing appropriate title insurance coverage.

**Workouts.** Represent lenders in restructuring and workout of troubled loans.



# Practice Areas

## Real Estate

Bankruptcy   Brokers and Salespersons   Commercial Leasing  
Commercial Sales   Condemnation   Construction Law  
Financing   Landlord/Tenant   Land Use/Zoning  
Litigation/Alternative Dispute Resolution   Mortgage Foreclosures  
Tax Appeals   Title Insurance   Workouts

## Business

Business Entity Formation   Commercial Law  
Creditor's Rights and Bankruptcy   Employee Benefits  
Employment Law   Financial Institutions   Intellectual Property  
Litigation/Alternative Dispute Resolution  
Medical Practices   Mergers/Acquisitions  
Professional Liability

## Estates

Business Succession Planning  
Estate Planning and Administration  
Estate and Trust Litigation   Guardianships and Conservatorships  
Charitable and Family Gifting   Disability Planning  
Powers of Attorney   Trusts and Administration



Adams Jones is a charter member of MERITAS, an international affiliation of independent high-quality, medium-sized law firms with commercial law emphasis. This affiliation provides Adams Jones and its clients with ready access to legal expertise throughout the United States and in other countries. There are currently 172 independent business law firms in this worldwide affiliation. Membership in MERITAS is by invitation only, and members are held accountable to specific service standards and other strict membership requirements.



1635 N. Waterfront Parkway, Suite 200  
Wichita, KS 67206-6623  
(316) 265-8591  
Fax (316) 265-9719  
[www.adamsjones.com](http://www.adamsjones.com)