

Recent Changes in Real Estate Law in Kansas

2012 Kansas Legislation and Recent Case Law



Prepared by the Real Estate Group of

ADAMS  JONES
LAW FIRM, P.A.

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Recognitions

Top Tier in Kansas Real Estate. 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.



Best Lawyers in America. **Mert Buckley, Patrick Hughes** and **Roger Hughey** were selected for the 2011 Edition of The Best Lawyers in America in the area of Real Estate; **Bradley Stout** was selected for Eminent Domain and Condemnation Law; **Patrick Hughes** was selected for Commercial Litigation and Land Use & Zoning Law; **Monte Vines** was selected for Commercial Litigation, Ethics and Professional Responsibility Law, Legal Malpractice Law, Litigation—Banking & Finance and Litigation—Real Estate; 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.

Super Lawyers. Selection to the most recent Missouri & Kansas Super Lawyers included **Mert Buckley** and **Roger Hughey** in the area of Real Estate and **Monte Vines** in the area of Business Litigation.

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.

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Legislation

Appraisal of State Property Revisions. HB 2706

Current law requires the Judicial Administrator to appoint three disinterested appraisers to determine the market value of any real estate prior to the state's purchase or disposition. This bill requires only one appraiser for real property valued at \$200,000 or less. Three appraisers are still required if the real property is valued over \$200,000 by the county's assessed valuation.

The bill also amends K.S.A. 45-221 concerning exemptions from mandatory disclosures in a Kansas Open Records request. Currently, requests for appraisals made during the acquisition of state property are exempt. This amendment also exempts from the Open Records request appraisals made during the disposal of state property.

County Clerks and Assessors. HB 2675

- Eliminates the requirement that, in preparing the assessment rolls, the county clerk use reports from the United States Land Office and also eliminates the clerk's option to require the owner or occupant of the real estate to furnish a proper description.
- Deletes language regarding the deduction of acreage of lands used for railway rights-of-way or interurban railway rights-of-way in making the assessment rolls.
- Deletes the requirement that the county clerk deliver the completed assessment rolls to the county appraiser no later than December 15.
- Allows for the assessment rolls and descriptions to be maintained electronically, as the county deems necessary and proper.

(Summary from Legislative Supplemental Note.)

Groundwater Rights-Due and Sufficient Cause for Nonuse. HB 2451

Current law provides that water rights are abandoned if not used over a period of time. This amendment excepts from abandonment nonuse of water rights in areas declared closed for further appropriation.

Income Tax-Major Changes. HB 2117

On May 22, 2012, Governor Brownback signed House Bill 2117, which provides for the elimination of state income

taxes on certain business and farm income and on the income from rental real estate. It also increases the standard deduction for married and head of household taxpayers, and makes other tax changes.

Beginning next year, Kansas taxpayers, in calculating their Kansas adjusted gross income, will be allowed to subtract from their federal adjusted gross income the following:

- Net profit from business as reported on Line 12 of Form 1040 from federal Schedule C
- Net income from rental real estate, royalties, partnerships, S corps, estates, trusts, residual interest in real estate mortgage investment conduits and net farm rental, as reported on Line 17 of Form 1040 from federal Schedule E
- Net farm profit as reported on Line 18 of Form 1040 from federal Schedule F



Also beginning next year, the individual income tax rate brackets will be modified as follows:

Filing as an Individual

- 3 percent of Kansas taxable income for taxable income up to \$15,000 (modified from this year's 3.5 percent)
- \$450 plus 4.9 percent of the excess over \$15,000, for taxable income over \$15,000 (modified from this year's \$525 plus 6.25 percent for taxable income between \$15,000 and \$30,000, and \$1,462.50 plus 6.45 percent of excess over \$30,000 for taxable income more than \$30,000)

Filing as a Married Couple

- 3 percent of Kansas taxable income for taxable income up to \$30,000 (modified from this year's 3.5 percent)
- \$900 plus 4.9 percent of the excess over \$30,000, for taxable income over \$30,000 (modified from this year's \$1,050 plus 6.25 percent for taxable income between \$30,000 and \$60,000, and \$2,925 plus 6.45 percent of excess over \$60,000 for taxable income more than

\$60,000)

The Kansas income tax standard deduction in 2013 will be as follows:

- \$3,000 for a single individual (currently \$3,000)
- \$9,000 for a couple filing jointly (currently \$6,000)
- \$9,000 for a head of household (currently \$4,500)

A number of other provisions were also modified, including:

- The state sales tax hike will be allowed to expire, dropping the state sales tax from 6.3% to 5.7% as of July 1, 2013 (plus whatever local sales taxes are applicable).
- The subtraction modification for certain long-term care insurance expenditures is eliminated.
- Two-year new pool severance tax exemption to all oil production from pools producing more than 50 barrels a day is repealed.
- Renters will no longer be eligible to participate in the Homestead Property Tax Refund program.
- The net operating loss and expense deductions for investment expenditures no longer will be available to individual Kansas income tax filers.
- A number of income tax credits will no longer be available to individual Kansas income tax filers.

Kansas Appraisal Management Company Registration Act. SB 345

SB 345 creates the Kansas Appraisal Management Company Registration Act to provide a process for registration and regulation of entities conducting, performing, or engaging in real estate appraisal management services as real estate appraisal management companies in the state of Kansas.



The bill requires registration of appraisal management companies by the Kansas Real Estate Appraisal Board (Board).

The bill defines appraisal management companies (AMC) as entities acting as extended third parties authorized to perform appraisal management services, either by a creditor in a consumer credit transaction that is secured by a consumer's principal dwelling, or by an underwriter or a principal in the secondary mortgage market when such entity oversees more than 15 licensed Kansas appraisers or more than 25 appraisers licensed in Kansas and another jurisdiction. Appraisal management services consist of administering an appraiser panel, recruiting qualified appraisers, assigning appraisal orders, and submitting completed appraisals to clients. (Summary is excerpt of Legislative Supplemental Note.)

Kansas Storage Tank Act. SB 406

The current Kansas Storage Tank Act allows for reimbursement costs to clean-up contaminated underground storage tank sites, but not for the cost of removal of the tanks themselves. This amendment provides a reimbursement fund to assist owners of property with abandoned underground storage tanks. The bill also extends the sunset of the Kansas Storage Tank Act from July 1, 2014 to July 1, 2024.

Property taxes-Interest Rates. SB 10

The interest rate charged for delinquent or underpaid property taxes of \$10,000 or more will increase January 1, 2012 to the greater of 10% or the established federal rate plus one percent. The current rate is the federal rate plus one percent, which remains for amounts below \$10,000. The interest rate is increased for property tax overpayments from the current federally established rate to such rate plus two percent. This bill also addressed specific tax authority for Douglas, Edwards and Jackson counties.

Property taxes-Military Housing. HB 2769

HB 2769 clarifies that all housing developments and related improvements on U.S. military installations and used exclusively by military personnel and their families are exempt from property taxation, notwithstanding the fact that the property may have been developed pursuant to the military housing privatization initiative. (Addresses an issue at Fort Riley.)

Property taxes-Plats. SB 193

The Register of Deeds shall not record a plat unless it is accompanied by a receipt from the county treasurer showing payment of all real estate taxes and assessments on the land to be platted for all years "up to and including the tax year

prior to the first tax year affected by the plat recording.” If the amount of the tax has not been certified, this amendment creates a formula for estimating and collecting the taxes and assessments.

Series Limited Liability Companies. Sub. for HB 2207

Sub. for HB 2207 allows for the formation of a business entity known as a series limited liability company (series LLC). Pursuant to the bill, an operating agreement can establish or provide for the establishment of one or more designated “series” of members, managers, or LLC interests. The series can have separate rights, powers, or duties with respect to specified property or obligations of the LLC or with respect to profits or losses associated with specified property or obligations. Additionally, the series can have separate business purposes and investment objectives to the extent provided in the operating agreement. The bill also allows for limitation of liability for each series and includes other provisions concerning their formation, operation, and dissolution. (Summary from Legislative Supplemental Note.)

Uniform Commercial Code Amendments. HB 2621

HB 2621 amends the Uniform Commercial Code concerning secured transactions as recommended by the Uniform Law Commissioners. The only testimony was from the Kansas Bankers Association in support. Of particular interest:

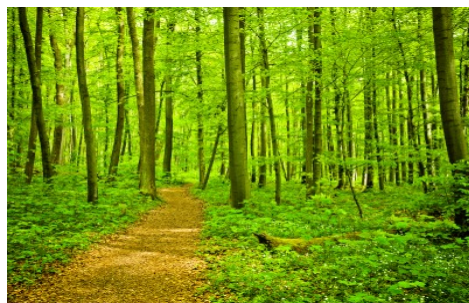
- Requires financing statement of an individual debtor to name the debtor as he or she is named on their driver’s license or state issued identification card. Not required for mortgages filed as financing statements if the mortgage provides the individual name of the debtor or the debtor’s surname and first personal name.
- Creates a new term of “public organic record” which means a record available for public inspection that has been filed with a governmental entity, such as a secretary of state or city and filed to form an organization. It also includes an organic record of business trusts filed with a state, and a record created by legislative action and act of Congress which forms or organizes an organization.
- Amends the procedure for filing information of record by a debtor and secured party to correct inaccurate statements of the other.
- Allows for electronic signatures in the definition of

“authenticate.”

Effective date: July 1, 2013

Wildlife and Parks-Purchase of Land. SB 123

Current law requires legislative approval of purchase of 640 acres or more by the Secretary of Wildlife and Parks. The Bill amends the law to 320 acres. Current law also excludes from its coverage any land purchased by the Secretary from a private individual for less than its appraised value. This amends the exemption to only purchases of less than 640 acres.



City of Wichita New HOME Program

The City of Wichita (the “City”) has established the New Home Ownership Made Easy Program (“New HOME Program”) to rebate the City’s portion of real estate property taxes for up to five years on certain properties. A summary of the requirements to qualify for the New HOME Program follows:

- The property must be a single-family, owner-occupied residence which has not been previously occupied and purchased on or after February 1, 2012.
- The property must be within the City limits in a platted development and all special assessments and general taxes on all lots with existing streets and utilities within the development must be paid through 2010.
- All special assessments and general taxes for the property must be current.
- The property cannot be located within a tax increment finance district.
- The property owner must complete an application and if the City approves the application, the property owner must furnish a Form W-9 to the City and execute a program agreement with the City.

- The property owner cannot appeal the property tax valuation during the rebate period.

Applications will be accepted from March 1, 2012 through December 31, 2013, or until 1,000 properties have been approved for participation. The total mill levy for 2012 for property located within the City limits and in Unified School District 259 is 120.3048453. Of the total, 32.360 is the mill levy for the City so the rebate for 2012 would be approximately 26.9% of the general real property taxes paid.

Under the New HOME Program, the property owner is still required to pay all taxes when due and then the City will issue a rebate around July 1 of each year. The property owner will forfeit the right to the rebate if: (i) the property is sold or the owner ceases to occupy the property, (ii) the owner fails to timely pay all taxes, (iii) the owner appeals the property tax valuation, or (iv) the owner fails to comply with any other requirements of the New HOME Program. In the event of (ii) or (iv), the City is to provide a notice to the owner and the owner has thirty days to cure the default.

Cases

Adverse Possession—Good Faith Belief of Ownership

Adverse possession established even though there was no agreement about location of the boundary line.

Wright v. Sourk, 45 Kan. App. 2d 860, 258 P.3d 981 (2011), *review denied* (2012). This quiet title action was tried to a jury which found that the plaintiffs obtained property by adverse possession by being in open, exclusive and continuous possession of a 22.5-foot strip of land under a good-faith belief of ownership for a period of 15 years or more. But the jury also found that there was no agreement between the parties that a property line they discussed (which was in the same place as the line established by adverse possession) was the boundary line.

On appeal, Sourk argued that the jury's findings were inconsistent because if there was no agreement about the location of the boundary line, then the Wrights could not have a good-faith belief of ownership to establish adverse possession. The Court of Appeals held that even if there had been

no actual agreement as to the location of the boundary line, the Wrights could still have a good-faith belief based on representations about the line's location. Sourk also argued that the Wrights' use of the property was insufficient to give rise to a claim for adverse possession prior to them building on the land. However, the Court of Appeals concluded that placing play equipment and other personal property on the land and mowing it was enough.

Adverse Possession—How to Start the Statute of Limitations; How to Stop It

Transitory act of cutting and baling weeds did not start the statute of limitations; disking of property sufficient to start it; certified letter from title owner stopped it.

Crone v. Nuss, 46 Kan. App. 2d 436, 263 P.3d 809 (2011). The Crones filed an action to quiet title to 48.5 acres to which the defendants, including Nuss, held the



deed. The Crones claimed to own the isolated, weedy land by adverse possession because they started cutting and baling noxious Johnson grass in 1988 to keep it from spreading and continued doing so until

1991 or 1993 and then disked the soil and starting planting Sudan grass, and because they built fences and blocked motorcycle access. Both the Crones and Nuss gave people permission to hunt on the land. Starting in 2003 the Crones planted crops. At that point Nuss demanded a share of the crops. In 2005 Nuss put up no trespassing signs, and he and his lawyer sent the Crones letters notifying them that they were trespassing.

The trial court denied the Crones' request that title be quieted in them and determined they were just trespassing when cutting weeds for their own benefit on land they knew belonged to someone else. The Court of Appeals ruled that it was the Crones' act of disking, not their transitory act of cutting and baling weeds, that first provided notice of an open claim of ownership and started the clock running for an adverse possession claim.

The Crones also argued that their possession was sufficiently exclusive because Nuss's contact with the land was minimal. The Court of Appeals held that testimony that Nuss visited the land, and evidence that Nuss paid the taxes and enrolled the land for farm programs was sufficient to support the trial court's finding that the Crones' use was not exclusive. The final issue concerned whether Nuss had done enough to toll the statute of limitations by orally notifying the Crones in 2003 that they were not to be on the land. The general rule is that a true owner stops the running of the statute of limitations by obtaining a judgment or taking an action that actually ousts the possessor and provides notice of the intent to resume possession but an oral protest is insufficient. The Court found that in this case, the written protest in 2005 was enough to toll the statute.

Annexation—Island Annexations

County Commission cannot allow an island annexation without examining the proposed use or proposed potential deleterious uses of the land.

Baggett v. Board of County Commissioners of Douglas County, 46 Kan. App. 2d 580, 266 P.3d 549 (2011), reversed the Board of County Commissioners of Douglas County's finding that an island annexation into the City of Lawrence would not hinder or prevent the area's proper growth and development, or that of any other incorporated city in the county. That finding allowed an annexation to go forward that was sought by an applicant who had not identified a specific use for the property, but asserted it would be used for purposes allowed within industrial zoning classifications of the City.

The undisputed evidence was that the annexation request was not consistent with the City's formal planning policy statement, that industrial uses could include those commonly recognized to create nuisance conditions such as noxious or toxic fumes, noise, vibration, and night illumination in residential areas, and that there were several homes adjacent to the proposed annexation area. The Court of Appeals noted the record did not show "any consideration by the Board of the impact on the current area of those more deleterious uses that would be permitted under the IG zoning classification" and reversed the Board's decision.

Appointment of Receiver—Standards

Receiver should not be appointed to operate real property unless there are no other options in cases of greatest emergency.

City of Mulvane v. Henderson, 46 Kan. App. 2d 113, 257 P.3d 1272 (2011). When the purchaser of a mobile home park under an installment contract failed to pay sewer fees to the City of Mulvane, the City sued seeking to collect the fees and for declaratory judgment so service could be cut off to the park. Seller intervened and asked that a receiver be appointed to collect income, pay bills, and maintain the park after the City threatened to cut off sewer service if no receiver was appointed. The trial court appointed a receiver.

On appeal, the Kansas Court of Appeals noted that the power to appoint a receiver should be used "only in cases of greatest emergency" because it "involves a taking without an adjudication on the merits." A receiver should be appointed, the Court said, only when there is no other adequate remedy available. It reversed the appointment of a receiver since remedies such as an injunction or a bond might have been enough.

Easement—Interference with Use

Landowner required to remove tree over pipeline easement.

Brown v. ConocoPhillips Pipeline Company, 47 Kan. App. 2d 26, 271 P.3d 1269 (2012). In the 1960's, ConocoPhillips obtained an easement to "lay, maintain, operate, inspect, and remove" its pipeline and laid a pipeline on Brown's property. Conoco claimed the roots of a 60' - 70' oak tree that had grown on the property could damage the pipeline and that the tree interfered with inspecting the pipeline by air as required by federal guidelines. Brown obtained an injunction from the district court to preserve the tree, but the court's ruling allowed it to be removed in the event of an emergency.



The Court of Appeals noted the governing principle of easement law allows the landowner to "make any use of his or

her property which is consistent with or not calculated to interfere with the use of the easement granted.” So the issue before the trial court was whether the tree materially interfered with Conoco’s easement right. The Court of Appeals found that it did and could be removed.

Eminent Domain—Attorneys’ Fees

Attorneys’ fees not allowed for *quantum meruit* claim.

Miller v. FW Commercial Properties, LLC, 293 Kan. 1099, 272 P.3d 596, (2012). Property which was the subject of an eminent domain action was also involved in a quiet title case resolving a claim of adverse possession. The claimants lost their adverse possession case and their attorney, who also represented them in the eminent domain proceeding, was awarded attorney fees from the condemnation award for his *quantum meruit* work on behalf of the losing claimant. The court found that his work for his losing client benefited the actual owner of the property in the eminent domain proceeding.

The Supreme Court reversed, holding the attorney had no standing to receive fees in the eminent domain case because he was not a party in interest to the eminent domain proceeding.

Eminent Domain—Evidence of Value

Owner’s prior statements in tax appeal case were admissible against him in later eminent domain proceeding.

Kansas City Mall Assoc., Inc. v. The Unified Gov’t of Wyandotte County/Kansas City, Kansas, ___ Kan. ___, 272 P.3d 600, 2012 WL 892237 (2012). Landowner claimed his property was worth \$30 million to \$35 million in a condemnation action and sought to exclude his 2005 tax appeal documents in which he argued it was worth only \$2.65 million. The Supreme Court allowed these prior statements because an owner is deemed competent to testify about the value of his or her own property.

The owner also objected to expert testimony comparing the subject property to retail malls instead of a business park. The property was a former retail shopping center that was being rented for business office use. The Court found no

error in using retail shopping malls as comparables to establish valuation for this former retail center now used for business/office purposes.

Eminent Domain—Evidence of Value

Landowner can testify on market value but not on replacement cost.

Manhattan Ice and Cold Storage, Inc. v. City of Manhattan, ___ Kan. ___, 274 P.3d 609, (2012). Although a property owner is competent to testify about the value of his or her own property, here the Court would not allow his testimony on replacement value, saying that was the role of an expert and the landowner was not qualified “as a lay landowner, to assemble the components of and calculate replacement cost.”

Eminent Domain—Jurisdiction

Court did not have jurisdiction to award personal judgment for money in an eminent domain proceeding.

Miller v. Glacier Development Company, L.L.C., 293 Kan. 665, 270 P.3d 1065 (2011). KDOT paid Glacier \$2,190,000 for condemnation of property for highway purposes pursuant to an appraiser’s award, and then appealed. A jury then valued the property at \$800,000, resulting in a judgment in favor of KDOT against Glacier and its sole member, Dean, for a difference of \$1,390,000. The Supreme Court held that the trial court did not have jurisdiction to enter judgment against Dean. The Court said that KDOT should have brought a separate action if it sought to recover from Dean personally.

Fixtures—Rule of Intent

Parties’ agreement that windows installed in debtor’s home would remain personal property is binding between them.

In re Dalebout, 454 B.R. 158 (Bankr. D. Kan. 2011), is a bankruptcy case in which the debtors entered into a financing contract with Wells Fargo for purchase and installation of windows in their house. The agreement purported to give Wells Fargo a security interest



in the windows, and the parties agreed the windows would "remain personal property and will not become a fixture even if attached to real property." The debtors claimed that despite the agreement, the windows were part of the real estate and that Wells Fargo was an unsecured creditor. The bankruptcy court predicted Kansas courts would give controlling weight to the unequivocally expressed intention of the parties that goods did not become fixtures and would enforce their contract, at least when there were no third parties without notice of the contract who would be affected, and when removal of the personal property was not shown to cause substantial damage to the real estate.

Home Inspectors—No Commissions, Referral Fees or Kickbacks Allowed

Kan. Atty. Gen. Op. 2011-020. K.S.A. 2010 Supp. 58-4505(a)(4)(B) prohibits licensed home inspectors from receiving commissions, referral fees and kickbacks. The secretary of the Kansas Home Inspector Registration Board asked the Attorney General whether this prohibition only applied to activities involving fraud or collusion or whether it also extended to "traditional incentive marketing techniques." The Attorney General said the restriction applies to "any commission, referral fee or kickback paid by a registered home inspector . . . for the referral of business...."

Leases—What Constitutes a Lease

An arrangement under which the purported landlord can sell part of the property during the term of the arrangement is not a lease because the other party does not have the exclusive right of possession.

In re American Legion Post #81, 45 Kan. App. 2d 812, 255 P.3d 31 (2011).

The City of El Dorado entered into an agreement regarding a golf course owned by an American Legion post giving the City the right to occupy the land for 99 years in exchange for a monthly payment. The City had an option to buy the property for a nominal amount at the end of the 99 years. The American Legion retained the right to sell portions of the land during the term with a commensurate reduction in the monthly payment. Under K.S.A. 2010 Supp. 79-201a *Second*, land acquired by a municipality through "a lease-

purchase agreement" is to be exempt from property taxes. The basic issue was whether the arrangement qualified, which turns on the legal question: "What substantive attributes make an agreement affecting real property a lease?" The Kansas Court of Appeals held the arrangement did not create a lease because the American Legion clearly reserved the right to sell portions of the land, it transferred less than a leasehold interest to the City, and the City did not have an exclusive right to possess the land.

Loan Agreements—Lender Liability

Lender liable for breach of loan agreement and breach of fiduciary duty, leading to punitive damages.

Bank of America, N.A. v. Narula, 46 Kan. App. 2d 142, 261 P.3d 898 (2011). Judgment was entered against Bank of America for its conduct in a commercial loan as follows: breach of a loan agreement, breach of fiduciary duty, breach of good faith and fair dealing, and punitive damages. The trial court also denied the bank's claim for recovery of interest after the date of the bank's breach of the loan agreement, and refused to enforce loan modification agreements because they were based on fraud by the bank.

The bank encouraged the borrowers to construct their own office building, then borrow the construction loan from the bank. The loan agreement allowed the construction loan to convert to a permanent loan if construction was completed by December 31, 2001, which it was. But in the interim, the bank decided internally that it did not want to fund the permanent loan and encouraged the borrowers to extend the loan, then deleted the borrowers' right to convert to a permanent loan in the extension without calling it to their attention. The bank further told the borrowers that the extension had to be signed overnight in order to avoid foreclosure.

The loan also had a rate swap feature. The bank's loan officers received bonuses for selling rate swap agreements and the evidence was that the borrowers had no idea how a swap worked. The rate swap eventually had a \$100,000 deficiency and the bank did not tell the borrowers this at the time, nor disclose that they would have a substantial termination fee under the swap agreement by signing the loan extension agreement and eliminating their right to a permanent loan. On top of this, the court noted that the bank held itself

out to the borrowers as their “trusted financial advisor,” and the borrowers considered the bank as such.

The bank also made trades on the borrowers’ personal investment accounts, without their approval, in order to pay off a business line of credit as a condition to one of the loan modifications and extension agreements. This resulted in commissions paid to the bank.

The court found the first loan extension agreement in which the borrowers gave up their right to a permanent loan failed for lack of consideration. The borrowers had met all of the requirements for the permanent loan and the court said the extension did not benefit the borrowers at all; it was created to benefit the bank, not the borrowers. Subsequent extensions of the loan agreement were likewise unenforceable for reasons of fraud, breach of fiduciary duty, economic duress, breach of contract and breach of the covenant of good faith and fair dealing.

Mechanic’s Lien—Validity

Verification of a mechanic’s lien, even if in the proper form, is not sufficient if the person signing did not know the truth of the contents of the lien statement; a lien statement is not reasonably itemized when it claims a balance due and attaches invoices but shows neither the contract price nor the payments received.

CoreFirst Bank & Trust v. First Management, 2011 WL 2414212 (Bankr. D. Kan. 2011) concerned a lien filed by a general contractor on a fixed-price project to build the second phase of an apartment complex. Kansas law requires that lien statements be verified. In this case, the president of the general contractor verified the lien statement. The valid-



ity of the verification was challenged at trial and the lien claimant’s president testified he believed the lien statement was true but could not state he knew it to be, testifying that

he “did not have a clue” about the lien statement contents at the time he signed it. The court found this made the verification qualified and the mechanic’s lien unenforceable.

Kansas law also requires a lien statement to contain a reasonably itemized statement and the amount of the claim. The general contractor attached to the lien statement documents showing a “bill out balance” that was not otherwise described. The Bankruptcy Court found the lien statement was not reasonably itemized because the basis for the “bill out balance” was not evident on the face of the lien, and required testimony at trial. The Court suggested the contractor could have satisfied the statute by attaching a statement showing the fixed contract price and the payments the contractor had received, or the payment applications that showed the unpaid balance.

Nuisance

County notice of nuisance to landowner did not arise to a class-of-one equal protection violation.

Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210 (10th Cir. 2011) was an action by a landowner, Kansas Penn Gaming, LLC, against the Cherokee County government. It was filed on a class-of-one equal-protection theory after an enforcement official in the Cherokee County Health Department sent Kansas Penn Gaming a notice stating that the condition of its property violated state and local nuisance laws and regulations, and warning that a failure to clean up the property would lead to an enforcement action. At the time, the county was in litigation with Kansas Penn Gaming over a failed casino project and the letter was sent the day after a significant event in the casino development failure.

Class-of-one equal-protection claims have been recognized in zoning and development disputes where a public official comes down hard on a citizen with no conceivable basis other than spite or some other improper motive. However, the court does not inquire into the government actor’s actual motivations if there is reasonable justification for the challenged action. The case was dismissed because the court found that the allegations were insufficient to state a claim for a class-of-one equal-protection violation -- the landowner failed to allege facts showing that the condition of its property did not violate laws or regulations.

Neighborhood Revitalization Act

Land in sewer district can qualify for Neighborhood Revitalization Area.

Kan. Atty. Gen. Op. 2011-017. The Kansas Neighborhood Revitalization Act allows municipalities to encourage owners to improve blighted areas with the use of property tax rebates. The Attorney General opined that land within a sewer district created under K.S.A. 19-27a01 *et seq.* (the Sewer Act) may be subsequently designated as a neighborhood revitalization area under the Neighborhood Revitalization Act.

Rail-Banked Recreational Trails—Constitutionality of the Kansas Recreational Trails Act

Kansas Recreational Trails Act held to be constitutional.

Miami County Board of Commissioners v. Kanza Rail-Trails Conservancy, Inc., 292 Kan. 285, 255 P.3d 1186 (2011).



Federal statutes provide a mechanism by which railroad rights-of-way no longer needed for railway use can be preserved for possible future rail use and used for recreational trails in the interim. Kansas

adopted the Kansas Recreational Trails Act (KRTA) to require the party who has assumed responsibility for the interim trail under the federal law to prepare a development plan for the trail and submit the plan to the counties or cities where the trail will pass. The KRTA also imposes duties relating to safety, accessibility, litter control, maintenance, use and other matters.

Miami County filed a petition asking that the interim trail operator, Kanza Rail-Trails Conservancy, Inc., be compelled to perform its duties. Kanza challenged the constitutionality of the KRTA. The Kansas Supreme Court held that the Act is constitutional.

Residential Construction—Consumer Protection Act

Contractor liable for not giving notice of overruns, but not required to disclose ownership interest in a subcontractor.

Louisburg Building & Development Company, L.L.C. v. Albright, 45 Kan. App. 2d 618, 252 P.3d 597 (2011), *review granted* (Mar. 9, 2012). This case involves a residential construction dispute in which homeowners obtained judgment for the contractor's failure to construct their home in a workmanlike manner, including damages for breach of contract and \$90,000 of civil penalties under the Kansas Consumer Protection Act (KCPA). The trial court found it was an unconscionable act under the KCPA for the contractor to fail to provide the homeowners with any indication of cost overruns on the homes from January to September when he knew they had budget concerns and the Court of Appeals agreed.

The homeowners also complained that the contractor did not disclose to them that the person who owned one-half interest in the general contractor also owned 100% interest in one of the subcontractors. They claimed this was unconscionable. Unconscionability requires deceptive conduct and unequal bargaining power amongst the parties. Here, the trial court found neither existed and the Court of Appeals agreed.

Residential Construction—Economic Loss Doctrine

Economic loss doctrine does not apply to homeowner claims for negligent residential construction.

David v. Hett, 293 Kan. 679, 270 P.3d 1102 (2011). Homeowners hired a contractor to perform the foundation work, which eventually settled.



They sued the contractor for breach of contract, negligence, fraud, fraudulent concealment, and violation of the Kansas Consumer Protection Act. The trial court ruled the economic loss doctrine barred the homeowners from bringing their negligence claim because the facts were governed by contract. The homeowners appealed, and the Supreme Court reversed, reversing existing law in the process.

The economic loss doctrine is generally described as “a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses.” The concept is that the manufacturer of a product should be accountable for physical injury caused by its product, but not be charged with economic loss caused by the failure of its product unless the manufacturer agreed to assume that risk in a contract.

The Supreme Court held the economic loss doctrine should not apply to residential construction claims because: (1) service contracts for residential construction usually lack the warranty protections given to goods under the Kansas Uniform Commercial Code for sales; (2) residential contracts rarely involve sophisticated parties on equal bargaining levels; and (3) the doctrine’s application in the residential home context “focused on the consequence or damages, rather than the duty breached.” It is illogical that a contractor would be liable if someone was hurt but would escape liability if the negligence was discovered before someone was hurt, limiting the damage to economic loss.

Seller Liability for Misrepresentation—Kansas Consumer Protection Act

A purchaser could not bring a Kansas Consumer Protection Act claim for misrepresentation in a real estate purchase when the purchaser had an inspection report showing the facts before closing.

Schneider v. Liberty Assets, 45 Kan. App. 2d 978, 251 P.3d 666 (2011). Schneider purchased a house from Liberty Assets that did not have a new roof, even though the Metropolitan



Listing Service (MLS) description of the property claimed it did. Schneider had the home inspected before purchase and the inspection disclosed that the roof was not new. Schneider had signed contract terms which precluded her from making a contract claim against the seller or relying

on the MLS listing. Nonetheless, Schneider sued the seller, claiming that the erroneous description in the property listing was a deceptive act under the Kansas Consumer Protection Act (KCPA). The district court entered judgment for Schneider.

On appeal, the Kansas Court of Appeals agreed that Liberty Assets had engaged in a deceptive act. However, the Court also ruled that Schneider was not an aggrieved party under the KCPA entitled to bring a claim because she did not show a causal connection between the deceptive act and the claimed injury. Schneider could not show that she was an aggrieved party by reason of the misrepresentation in the listing because she knew it was not true as a result of her inspection report.

Statute of Frauds—Scope of Application

Joint-venture agreement to pursue a residential housing development not required to be in writing and signed in order to be enforceable.

In *Meyer v. Christie*, 634 F.3d 1152 (10th Cir. 2011), plaintiffs sued former partners in an oral joint venture to pursue a residential development project. A jury entered a verdict in favor of the plaintiffs and the defendants appealed. Defendants argued that judgments on the legal claims that depended on the existence of a joint-venture agreement could not stand because the agreement was unenforceable under the Kansas statute of frauds. The Tenth Circuit rejected the argument, finding that Kansas courts have been consistent in holding that joint-venture agreements deal with personal relationships of the parties and not the sale of real estate.

Surface Owner Rights—Free Gas Clauses

Under oil and gas lease, lessee must provide free gas of a quality suitable for domestic use; however, failure to do so is not remediable by injunction.

Schell v. OXY USA, Inc., 822 F. Supp. 2d 1125 (D. Kan. 2011) is a class action case filed to determine whether, under oil and gas leases that provide the surface owner with a right to free gas for household use, it is the lessee or the surface owner who bears the cost of making the “free gas”

available at a useable pressure and quality.

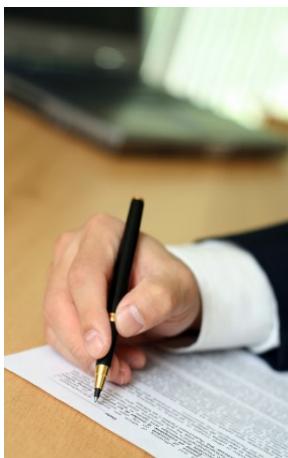
The court looked at the uses of the free gas contemplated by the leases — for stoves and lighting — as providing guidance for the quality of gas that was to be provided for free, and held that the leases require that the gas must be provided in a condition suitable for domestic use. However, the court held that the surface owners were not entitled to have the lessees install expensive equipment or discontinue downstream compression that made the gas more marketable, but could only recover damages for not receiving useable gas.

Tax Sale of Real Property—Notice

Real property may not be sold for payment of taxes without reasonable efforts to notify owner, including Internet search of websites of Secretaries of State.

J.A. Tobin Construction Co. v. Williams, 46 Kan. App. 2d 593, 263 P.3d 835 (2011). An 11-acre tract owned by J.A. Tobin Construction Co., a Missouri corporation, was sold at a tax sale. The county was unsuccessful in attempting personal service on a company with which Tobin had merged, Rosedale Development, and resorted to publication service on that company. Rosedale was a Missouri corporation that had forfeited its Kansas foreign corporation status. However, a search of the Missouri Secretary of State's website would have revealed the merger and Tobin's address. Tobin brought an action to vacate the sale.

The Kansas Court of Appeals said that due process requires a county to take reasonable measures to notify an owner before sale of the property. If the owner's name and address are readily ascertainable, service by publication is not sufficient and the failure of personal service renders the sale void. There was evidence at trial that an independent title examiner not knowing of the connection between Rosedale and Tobin discovered it when preparing an ownership and encumbrances report. The Court determined the county was required in these circumstances to perform the Internet search and serve Tobin personally to satisfy due process.



Taxation—Appraisal Methodology

County appraisal must recognize chronic vacancy of property.

In re Appeal of Brocato, 46 Kan. App. 2d 722, 234 P.3d 866 (2011). A retail strip shopping center in Overland Park had a chronic vacancy rate of 50% since at least 2004. The county appraiser accounted for this by applying a market vacancy of only 4%, and then a rent loss adjustment "below the line" of an additional 45% based on the present value of one year of rent attributable to that additional vacancy. The Court of Tax Appeals agreed, but the Court of Appeals reversed.

Kansas law requires that appraisal practice be governed by the Appraisal Foundation, Uniform Standards of Professional Appraisal Practice (USPAP). USPAP requires that a vacancy factor should be calculated into the entire time frame of the expected vacancy. Here, the property had a history of chronic vacancy of 50%, but the county's method of valuation assumed only a one-year vacancy. The Court said the county should have followed the USPAP standard and used a 50% vacancy factor.

Taxation—Appraisal Methodology

Leasehold interests are not subject to separate taxation in Kansas; leasehold value is included in taxation of the landlord's interest.

In re Tax Appeal of Wine, 46 Kan. App. 2d 134, 260 P.3d 1234 (2011). The City of Council Grove owns the land surrounding the City lake. By ground leases, the City leases the lakefront lots to tenants who have placed mobile homes or permanent site-built homes on the lots. City Lake tenants filed appeals to the Court of Tax Appeals (COTA) claiming that the County improperly allocated the value of the leasehold interests to tenants instead of to the City. COTA consistently held in favor of the tenants, but the County did not change its approach to appraising the properties except as ordered in each case. In this case, one lake tenant requested a reappraisal of all City Lake improvements. COTA granted the requested relief.

The County argued to the Kansas Court of Appeals that the value of the unique location of the improvements on the properties should be included in the value of those improvements. In another case currently before the Kansas Supreme Court, another Court of Appeals panel rejected the County's argument. The panel in this case agreed with that panel's reasoning and result, based on the principle that a leasehold estate is not subject to real estate taxation and that Kansas tax statutes do not provide for taxation of divided interests in real property.

Taxation—Classification

County could not change classification of property after March 1.

In re Protests of Oakhill Land, 46 Kan. App. 2d 1105, 269



P.3d 876 (2012). Taxpayers owned bare ground that was reclassified from agricultural to vacant use. Land classified as agricultural is taxed at its income value, which is a more advantageous rate than for land classified as vacant. State law requires the county to notify tax-

payers on or before March 1 of the classification and appraised valuation of all real estate. The appraiser is allowed to make "necessary changes to the classification or appraised value" before the tax rolls are certified on June 15.

Here, the notice didn't go out to taxpayers before March 1. The appraiser inspected the property on June 9, determined there wasn't agricultural activity taking place, and changed the classification from agriculture to vacant before the June 15 deadline. The Court of Tax Appeals concluded the county could not change the classification after March 1 and the Court of Appeals agreed.

Taxation—Exemptions

Humanitarian services defined for purposes of an exemption.

In re Boy Scouts of America Quivira Council, 47 Kan. App. 2d 67, 270 P.3d 1218 (2012). The Quivira Council of the Boy Scouts of America ("BSA") owned a 3,575-acre ranch

in Chautauqua County. The land had been exempt from taxation since its acquisition as property used "exclusively for educational, charitable and/or benevolent purposes." But the County Appraiser put the ranch back on the tax rolls in 2009 because BSA had leased much of the land for grazing, allowed turkey and deer hunts, and permitted approximately 30 individuals who contributed \$1,000 to BSA to have fishing privileges at the ranch, so the exclusivity requirement was no longer met.

There is a separate exemption for real property used by a community service organization for the predominant purpose of providing humanitarian services which is owned and operated by a corporation organized for the purpose of providing humanitarian services. K.S.A. 2010 Supp. 79-201 *Ninth*. The Court of Tax Appeals denied that exemption. The Court of Appeals disagreed and reversed.

The Court ruled that failing to meet the exemption for charitable and educational purposes in K.S.A. 2010 Supp. 79-201 *Second* did not prohibit BSA from qualifying for the exemption for humanitarian purposes in K.S.A. 2010 Supp. 79-201 *Ninth* -- the two exemptions were not mutually exclusive. The statutory definition of "humanitarian services" includes a showing that the organization is meeting a "demonstrated community need." The County argued this meant BSA must show it is meeting a need within the County. The Court disagreed, finding "community" was not based solely on the county where the property was located.

Taxation—Valuation

Rental rates for build-to-suit properties used to establish ad valorem taxation valuations must be adjusted for landlord's amortized costs and other market factors.

In re Prieb Properties, LLC, ___ Kan. App. 2d ___, 275 P.3d 56, (2012). The Court of Appeals noted that rental rates on build-to-suit properties do not reflect market rental rates because the property is designed to meet the needs of a particular tenant and the landlord amortizes some of its investment in rentals. The Court ruled that a tax appraisal cannot be based on an income approach or sales approach that uses a build-to-suit lease as a comparable, at least not without adjusting the comparable build-to-suit lease to account for its variations from market rent. The Court also rejected the County's argument that an appraisal should value the leased fee. It said the proper standard is to value the fee simple interest while looking at market rent, and not value

the leased fee interest.

Taxation—Valuation

County appraiser may consider the listing price for sale of a property to determine fair market value.

Wagner v. State of Kansas, 46 Kan. App. 2d 858, 265 P.3d 577 (2011). The Director of Property Valuation issued a directive for all county appraisers to "consider a listing price when determining the fair market value of property." Wagner, a property owner, sought an injunction to prohibit the Secretary of Revenue from enforcing this directive. Kansas courts have recognized that the Uniform Standards of Professional Practice (USPAP) are "generally accepted and consistent with the definition of fair market value." And USPAP standards state that a listing price is "a proper consideration in developing a real property appraisal." Therefore, listing prices may be considered.

Trespass—Continuing Permanent Trespass; Good-Faith and Bad-Faith Trespass

Oil and gas producer's continued activity after termination of lease was a continuing trespass but not in bad faith while dispute still on appeal.

Dexter v. Brake, 46 Kan. App. 2d 1020, 269 P.3d 846 (2012). Here, the defendant was an oil and gas lessee who continued to operate wells after the lease had been terminated. The mineral owners sued, and one question was when the statute of limitations started to run on the trespass claim. A continuing trespass is when "there is some continuing or ongoing tortious activity attributable to the defendant, while a permanent trespass occurs when the defendant's tortious act has been fully accomplished." The court found this was a continuing trespass. Thus, the statute of limitations had not begun to run.

Another issue involved the distinction between a good-faith trespasser and a bad-faith trespasser. A good-faith trespasser has an "honest and reasonable belief in the superiority of his or her title." Or, simply put, a good-faith trespasser reasonably believes he or she is right and a bad-faith trespasser knows he or she is wrong. Bad-faith trespassers are held strictly accountable for their misappropriation of the owner's property, and as such, the operator would not be entitled to recover his costs of production if found to have been acting in bad faith. The Court found good faith. The operator was working under one original lease, divided into several wells with different parties. The lease was terminated as to several mineral lessors, but not as to one of them. The

Court held that the operator had a good-faith belief that he was entitled to operate all wells, at least while the case with the terminated mineral lessors was on appeal.

Zoning—Constitutionality of Prohibition of Industrial-Scale Wind Turbines

Wabaunsee County landowners had no vested right to build wind turbines, so County prohibition cannot be a taking; question of whether regulation violates the dormant aspect of the Commerce Clause requires evidence.

Zimmerman v. Board of County Commissioners of Wabaunsee County, 293 Kan. 332, 264 P.3d 989 (2011). In 2004, Wabaunsee County adopted a zoning ordinance prohibiting industrial-scale wind turbines anywhere in the county. In 2009, the Kansas Supreme Court ruled that the prohibition was reasonable and had been adopted following proper procedures.

However, the Court asked for supplemental briefing concerning whether the prohibition was a taking such that the County would have to pay just compensation, and whether it violated the dormant aspect of the Commerce Clause. It ruled there was no taking because the parties challenging the county had no vested right to use their property for industrial-scale wind turbines because prior to the prohibition such a land use would have required a conditional use permit, which would have been discretionary with the County.



The dormant Commerce Clause prohibits "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." The Commerce Clause claims had been dismissed by the district court without any evidence having been presented. Because state laws can violate the dormant aspect of the Commerce Clause when the burdens on interstate commerce are clearly excessive when compared to the putative local interest, the Court held the dismissal was improper and remanded the case for development of a factual record.

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