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A Shift in Power: Why Increased Urban Drilling Necessitates a Change in Regulatory Authority Comment.

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COMMENT

A SHIFT IN POWER: WHY INCREASED URBAN DRILLING NECESSITATES A CHANGE IN REGULATORY AUTHORITY*

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* This Comment was written prior to the 82nd Texas Legislative Session in 2011. No legislation was passed in the session that affects this Comment's substantive content.

I. INTRODUCTION

The meeting of the 81st Texas Legislature was replete with legislation attacking the oil and gas industry.[1] Due to changes in the political climate and shifting state demographics,[2] "over 950

1. *See* ROYCE POINSETT, MCGINNIS, LOCHRIDGE & KILGORE, LLP, 2009 TEXAS OIL & GAS LEGISLATION: "NARROW ESCAPE FROM DEATH BY A THOUSAND CUTS" (2009), *available at* http://www.mcginnislaw.com/pub_pres/333_2009_oil_and_gas_review_poinsett_10_2009.pdf (discussing bills proposed during the 2009 legislative session that would have negatively impacted the oil and gas industry); Ben Sebree et al., *The Changing Face of Public Policy and Key Legislation Affecting the Texas Oil & Gas Industry*, *in* 27TH ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE 1, 1 (2009) (stating that if passed, proposed bills "would have undermined many aspects of exploration and production, Barnett Shale operations, oil and gas tax incentives, mineral estate dominance, [and] rational environmental policy").

2. The trend in Texas has been a population shift from rural to urban areas, where voters are generally more concerned with environmental issues and view oil and gas production less favorably. ROYCE POINSETT, MCGINNIS, LOCHRIDGE & KILGORE, LLP, 2009 TEXAS OIL & GAS LEGISLATION: "NARROW ESCAPE FROM DEATH BY A THOUSAND CUTS" (2009), *available at* http://www.mcginnislaw.com/pub_pres/333_2009_oil_and_gas_review_poinsett_10_2009.pdf; *accord* Reeve Hamilton, *Former Census Director Talks Demographic Shift*, THE TEXAS TRIBUNE, March 11, 2010, http://www.texastribune.org/texas-counties-and-demographics/census/former-census-director-talks-demographic-shift/ (noting that in Texas, many urban areas have experienced an increase in population, while the populations in many rural areas have decreased). The number of House Committee Chairs from West Texas, who have been traditional advocates of the oil and gas industry, decreased from seven to four between the

separate pieces of legislation" were filed concerning the industry.[3] Although the proposed legislation dealt with an array of issues concerning oil and gas, notably important were bills addressing operations in urban areas, particularly the Barnett Shale.[4] This legislation purported to remedy the longtime conflict in Texas property law caused by the dominance of the mineral estate over the surface estate.[5] Despite the numerous attempts, no bills were passed that would have major policy-changing implications.[6] However, in response to this barrage of proposed legislation, Speaker of the House Joe Strauss issued the following charge to the House Committee on Energy Resources:

> Survey current local ordinances governing surface use of property in oil and gas development. Recommend changes, if any, to the authority of the Railroad Commission to regulate the operation of

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2007 and 2009 legislative sessions. ROYCE POINSETT, MCGINNIS, LOCHRIDGE & KILGORE, LLP, 2009 TEXAS OIL & GAS LEGISLATION: "NARROW ESCAPE FROM DEATH BY A THOUSAND CUTS" (2009), *available at* http://www.mcginnislaw.com/pub_pres/333_2009_oil_and_gas_review_poinsett_10_2009.pdf. Due to voter opposition to drilling in the Barnett Shale area, historically pro-industry North Texas legislators also supported legislation detrimental to the oil and gas industry. *Id.*; Ben Sebree et al., *The Changing Face of Public Policy and Key Legislation Affecting the Texas Oil & Gas Industry*, *in* 27TH ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE 1, 1 (2009) (noting that political changes in Texas and the nation were responsible for legislation attacking the oil and gas industry).

3. Ben Sebree et al., *The Changing Face of Public Policy and Key Legislation Affecting the Texas Oil & Gas Industry*, *in* 27TH ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE 1, 1 (2009).

4. *See* ROYCE POINSETT, MCGINNIS, LOCHRIDGE & KILGORE, LLP, 2009 TEXAS OIL & GAS LEGISLATION: "NARROW ESCAPE FROM DEATH BY A THOUSAND CUTS" (2009), *available at* http://www.mcginnislaw.com/pub_pres/333_2009_oil_and_gas_review_poinsett_10_2009.pdf (summarizing proposed bills that, if passed, would have hindered oil and gas operations in urban areas); *see also* TEX. H.B. 3590, 81st Leg., R.S. (2009) (proposing creation of an inventory "of emissions of air contaminants from oil [and] gas production, transportation, [and] processing facilities" by the Texas Commission on Environmental Quality); TEX. H.B. 3591, 81st Leg., R.S. (2009) (proposing changes in "control of emissions from crude oil and condensate storage tanks" in urban areas); TEX. H.B. 1538, 81st Leg., R.S. (2009) (proposing to grant local municipalities and counties authority to establish and enforce local pipeline safety standards).

5. *See* Steven John Berry, Comment, *Surface Damages in Texas: A Proposal for Legislative Intervention*, 17 ST. MARY'S L.J. 121, 122 (1985) (noting that the dominance of the mineral estate often leaves the surface owner without a cause of action for damage to his property caused by the production of minerals).

6. Ben Sebree et al., *The Changing Face of Public Policy and Key Legislation Affecting the Texas Oil & Gas Industry*, *in* 27TH ANNUAL ADVANCED OIL, GAS AND ENERGY RESOURCES LAW COURSE 1, 1–2 (2009).

oil and gas industries in urban areas of the state, particularly the Barnett Shale.[7]

Part II of this Comment will begin with an overview of the historical use of the surface estate by the mineral estate in Texas. It will continue with a discussion of the dominance of the mineral estate and the weakness of surface estate protections in place in Texas. Part III will assess the conflicts that have arisen as a result of urban drilling, beginning with a brief introduction on the history of the Barnett Shale and an examination of the current local ordinances governing the drilling of oil and gas wells in the area. Subsequently, Part IV will shift the discussion to a summary of the current authority of the Railroad Commission of Texas, followed by a call for an increase in the Commission's regulatory authority in urban areas. Part V will conclude this Comment with an analysis of the likelihood that the legislature will indeed recommend a change in authority, and a comparison of the regulatory authority of state agencies in other states faced with the difficulties caused by urban drilling.

II. HISTORY OF SURFACE USE BY THE MINERAL ESTATE IN TEXAS

A. *Two Separate Estates: Mineral Estate and Surface Estate*

Texas has a long history of tension between owners of the surface estate and owners of the mineral estate.[8] To fully understand the origin of this conflict, it is necessary to examine the law creating the two estates. The fee simple owner of a tract of land in Texas has a fee simple ownership in the minerals beneath it

7. TEX. H.R., INTERIM COMMITTEE CHARGES, 81st Leg., R.S., at 12 (2009), *available at* http://www.house.state.tx.us/committees/charges/81interim/interim-charges-81st.pdf.

8. *See* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 133 (Tex. 1967) (regarding a suit brought by owner of the surface estate against the owner of an oil and gas lease for damages to the surface); Greene v. Robison, 117 Tex. 516, 8 S.W.2d 655, 659 (1928) (adjudicating a situation where "[t]here was a dual or double ownership of the land, the surface estate and the mineral estate, each antagonistic to and conflicting with each other"); Valence Operating Co. v. Tex. Genco, LP, 255 S.W.3d 210, 214 (Tex. App.—Waco 2008, no pet.) (reviewing an action by the surface owner to enjoin the owner of the mineral estate from straight-hole drilling a well on a tract used by the surface owner for a landfill).

as well.[9] The fee simple owner can grant or reserve the mineral interests, thus effecting a severance from the surface estate.[10] This leads to the creation of two separate and distinct estates: a surface estate and a mineral estate.[11]

It is important to note that there are many instances where the property owner holds title to both the mineral and surface estates. However, there are relatively few situations in which the owner of the surface estate actually produces the mineral estate himself. Thus, a brief examination of the legal rights affecting each estate is in order. Texas law recognizes five interests in a mineral estate: "(1) the right to develop, . . . (2) the right to lease, . . . (3) the right to receive bonus payments, . . . (4) the right to receive delay rentals[,] . . . [and] (5) the right to receive royalty payments."[12] There is a presumption that all five interests remain with the mineral estate upon conveyance, but the grantor may reserve individual interests.[13]

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9. *See* Stephens Cnty. v. Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S.W. 290, 292 (1923) ("We do not regard it as an open question in this state that gas and oil in place are minerals and realty, subject to ownership, severance, and sale, while embedded in the sands or rocks beneath the earth's surface. . . .").

10. Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (citing Tex. Co. v. Daugherty, 107 Tex. 226, 176 S.W. 717, 719–22 (1915); A.W. Walker, Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 128–29 (1928)); *see also* Steven John Berry, Comment, *Surface Damages in Texas: A Proposal for Legislative Intervention*, 17 ST MARY'S L.J. 121, 122–23 (1985) ("Severance is accomplished when the grantor conveys or leases the mineral rights, or grants the surface estate and reserves the mineral estate.").

11. *Acker*, 464 S.W.2d at 352 (citing *Tex. Co*, 176 S.W. at 719–22; A.W. Walker, Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 128–29 (1928)).

12. Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986) (citing RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 2.1–2.5 (1971)); *accord* French v. Chevron U.S.A., Inc., 896 S.W.2d 795, 797 (Tex. 1995) (relying on *Altman* to list the five interests of the mineral estate); Bank One, Tex., Nat'l Ass'n v. Alexander, 910 S.W.2d 530, 532 (Tex. App.—Austin 1995, writ denied) (noting that the mineral estate consists of the five rights listed in *Altman*).

13. *See French*, 896 S.W.2d at 797 ("[W]hen an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed." (quoting Day & Co. v. Texland Petrol., Inc., 786 S.W.2d 667, 669 n.1 (Tex. 1990)) (internal quotation marks omitted)). The grantor must specifically reserve the individual interests accompanying the right to develop, and the reservation cannot be implied. *See* Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 616–17 (Tex. App.—Eastland 2009, pet. granted) (rejecting the argument that by including a restriction against mineral development in deeds to lot owners, the developer reserved executive rights to the mineral estate by implication), *aff'd*, 54 Tex. Sup. Ct. J. 1705, 2011 WL 3796568 (Aug. 26, 2011).

The first step in understanding the benefits bestowed upon the mineral estate is to examine what is meant by the right to develop. The term "develop" has been construed very broadly and encompasses "[e]xploring, drilling, producing, transporting, storing, and marketing."[14] The logical continuance of the law is that the owner of a severed surface estate has no right to engage in any of these activities associated with the development of the mineral estate,[15] with the exception of land that is subject to the Relinquishment Act.[16]

Inherent within the right to develop is an opportunity for the mineral estate owner to develop the estate himself.[17] As a practical matter, the majority of landowners do not possess the "financial resources, skill, or expertise to develop the mineral fee themselves."[18] Furthermore, unless the titleholder to a severed mineral estate is an oil or gas producer, the owner is likely in the same position as a landowner. Therefore, the right to lease, or the executive right,[19] is usually exercised to transfer the right to

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14. 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)(1)(b) (2d ed. 2010); *see also Altman*, 712 S.W.2d at 118 (clarifying that the right to develop includes the right of ingress and egress).

15. The right to explore for minerals is a valuable right that can be legally protected, and it must be vested in the mineral estate to protect the value of the interest. Given the speculative nature of mineral rights, it would be unfair to allow the surface estate owner to explore for minerals, and thereby affect the value of the interest owned by the mineral estate. *See* Phillips Petrol. Co. v. Cowden, 241 F.2d 586, 590 (5th Cir. 1957) (offering justification for vesting the right to explore in the mineral estate).

16. *See* TEX. NAT. RES. CODE ANN. § 52.171 (West 2011). The pertinent portion of the Relinquishment Act declares:

> The state hereby constitutes the owner of the soil its agent for the purposes herein named, and in consideration therefor, relinquishes and vests in the owner of the soil an undivided fifteen-sixteenths of all oil and gas which has been undeveloped and the value of the same that may be upon and within the surveyed and unsurveyed public free school land and asylum lands and portions of such surveys sold with a mineral classification or mineral reservation, subject to the terms of this law. The remaining undivided portion of said oil and gas and its value is hereby reserved for the use of and benefit of the public school fund and the several asylum funds.

Id.; *see also* 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)(2) n.34 (2d ed. 2010) (explaining the Relinquishment Act).

17. 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)(1)(b) (2d ed. 2010).

18. *Id.*

19. *Altman*, 712 S.W.2d at 118; *accord* Veterans Land Bd. v. Lesley, 281 S.W.3d 602, 615 (Tex. App.—Eastland 2009, pet. granted) (stating that the right to lease is the

develop to an oil and gas company.[20] The rights to receive bonus payments,[21] delay rentals,[22] and royalty payments[23] pertain to financial benefits flowing from the lease.[24] Apart from the fact that these rights provide an incentive to lease the mineral estate, their further analysis is not relevant to the discussion of this Comment.

What is critical to the scope of this Comment is the effect that the right to develop has on the surface estate. In the case of an owner who holds title to both the surface and mineral estates, a lease conveying the right to develop is, in effect, a severance, despite the fact that the owner still retains the right to payments.[25] Therefore, the remainder of this Comment will focus on situations

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executive right), *aff'd*, 54 Tex. Sup. Ct. J. 1705, 2011 WL 3796568 (Aug. 26, 2011).

20. 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)(1)(b) (2d ed. 2010).

21. *See In re* Estate of Slaughter, 305 S.W.3d 804, 811 (Tex. App.—Texarkana 2010, no pet.) (defining "bonus" as "[a] payment that is made in addition to royalties and rent as an incentive for a lessor to sign an oil-and-gas lease" (quoting BLACK'S LAW DICTIONARY 206 (9th ed. 2009)) (internal quotation marks omitted)).

22. *See id.* (explaining that a "delay rental" is "a periodic payment made by an oil-and-gas lessee to postpone exploration during the primary lease term" (quoting BLACK'S LAW DICTIONARY 1411 (9th ed. 2009)) (internal quotation marks omitted)).

23. *See id.* (defining "royalty interest" as "a share of production[,] or the value or proceeds of production, free of the costs of production[,] when and if there is production" (quoting BLACK'S LAW DICTIONARY 1446 (9th ed. 2009)) (internal quotation marks omitted)).

24. 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)(1)(b) (2d ed. 2010).

25. Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188, 192 (Tex. 2003) (citing Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982); Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W.2d 27, 28–29 (1929)).

> In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee's/grantee's interest is "determinable" because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that the lease specifies will cause termination of the estate.

Id. (citing *Cherokee Water*, 641 S.W.2d at 525; *Waggoner Estate*, 19 S.W.2d at 28–29). A reservation of a royalty interest by the lessor is a non-possessory interest. *See Pool*, 124 S.W.3d at 192 (distinguishing royalty interests from mineral interests) (citing *Waggoner Estate*, 19 S.W.2d at 28; A.W. Walker, Jr., *Fee Simple Ownership of Oil and Gas in Texas*, 6 TEX. L. REV. 125, 128–29 (1928)).

where the party with the right to develop the mineral estate is not the owner of the surface estate.[26]

B. *Dominance of the Mineral Estate*

Historically, Texas law has seemingly favored the mineral estate, granting the owner/lessee broad discretion in developing the minerals[27] and offering limited protection to the surface estate.[28] It is well established in Texas that the mineral estate owner is entitled to as much use of the surface estate as is reasonably necessary to carry out operations[29] or to "comply with the terms of the lease and to effectuate its purposes."[30] In this sense, the surface estate is clearly servient to the dominant mineral estate.[31]

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26. The only remaining situation would be that of a party with title to both estates who develops the mineral estate himself. As previously mentioned, this is a rare occurrence. *See* 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)(1)(b) (2d ed. 2010) ("[F]ew individual landowners have the financial resources, skill, or expertise to develop the mineral fee themselves.").

27. *See* Vest v. Exxon Corp., 752 F.2d 959, 961 (5th Cir. 1985) ("Texas law (legislative, judicial, and administrative) has often favored the oil and gas operator over the royalty or surface owners.").

28. *See* Andrew M. Miller, Comment, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas Is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461, 464 (2003) (noting that until the mid-1970s "surface owners remained without any statutory protections from the effects of oil and gas exploration or drilling operations on their property").

29. Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972); *see also* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (noting the dominance of the mineral estate); Warren Petrol. Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410, 413 (1954) (discussing the rights of the mineral estate).

30. *Williams*, 420 S.W.2d at 134 (citing Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863, 865 (1961); Warren Petrol. Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362, 363 (1957); *Martin*, 271 S.W.2d at 413; Page Keeton & Lee Jones, Jr., *Tort Liability and the Oil and Gas Industry*, 35 TEX. L. REV. 1, 3 (1956)). The right to reasonable use of the surface estate is implied from the grant. *See Sun Oil*, 483 S.W.2d at 810 (noting the dominance of the mineral estate over the surface estate). The *Sun Oil* court solidified this position by stating, "[t]he oil and gas lessee's estate is the dominant estate and the lessee has an implied grant, absent an express provision for payment, of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate." Unless there is an express limitation, this right cannot be limited by evidence that the parties to the conveyance "did not intend the legal consequences of the grant." *Id.* at 811.

31. *See* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980) (holding that a mineral lease gave the lessee the dominant estate); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621–22 (Tex. 1971) ("It is well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premise as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease." (citing *Williams*, 420 S.W.2d at

The right to develop is also known as the right of ingress and egress, which grants the mineral estate owner the right to use the surface estate to gain access to and from the mineral estate.[32] However, subject to reasonable use, the scope of this right is very burdensome to the surface estate. It also includes a "right to select the locations of wells and facilities upon the property"[33] and "to construct roads, tanks, pits, and flow lines."[34] Furthermore, this right permits the authorization of third parties to conduct developmental activities upon the surface estate, such as seismographic exploration.[35]

In addition, unless water has been expressly severed by conveyance or reservation, it is a part of the surface estate.[36] As such, "[t]he implied grant of reasonable use extends to and includes the right to use water from the leased premises in such

134; *Brown*, 344 S.W.2d at 865; Gen. Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W.2d 668, 669 (1961); Page Keeton & Lee Jones, Jr., *Tort Liability and the Oil and Gas Industry*, 35 TEX. L. REV. 1, 3 (1956))).

32. *See* Garza v. Prolithic Energy Co., 195 S.W.3d 137, 142 (Tex. App.—San Antonio 2006, pet. denied) (stating that the right to develop "is referred to as the right of ingress and egress").

33. Peter Vermillion & Gaye White, *Recent Developments in Texas, United States and International Energy Law*, 2 TEX. J. OIL GAS & ENERGY L. 211, 214 (2007) (citing Gulf Oil Corp. v. Walton, 317 S.W.2d 260, 262–63 (Tex. Civ. App.—El Paso 1958, no writ)).

34. *Id.* (citing Delhi Gas Pipeline Corp. v. Dixon, 737 S.W.2d 96, 97–98 (Tex. App.—Eastland 1987, writ denied); Ottis v. Haas, 569 S.W.2d 508, 513–14 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.)); *see also* Davis v. Devon Energy Prod. Co., 136 S.W.3d 419, 423–24 (Tex. App.—Amarillo 2004, no pet.) (holding that the surface estate owner could not prevent lessor of mineral estate from constructing caliche roads).

35. *See* Phillips Petrol. Co. v. Cowden, 241 F.2d 586, 590 (5th Cir. 1957) (recognizing that the owner of the mineral estate has the right to allow seismographic exploration); Walace Hawkins, *The Geophysical Trespasser and Negligent Geophysical Explorer*, 29 TEX. L. REV. 310, 313 (1951) ("The right and power to explore for oil, gas, and other minerals and to authorize others to conduct explorations with respect thereto is an incident of mineral ownership." (citing Stanolind Oil & Gas Co. v. Wimberly, 181 S.W.2d 942 (Tex. Civ. App.—El Paso 1944, no writ))).

36. Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (citing Fleming Found. v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.)). Water is technically a mineral, but absent an express intent to define mineral rights in a technical sense, mineral rights are given an ordinary and natural meaning. *Fleming Found.*, 337 S.W.2d at 852 (citing Heinatz v. Allen, 147 Tex. 512, 217 S.W.2d 994, 997 (1949)). The surface estate includes both surface and subsurface water. *See id.* (determining that "the rule in this state" should be "that the reservation of oil, gas, and other minerals does not include the sub-surface water" (citing Vogel v. Cobb, 141 P.2d 276, 280 (Okla. 1943))).

amount as may be reasonably necessary to carry out the lessee's operations under the lease."[37] As long as the use of the water is not excessive or wasteful, and there are no reasonable alternatives, the mineral estate is not obligated to bring in water from other sources.[38] Similarly, this right also allows the lessee to dispose of wastewater, accumulated as a by-product of mineral production, by injecting it into subsurface formations.[39]

C. *Measures of Surface Estate Protection*

Notwithstanding the favorable treatment shown the mineral estate in development and exploration, the surface estate owner is not without recourse. There are measures in place that limit the dominance of the mineral estate. Nonetheless, compared to the comprehensive surface protection acts in other states,[40] these

37. *Sun Oil*, 483 S.W.2d at 811 (citing Guffey v. Stroud, 16 S.W.2d 527, 528 (Tex. 1929)).

38. Peter Vermillion & Gaye White, *Recent Developments in Texas, United States and International Energy Law*, 2 TEX. J. OIL GAS & ENERGY L. 211, 215 (2007) (citing *Sun Oil*, 483 S.W.2d at 811; Robinson v. Robbins Petrol. Corp., 501 S.W.2d 865, 867 (Tex. 1973)).

39. *See* Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863, 867 (1961) (acknowledging that the right to dispose of salt water extends to lessees as long as it is does not cause negligent or unnecessary damage); TDC Eng'g, Inc. v. Dunlap, 686 S.W.2d 346, 349 (Tex. App.—Eastland 1985, writ ref'd n.r.e.) (holding that a salt water injection well was reasonably necessary); *see also* Peter Vermillion & Gaye White, *Recent Developments in Texas, United States and International Energy Law*, 2 TEX. J. OIL GAS & ENERGY L. 211, 215 (2007) (relying on *Brown* and *Dunlap* to conclude that the lessee generally has the right to dispose of salt water).

40. The New Mexico Surface Owners Protection Act requires that surface owners be notified thirty days prior to drilling or related operations, that mineral operators furnish surface owners with a description of proposed oil and gas operations, that operators compensate surface owners for the use of the property and pay for damages caused by operational activities, and that operators clean up the site when they are done. N.M. STAT. ANN. §§ 70-12-1 to -10 (LexisNexis Supp. 2010) (enacting strict requirements that oil and gas producers must follow); *see also* Press Release, Office of the Governor of the State of N.M., Governor Richardson Enacts Most Comprehensive Set of Landowner Protections in Country (Mar. 8, 2007), *available at* http://www.governor.state.nm.us/press/2007/march/030807_01.pdf (summarizing the provisions of the Surface Owners Protection Act). The Oklahoma Surface Damage Act requires good faith negotiations on the part of oil and gas operators in determining compensation for the damage likely to be caused to property by the production of oil and gas. OKLA. STAT. ANN. tit. 52, §§ 318.2–.9 (West 2011). It further provides for an appraisal and trial to determine damages if negotiations are unsuccessful. *See id.* (stating a requirement for operators to compensate surface owner for damages to property); SHANNON L. FERRELL, OKLA. STATE UNIV. DIV. OF AGRIC. SCI. & NATURAL RES., UNDERSTANDING OKLAHOMA'S SURFACE

measures are generally considered to offer limited protection to surface owners.[41]

The mineral estate owner's right to use the surface estate to explore for oil and gas is not necessarily absolute.[42] The dominant party is not entitled to more use of the surface estate than is reasonably necessary, and this reasonable use must be conducted without negligence.[43] Therefore, it is no surprise that the majority of litigation arises as a result of disputes regarding what constitutes reasonable use.

In the landmark case of *Getty Oil Co. v. Jones*,[44] the Texas Supreme Court purported to impose a limitation on the broad rights granted to the mineral estate.[45] The court held that these rights must be "exercised with due regard for the rights of the owner of the servient estate."[46] In an attempt to balance the

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DAMAGE ACT (2009), *available at* http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-6036/AGEC1014web.pdf (discussing Oklahoma's Surface Damage Act); *see also* N.D. LEGISLATIVE COUNCIL, NO. 19449, SURFACE OWNER PROTECTION ACTS AND OIL AND GAS DEVELOPMENT (2010), *available at* http://www.legis.nd.gov/assembly/61-2009/docs/pdf/19449.pdf (summarizing surface use statutes in other states).

41. *See* Andrew M. Miller, Comment, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas Is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461, 465–84 (2003) (examining "the nature of oil and gas leases in Texas and provid[ing] an analysis of the development of surface damage acts in other states").

42. Taylor v. Brigham Oil & Gas, L.P., No. 07-00-0225-CV, 2002 WL 58423, at *1 (Tex. App.—Amarillo Jan. 16, 2002, no pet.) (not designated for publication).

43. Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (citing Warren Petrol. Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (1957); Finder v. Stanford, 351 S.W.2d 289, 292 (Tex. Civ. App.—Houston 1961, no writ); Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 652 (Tex. Civ. App.—Eastland 1953, no writ)); *accord Taylor*, 2002 WL 58423 at *1 (looking to *Williams* to determine that an "entity performing the exploration may not commit negligence nor use more of the surface than reasonably necessary"); Oryx Energy Co. v. Shelton, 942 S.W.2d 637, 641 (Tex. App.—Tyler 1996, no writ) ("A person who seeks to recover from the lessee for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary." (quoting *Williams*, 420 S.W.2d at 134) (internal quotation marks omitted)).

44. Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).

45. *See id.* at 621 ("We now hold explicitly that the reasonably necessary limitation extends to the superadjacent airspace as well as to the lateral surface and subsurface of the land."); *see also* Harper Estes & Douglas Prieto, *Contracts As Fences: Representing the Agricultural Producer in an Oil and Gas Environment*, 73 TEX. B.J. 378, 379 (2010) ("The *Getty* case was hailed by many as an expansion of surface rights, or at least a diminution of the expansive rights of the mineral lessee with regard to the surface." (citations omitted)).

46. *Getty Oil*, 470 S.W.2d at 621 (citing *Williams*, 420 S.W.2d at 134). "The due

correlative rights of the two parties, it adopted a principle now referred to as the "Accommodation Doctrine:"[47]

> [W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.[48]

However, the effect of the Accommodation Doctrine has not greatly diminished the right of surface use.[49] The burden of proof rests on the surface owner to show that the surface use is not reasonably necessary.[50] Notably, damage to the surface alone is not evidence of unreasonable conduct.[51] Nor does mere inconvenience caused to the surface owner constitute unreasonable conduct.[52] If the surface owner is unable to meet his burden of proof, the mineral estate owner is not liable for damages.[53] Additionally, if the surface estate owner interferes with reasonable

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regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary." *Id.* at 622.

47. Haupt, Inc. v. Tarrant Cnty. Water Control & Imp. Dist. No. One, 870 S.W.2d 350, 353 (Tex. App.—Waco 1994, no writ).

48. *Getty Oil*, 470 S.W.2d at 622.

49. Harper Estes & Douglas Prieto, *Contracts As Fences: Representing the Agricultural Producer in an Oil and Gas Environment*, 73 TEX. B.J. 378, 379 (2010) (citing Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972)).

50. The surface owner must show that there are non-interfering and reasonable means of mineral production available to the mineral lessee, that the use of such means "will obviate the abandonment" by the surface owner of his existing use of the surface, and that the alternatives available to the surface owner "would be impractical and unreasonable under all the conditions." *Getty Oil*, 470 S.W.2d at 623.

51. Taylor v. Brigham Oil & Gas, L.P., No. 07-00-0225-CV, 2002 WL 58423, at *2 (Tex. App.—Amarillo Jan. 16, 2002, no pet.) (not designated for publication) (citing Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980)).

52. Ottis v. Haas, 569 S.W.2d 508, 514 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e) (citing *Getty Oil*, 470 S.W.2d at 628 (McGee, J., dissenting)).

53. *See Getty Oil*, 470 S.W.2d at 622 (recognizing that the lessee is not responsible for damage caused to the surface when there is only one mode by which the surface can be used in the production of minerals (citing Kenny v. Tex. Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App.—Waco 1961, writ ref'd))); *see also* Tarrant Cnty. Water Control & Imp. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993) (looking to *Getty Oil* to hold that when there is only one manner by which the dominant estate can use the surface in mineral exploration, the dominant estate may do so regardless of damage caused to the surface).

use, the mineral estate can get an injunction prohibiting the interference.[54]

In addition to reasonable use limits, surface owners can limit the rights of the mineral estate by placing protective provisions in the oil and gas lease. The rights of the mineral estate cannot exceed the rights conveyed by the lease.[55] However, many lessors have lacked the foresight to anticipate the problems that could arise due to the dominance granted the mineral estate and, as a result, have conveyed inadequate standard leases that are still in effect today.[56]

D. *Measures of Surface Estate Protection in Urban and Suburban Areas*

Having examined the extent of mineral producers' rights in Texas, this Comment will now shift to a more narrow examination of the limitations imposed on the mineral estate in urban and suburban areas, and will transition into a discussion of the municipal ordinances governing surface use of urban property in oil and gas development.

Chapter 92 of the Texas Natural Resources Code provides an

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54. *Sun Oil*, 483 S.W.2d at 812.

55. *See* Phillips Petrol. Co. v. Cowden, 241 F.2d 586, 591 (5th Cir. 1957) (citing Wilson v. Tex. Co., 237 S.W.2d 649, 650 (Tex. Civ. App.—Fort Worth 1951, writ ref'd n.r.e.) (distinguishing the rights of mineral lessees under a lease for limited purposes and a lease that granted exclusive rights); Shell Petrol. Corp. v. Puckett, 29 S.W.2d 809, 810 (Tex. Civ. App.—Texarkana 1930, no writ)); *see also* Robinson v. Robbins Petrol. Corp., Inc., 501 S.W.2d 865, 868 (Tex. 1973) ("Nothing in the . . . lease or the reservation contained in [the] deed authorized the mineral owner to increase the burden on the surface estate for the benefit of additional lands.").

56. *See* JUDON FAMBROUGH, TECHNICAL REPORT 229, REAL ESTATE CTR. AT TEX. A&M UNIV., HINTS ON NEGOTIATING AN OIL AND GAS LEASE 1 (1997), *available at* http://recenter.tamu.edu/pdf/229.pdf (explaining how an inexperienced mineral owner can be at a disadvantage when dealing with experienced mineral lessees, as excitement of prospective income and lack of substantial bargaining power frequently leads to executing leases that are not in the best interests of the lessor). There is no standard lease form, but many oil and gas companies have pre-drafted agreements that are usually similar to a Producers 88 Lease Form. *Id.* An oil and gas lease has two terms, the primary and secondary term. *Id.* at 2. The duration of the primary term, which is stated in the lease, is generally two to five years; however, the Producers 88 Lease Form provides for a ten-year term. *Id.* The secondary term begins upon the completion of the primary term, and its duration is stated in the lease's habendum clause. *Id.* at 3. Habendum clauses usually provide that the lease will exist "for so long as operations continue" or "for so long as production continues." *See id.*

exception to the general rule that a mineral estate has a right to use as much of the surface estate as is reasonably necessary to carry out its operations.[57] This exception allows a surface owner to create a qualified subdivision on his land, based on acreage, location, and zoning,[58] and subject to the approval of the Railroad Commission of Texas.[59] The Commission then holds a hearing, during which the surface and mineral estate owners are allowed to present evidence, and the Commission will either "approve, reject, or amend" the surface owner's application.[60]

If the qualified subdivision is approved, it imposes a significant limitation on the rights of the dominant mineral estate. "An owner of a possessory mineral interest within a qualified subdivision may use only the surface contained in designated operations sites for exploration, development, and production of minerals and the designated easements only as necessary to adequately use the operations sites."[61] The mineral operator is allowed to drill wells under the surface of the qualified subdivision, but it must be done "from an operations site or from a site outside of the qualified subdivision[,]" and the operations "cannot

57. SWEPI LP v. R.R. Comm'n of Tex., 314 S.W.3d 253, 256 (Tex. App.—Austin 2010, pet. denied) (referring to various sections within chapter 92 of the Texas Natural Resources Code).

58. "'Qualified subdivision' means a tract of land of not more than 640 acres" located in a county with a population of more than 400,000, or a county with a population of more than 140,000 that borders a county with a population of more than 400,000 or that is "located on a barrier island." TEX. NAT. RES. CODE ANN. § 92.002(3) (West 2011). The subdivision must also be legally authorized for "residential, commercial, or industrial use," and each 80 acres within the tractmust contain room for an operations sight and "provisions for road and pipeline easements" to use the site. *Id.*

59. *Id.* § 92.003. A plat of the subdivision must also be "filed with the clerk of the county in which the subdivision is to be located." *Id.* The Railroad Commission has the authority to "approve two contiguous 640 acre qualified subdivisions" for "the same development on a single parcel of land." *SWEPI LP*, 314 S.W.3d at 259. The industrial use requirement of a qualified subdivision is broad enough to include a landfill. *Id.*

60. *See* NAT. RES. § 92.004 (West 2011) (stating the requirements for application of a qualified subdivision and the procedure for the hearing regarding the application). At the hearing, the Railroad Commission will "consider the adequacy of the number and location of operations sites and road and pipeline easements." *Id.* § 92.004(b).

61. *Id.* § 92.005(a). "'Operations site' means a surface area of two or more acres located in whole or in part within a qualified subdivision, designated on the subdivision plat, that an owner of a possessory mineral interest may use to explore for and produce minerals." *Id.* § 92.002(1).

unreasonably interfere with the use of the surface . . . outside the operations site."[62]

However, the surface owner must begin "actual construction of roads or utilities" and must sell a lot to a third party within three years of the final order of the Commission.[63] If he fails to do so, the mineral estate owner is no longer limited to conducting activities solely in the operations sites and the general reasonable use rule applies.[64] As a practical matter, this exception is greatly limited by population requirements that render it applicable only as to certain counties.[65]

Furthermore, restrictive covenants imposed on subdivisions can limit the activities in which a mineral estate owner may engage.[66] However, the restrictions must have been put in place before the mineral estate was severed from the surface estate.[67] The imposition of restrictive covenants "subsequent to the severance of the minerals in and under the subdivision . . . do not determine the scope of the implied surface easements that are incidental to the ownership of the minerals."[68]

For the purposes of this Comment, the most relevant manner in which the mineral owner's right to surface use can be hindered is through governmental regulations and ordinances. In such a situation, the operator has the possibility of an inverse condemnation claim against the governmental entity.[69] "Inverse condemnation can take the form of a regulatory taking if a

62. *Id.* § 92.005(b).

63. *Id.* § 92.005(c)(1)–(2).

64. *Id.*

65. *See id.* § 92.002(3) (explaining that the qualified subdivision exception only applies to land located in counties with a population greater than 400,000, or a county with more than 140,000 residents that borders a county with a population greater than 400,000 or that is situated on a barrier island).

66. Specifically, "[a]n exercise of discretionary authority by a property owners' association or other representative designated by an owner of real property concerning a restrictive covenant is presumed reliable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory." TEX. PROP. CODE ANN. § 202.004(a) (West 2007).

67. Prop. Owners of Leisure Land, Inc. v. Woolf & Magee, Inc., 786 S.W.2d 757, 760 (Tex. App.—Tyler 1990, no writ).

68. *Id.*

69. *See* Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 354 (2008) (discussing inverse condemnation as a result of government regulations).

'government regulation, whether federal, state, or local, effectively deprives a property interest of all of its economic value or utility.'"[70]

In *Tarrant County Water Control & Improvement District Number One v. Haupt, Inc.*,[71] the Texas Supreme Court applied the Accommodation Doctrine in an inverse condemnation proceeding involving governmental surface owners.[72] Where there is evidence that the use of the surface is the only manner by which the minerals can reasonably be produced, the mineral estate owner has the right to this use.[73] The court held that, if in the process of protecting the fresh water supply, the Water District prevented this use of the surface, the result was an inverse condemnation of the mineral estate.[74] Thus, if a mineral owner can show that there was no reasonable alternative means of accessing the minerals, then he will be entitled to damages as determined in an inverse condemnation proceeding.[75]

Prohibitive ordinances imposed by local governments have been the source of extreme controversy.[76] In *City of Houston v. Trail*

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70. *Id.* (quoting John S. Lowe et al., CASES & MATERIALS ON OIL & GAS LAW 130 (5th ed. 2008)).

71. Tarrant Cnty. Water Control & Imp. Dist. No. One v. Haupt, Inc., 854 S.W.2d 909 (Tex. 1993).

72. *Id.* at 913. "An inverse condemnation may occur when the government physically appropriates or invades the property, or when it unreasonably interferes with the landowner's right to use and enjoy the property, such as by restricting access or denying a permit for development." Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992) (referencing City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978); City of Waco v. Texland Corp., 446 S.W.2d 1 (Tex. 1969); DuPuy v. City of Waco, 396 S.W.2d 103 (Tex. 1965)).

73. *Haupt*, 854 S.W.2d at 913 (citing Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex. 1971)).

74. *Id.* (citing *Getty Oil*, 470 S.W.2d at 623; Chambers-Liberty Cntys. Navigation Dist. v. Banta, 453 S.W.2d 134, 137 (Tex. 1970)). When "the government appropriates property without paying adequate compensation, the owner may recover the resulting damages in an 'inverse condemnation' suit." *Westgate*, 843 S.W.2d at 452 (referencing *Teague*, 570 S.W.2d at 394); *see also* TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation. . . .").

75. *Haupt*, 854 S.W.2d at 913.

76. *See* Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 354 (2008) (discussing the issues arising out of operator claims of inverse condemnation against cities).

Enterprises, Inc.,[77] a mineral owner brought an inverse condemnation suit based on a city ordinance that prohibited drilling for oil on the landowner's property.[78] The trial court concluded that a taking had occurred, but granted summary judgment in favor of the city on grounds of ripeness.[79] Subsequently, the Tenth Court of Appeals held that the case was ripe and awarded damages in favor of the landowner.[80] Although the decision was later reversed on procedural issues, the court unanimously held that the city ordinance constituted an inverse condemnation.[81] Regardless of the outcome, the *Trail Enterprises, Inc.* case is evidence of the confusion caused when municipalities attempt to regulate the production of oil and gas. The next section will examine the substance of these controversial ordinances.

III. CONFLICTS IN URBAN AREAS

A. *Barnett Shale Background Information*

Improvements in drilling technology have led to increased activity in Texas shale formations,[82] and as a result, the ability of

77. City of Hous. v. Trail Enters., Inc., 300 S.W.3d 736 (Tex. 2009).

78. *Id.* at 736.

79. *Id.* at 737.

80. Trail Enters., Inc. v. City of Houston, 255 S.W.3d 105, 115 (Tex. App.—Waco 2007), *rev'd*, 300 S.W.3d 736 (Tex. 2009). The Texas Supreme Court reversed the judgment of the court of appeals and remanded to the trial court "because the trial court relied only on the jurisdictional ripeness issue in disposing of the case, [and] it was improper for the court of appeals to render judgment on the jury verdict." *Trail Enters.*, 300 S.W.3d at 737. However, the supreme court's ruling was based solely on the procedural aspects of the case, and it did not rule on the issue of whether inverse condemnation had taken place. *See id.* at 738 n.5 ("In reversing the court of appeals' judgment, we provide no opinion as to whether these or any other issues remain in this case, or as to their potential resolution.").

81. *Trail Enters.*, 255 S.W.3d at 112.

82. *See generally* THE BARNETT SHALE FORMATION, HORIZONTAL DRILLING IN NORTH TEXAS, http://www.expertsreviewof.com/ (last visited Nov. 1, 2011) (introducing the economic difficulties of vertical wells in the Barnett Shale). The first attempt to fracture the Barnett Shale was in 1981 by Mitchell Energy. *Id.* Mitchell drilled a vertical well that was able to produce natural gas, but the project was not economically viable. *Id.* With the introduction of horizontal drilling and the use of "a mix of water, sand, and chemicals for hydraulic fracturing," mineral production in the Barnett Shale has been very successful. Michael J. Byrd et al., *Common Legal Issues in U.S. Shale Plays*, *in* 34-2 OIL, GAS AND ENERGY RESOURCES LAW SECTION REPORT 3, 3 (Dec. 2009) (citing Ben

governmental units to limit the exploration, development, and production of minerals in urban areas has garnered serious attention.[83] The exploration of shale formations has become one of the most important and promising sources of mineral production in the United States, and the Barnett Shale is among the most notable of these formations.[84] Accordingly, oil and gas companies have flocked to the Barnett Shale.[85]

The productive portion of the Barnett Shale "is estimated to stretch from the city of Dallas west and south, covering 5,000 square miles . . . and at least [eighteen] counties."[86] Many of the cities within this area are situated atop shale formations with mineral production capabilities, and consequently, oil and gas companies have eagerly sought to drill within these municipalities.[87] However, this raises many issues as to what

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Casselman, *U.S. Gas Fields Go from Bust to Boom*, WALL ST. J., Apr. 30, 2009, at A). "Horizontal drilling is a technology whereby oil and gas companies can drill 'sideways' at ninety degrees across a zone of ricks such as the Barnett Shale, allowing for hundreds of feet of profile to be exposed." THE BARNETT SHALE FORMATION, HORIZONTAL DRILLING IN NORTH TEXAS, http://www.expertsreviewof.com/ (last visited Nov. 1, 2011).

83. *See* Michael J. Byrd et al., *Common Legal Issues in U.S. Shale Plays*, *in* 34-2 OIL, GAS AND ENERGY RESOURCES LAW SECTION REPORT 3, 5 (Dec. 2009) ("Some emerging shale plays include densely populated urban areas, giving rise to legal issues that are not as frequently encountered in rural oil and gas development.").

84. *Id.* at 3; *accord What Is the Barnett Shale Formation?*, OILSHALEGAS.COM, http://oilshalegas.com/barnettshale.html (last visited Nov. 1, 2011) ("The Barnett Shale Field has been referred to as the biggest natural gas field in the United States, having been proved to hold roughly 2.5 trillion feet of [n]atural [g]as.").

85. *See What is the Barnett Shale Formation?*, OILSHALEGAS.COM, http://oilshalegas.com/barnettshale.html (last visited Nov. 1, 2011).

86. *Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011). The core counties affected are Denton, Johnson, Tarrant, and Wise. *Id.* The non-core counties are nonetheless still affected; these include Archer, Bosque, Clay, Comanche, Cooke, Coryell, Dallas, Eastland, Ellis, Erath, Hamilton, Hill, Hood, Jack, Montague, Palo Pinto, Parker, Shackelford, Somervell, and Stephens. *Id.*

87. In Dallas, specific use permits have been issued to oil and gas companies on private property; Arlington and Grapevine have allowed drilling on property owned by the city. Wendy Hundley, *North Texas Cities Weigh Benefits, Risks of Barnett Shale Gas Drilling*, DALLAS MORNING NEWS, Aug. 1, 2010, http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-shalemoney_01met.ART0.Central.Edition1.35f55d9.html. In Fort Worth, there are around 1,300 wells operating within the city limits. Rich Blake, *Drilling Divides Fort Worth*, ABC NEWS, June 23, 2010, http://abcnews.go.com/Business/natural-gas-drilling-divides-fort-worth/story?id=10985416&page=1.

extent mineral production should be allowed within city limits and adjacent areas.[88]

There are many competing interests and policy arguments that must be considered when examining these issues. Many residents wish to allow drilling because of the resulting economic benefits.[89] On a broader level, oil and natural gas are non-renewable resources, and the Barnett Shale has massive potential for production.[90] However, many residents have concerns about the potential health and safety dangers of having drilling rigs in such close proximity to residential areas.[91] There are also concerns about the increased traffic in residential areas as a result of exploration, development, and transportation activities.[92]

88. *See* Wendy Hundley, *North Texas Cities Weigh Benefits, Risks of Barnett Shale Gas Drilling*, DALLAS MORNING NEWS, Nov. 14, 2010, http://www.dallasnews.com/sharedcontent/dws/news/localnews/stories/DN-shalemoney_01met.ART0.Central.Edition 1.35f55d9.html (comparing the extent to which different cities within the Barnett Shale have allowed drilling on city owned property and privately owned property); Rich Blake, *Drilling Divides Fort Worth*, ABC NEWS, June 23, 2010, http://abcnews.go.com/Business/natural-gas-drilling-divides-fort-worth/story?id=10985416&page=1 (discussing the split in opinions of Fort Worth residents concerning the drilling of wells in residential areas).

89. *See Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011). As a result of gas production in the Barnett Shale, individuals, local governments, and the state receive economic benefits "in the form of . . . bonus payments and royalty income directly to cities, school districts and others; new tax base, various permits and fees payable to local governments, other types of levies such as hotel/motel occupancy taxes; new jobs, new service companies and enhanced economic development." *Id.*

90. *See* Michael J. Byrd et al., *Common Legal Issues in U.S. Shale Plays*, *in* 34-2 OIL, GAS AND ENERGY RESOURCES LAW SECTION REPORT 3, 3 (Dec. 2009) ("The Barnett [Shale] is estimated to cover [two] million core acres and have [thirty-four] TcF of remaining recoverable reserves." (citing Tom Fowler, *Next Generation Drilling Game Changer or Hype?*, HOUSTON CHRONICLE, Nov. 1, 2009)).

91. *See* Asher Price, *As Urban Gas Drilling Expands, So Do Health Concerns*, AUSTIN AMERICAN-STATESMAN, June 13, 2010, http://www.statesman.com/news/texas-politics/as-urban-gas-drilling-expands-so-do-health-744189.html (expressing concerns of some Barnett Shale residents regarding the possibility that emissions from natural gas productions are contaminating the air quality). However, officials with the Texas Commission on Environmental Quality have collected air samples and performed tests, which they say do not indicate a cause for concern. *Id.* Residents are also concerned with the dangers posed by accidental transportation pipeline explosions; however, representatives for oil and gas companies claim that the pipelines that have been involved in accidental explosions are not the types that are associated with typical well operation. Rich Blake, *Drilling Divides Fort Worth*, ABC NEWS, June 23, 2010, http://abcnews.go.com/Business/natural-gas-drilling-divides-fort-worth/story?id=10985416&page=1.

92. *See* TIMOTHY W. KELSEY, PENN STATE COOP. EXTENSION, POTENTIAL

B. *Examination of Current Local Ordinances*

It is clear that individuals are divided over these issues, and there is no uniform ordinance that governs municipal drilling in the Barnett Shale.[93] In Texas, there are two types of cities pertinent to the analysis of this Comment: home rule cities and general law cities.[94] This distinction is important because the extent of a municipality's regulatory authority depends on the form that it takes. Municipalities chartered as home rule cities have the full authority of local self-government to the extent that authority is not limited by the Texas Constitution or the legislature.[95] Furthermore, a home rule city "may enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants."[96] Conversely, general law cities have only the power granted to them by the legislature.[97]

With respect to oil and gas, zoning and subdivision ordinances regulate operations within the municipal limits.[98] Chapter 211 of

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ECONOMIC IMPACTS OF MARCELLUS SHALE IN PENNSYLVANIA: REFLECTIONS ON THE PERRYMAN GROUP ANALYSIS FROM TEXAS, *available at* naturalgaslease.pbworks.com/f//Potential+Economic+Impacts+of+Marcellus+Shale.pdf (noting the increase in traffic as a result of drilling in the Barnett Shale).

93. *See* CITY OF BEDFORD, GAS DRILLING ORDINANCE COMPARISON (comparing municipal drilling ordinances in the cities of Bedford, Argyle, Arlington, Colleyville, Euless, Fort Worth, Granbury, Grapevine, Hurst, and North Richland Hills, Texas) (on file with the *St. Mary's Law Journal*).

94. David B. Brooks, *Municipal Law and Practice*, *in* 22 TEX. PRAC. § 3.03 (2d ed. 2010). The power of home rule cities is granted by the Texas Constitution. City of Galveston v. State, 217 S.W.3d 466, 469 (Tex. 2007) (citing TEX. CONST. art. XI, § 5; Proctor v. Andrews, 972 S.W.2d 729, 733 (Tex. 1998)); *see also* TEX. CONST. art. XI, § 5 (establishing the extent of a home rule city's power). General law cities derive their power from the legislature. David B. Brooks, *Municipal Law and Practice*, *in* 22 TEX. PRAC. § 3.03 (2d ed. 2010).

95. TEX. LOC. GOV'T CODE ANN. § 51.072 (West 2008); *see also* TEX. CONST. art. XI, § 5 (stating that the cities' powers are subject to the limitations imposed by the legislature, and their charters may not contain provisions inconsistent with the Constitution or laws of the state).

96. LOC. GOV'T § 54.004 (West 2008).

97. There are three types of general law cities: types A, B, and C. A type A city "may adopt an ordinance, act, law, or regulation, not inconsistent with state law, that is necessary for the government, interest, welfare, or good order of the municipality[.]" *Id.* § 51.012. A type B city may adopt an ordinance or bylaw "that the governing body considers proper," as long as it is not inconsistent with state law. *Id.* § 51.032. The authority of a type C city depends on its number of inhabitants. *Id.* §§ 51.051–.052.

98. Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the*

the Texas Local Government Code grants municipalities the authority to regulate zoning[99] for "the purpose of promoting the public health, safety, morals, or general welfare and protecting and preserving places and areas of historical, cultural, or architectural importance and significance."[100] In addition, chapter 212 of the Local Government Code authorizes municipalities to regulate subdivisions and property development.[101] In the first part of his charge, Speaker of the House Joe Strauss charged the House Committee on Energy Resources with surveying the "current local ordinances governing surface use of property in oil and gas development."[102] While there are many cities with local regulatory ordinances, this Comment will analyze several of the surface use ordinances in notable municipalities located in core counties of the Barnett Shale region.[103]

1. Fort Worth, Tarrant County

According to Mike Moncrief, the Mayor of Fort Worth, "no other city in Texas has seen more urban drilling activity than Fort Worth[,]" which has raised "serious questions and concerns about

Issues an Operator Will Face, 4 TEX. J. OIL GAS & ENERGY L. 337, 349 (2008) (citing LOC. GOV'T. §§ 211.001, 245.001–.007 (West 2008)); *see also* Martin E. Garza, *Gas Well Development in the Urban Environment*, PRESENTATION AT THE AMERICAN ASSOCIATION OF PETROLEUM LANDMEN ANNUAL MEETING, June 14, 2008, at 17.

99. LOC. GOV'T. § 211.003(a) (West 2008) ("The governing body of a municipality may regulate . . . the location and use of buildings, other structures, and land for business, industrial, residential, or other purposes . . . .").

100. *Id.* § 211.001; *see also* Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 349 (2008) (discussing the purpose of allowing municipalities the authority to regulate zoning).

101. LOC. GOV'T. § 212.002 (West 2008) ("After a public hearing on the matter, the governing body of a municipality may adopt rules governing plats and subdivisions of land within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.").

102. TEX. H.R., INTERIM COMMITTEE CHARGES, 81st Leg., R.S., at 12 (2009), *available at* http://www.house.state.tx.us/committees/charges/81interim/interim-charges-81st.pdf.

103. *See Legislation*, BARNETT SHALE ENERGY EDUC. COUNCIL, http://www.bseec.org/stories/legislation (last visited Nov. 1, 2011) (stating that "almost all North Texas municipalities have adopted an ordinance regulating the exploration and production of oil and gas"). These ordinances regulate "issues such as distance requirements, sound level, water usage and permitting processes." *Id.*

the safety and long-term effects of this natural gas boom."[104] While the drilling activities have been beneficial to some residents, they have been detrimental to others.[105] In response to the increased drilling, the city "adopted a new Gas Drilling Ordinance" in December of 2008.[106] Furthermore, Fort Worth is a home rule city, meaning that it has the "full authority of local self-government."[107]

The ordinance provides for the designation of a Gas Inspector tasked with enforcing the provisions set forth in the ordinance[108] and authorized "to review and approve or disapprove all applications" for permits.[109] Operators are required to designate an agent for service of orders and notices.[110] Before operators

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104. Mike Moncrief, Mayor of Fort Worth, Address to Texas House Committee on Energy Resources (Nov. 18, 2010) (on file with the *St. Mary's Law Journal*); *see also Learning From Fort Worth, Texas*, TOMPKINS COUNTY COOPERATIVE EXTENSION, http://ccetompkins.org/energy/natural-gas-drilling/learning-fort-worth-texas (last updated June 1, 2010) (discussing the large number of wells permitted and drilled in Fort Worth).

105. Mike Moncrief, Mayor of Fort Worth, Address to Texas House Committee on Energy Resources (Nov. 18, 2010) (on file with the *St. Mary's Law Journal*).

> The expansive activity in [Fort Worth] has been both a blessing and a challenge. If you are [a] property owner who owns mineral rights, you are reaping a modest and unexpected financial windfall[, and] . . . [i]f you live near a drilling or production site, you have health, safety, noise and traffic concerns. [Fort Worth has] a local gas drilling ordinance that is a model for the state and the nation. The ordinance covers many quality of life issues. . . .

Id.

106. The new regulation was Ordinance Number 18449-02-2009, which amended Article II of Chapter 15 of the Code of Ordinances of Fort Worth, Texas. FORT WORTH, TEX., ORDINANCE 18449-02-2009 (Feb. 3, 2009) (codified at FORT WORTH, TEX., CODE OF ORDINANCES ch. 15, art. II, §§ 30–50 (2009)), *available at* http://www.fortworthgov.org/uploadedFiles/Gas_Wells/090120_gas_drilling_final.pdf; *see also Gas Well Drilling*, CITY OF FORT WORTH, TEX., http://www.fortworthgov.org/gaswells/ (last visited Nov. 1, 2011) ("Ordinance No. 18449-02-2009 combines the provisions of the two gas drilling ordinances[,] No. 18399-12-2008 and No. 18412-12-2008[,] adopted by the City Council in December 2008 that were effective [January] 1, 2009. Ordinance 18449-02-2009 is effective [February] 10, 2009, pending receipt of an affidavit from the publisher.").

107. Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 348 (2008).

108. FORT WORTH, TEX., CODE OF ORDINANCES ch. 15, art. II, § 37 (2009).

109. *Id.* "The Gas Inspector shall have the authority to enter and inspect any premise covered by the provisions of this [o]rdinance to determine compliance with the provisions of this [o]rdinance and . . . of the State and to issue citations for violations. . . ." *Id.* § 32.

110. *Id.* § 33.

can engage in production activities, they are required to "apply for and obtain a [g]as [w]ell [p]ermit."[111] In addition, the city charges a permit fee that must accompany every gas well permit application.[112] The city will not issue permits for wells that are "to be drilled within six hundred . . . feet of a Residence, Religious Institution, Hospital Building, School or Public Park."[113] Furthermore, the Gas Inspector has the authority to suspend or revoke the permit, or issue a citation.[114]

Gas well operators are responsible for cleaning up the drilling site and restoring the property to its pre-existing condition.[115] To ensure that this is done, operators must "provide the Gas Inspector with a security instrument in the form of a bond or an irrevocable letter of credit."[116] There are also specific technical regulations that must be followed.[117] "All pad sites and off-site fracture ponds shall be secured with a permanent fence with a secured gate[,]" and "tree preservation and/or planting measures" must be instated.[118] Moreover, the ordinance contains specific technical and permit regulations with regard to oil and gas pipelines[119] and saltwater pipelines.[120] If an operator engages in an unauthorized activity, fails to comply with the requirements

111. *Id.* § 34(A). Production activities include "the drilling, re-drilling, deepening, re-entering, activating or converting of each well." *Id.* § 34(B).

112. *Id.* § 35(B); *see also id.* § 35(C) (listing the information that must be included in an application).

113. *Id.* § 36(A). This distance may be reduced under certain circumstances, "but never [to] less than three hundred (300) feet" from a restricted building. *Id.* § 36(A).

114. *Id.* § 39 (requiring the Gas Inspector to provide the operator with written notice that he had failed to comply with a permit requirement, and allotting the operator a reasonable amount of time to remedy the problem). Once an action has been taken against the operator, he cannot carry on any operation until the noncompliance is cured. *Id.*

115. *Id.* § 41(A). Operators also must agree to indemnify city employees' claims of loss or damage. *Id.*; *see also id.* §§ 44–45 (listing requirements for cleanup maintenance and plugged and abandoned wells).

116. *Id.* § 41(B).

117. Section 42(A) lists the on-site regulations required by the ordinance; section 42(B) provides for the control of noise created by drilling operations; section 42(C) imposes limitations on the distance that a well must be from specific places and objects; and section 42(D) contains the regulations for natural gas facilities. *Id.* § 42(A)–(D).

118. *Id.* § 43(A), (C).

119. *Id.* § 46.

120. *Id.* § 47.

accompanying a gas well permit, or violates any provisions of the ordinance, it is an unlawful offense.[121]

2. Flower Mound, Denton County

The City of Flower Mound is also a home rule city,[122] and it has established a local ordinance to govern oil and gas operations within the municipality.[123] The basic provisions of the ordinance are similar to those of the Fort Worth ordinance,[124] but the provisions vary in substance.[125] Moreover, the Flower Mound ordinance also adds certain provisions that are not found in the Fort Worth ordinance. Section 427(d) is of notable importance, pertaining to flow lines and gathering lines.[126] Section 423.1 also

121. *Id.* § 50(A). "Any violation of this Ordinance shall be punished by a fine of not more than $2,000.00 per day, subject to applicable State law. Each day that a violation exists shall constitute a separate offense." *Id.* § 50(B).

122. FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII, § 6 (2003).

123. *See Environmental Resources: Oil and Natural Gas Well Drilling*, TOWN OF FLOWER MOUND, TEX., http://www.flower-mound.com/env_resources/env_resources_ong.php (last visited Nov. 1, 2011).

124. *Compare* FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII, §§ 416–433 (2003) (stating the regulations that must be followed to drill an oil or gas well in Flower Mound, Texas), *with* FORT WORTH, TEX., CODE OF ORDINANCES ch. 15, art. II, §§ 32–50 (2009) (listing the regulations that must be followed to drill a gas well in Fort Worth).

125. A violation of the Flower Mound Ordinance is punishable "by a fine of not more than $500[,]" unless it is a violation of an "article that governs fire safety, public health, and/or sanitation." FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII, § 433 (2003). In the case of such a violation, the fine shall not exceed $2,000. *Id.* Any violation of the Fort Worth Ordinance is punishable by a fine of not more than $2,000. FORT WORTH, TEX., CODE OF ORDINANCES ch. 15, art. II, § 50(B) (2009). The two local ordinances also differ as to the required setback distances. *Compare* FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII, § 422 (2007) (listing required setback distances between 500 and 1,000 feet for the location of oil and gas wells in Flower Mound), *with* FORT WORTH, TEX., CODE OF ORDINANCES ch. 15, art. II, § 36(A) (2009) (stating that drilling sites must be 600 feet away from places of public assembly and residences).

126. FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII, § 427(d) (2007). More specifically:

> (1) The operator shall place an identifying sign at each point where a flow line or gathering line crosses a public street or road[;] (2) The operator shall place a warning sign for lines carrying H2S (Hydrogen Sulfide) gas as required by the Commission and all other applicable state or federal regulatory agencies[;] (3) All flow lines and gathering lines within the corporate limits of the Town (excluding Town utility lines and franchise distribution systems) that are used to transport oil, gas, and/or water shall be limited to the maximum allowable operating pressure applicable to the pipes

allows for the transfer of oil and gas well permits.[127] In addition, section 425.1 requires that certain information concerning the oil and gas well must be made available to the public.[128] This information includes, but is not necessarily limited to, information concerning "site preparation and grading, site construction of the drilling rig and accessory structures, the expected amount of time spent drilling on site, all casing installation, testing, flaring, disassembly of the drilling rig, pipeline installation, fracture stimulation, maintenance, tank battery construction, site cleanup, and production."[129]

3. Other Cities in the Barnett Shale

As previously discussed, there is no uniform municipal ordinance governing oil and gas well drilling. However, given that many of the cities are seeking to protect the same rights and interests, many of the ordinances are similar in form.[130] Most city

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installed and shall be installed with at least the minimum cover or backfill specified by the American National Safety Institute Code, as amended, provided all pipelines shall be buried to a minimum of at least thirty-six inches (36") below the ground surface. During the backfill of any pipeline excavations, whether such pipelines are located inside or outside the permitted oil and/or gas well pad site, "Buried Pipeline" warning tape shall be buried one foot (1') above any such pipeline to warn future excavators of the presence of a buried pipeline[;] (4) Structures shall not be built over flow lines or gathering lines and within any pipeline easement[;] (5) Easements must be acquired for all pipelines outside the permitted oil and/or gas well pad site. The location of easements shall be shown in a Pipeline Easement Map approved by the Town prior to the installation of any pipelines. In addition, once construction has been completed, as-built plans shall be provided to the Town of all pipelines, including those inside the permitted oil and/or gas well pad site.

Id.; Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 352 (2008).

127. FLOWER MOUND, TEX., CODE OF ORDINANCES ch. 34, art. VII, § 423.1 (2008) ("An oil, gas, combined, or pad site permit may be transferred by the operator with the prior written consent of the town if no outstanding violations of the terms of the article" exist).

128. *Id.* § 425.1 (2007) ("After approval of a permit application, the operator shall submit in writing an accurate timeline account, which is updated weekly, of planned operational events associated with the permit to the oil and gas inspector.").

129. *Id.*

130. *See Legislation*, BARNETT SHALE ENERGY EDUC. COUNCIL, http://www.bseec.org/stories/legislation (last visited Nov. 1, 2011) (listing municipal ordinances governing oil and gas well drilling in the Barnett Shale); *see also* CITY OF BEDFORD, GAS DRILLING ORDINANCE COMPARISON (comparing municipal drilling ordinances in the cities of Bedford, Argyle, Arlington, Colleyville, Euless, Fort Worth,

ordinances have requirements for separate zoning and allow drilling on public and park land.[131] Most ordinances also have provisions that require oil and gas operators to enter road repair agreements or contracts.[132] All cities have setback distance requirements that preclude operators from drilling within a certain distance of residences or places of public assembly.[133] In addition, most municipalities also have requirements that other drilling-related activities be conducted a certain distance away from residences and other public places.[134] Even though these ordinances share similar characteristics, the requirements often vary as to their substance, creating confusion for operators.[135] Furthermore, as noted above, not all cities have created similar guidelines.

Although these local municipalities are currently regulating the drilling of oil and gas wells within or near the city limits, it is the Railroad Commission of Texas that is responsible for regulating "the exploration and production of oil and natural gas in Texas."[136] This Comment will now move into an examination of the Commission's authority to regulate the operations of oil and gas companies in urban areas of the state.

IV. THE AUTHORITY OF THE RAILROAD COMMISSION OF TEXAS

A. *The Railroad Commission's Current Authority*

The House Committee on Energy Resources was also asked to "[r]ecommend changes, if any, to the authority of the Railroad Commission to regulate the operation of oil and gas industries in

Granbury, Grapevine, Hurst, and North Richland Hills, Texas) (on file with the *St. Mary's Law Journal*).

131. *But see Gas Drilling Ordinance Comparison,* CITY OF BEDFORD, http://www.ci.bedford.tx.us/News/news_pdf/gasdrilling/comparisons_bedford.pdf (noting that Fort Worth and North Richland Hills do not require separate zoning).

132. *But see id.* (reporting that both Colleyville and Grapevine do not require road repair agreements or contracts).

133. Although all cities have setback distances, the actual distance varies by city. *See id.* (comparing setback distances among cities with municipal drilling ordinances).

134. *See id.* (listing the different setback requirements for other drilling-related activities).

135. *See id.* (evidencing that cities differ as to the distance of setback requirements).

136. *Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011).

urban areas of the state, particularly the Barnett Shale."[137] The Commission has the authority to "make and enforce rules and orders for the conservation . . . and prevention of waste of oil and gas."[138] This power encompasses the ability to require the plugging of dry or abandoned wells[139] and "to require wells to be drilled and operated in a manner that will prevent injury to adjoining property."[140] To ensure that these rules are followed, the Commission is tasked with the issuance of permits[141] and the collection of financial assurances.[142]

The Commission is also responsible for protecting surface and subsurface water, and for "ensuring that all mineral interest owners have an opportunity to develop their fair share of the minerals underlying their property."[143] Pursuant to section 81.051 of the Texas Natural Resources Code, this authority extends over all "common carrier pipelines[,] . . . oil and gas wells in Texas[,] persons owning or operating pipelines in Texas[,] and persons owning or engaged in drilling or operating oil or gas wells in Texas."[144]

However, "[t]he Railroad Commission does not have jurisdiction over roads, traffic, noise, odors, leases, pipeline easements, or royalty payments."[145] Accordingly, permits issued by the Commission do not limit the authority of a local municipality with regard to road use.[146] Furthermore, issues

137. TEX. H.R., INTERIM COMMITTEE CHARGES, 81st Leg., R.S., at 12 (2009), *available at* http://www.house.state.tx.us/committees/charges/81interim/interim-charges-81st.pdf.

138. TEX. NAT. RES. CODE ANN. § 85.201 (West 2011).

139. *See id.* § 85.202(a)(2) (stating that Commission rules and orders shall "require dry or abandoned wells to be plugged in a manner that will confine oil, gas, and water in the strata in which they are found and prevent them from escaping into other strata").

140. *Id.* § 85.202(a)(4).

141. *Id.* § 85.202(a)(8).

142. *See id.* § 91.104 ("The commission shall require a bond, letter of credit, or cash deposit to be filed with the commission. . . .").

143. *Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011).

144. NAT. RES. § 81.051 (West 2011).

145. *Railroad Commission Authority and Jurisdiction: Frequently Asked Questions*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/about/faqs/rrcjurisdictions.php (last visited Nov. 1, 2011).

146. *See Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011) ("Permits

concerning noise and nuisances that arise as a result of oil and gas production activities are governed by local ordinances.[147] Additionally, if a well is located within the limits of a municipality, the local ordinances regulate any odors that the well produces.[148]

Given the historical dominance of the mineral estate in Texas, it is clear that the state places a very high value on the rights of mineral owners. However, the owner of the surface also has an important interest in the protection of his property. To further complicate matters, municipal areas that contain substantial oil and gas reserves lead to a combination of protected mineral interests and a highly concentrated quantity of surface owners. Thus, it is not surprising that urban drilling has become a hotly debated topic. While there is no perfect solution, this Comment will explain why granting the Commission more authority in urban areas will better suit the needs of all parties; it will discuss the likelihood that there will be an increase in authority, and conduct a comparison of the regulatory authority of state agencies in other states with urban drilling.

B. *Why the Railroad Commission Should be Given Increased Regulatory Authority*

Granting the Railroad Commission increased authority to regulate oil and gas production in urban areas, such as the Barnett Shale, would be the best form of compromise; such a compromise would balance the needs and concerns of oil and gas producers, residents, and local governments. Both the cities and oil and gas operators have important interests that must be protected. The local governments owe a duty to protect the safety and welfare of their citizens. On the other hand, the owner of the mineral estate has the legal right to develop the minerals beneath the land.[149]

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issued by the Commission for oil and gas exploration, production, and waste disposal do not limit any independent authority of a municipality . . . with respect to road use."). The Texas Department of Transportation is responsible for the regulation of state highways. *Id.*

147. *See id.* (providing a link to local ordinances of cities located in the Barnett Shale Region).

148. *See id.* ("The Railroad Commission does not have regulatory authority over odors."). For other issues related to air contaminants, the Texas Commission on Environmental Quality has jurisdiction. *Id.*

149. Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (citing

Any unnecessary hindrance to this right is detrimental, not only to the mineral owner, but also to society as a whole. Any halt in production is a decrease in the economic benefits that otherwise would have flowed from the activities.[150]

1. Preemption

In certain cases, the local ordinances passed by cities can be more restrictive than state and federal regulations.[151] Oil and gas operators complain that these regulations are beyond the scope of the municipality's power.[152] As discussed in the examination of local ordinances, the degree to which a city has authority to enforce regulatory ordinances depends on the form that it takes.[153] General law municipalities are limited to the authority that is granted by the legislature, provided it does not conflict with state law.[154] Conversely, home rule cities are given broad authority through their police power to impose "ordinances necessary to protect health, life, and property."[155] However,

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Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863, 865 (1961); Warren Petrol. Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362, 363 (1957); Warren Petrol. Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410, 413 (1954); Page Keeton & Lee Jones, Jr., *Tort Liability and the Oil and Gas Industry*, 35 TEX. L. REV. 1, 3 (1956)).

150. As a result of gas production in the Barnett Shale, individuals, local governments, and the state receive economic benefits "in the form of . . . bonus payments and royalty income directly to cities, school districts and others; new tax base, various permits and fees payable to local governments, other types of levies such as hotel/motel occupancy taxes; new jobs, new service companies and enhanced economic development." *Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011).

151. Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 351 (2008).

152. *Id.*

153. *Supra* Part III.B.

154. *See* TEX. LOC. GOV'T CODE ANN. § 51.012 (West 2008) (providing for the regulatory authority of type A general law cities); *id.* § 51.032 (authorizing the regulatory authority of type B general law cities); *id.* §§ 51.051–.052 (granting regulatory authority for Type C general law cities).

155. *Id.* § 54.004; *see also* Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 352 (2008) (citing Martin E. Garza, *Gas Well Development in the Urban Environment*, PRESENTATION AT THE AMERICAN ASSOCIATION OF PETROLEUM LANDMEN ANNUAL MEETING, June 14, 2008, at 17; Bruce Kramer, *Drilling in the Cities and Towns: Rights and Obligations of Lessees, Royalty Owners, and Surface Owners in an Urban Environment*, 23 PETROL. ACCT. & FIN. MGMT. J. 39 (2004) (discussing a home rule city's authority to pass ordinances using its police power)).

under the Texas Constitution, any adoption or amendment to a city's charter "is subject to such limitations as may be prescribed by the legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the legislature of this State."[156] Thus, regardless of the form that it takes, no municipality may enact an ordinance that is more restrictive than state law allows.

One of the most prevalent complaints of a city over-stepping its boundaries involves local ordinances that attempt to regulate pipelines.[157] In Texas, the Railroad Commission has jurisdiction to regulate all intrastate pipelines.[158] The Commission is responsible for establishing "fair and equitable rules for the full control and supervision of [gas pipelines] and all their holdings pertaining to the gas business in all their relations to the public."[159] Furthermore, the Commission is responsible for prescribing and enforcing rules relating to the control of pipelines owned by the government, as well as regulating and apportioning gas supplies between municipalities.[160]

While the Commission is expressly granted statutory authority to regulate pipelines, a municipality's power is expressly limited by the Texas Utilities Code.[161] Section 121.202(a) states that "[a] municipality or a county may not adopt or enforce an ordinance that establishes a safety standard or practice applicable to a facility that is regulated under" state or federal law.[162] Viewing the statutory language as a whole, the Code seems to impose a very broad limitation on cities.

First, the power given to the Commission to regulate intrastate pipeline safety is very extensive in nature. Federal law sets the minimum standards, but the Commission is tasked with enforcement, and is given authority to impose more stringent

156. TEX. CONST. art. XI, § 5.

157. Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 351 (2008).

158. TEX. NAT. RES. CODE ANN. § 81.051 (West 2011).

159. TEX. UTIL. CODE ANN. § 121.151(2) (West 2007).

160. *Id.* § 121.151(4)–(5).

161. *Id.* § 121.202(a).

162. *Id.*

measures.[163] Conversely, the limited power over pipelines provided to municipalities is specifically granted in the statutes. For instance, the safety limitation does not affect a county's jurisdiction over county roads or a city's right to "adopt an ordinance that establishes conditions for mapping, inventorying, locating, or relocating pipelines over, along, under or across a public street or alley or private residential area in the boundaries of the municipality."[164] The fact that the statute specifically details the authority given to a local government in pipeline safety matters is strong evidence of the intention to limit the power to more narrow exceptions.

In addition, the Railroad Commission is responsible for establishing and enforcing "reasonable rates of charges and rules" for activities related to gas pipelines.[165] However, a city is allowed to assess a reasonable charge for actions associated with pipelines located within the city limits under specifically stated conditions.[166] In spite of this authority, an operator may still appeal municipal charges believed to be excessive to the Commission.[167] This is yet another example of the narrow grant of authority given to cities to regulate gas pipelines.

Although the language of the Constitution and statutes seems to indicate that the authority of state agencies limits that of local governments, the provisions have not always been strictly interpreted as such. Within the overlap of state and local authority, a gray area of sorts has emerged. As several commentators have noted, the drilling of oil and gas wells in urban areas "breeds the potential for conflicting regulatory schemes[,]

163. Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 351 (2008); *see also* 49 U.S.C. § 60104(c) (2006) (granting states authority to adopt more stringent safety standards that are compatible with the federal minimum standards); UTIL. § 121.201 (West 2007) (detailing the powers of the Railroad Commission); *id.* § 121.2015 (West Supp. 2010) (authorizing the Railroad Commission to regulate pipeline safety).

164. UTIL. § 121.202(b)(2)(A).

165. *Id.* § 121.151(1).

166. A municipality is permitted to impose charges "for the placement, construction, maintenance, repair, replacement, operation, use, relocation, or removal by an owner or operator of a gas pipeline facility on, along, or across the public roads, highways, streets, alleys, streams, canals, or other public ways" within the city limits. *Id.* § 121.2025(b)(1) (West Supp. 2010).

167. *Id.* § 121.2025(d).

but . . . concurrent oil and gas regulations by municipalities and the Commission are 'widespread and judicially accepted.'"[168]

In *Klepak v. Humble Oil & Refining Co.*,[169] the First Court of Civil Appeals held that by delegating regulatory authority to the Railroad Commission, the legislature did not repeal the existing law "that municipalities in Texas have, under the police power, authority to regulate the drilling for and production of oil and gas within their corporate limits, when acting for the protection of their citizens and the property within their limits."[170] Another appellate court case, *Unger v. State*,[171] arose as a result of a dispute over a municipal ordinance requiring a permit to drill a well within city limits.[172] The Second Court of Appeals found that a city has the authority to regulate and prohibit oil and gas wells drilled within the city limits and that a prohibitive ordinance was "not in conflict with a state law on the same subject."[173]

The most recent adjudication of an oil and gas preemption issue was tried in federal court. *Texas Midstream Gas Services, LLC v. City of Grand Prairie*[174] involved a claim that the Federal Pipeline Safety Act preempted a local ordinance regulating compressor stations.[175] The pipeline company alleged that the ordinance imposed safety standards for which the city had no jurisdiction.[176] Upon a finding that the majority of the provisions did not constitute "safety standards," the court held that federal law did not preempt the ordinance, except as to a requirement for the

168. Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 352–53 (2008) (quoting Timothy Riley, Note, *Wrangling with Urban Wildcatters: Defending Texas Municipal Oil and Gas Development Ordinances Against Regulatory Takings Challenges*, 32 VT. L. REV. 349, 361–62 (2007)).

169. Klepak v. Humble Oil & Ref. Co., 177 S.W.2d 215 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.).

170. *Id.* at 218 (citing Marrs v. City of Oxford, 32 F.2d 134, 134 (8th Cir. 1929); Tysco Oil Co. v. R.R. Comm'n of Tex., 12 F. Supp. 195, 200 (S.D. Tex. 1935)).

171. Unger v. State, 629 S.W.2d 811 (Tex. App.—Fort Worth 1982, writ ref'd).

172. *Id.* at 812.

173. *Id.* at 812–13 (citing *Tysco Oil*, 12 F. Supp. at 200; *Klepak*, 177 S.W.2d at 218).

174. Tex. Midstream Gas Servs., LLC v. City of Grand Prairie, 608 F.3d 200 (5th Cir. 2010).

175. *Id.* at 204. Grand Prairie enacted an ordinance that required an operator to comply with certain provisions before obtaining a permit to construct a compressor station. *Id.*

176. *Id.* at 209–10.

construction of a security fence around the compressor station.[177]

While *Texas Midstream Gas Services* would seem to conflict with the previous discussion of pipeline regulatory authority, the case can be narrowed to its facts. The court noted that "[b]ecause a compressor station is above ground, unlike a pipeline, . . . there are non-safety concerns related to its design and construction, including aesthetics."[178] Nonetheless, the court recognized that unauthorized local government entities cannot impose regulations aimed at reducing risks to life or property posed by pipelines and related facilities, including compressor stations.[179] Thus, while maintaining safety standards as the subject of federal jurisdiction, the court recognized that the physical nature of a compression station raises non-safety concerns that might overlap with regulatory areas delegated to the U.S. Department of Transportation.[180] On the other hand, given that underground pipelines are not visible and could not possibly have any aesthetic value, the ruling would seem to indicate that a city could not have a non-safety interest in underground pipelines, weakening any possible argument for such regulation. In addition, Texas courts have yet to consider a state law preemption issue relating to a city ordinance that regulates pipeline safety.

Furthermore, the Supreme Court of Texas has never ruled on an oil and gas municipal preemption issue. The court has, however, ruled that state law in other similar matters of an economic nature

177. *Id.* at 212. The district court found that requirements for building permits, minimum setbacks, concrete driveway and parking areas, landscaping, and noise level regulations did not constitute safety standards. *See* Tex. Midstream Gas Servs., LLC v. City of Grand Prairie, No. 3:08-CV-1724-D, 2008 WL 5000038, at *21 (N.D. Tex. Nov. 25, 2008) (mem. op.) (holding that many of the local ordinances were enforceable), *aff'd*, 608 F.3d 200 (5th Cir. 2010). However, the district court held that the requirement "to erect a fence around [the] compressor station site" was preempted by the Pipeline Safety Act. *Id.* at *12. The operator appealed the court's decision that the setback requirement did not constitute a safety standard, but the judgment was affirmed. *Tex. Midstream*, 608 F.3d at 209.

178. *Tex. Midstream*, 2008 WL 5000038 at *9.

179. *Id.* at *7 (citing 49 U.S.C. §§ 60101(a)(3), 60102(a)(1) (2006); 49 C.F.R. § 192.3 (2000)). The Pipeline Safety Act "prohibits state authorities from adopting or enforcing safety standards for intrastate pipeline facilities and intrastate pipeline transportation unless the state authority is either certified by [the Department of Transportation] or" the two entities have reached an agreement. *Id.* at *5 (citing 49 U.S.C. §§ 60104(c), 60106(a) (2006)).

180. *Id.* at *9 (citing 49 U.S.C. § 60102(a)(1)).

preempted local ordinances. For example, the court held that a home rule city ordinance that restricted the sale of alcoholic beverages near residential neighborhoods was preempted by the Texas Alcoholic Beverage Code.[181] The ordinance created new zoning categories and prohibited the sale of alcoholic beverages "within 300 feet of residentially zoned properties," unless the business obtained a specific use permit.[182]

Of notable importance was the court's examination of section 109.57(b) of the Alcoholic Beverage Code.[183] The statute states that the "code shall exclusively govern the regulation of alcoholic beverages in this state, and that except as permitted by this code, a governmental entity of this state may not discriminate against a business holding a license or permit under this code."[184] The court interpreted the section to mean that, unless otherwise provided, alcoholic beverages regulation was exclusively governed by the Alcoholic Beverage Code.[185] Similarly, section 121.02(a) of the Texas Utilities Code provides that local government "may not adopt or enforce an ordinance that establishes a safety standard or practice applicable to a facility that is regulated under this subchapter, another state law, or a federal law."[186] Furthermore, subsection (b) describes the instances in which a city or county retains authority to enact an ordinance.[187]

Although the Alcoholic Beverage Code arguably contains much stronger language than the Utilities Code, the preemption question is easily put to rest by a review of the source of the state's authority to regulate pipeline safety. The state's power is subject to a certification or agreement by the U.S. Department of Transportation that the state will adopt minimum safety standards.[188] Thus, the state does not have the "exclusive" right

181. Dallas Merch.'s & Concessionaire's Assoc. v. City of Dallas, 852 S.W.2d 489, 490 (Tex. 1993).

182. *Id.*

183. *Id.* at 491.

184. TEX. ALCO. BEV. CODE ANN. § 109.57(b) (West 2007).

185. *Dallas Merch.'s*, 852 S.W.2d at 491–92.

186. TEX. UTIL. CODE ANN. § 121.202(a) (West 2007).

187. *Id.* § 121.202(b).

188. 49 U.S.C. § 60104(c) (2006); *see id.* § 60106(a) (allowing an agreement with a state even if the Secretary of Transportation does not receive certification of title).

to govern pipeline safety, but does have the exclusive right with regards to local government.[189]

Even though no state law precedent exists, a collective examination of the laws indicates that a pipeline operator's challenge to a local ordinance imposing safety-related standards would likely enjoy success, particularly as to actual underground pipelines. The most compelling argument supporting this claim is taken from the strong language of the Utilities Code, which grants the Railroad Commission broad authority and prohibits such regulatory ordinances with limited exceptions.[190] In further support, the Supreme Court of Texas heavily relied on similar language in finding that a municipal ordinance was preempted by the Alcoholic Beverage Code.[191] Moreover, the only contrary case law on the matter was premised on the fact that the structure at issue was above ground, but seemingly signaled that non-safety concerns would not be applicable to an underground pipeline.[192] Thus, an operator would clearly have a very strong case.

It is also worth noting that the majority of Texas decisions concerning other oil and gas preemption issues were decided over twenty years ago, at a time when fewer oil and gas wells were drilled within municipal limits.[193] When conflict surrounding

189. *Cf.* ALCO. BEV. § 109.57(b) (granting TABC exclusive authority over the regulation of alcoholic beverages in Texas).

190. *See* UTIL. § 121.201 (West 2007) (delineating the broad powers of the Railroad Commission); *id.* § 121.2015 (West Supp. 2010) (stipulating the safety rules the Railroad Commission is required to adopt); *id.* § 121.202 (limiting municipal authority).

191. *See* Dallas Merch.'s & Concessionaire's Assoc. v. City of Dallas, 852 S.W.2d 489, 490 (Tex. 1993) (finding a home rule city ordinance to be preempted by the TABC).

192. *See* Tex. Midstream Gas Servs., LLC v. City of Grand Prairie, No. 3:08-CV-1724-D, 2008 WL 5000038, at *9 (N.D. Tex. Nov. 25, 2008) (mem. op.) (permitting the city to create ordinances dealing with non-safety concerns of above ground structures), *aff'd*, 608 F.3d 200 (5th Cir. 2010). The court surmised that aesthetics, a non-safety concern, would constitute a valid reason for local governments to impose requirements on above ground structures. *Id.* However, an aesthetic concern would not be applicable to an underground pipeline since the pipeline is not visible.

193. *See* Unger v. State, 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982, writ ref'd) ("[U]nder its police power[, a city] has full authority to both regulate and prohibit the drilling of oil wells within its city limits."); Klepak v. Humble Oil & Ref. Co., 177 S.W.2d 215, 218 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.) ("[M]unicipalities in Texas have, under [their] police power, authority to regulate the drilling for and production of oil and gas within their corporate limits, when acting for the protection of their citizens and the property within their [city] limits, looking to the preservation of good government, peace, and order therein."). In Fort Worth, no gas wells were drilled in the

urban drilling was limited to isolated instances, allowing the local government to fully regulate was much more sensible. Conversely, there are currently many wells operating within the cities in the Barnett Shale region. Due to improvements in horizontal drilling and hydraulic fracturing technologies, development of the shale became "economically viable in the mid-1990s."[194] Since that time, the development techniques have progressed tremendously and production numbers have increased accordingly.[195]

Furthermore, these advancements have also greatly reduced the negative impact of production on the environment. By utilizing horizontal drilling, "operators are often able to develop a reservoir with a significantly smaller number of wells, since each horizontal well can drain a larger rock volume than a vertical well could."[196] However, along with these added benefits comes the necessity for increased regulation and oversight to prevent waste and to protect correlative rights.[197] Therefore, a strong argument exists that the

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town prior to 2000; ten years later, 1,675 wells were located within the city limits. *Webinar to Discuss Shale-Gas Drilling in Urban Areas*, PENN STATE LIVE (May 14, 2010), http://live.psu.edu/story/46762.

194. HALLIBURTON, U.S. SHALE GAS: AN UNCONVENTIONAL RESOURCE. UNCONVENTIONAL CHALLENGES. 5 (2008), *available at* http://www.halliburton.com/public/solutions/contents/shale/related_docs/H063771.pdf.

195. *See Horizontal Drilling*, TECH-FAQ, http://www.tech-faq.com/horizontal-drilling.html (last visited Nov. 1, 2011) ("Over the past 25 years, horizontal drilling has evolved tremendously. With this evolution, it becomes more inexpensive as the research continues to grow."); HALLIBURTON, U.S. SHALE GAS: AN UNCONVENTIONAL RESOURCE. UNCONVENTIONAL CHALLENGES. 5 (2008), *available at* http://www.halliburton.com/public/solutions/contents/shale/related_docs/H063771.pdf ("Today, completion and drilling techniques are well established [in the Barnett Shale], and drilling efficiencies continue to improve even as laterals extend to increasing lengths.").

196. Lynn Helms, *Horizontal Drilling*, DMR NEWSL., Jan. 2008, at 1, 3, *available at* https://www.dmr.nd.gov/ndgs/newsletter/NL0308/pdfs/Horizontal.pdf; *see also* HALLIBURTON, U.S. SHALE GAS: AN UNCONVENTIONAL RESOURCE. UNCONVENTIONAL CHALLENGES. 5 (2008), *available at* http://www.halliburton.com/public/solutions/contents/shale/related_docs/H063771.pdf (stating that "pad drilling of several multilateral wells from a single pad" decreases the effect on the environment). When vertical wells are drilled, operators remove all the resources and then move and drill another well. *See Horizontal Drilling*, TECH-FAQ, http://www.tech-faq.com/horizontal-drilling.html (last visited Nov. 1, 2011) (differing from horizontal wells, vertical wells must be drilled directly over the reservoir). An area that would require twenty vertical wells to fully develop can be produced using only two or three horizontal wells. *Id.*

197. Lynn Helms, *Horizontal Drilling*, DMR NEWSL., Jan. 2008, at 1, 3, *available at* https://www.dmr.nd.gov/ndgs/newsletter/NL0308/pdfs/Horizontal.pdf.

Railroad Commission of Texas, the state agency with statutory authority to oversee the conservation of oil and gas and the prevention of waste, has a compelling interest in the regulation of oil and gas in urban areas that preempts the police power of local governments.

To clarify, this Comment should not be viewed as an attack on the governing power of municipalities. It has long been recognized that cities have an essential interest in the protection of their citizens and the land within municipal limits.[198] Moreover, there is a general presumption that the broad powers given to a home rule city are not preempted by state law.[199] Thus, unsurprisingly, older case law provided that cities had broad authority to regulate oil and gas drilling within city limits.[200] To reemphasize, this Comment should not be interpreted as, in any way, advocating infringement on the individual or property rights of local residents in areas of urban drilling.

Rather, this Comment is merely attempting to point out that, due to recent changes, the Railroad Commission is in a much better position to protect the interests of both the general public and the oil and gas operators. Therefore, the legislature should consider amending existing statutes to better clarify the extent of the Commission's authority in conflicting, or potentially conflicting, areas. Local government should not be permitted to exercise authority concerning matters in which it is prohibited from doing so. As discussed, pipeline safety is an area where operators frequently complain that cities exceed granted power. Although strong arguments for barring municipalities from imposing regulations related to pipeline safety already exist, a clarification of what constitutes "safety standards" would remove

198. *See* Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475, 478 (1934) ("[M]unicipal corporations have the right, under the police power, to safeguard the health, comfort, and general welfare of their citizens by such reasonable regulations as are necessary for that purpose." (quoting 30 TEX. JUR. § 58)).

199. Dallas Merch.'s & Concessionaire's Assoc. v. City of Dallas, 852 S.W.2d 489, 491 (Tex. 1993) (citing City of Sweetwater v. Geron, 380 S.W.2d 550, 552 (Tex. 1964)) ("[I]f the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home rule city, it must do so with unmistakable clarity.").

200. Unger v. State, 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982, writ ref'd); *accord* Klepak v. Humble Oil & Ref. Co., 177 S.W.2d 215, 218 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.) (clarifying that municipalities have the police power to regulate drilling within city limits despite powers granted to the Railroad Commission).

any gray area on which some cities rely, or might rely in the future.[201]

In addition, conflicts also arise in situations where the Railroad Commission and the local governments have concurrent jurisdiction. The legislature should consider amending current statutes to grant the Commission "exclusive" jurisdiction in certain areas where confusion regarding authority is present.[202] Moreover, local ordinances often impose requirements that are more restrictive and extensive in nature than those prescribed by the Commission. [203] Modifications to the existing law that expressly restrict certain aspects of excessive enactments would be beneficial as well. The current arrangement, whereby cities are allowed discretion to adopt and enforce their own regulations, also leads to problems of inconsistency and confusion.

2. Uniform Model Ordinance

Many municipalities in the Barnett Shale region are capable of hydrocarbon production, and each one is given independent authority to issue governing ordinances. Often, these rules contain regulatory provisions that are different from and inconsistent with those of other cities.[204] Thus, oil and gas operators complain that

201. Although Texas courts have not addressed a case dealing with safety standards, *Texas Midstream Gas Services* was heard before the United States District Court for the Northern District of Texas, and involved the issue of whether a local ordinance imposing requirements on compressor stations constituted a safety standard. Tex. Midstream Gas Servs., LLC v. City of Grand Prairie, No. 3:08-CV-1724-D, 2008 WL 5000038, at *11–13 (N.D. Tex. Nov. 25, 2008) (mem. op.), *aff'd*, 608 F.3d 200 (5th Cir. 2010).

202. In *City of Mont Belvieu v. Enterprise Products Operating, LP*, an operator claimed state law preempted a city ordinance requiring a permit to operate an underground salt dome hydrocarbon storage facility. City of Mont Belvieu v. Enter. Prods. Operating, LP, 222 S.W.3d 515, 518 (Tex. App.—Houston [14th Dist.] 2007, no pet.). After examining section 211.011 of the Texas Natural Resources Code, the court found that the Railroad Commission did not have "exclusive jurisdiction" over salt dome storage facilities. *Id.* at 521.

203. The Railroad Commission and local governments have concurrent authority to issue drilling permits. *See* MICHAEL J. BYRD & LOUIS J. DAVIS, BAKER & MCKENZIE, LAND AND LEGAL ISSUES IN SHALE PLAYS 13 (2010), *available at* http://www.hapl.org/attachments/files/1502/Session_6.Land_and_Legal_Issues_in_Shale_Plays.HAPL_Workshop.pdf (comparing the requirements for a Railroad Commission drilling permit and that of the Fort Worth City Ordinance).

204. *See* CITY OF BEDFORD, GAS DRILLING ORDINANCE COMPARISON (comparing municipal drilling ordinances in the cities of Bedford, Argyle, Arlington, Colleyville, Euless, Fort Worth, Granbury, Grapevine, Hurst, and North Richland Hills, Texas) (on

the multiple regulations make production activities needlessly confusing and time consuming.[205]

As a solution, oil and gas operators have advocated for a uniform model ordinance to govern urban drilling in all cities in the Barnett Shale.[206] Legislators from the Barnett Shale area proposed legislation during the last session of the Texas Legislature that would have allowed the Railroad Commission to create a model ordinance.[207] Had the legislation passed, the ordinance would have been enforceable only in unincorporated areas and would not have affected current city ordinances, unless local municipal governments chose to adopt the model.[208] Although such a proposal is commendable as an effort to reach a compromise, the practical effect side steps the real issues at hand. Municipal governments are highly unlikely to adopt such an ordinance, resulting in the continuance of the current conflict.[209]

Therefore, the best and most practical solution would be to authorize the Railroad Commission to create a mandatory oil and gas model ordinance binding all local governments in the Barnett Shale region. Such a measure would address the competing concerns of both producers and cities. First, a model ordinance would dispose of any argument asking whether state law preempts a local ordinance governing oil and gas matters.[210] The

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file with the *St. Mary's Law Journal*).

205. *See* Aman Batheja, *Cities Want to Retain Power to Regulate Gas Drilling Activities*, STAR-TELEGRAM, Nov. 18, 2010, http://www.star-telegram.com/2010/11/18/2643858/cities-want-to-retain-power-to.html (explaining that the oil and gas companies argue the different ordinances cause delays that increase the cost of production, which ultimately is against the best interests of the state).

206. *Id.*

207. TEX. S.B. 1633, 82d Leg., R.S. (2011); *see also* Aman Batheja, *Cities Want to Retain Power to Regulate Gas Drilling Activities*, STAR-TELEGRAM, Nov. 18, 2010, http://www.star-telegram.com/2010/11/18/2643858/cities-want-to-retain-power-to.html (discussing the future plans of Fort Worth Senator Wendy Davis).

208. Aman Batheja, *Cities Want to Retain Power to Regulate Gas Drilling Activities*, STAR-TELEGRAM, Nov. 18, 2010, http://www.star-telegram.com/2010/11/18/2643858/cities-want-to-retain-power-to.html.

209. *See* Chris Roark, *Debate over Local vs. State Control Heats Up*, FLOWER MOUND LEADER, Nov. 19, 2010, http://www.mesquitenews.com/articles/2010/12/03/flower_mound_leader/news/615.txt (analyzing the local government officials' opposition to interference with their ability to regulate oil and gas drilling in urban areas).

210. *See* Billie Ann Maxwell, Note, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 352 (2008) (discussing operator preemption claims).

Commission would not prescribe the creation of a model ordinance that was in conflict with its own regulatory authority, nor would it endorse rules beyond the scope of power given to local governments. Moreover, a uniform ordinance would alleviate the uncertainty resulting from the implementation of regulatory schemes on a city-by-city basis.[211] Even though a company might feel restricted by a certain requirement, the company would be aware of all the specific conditions precedent to conducting operations in an urban setting.

A uniform model ordinance would also ease the concerns of local governments fearing the loss of control over oil and gas regulatory matters.[212] During the creation of a model ordinance, the Railroad Commission could work closely with municipal representatives in reaching a comprehensive final product. Although the specifics of such an ordinance are beyond the scope of this Comment, the Commission would likely look to pre-existing ordinances for guidance in creating the structure, while referring to the Commission's vast experience concerning regulatory matters for substance. Additionally, local governments would retain the power of enforcement, looking to the Railroad Commission for support.

On the contrary, because the Barnett Shale is a large area comprised of multiple cities, establishing an ordinance that would adequately represent the possible unique interests of each city would be difficult.[213] However, this predicament is easily resolved by procedures already in place. If a city's unique attribute raises an issue, a complaint may be filed with the Railroad Commission, which will then hold a hearing.[214] "At the hearing, interested

211. *See* Aman Batheja, *Cities Want to Retain Power to Regulate Gas Drilling Activities*, STAR-TELEGRAM, Nov. 18, 2010, http://www.star-telegram.com/2010/11/18/2643858/cities-want-to-retain-power-to.html (depicting operator claims of confusion caused by multiple inconsistent ordinances).

212. *See* Chris Roark, *Debate over Local vs. State Control Heats Up*, FLOWER MOUND LEADER, Nov. 19, 2010, http://www.mesquitenews.com/articles/2010/12/03/flower_mound_leader/news/615.txt (describing the position taken by local government authorities as cities retaining regulatory power).

213. *See Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011) (estimating that the Barnett Shale covers a geographic area of over 5,000 square miles and encompasses at least eighteen counties).

214. *See* TEX. NAT. RES. CODE ANN. § 85.049 (West 2011) ("On verified

parties shall be entitled to be heard and to introduce evidence and require the attendance of witnesses."[215] The Railroad Commissioners or an employee authorized by the Commission will preside over the hearing.[216] Although it is difficult to imagine a situation that would pose a serious hindrance to a city's ability to protect its interests, municipal officials would nonetheless have an opportunity to make a case to the Commission.

In summary, a uniform model ordinance would be an exceptional means of balancing the concerns of oil and gas companies, local governments, and citizens. There are few, if any, drawbacks to a model ordinance, and the interests of all parties involved would be more than adequately protected. Furthermore, with authority to oversee the adoption and implementation of the ordinance, the Railroad Commission would be in the best position to ensure the prevention of waste and pollution, the protection of correlative rights, and the safety of local residents.[217]

3. The Railroad Commission and Local Residents

As previously indicated, the laws regarding surface protection have generally favored the dominant mineral estate.[218] Surface protection is an area that has been governed and regulated heavily by the Railroad Commission.[219] However, the 81st Texas

complaint . . . or on its own initiative, the [C]ommission, after proper notice, may hold a hearing to determine whether or not waste is taking place or is reasonably imminent and . . . if any other action should be taken to correct, prevent, or lessen the waste.").

215. *Id.* § 85.050.

216. *See id.* § 81.064 (authorizing the Railroad Commissioners to "hold a hearing; conduct an investigation; make a record of a hearing or investigation for the use and benefit of the [C]ommission; administer an oath; certify to an official act; and compel the attendance of a witness and the production of papers, books, accounts, and other pertinent documents and testimony").

217. *See About the Oil & Gas Division*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/about/divisions/aboutog.php (last updated Aug. 2, 2007) (discussing the Commission's initiative).

218. *See* Andrew M. Miller, Comment, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas Is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461, 464, 467–84 (2003) (examining "the nature of oil and gas leases in Texas and provid[ing] an analysis of the development of surface damage acts in other states").

219. *See generally Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011) (stating that the Railroad Commission is responsible for protecting surface and subsurface water and protecting the developmental interests of mineral estate owners).

Legislature added section 91.753 to the Natural Resources Code.[220] This addition requires gas well operators to provide the owner of the surface upon which the well is located with notice that a drilling permit has been issued.[221] Although certain situations exist in which the operator is not required to submit written notice, the legislation is a significant step in the direction of protecting surface estate owners.[222]

After years of narrowly defining surface protection statutes, it seems more than a mere coincidence that the legislation was passed soon after the introduction of technology that has enabled mass drilling in urban areas.[223] As a result of urban drilling, more surface owners are affected, many of whom receive little or no benefit from the oil and gas operations.[224] These situations are very different from typical oil and gas leases, and many new issues arise as a result.[225] Even in situations where urban surface owners possess the rights accompanying the mineral estate, "the increased

220. NAT. RES. § 91.753 (West 2011).

221. *See id.* (requiring a permitted operator to provide "the surface owner of the tract of land on which the well is located or is proposed to be located" with written notice that a permit has been issued no "later than the [fifteenth] business day" after issuance of the permit).

222. Operators are not required to provide the surface owner with notice when "the operator and the surface owner have entered into an agreement that contains alternative provisions regarding the operator's obligation to give notice of oil and gas operations[,] or the surface owner has waived in writing the owner's right to notice." *Id.* § 91.753(b); *see also* Ben Sebree et al., *The Changing Face of Public Policy and Key Legislation Affecting the Texas Oil & Gas Industry*, *in* 27TH ANNUAL ADVANCED OIL, GAS & ENERGY RESOURCES LAW COURSE 1, 6 (2009) (stating that the "legislature has responded to concerns of surface owners by passing" section 91.753 of the Natural Resources Code).

223. *See* NAT. RES. § 91.753 (creating protections for surface owners); *cf.* BARNETT SHALE ENERGY EDUC. COUNCIL, http://www.bseec.org (last visited Nov. 1, 2011) ("Horizontal wells were introduced into the Barnett Shale in 2002–2003 and are now the norm.").

224. *See* Ben Sebree et al., *The Changing Face of Public Policy and Key Legislation Affecting the Texas Oil & Gas Industry*, *in* 27TH ANNUAL ADVANCED OIL, GAS & ENERGY RESOURCES LAW COURSE 1, 5 (2009) (noting that because many surface owners in urban areas do not own the minerals under their land, the surface owners "gain nothing from oil and gas exploration and . . . production, but may have to put up with many of the inconveniences of such operations" (citing Billie Ann Maxwell, *Texas Tug of War: A Survey of Urban Drilling and the Issues an Operator Will Face*, 4 TEX. J. OIL GAS & ENERGY L. 337, 339 (2008))).

225. *See* 1 ERNEST E. SMITH & JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.1(A)(1)(b) (2d ed. 2010) (discussing the typical attributes of an oil and gas lease).

sophistication of urban lessors may lead to more leases with surface use agreements and surface restoration clauses."[226]

As a result of drilling in urban areas, the oil and gas industry is faced with many new issues.[227] Because more Texas citizens are now being affected, the legislature is seemingly more open to surface protection measures than in the past.[228] At the same time, the oil and gas industry is vital to the Texas economy, and the interests of producers must be simultaneously protected.[229] With experience and resources, the Railroad Commission of Texas is in the best position to adequately protect the interests of all parties involved.[230]

With respect to oil and gas, the Railroad Commission is the state agency tasked with prevention of waste and pollution, protection of the correlative rights of mineral interest owners, and provisions of safety in certain oil and gas matters.[231] The Commission's responsibility is to the citizens of the State of Texas, and any shift in authority from a municipality to the Commission would still adequately represent the best interests of local residents.[232]

As previously mentioned, to prevent waste and protect

226. Ben Sebree et al., *The Changing Face of Public Policy and Key Legislation Affecting the Texas Oil & Gas Industry*, *in* 27TH ANNUAL ADVANCED OIL, GAS & ENERGY RESOURCES LAW COURSE 1, 6 (2009).

227. *See id.* (commenting that sophisticated oil and gas leases in urban areas may alter "the default Texas rule that the mineral lessee may utilize and cause reasonable surface damages without making restitution to the surface owner.").

228. *See* NAT. RES. § 91.753 (requiring oil and gas operators to notify surface owners that permits have been granted for wells on their property).

229. *See* EUGENE M. KIM & STEPHEN C. RUPPEL, BUREAU OF ECON. GEOLOGY, UNIV. OF TEX. AT AUSTIN, OIL AND GAS PRODUCTION IN TEXAS 2 (2005), *available at* http://www.beg.utexas.edu/UTopia/images/pagesizemaps/oilgas.pdf ("[T]he total economic value of oil and gas is 2.91 times the value of production. . . . In terms of economic value trickled down through the Texas economy and jobs created, . . . [the industry is responsible for] nearly $110 billion and 719,115 jobs.").

230. *See id.* ("The Railroad Commission continues to serve Texas in its stewardship of natural resources and the environment, its concern for the individual and communal safety of citizens, and its support of enhancing development and economic vitality for the betterment of Texas as a whole.").

231. *About the Oil & Gas Division*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/about/divisions/aboutog.php (last updated Aug. 2, 2007).

232. *See* TEX. R.R. COMM'N, SELF-EVALUATION REPORT 7 (2009), *available at* http://www.sunset.state.tx.us/82ndreports/rct/ser.pdf (announcing that the Railroad Commission's "mission is to serve Texas by [its] stewardship of natural resources and the environment, [its] concern for personal and community safety, and [its] support of enhanced development and economic vitality for the benefit of Texans").

correlative rights, "the Commission grants drilling permits based on established spacing and density rules."[233] The Commission also utilizes an array of pollution prevention activities to manage the waste accumulated as by-products of oil and gas production.[234] For instance, injection and disposal wells are regulated using a federally approved program that includes "permitting, annual reports, and tests."[235]

Before any entities or individuals conduct oil or gas operations in Texas, they must "execute and file with the [C]ommission a bond, letter of credit, or cash deposit."[236] Once a well is drilled, the operator must strictly comply with the Commission's casing and completion requirements designed to ensure that zones of production are isolated from usable water.[237] If a well is dry or inactive, the drilling party is obligated to begin plugging operations within one year after operations cease and must "proceed with due diligence until completed."[238] In addition, "[t]o prevent pollution

233. *About the Oil & Gas Division*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/about/divisions/aboutog.php (last updated Aug. 2, 2007); *see* 16 TEX. ADMIN. CODE § 3.37(a) (2011) (Tex. R.R. Comm'n, Statewide Spacing Rule) (mandating that wells drilled to the same horizon or on the same tract must be at least 1,200 feet apart and at least 467 feet from the property line); *id.* § 3.38(b) (Tex. R.R. Comm'n, Well Densities) (setting requirements for well density).

234. *See About the Oil & Gas Division*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/about/divisions/aboutog.php (last updated Aug. 2, 2007) ("[W]aste management is carried out by permitting pits and landfarming, discharges, waste haulers, waste minimization, and hazardous waste management.").

235. *Id.*; *see also* 16 TEX. ADMIN. CODE § 3.9 (2011) (Tex. R.R. Comm'n, Disposal Wells) ("Any person who disposes of saltwater or other oil and gas waste by injection into a porous formation not productive of oil, gas, or geothermal resources shall be responsible for complying with this section, Texas Water Code, Chapter 27, and Title 3 of the Natural Resources Code.").

236. TEX. NAT. RES. CODE ANN. § 91.103 (West 2011). Section 91.103 requires that any entity or individual that is required to file an organization report must also post financial assurances. *Id.* Pursuant to section 91.142, any person or entity "operating wholly or partially in this state and acting as principal or agent for another for the purpose of performing operations which are within the jurisdiction of the commission" must file an organization report. *Id.* § 91.142.

237. 16 TEX. ADMIN. CODE § 3.13(a) (2011) (Tex. R.R. Comm'n, Casing, Cementing, Drilling, and Completion Requirements); *see id.* § 3.8(b) (Tex. R.R. Comm'n, Water Protection) ("No person conducting activities subject to regulation by the commission may cause or allow pollution of surface or subsurface water in the state."); *id.* § 3.7 (providing that hydrocarbon must be "confined in its original stratum until [it] can be produced and utilized without waste").

238. *Id.* § 3.14(b)(2).

of the state's surface and ground water resources, the Commission has an abandoned well plugging and abandoned site remediation program that uses funds provided by [the] industry through fees and taxes. Many wells and sites are remediated with these funds when responsible operators cannot be found."[239]

Moreover, standards and procedures are in place to respond to situations where soil in non-sensitive areas is contaminated by crude oil spills as a result of exploration, development, production, or transportation of oil or gas.[240] Conversely, when hydrocarbon condensate and crude oil spills occur in sensitive areas, the cleanup requirements are determined "on a case-by-case basis."[241] Additionally, the Commission has instituted a Voluntary Cleanup Program.[242] This program provides an incentive to "lenders, developers, owners, and operators who did not cause or contribute to contamination" to clean up contaminated property by transferring the liability to the state.[243]

As stated earlier, the Commission "has jurisdiction over all common carrier pipelines . . . [and] persons owning or operating pipelines in Texas."[244] Pursuant to this authority, all operators of pipelines used to transport oil or gas resources from lands within the state must obtain a permit from the Commission.[245] Such a permit is only issued upon a showing that the proposed pipeline will be "so laid, equipped, and managed, as to reduce to a minimum the possibility of waste, and will be operated in accordance with the conservation laws and conservation rules and regulations of the [C]ommission."[246] However, even if granted, the permit is revocable if the line is found to be unsafe, improperly equipped, or managed in such a manner that it is likely to result in waste.[247] Operators must strictly adhere to minimum safety

239. *About the Oil & Gas Division*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/about/divisions/aboutog.php (last updated Aug. 2, 2007).

240. 16 TEX. ADMIN. CODE § 3.91(b) (2011) (Tex. R.R. Comm'n, Cleanup of Soil Contaminated by a Crude Oil Spill).

241. *Id.*

242. *Id.* § 4.401 (Tex. R.R. Comm'n, Purpose).

243. *Id.*

244. TEX. NAT. RES. CODE ANN. § 81.051 (West 2011).

245. 16 TEX. ADMIN. CODE § 3.70(a) (2011) (Tex. R.R. Comm'n, Pipeline Permits Required).

246. *Id.*

247. *Id.* § 3.70 (b).

standards prescribed by the Commission.[248] With regards to liquefied petroleum gas, safety rules are also applied to systems, equipment, appliances, and truck and railcar loading racks.[249]

On the other hand, it is possible that there are certain situations that necessitate regulation to protect local residents from the possible adverse effects of hydrocarbon production, but it would not be practical for the Railroad Commission to do so. However, this problem is easily solved by delegating regulatory authority to other state agencies. One state agency that could likely provide protection is the Texas Commission on Environmental Quality (TCEQ). The TCEQ is the state's environmental agency, saddled with the goal of protecting "human and natural resources consistent with sustainable economic development."[250] Although the jurisdictions of the Railroad Commission and the TCEQ overlap at times, the Railroad Commission is responsible for regulating activities pertaining to oil and gas production, which often involves environmental issues, while the TCEQ's objectives are "clean air, clean water, and the safe management of waste."[251]

Rule 3.30 of the Texas Administrative Code contains a Memorandum of Understanding between the Railroad Commission and the TCEQ, which attempts to implement a division of jurisdiction in intersecting areas of regulation.[252] Under the Memorandum, the TCEQ has general jurisdiction over solid waste,[253] water quality,[254] and injection wells.[255]

248. *Id.* § 8.1(b) (Tex. R.R. Comm'n, General Applicability and Standards).

249. *Id.* § 9.1.

250. *About the TCEQ*, TEX. COMMISSION ON ENVTL. QUALITY, http://www.tceq.texas.gov/about (last visited Nov. 1, 2011).

251. *Id.*

252. 16 TEX. ADMIN. CODE § 3.30 (2011) (Texas R.R. Comm'n, Memorandum of Understanding Between the Railroad Commission of Texas and the Texas Commission on Environmental Quality).

253. *Id.* § 3.30(b)(1)(A) ("The TCEQ's jurisdiction encompasses hazardous and nonhazardous, industrial and municipal, solid wastes."); *see also id.* § 3.30(d) (explaining the division of jurisdiction over waste from specific activities).

254. *Id.* § 3.30(b)(1)(B) (providing the TCEQ with jurisdiction over discharges into water in the state, storm water discharges, storm water associated with industrial and construction activities, certain combined storm water, state water quality certification, and commercial brine extraction and evaporation, unless otherwise regulated by the Railroad Commission). The TCEQ also has exclusive jurisdiction over municipal storm water discharges. *Id.* § 3.30(b)(1)(B).

255. *Id.* § 3.30(b)(1)(C) ("[T]he TCEQ has jurisdiction to regulate and authorize the

Nonetheless, areas of uncertainty still exist, as in the case of air quality issues.[256] The swift resolution of this confusion is necessary to alleviate any potential adverse impacts on local communities.[257] The most efficient answer to such predicaments would be to increase either the regulatory authority of the Commission or of the TCEQ, depending on which agency is better qualified to address the concern.[258] This would also provide for a more uniform system of regulation, whereby operators are certain as to which regulations to follow.

Therefore, any shift in power would not be to the detriment of Texans residing in areas of urban drilling. In fact, citizens would actually benefit due to the experience and resources of the Commission and other state agencies.

C. *Likelihood that the Legislature Will Recommend Changes to the Authority of the Railroad Commission*

Although recommending changes to the authority of the Railroad Commission of Texas may seem like a drastic measure, the move is actually in line with modern trends. In similar areas of the law, adjustments have been made both toward increasing the power held by the Commission, and limiting the authority of local governments. Thus, a substantial likelihood exists that the legislature will grant the Commission more power to regulate the drilling of oil and gas wells in urban areas.

Recently, the Texas House of Representatives Committee on Energy Resources met at the Fort Worth City Hall to hear testimony relating to local ordinances governing surface use in oil

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drilling, construction, operation, and closure of injection wells unless the activity is subject to the jurisdiction of the RRC.").

256. *See* Mike Moncrief, Mayor of Fort Worth, Address to Texas House Committee on Energy Resources (Nov. 18, 2010) ("The Legislature should consider calling for the establishment of a 'Memorandum of Agreement (MOA),' or other appropriate vehicle, with respect to air quality jurisdiction between the Railroad Commission and the TCEQ.") (on file with the *St. Mary's Law Journal*).

257. *See id.* ("Instead of an environmental safety issue being addressed immediately by the state, it lingers[,] possibly endangering the health and welfare of our citizens.").

258. *See id.* ("Thanks to advances in technology, drilling and production will continue and increase . . . in areas that have never seen a drilling rig. . . . The [state] has an obligation and duty to do everything within its authority to protect the safety and sanctity of our communities.").

and gas development.[259] Representatives of both municipalities and the oil and gas industry were in attendance to advocate for their propositions.[260] While most city officials urged that local governments were in the best position to protect the interests of residents,[261] industry representatives also put forth convincing evidence as to why the regulatory authority of the Commission should be increased in urban areas.[262] Although the committee chairman claimed "that the meeting was simply to gain feedback and that no item was up for a vote,"[263] several important bills were proposed during the last meeting of the legislature, which purported to increase the drilling regulatory power of the state.[264] Therefore, it is clear that the Texas Legislature is seriously considering increasing the authority of the Commission.

In addition, recent judicial decisions have seemed to favor a general trend to increase the authority of state agencies, including the Commission. The most recent examination of a state agency's authority, *Railroad Commission of Texas v. Texas Citizens for a Safe Future and Clean Water*,[265] dealt with the Commission's

259. *See* Peter Gorman, *Important Energy Resources Meeting Tomorrow, Thursday, Nov. 18*, FORT WORTH WKLY. BLOG (Nov. 17, 2010, 11:51 AM), http://www.fwweekly.com/index.php?option=com_wordpress&p=7329&Itemid=482 ("An important Texas House of Representatives Energy Resources Committee meeting will be held tomorrow, Thursday, Nov. 18, beginning at 9 AM at Fort Worth City Hall, 1000 Throckmorton St.").

260. *See* Chris Roark, *Debate over Local vs. State Control Heats Up*, FLOWER MOUND LEADER, Nov. 19, 2010, http://www.mesquitenews.com/articles/2010/12/03/flower_mound_leader/news/615.txt (discussing the positions taken by proponents of both sides of the issue); Peter Gorman, *Important Energy Resources Meeting Tomorrow, Thursday, Nov. 18*, FORT WORTH WKLY. BLOTCH BLOG (Nov. 17, 2010, 11:51 AM), http://www.fwweekly.com/index.php?option=com_wordpress&p=7329&Itemid=482 (stating that officials urged "anyone who has been affected by gas drilling to attend the meeting to ensure that committee representatives have a clear picture of the issues").

261. *See* Chris Roark, *Debate over Local vs. State Control Heats Up*, FLOWER MOUND LEADER, Nov. 19, 2010, http://www.mesquitenews.com/articles/2010/12/03/flower_mound_leader/news/615.txt (reciting the testimonies given by mayors of cities in the Barnett Shale).

262. *See id.* (citing testimony given by representatives of the industry that "[a]ll regulations should go through [state] agencies because of duplications and inconsistencies" (internal quotation marks omitted)).

263. *Id.*

264. *See, e.g., id.* (noting that House Bill 4654, which was proposed in the 2009 regular legislative session, would have allowed the Railroad Commission to create a uniform set of oil and gas drilling model regulations to be adopted by local governments).

265. R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water,

interpretation of the statutory term "public interest."[266] Pursuant to the Texas Water Code, the Commission is required to weigh the "public interest" when reviewing a permit application for "proposed oil and gas waste injection wells."[267] An application to "convert an existing well into an injection well" was contested by a group of local residents on the grounds that allowing the well was not in the public's interest.[268] "Specifically, [the group] argued that large trucks used to haul waste water to the well would damage nearby roads and pose a threat to area residents who use the roads . . . ."[269]

After a hearing, the Commission issued the permit, finding that the injection well was in the public's best interest. In reaching a decision, the examiners noted that the Barnett Shale was a rapidly expanding area with an increased need for "an economical means of disposing of produced salt water from completed wells."[270] Thus, the public's interest was served by the resulting increases in recovery and prevention of waste.[271] Moreover, the public has a compelling interest in the "safe and proper disposal of produced saltwater."[272] In response to the contestant's truck-safety issue, the examiners further maintained that the regulation of traffic on state roads and highways was outside the Commission's jurisdiction.[273]

No. 08-0497, 2011 WL 836827 (Tex. Mar. 11, 2011).

266. *Id.* at *1.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at *2 (internal quotation marks omitted) (quoting an administrative hearing before Railroad Commission of Texas hearing examiners).

271. *Id.*

272. *Id.*

273. *Id.* In the Railroad Commission's final order, the Commission did not expressly adopt the examiner's statements regarding traffic safety. *Id.* at *3. However, the Commission has clarified "that it does not view its public interest analysis as an open-ended inquiry including public-safety issues, but rather one limited to matters related to oil and gas production." *Id.* Taken out of context, critics could argue that the Commission's order contradicts the position taken by this Comment that increasing the Commission's authority serves the best interest of local residents. To the contrary, an examination of the Commission's jurisdictional authority renders this argument meritless. *See Barnett Shale Information*, RAILROAD COMMISSION OF TEX., http://www.rrc.state.tx.us/barnettshale/index.php (last updated Sept. 29, 2011) (addressing the areas the Railroad Commission exercises jurisdiction). As stated on the agency website, the Commission does not have jurisdiction over roads or traffic. *Id.* Thus, the Commission

On review, the Supreme Court of Texas visited the established principle that "an agency's interpretation of a statute it is charged with enforcing is entitled to 'serious consideration,' so long as the construction is reasonable and does not conflict with the statute's language."[274] Under a "serious consideration" inquiry, courts will generally uphold the agency's interpretation.[275] Additionally, the court commented on the statutory distinction between the TCEQ, which is required to consider the effect of injection wells on public roadways when issuing a permit, and the Railroad Commission, which is not required to do so.[276] However, the strongest statement with regards to authority was the court's acknowledgment that "[t]he Commission has long been the agency charged with regulating matters related to oil and gas production, and is given broad discretion in its administration of oil and gas laws."[277] Thus, the court found that the Commission's interpretation of "public interest" was "reasonable and in accord with the plain meaning of the statute."[278]

In *SWEPI LP v. Railroad Commission of Texas*,[279] the owner of an oil and gas lease brought an action challenging an order of the Commission that approved two subdivision plats filed by the

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does not take such considerations into account when deciding public interest issues. *See id.* (clarifying that the Texas Department of Transportation addresses road and traffic concerns). Taken a step further, the proposition actually supports the idea that an increase in Commission authority would better serve the interest of citizens residing in areas of urban drilling, although this Comment is not suggesting that the agency should be given authority as to roads and traffic. In addition, the hearing examiners acknowledged the safe disposal of saltwater in analyzing public interest. *Tex. Citizens*, 2011 WL 836827 at *2 (quoting administrative hearing before Railroad Commission of Texas hearing examiners). Since saltwater is accumulated as a by-product of productive wells, it must be disposed of in order to protect the public. *Id.* (quoting an administrative hearing before the Railroad Commission of Texas hearing examiners, while identifying completed wells as producing salt water). Short of the cessation of production, which is not only absurd, but also an unlawful infringement on the mineral estate, no other viable alternatives exist.

274. *Tex. Citizens*, 2011 WL 836827 at *3.

275. *Id.* at *4 (citing First Am. Title Ins. Co. v. Combs, 258 S.W.3d 627, 632 (Tex. 2008)).

276. *Id.* (citing TEX. WATER CODE ANN. § 27.051 (West 2009)).

277. *Id.* at *8 (citing TEX. NAT. RES. CODE ANN. § 85.202(b) (West 2011); R.R. Comm'n of Tex. v. Lone Star Gas Co., 844 S.W.2d 679, 686 (Tex. 1992); Stewart v. Humble Oil & Ref. Co., 377 S.W.2d 830, 834 (Tex. 1964)).

278. *Id.* at *10.

279. SWEPI LP v. R.R. Comm'n of Tex., 314 S.W.3d 253 (Tex. App.—Austin 2010, pet. filed).

owner of the surface estate.[280] By approving the two parcels of land as qualified subdivisions, the Commission effectively limited the areas in which the operator could engage in the exploration, development, and production of minerals.[281] The operator filed an action claiming "the Commission's final orders were in excess of the Commission's statutory authority and interfered with and impaired a legal right or privilege of" the owner of the lease.[282] However, the Third Court of Appeals held that "[t]he Commission's interpretation of chapter 92 and rule 76 [was] reasonable and consistent with the legislative history of chapter 92."[283] The court also ruled "that the Commission's orders were not arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," as the operator claimed.[284]

Of notable importance was the Third Court of Appeals' examination of the Texas House Committee on Energy's bill analysis of Senate Bill 946.[285] "The House Committee on Energy in its bill analysis references by way of background that 'cities are expanding out over adjacent farm and ranch land to meet the needs of the people for residential, commercial, and industrial

280. *Id.* at 256.

281. *Id.* at 257; *see also* NAT. RES. §§ 92.001–.007 (West 2011) (providing an exception to the common law rule that the mineral estate is entitled to as much use of the surface estate as reasonably necessary); 16 TEX. ADMIN. CODE § 3.76 (2011) (Tex. R.R. Comm'n, Commission Approval of Plats for Mineral Development) (listing the procedure and requirements for getting a parcel of land approved as a qualified subdivision).

282. *SWEPI LP*, 314 S.W.3d at 258. More specifically, the operator charged that the Commission acted in excess of its authority because chapter 92 of the Natural Resources Code does not grant the Commission authority to approve two qualified subdivisions on the same tract of land. *Id.* at 260. The operator also claimed that the Commission exceeded its powers by considering and approving land designated as a landfill to be used for residential, commercial or industrial use, and by interpreting the companion rule, rule 76 of the Texas Administrative Code, in a way that impaired the operator's legal rights. *Id.* at 259.

283. *Id.* at 263 (citing TEX. GOV'T CODE ANN. § 311.023(3), (6) (West 2005); Tarrant Appraisal Dist. v. Moore, 845 S.W.2d 820, 823 (Tex. 1993); Pub. Util. Comm'n of Tex. v. Gulf States Utils. Co., 809 S.W.2d 201, 207 (Tex. 1991); R.R. Comm'n of Tex. v. Coppock, 215 S.W.3d 559, 563 (Tex. App.—Austin 2007, pet. denied)).

284. *Id.* at 265 n.13 (citing GOV'T § 2001.174(2)(F) (West 2008)).

285. *See id.* at 265 n.14 (examining the analysis of Senate Bill 946 by the House Committee on Energy and by the Senate Committee on Natural Resources (citing House Comm. on Energy, Bill Analysis, TEX. S.B. 946, 68th Leg. R.S. (1983); Senate Comm. on Nat. Res., TEX. S.B. 946, 68th Leg. R.S. (1983))).

buildings.'"[286] Furthermore, "[t]he House Research Organization noted that chapter 92 was passed to allow 'both real-estate development and mineral exploration.'"[287] Put together, these two legislative documents evidence a belief that, given the rate of growth and expansion, it is necessary for the Railroad Commission to have more regulatory power to protect the interests of all parties.

In contrast, regarding the authority of local governments, the trend has been to lessen their power. A prime example of the limitations imposed on the authority of home rule cities is seen through the restrictions placed on annexation powers.[288] In 1912, Texas adopted the Home Rule Amendment,[289] which bestowed broad discretion upon home rule cities in governing local matters.[290] As a result, cities were able to annex at will with little control exercised by the legislature.[291] However, in 1963, the Texas Legislature constrained this broad authority by passing the Municipal Annexation Act.[292] The Act restricted a city's annexation powers by providing an annexation process and

286. *Id.* (quoting HOUSE COMM. ON ENERGY, BILL ANALYSIS, TEX. S.B. 946, 68th Leg., R.S. (1983)). The Senate Committee on Natural Resources stated that "bank[s] or other lending institutions are reluctant to lend construction capital if there is a possibility that the building they finance . . . might later be demolished by the subsurface mineral owners in order for the minerals to be brought to the surface." *Id.* at 266 n.14 (quoting SENATE COMM. ON NAT. RES., BILL ANALYSIS, TEX. S.B. 946, 68th Leg., R.S. (1983) (internal quotation marks omitted).

287. *Id.* at 266 (quoting House Research Org., Daily Report for May 20, 1987).

288. *See* Robert R. Ashcroft & Barbara Kyle Balfour, *Home Rule Cities and Municipal Annexation in Texas: Recent Trends and Future Prospects*, 15 ST. MARY'S L.J. 519, 520 (1984) ("In the succeeding twenty-one years Texas metropolitan areas have experienced significant political, physical, and demographic changes[, and t]he effects of these changes have resulted in restrictions on the annexation powers of home rule cities.").

289. TEX. CONST. art. XI, § 5. In particular, the amendment states, "[c]ities having more than five thousand . . . inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters." *Id.*

290. *See* Robert R. Ashcroft & Barbara Kyle Balfour, *Home Rule Cities and Municipal Annexation in Texas: Recent Trends and Future Prospects*, 15 ST. MARY'S L.J. 519, 522 (1984) ("[H]ome rule cities were given the power to do anything that the Legislature could have given them permission to do, including the power to change boundaries.").

291. *See id.* at 523 (discussing the freedom with which cities annexed land (citing City of Gladewater v. State ex rel. Walker, 138 Tex. 173, 157 S.W.2d 641, 643 (1941))).

292. *Id.* at 526.

establishing an extra-territorial jurisdiction as the only area that a city could annex.[293]

The Municipal Annexation Act was the first step toward curbing the power of local governments; however, subsequent legislative actions have further decreased the authority to annex.[294] Pursuant to an act passed in 1978, municipalities cannot annex areas that are not at least one thousand feet wide.[295] In addition, legislation passed in 1999 imposed more restrictions with regards to municipal annexation.[296] If a municipality exceeds its authority to annex, "a private challenge will be allowed because the annexation ordinance is void."[297] Examples of void ordinances "include: annexing territory that exceeds statutory size limitations, attempting to annex territory within the corporate limits of another municipality, attempting to annex territory that is not contiguous with current city limits, and describing territory in such a way that the boundary of the annexed area does not close."[298] Therefore, taking into account both statutory law and judicial decisions, a clear effort across the board has been made to limit the authority of local governments.

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293. *Id.* at 526–27. "The extraterritorial jurisdiction of a municipality is the unincorporated area that is contiguous to the corporate boundaries of the municipality . . . ." TEX. LOC. GOV'T CODE ANN. § 42.021(a) (West 2008). Section 42.021(a) lists the requirements and boundaries for extraterritorial jurisdictions. *Id.* § 42.021(a).

294. Robert R. Ashcroft & Barbara Kyle Balfour, *Home Rule Cities and Municipal Annexation in Texas: Recent Trends and Future Prospects*, 15 ST. MARY'S L.J. 519, 526 (1984).

295. *See* LOC. GOV'T § 43.054 (West 2008) ("A municipality with a population of less than 1.6 million may not annex a publicly or privately owned area, including a strip of area following the course of a road, highway, river, stream, or creek, unless the width of the area at its narrowest point is at least 1,000 feet.").

296. *See id.* § 43.002 (listing uses that a municipality may not prohibit a person from engaging in on his property after an area is annexed); *id.* § 43.052 (discussing the requirement of a municipal annexation plan); *id.* § 43.053(b) (requiring that a municipality "compile a comprehensive inventory of services and facilities provided by public and private entities" in areas that are to be annexed); *id.* § 43.056(a) (providing that "the municipality proposing the annexation shall complete a service plan that allows for the extension of full municipal services to the area to be annexed"); *id.* § 43.0561 (requiring public hearings before an annexation occurs); *id.* § 43.148 (granting a refund of taxes to property owners in areas that have been disannexed).

297. City of Wichita Falls v. Pearce, 33 S.W.3d 415, 417 (Tex. App.—Fort Worth 2000, no pet.) (citing Alexander Oil Co. v. City of Seguin, 825 S.W.2d 434, 438 (Tex. 1991)).

298. *Id.* (citing *Alexander Oil*, 825 S.W.2d at 438).

D. *Comparison of the Regulatory Authority of State Agencies in Other States with Urban Drilling*

Because mass drilling for oil and gas in urban areas is a relatively new concept, little precedent exists regarding how the drilling should be regulated.[299] As a result, other states with major oil and gas plays in urban areas are largely looking to Texas to see how the situation will be handled.[300] Nonetheless, an examination into who possesses the regulatory power in these states is helpful to the analysis of this Comment.

1. Pennsylvania

The Marcellus Shale is a vast source of natural gas that lies underneath much of Pennsylvania.[301] The massive size of the shale has inevitably led to drilling for natural gas in urban areas.[302] As a result, Pennsylvania is faced with the same issues that trouble the residents of the Barnett Shale.[303]

In 1984, the Pennsylvania Legislature enacted the Oil and Gas Act.[304] The Act provides that any local ordinances that conflict with the provisions of the Act are superseded.[305] In two decisions

299. *See generally Webinar to Discuss Shale-Gas Drilling in Urban Areas*, PENN STATE LIVE (May 14, 2010), http://live.psu.edu/story/46762 (commenting on the massive increase in the number of wells drilled within the city of Fort Worth).

300. *See* Ed Lavandera, *Urban Drilling Bonanza Pits Neighbor Against Neighbor*, CNN, Aug. 20, 2008, http://articles.cnn.com/2008-08-20/living/urban.drilling_1_natural-gas-drilling-energy-companies?_s=PM:LIVING ("The Barnett Shale is the most-productive natural gas field in such a highly populated area spanning 5,000 square miles. The drilling here is being watched closely in Louisiana and Pennsylvania, which also have natural gas fields under urban areas.").

301. *See* Don Hopey, *Marcellus Shale Gas Drilling Put Under Microscope: Moratorium Weighed as Towns, People Wary of Potential Mishaps*, PITTSBURGH POST-GAZETTE, June 13, 2010, http://www.post-gazette.com/pg/10164/1065304-455.stm ("The Marcellus Shale lies 5,000 to 8,000 feet deep under three-fourths of Pennsylvania . . . [and] contains approximately 363 trillion cubic feet of natural gas . . . .").

302. *See id.* ("[D]evelopment pressure is mounting in rural and more populated, even urban areas.").

303. *See id.* (noting that extraction of the natural gas would benefit the economy, but production also carries the risk of potential dangers to residents).

304. 58 PA. STAT. ANN. § 601.101 (West 1996).

305. Range Res. Appalachia, LLC v. Salem Twp., 964 A.2d 869, 870 n.1 (Pa. 2009) (citing 58 PA. STAT. § 601.602 (West 1996)).

> Except with respect to ordinances adopted pursuant to the . . . Municipalities Planning Code, and the . . . Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are

rendered on the same day, the Pennsylvania Supreme Court clarified the extent to which state regulatory authority over oil and gas development preempts local governments.[306] Although the court ruled that the Act did not preempt a local zoning ordinance, the court held that the city council did not have the authority to deny an application for a conditional use permit to drill for natural gas on a residential property.[307]

Looking to the preemption doctrine,[308] the court explained that "local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow."[309] Local ordinances are preempted when "they either 'contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by' the Act, or 'accomplish the same purposes as set forth in' the Act."[310] In addition, the same court found that certain local regulatory ordinances were preempted by the Act.[311] These ordinances were more stringent than the Act and imposed excessive costs on the oil and gas operators.[312] The ordinance purported to "police many of the same aspects of oil and gas extraction activities that are addressed by the Act, [and] the comprehensive and restrictive nature of its regulatory scheme represent[ed] an obstacle to the

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hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

Id.

306. *See* Tom Yerace, *Oakmont Case Gives Guidance on Drilling*, VALLEY NEWS DISPATCH, Feb. 27, 2009, http://www.pittsburghlive.com/x/valleynewsdispatch/print_613713.html (comparing the two decisions handed down by the Pennsylvania Supreme Court concerning preemption of local ordinances by state law).

307. Huntley & Huntley, Inc. v. Borough Council of Oakmont, 964 A.2d 855, 866, 869 (Pa. 2009).

308. *See id.* at 862 ("The preemption doctrine establishes a priority between potentially conflicting laws enacted by various levels of government.").

309. *Id.*

310. *Id.* at 863 (quoting 58 PA. STAT. § 601.602).

311. *See* Range Res. Appalachia, LLC v. Salem Twp., 964 A.2d 869, 875 (Pa. 2009) ("[W]e find that the Ordinance reflects an attempt by the Township to enact a comprehensive regulatory scheme relative to oil and gas development within the municipality.").

312. *Id.* at 875–76.

legislative purposes underlying the Act, thus implicating principles of conflict preemption."[313] These rulings clearly indicate that state agencies largely regulate the drilling of oil and gas wells in urban areas of the Marcellus Shale.

2. Louisiana

Louisiana is another state that has seen conflict as a result of drilling for natural gas in urban areas.[314] The Haynesville formation encompasses an area that includes "northwestern Louisiana, southwestern Arkansas and eastern Texas."[315] The most productive area, known as the Haynesville Shale, is located in an "area encompassing southern Caddo Parish as well as DeSoto and other adjoining Parishes."[316]

The two offices within the State Department of Natural Resources that regulate the exploration and production of oil and gas are the Office of Conservation and the Office of Mineral Resources.[317] "The Office of Conservation's duties lie in the declaration of properties as units for the purpose of oil and gas drilling and production sites, permitting of wells, inspection of wells and audits of well production."[318] The Office of Mineral Resources is responsible for regulating mineral leases on state-owned lands, even when the negotiations are handled by a local government entity.[319]

The Louisiana Attorney General has addressed the issue of whether a local governmental unit can enforce zoning ordinances to prevent a gas well from being drilled when the Commissioner of

313. *Id.* at 877.

314. *See* Ed Lavandera, *Urban Drilling Bonanza Pits Neighbor Against Neighbor*, CNN, Aug. 20, 2008, http://articles.cnn.com/2008-08-20/living/urban.drilling_1_natural-gas-drilling-energy-companies?_s=PM:LIVING (commenting that Louisiana has natural gas fields under urban areas).

315. *Haynesville Shale*, DEPARTMENT OF NAT. RESOURCES, ST. OF LA. (accessed May 16, 2011) (on file with the *St. Mary's Law Journal*).

316. *Id.*

317. *Id.*

318. *Id.*; *see also* LA. REV. STAT. ANN. § 30:4 (2007) ("The commissioner [of conservation] has jurisdiction and authority over all persons and property necessary to enforce effectively the provisions of this Chapter and all other laws relating to the conservation of oil or gas.").

319. *Haynesville Shale*, DEPARTMENT OF NAT. RESOURCES, ST. OF LA. (accessed May 16, 2011) (on file with the *St. Mary's Law Journal*).

Conservation has issued a permit.[320] In reaching an opinion, the Attorney General looked to similar Louisiana Supreme Court decisions regarding zoning ordinances.[321] The court held that the authority granted to local governments did not reduce the state's police power, and the municipal power was subordinate to that of the state.[322]

The Attorney General found that the statute granting authority to the Office of Conservation was "a reasonable exercise of the police authority retained by the State."[323] The Attorney General further opined that the legislature clearly intended to grant exclusive authority to regulate the drilling of oil and gas wells to the Commissioner of Conservation.[324] Therefore, "permits granted pursuant to [the] statute pre-empt local zoning ordinances that attempt to prohibit or regulate the same activity covered by the permit."[325]

V. CONCLUSION

Historically, Texas has experienced a very lucrative oil and gas industry, which has been vital to the state's successful economy.[326] Due to the importance of this source of revenue, the laws in Texas have generally favored the mineral estate while offering less

320. La. Att'y Gen., Op. 89-416 (1989).

321. *See id.* (referencing City of New Orleans v. State, 364 So. 2d 1020 (La. 1978); Boh Bros. Constr. v. City of New Orleans, 499 So. 2d 385 (La. Ct. App. 1986)).

322. *Id.*

323. *Id.* Section 204 was replaced with section 28, but the authority of the state was not decreased. *See* LA. REV. STAT. § 30:28(A) (2007) (regulating drilling permits). Section 28 states that "[n]o well or test well may be drilled in search of minerals without first obtaining a permit from the commissioner of conservation, and the commissioner shall collect for each such well or test well a drilling permit fee." *Id.*

324. La. Att'y Gen., Op. 89-416 (1989) (citing La. Att'y Gen., Op. 88-418 (1988)).

325. *Id.* Although the statute has been replaced, section 28 still empowers the Commissioner of Conservation with authority to regulate the drilling of oil and gas wells in Louisiana. LA. REV. STAT. § 30:28(A); *see also* La. Att'y Gen. Op. 88-418 (1988) ("[I]t is the opinion of [the Louisiana Attorney General] that a local governing body . . . cannot interfere with the drilling of a well or test well. . . . [It] should be noted that a parish governing body has authority to regulate the use of roads and bridges with its system. . . . However, regulations pertaining to the parish road system cannot be arbitrary or discriminatory.").

326. *See* Bruce Wright, *Weathering the Storm: A Series of Reports on the Texas Economic Climate*, FISCAL NOTES, Mar. 2009, at 2, 5, http://www.window.state.tx.us/comptrol/fnotes/fn0903/fn0903.pdf (noting that the production of energy is "a traditional mainstay of the Texas economy").

deference to the protection of surface owners.[327] However, due to increased drilling in urban areas, the number of affected surface owners exploded overnight, attracting serious attention to oil and gas related issues.[328] A fundamental tenet of this analysis focuses on the fact that both producers and citizens have compelling, though often competing, interests that must be balanced. Under the current system of administration, local governments freely adopt and enforce oil and gas regulations that often cross into the domain of jurisdiction statutorily granted the Railroad Commission of Texas.[329] Furthermore, these ordinances vary from city-to-city, creating inconsistencies for operators attempting to adhere to the prescribed rules.[330] In an effort to resolve these problems, the legislature should increase the "authority of the Railroad Commission to regulate the operation of oil and gas industries in urban areas of the state, particularly the Barnett Shale."[331]

This Comment should not be misconstrued as advocating the complete deregulation of local government in oil and gas matters, nor is it necessarily proposing an increase in Commission authority not already possessed. Rather, this Comment is suggesting that the Commission is in the best position to protect the interests of all interested parties in light of recent changes in industry practice.[332] Thus, the legislature should consider amending existing law to clarify the extent of, and in certain situations increase, the Commission's jurisdictional authority in areas of conflict.[333] These changes would by no means represent a radical shift in

327. *See* Andrew M. Miller, Comment, *A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas is Ready to Take the Next Step with a Surface Damage Act*, 40 HOUS. L. REV. 461, 464, 467–84 (2003) (examining "the nature of oil and gas leases in Texas and provid[ing] an analysis of the development of surface damage acts in other states").

328. *See* Michael J. Byrd et al., *Common Legal Issues in U.S. Shale Plays*, 34-2 OIL GAS & ENERGY RES. L. SECT. REP. 3, 5 (Dec. 2009) ("Some emerging shale plays include densely populated urban areas, giving rise to legal issues that are not as frequently encountered in rural oil and gas development.").

329. *Supra* Part IV.B.1.

330. *Supra* Part IV.B.2.

331. TEX. H.R., INTERIM COMMITTEE CHARGES, 81st Leg., R.S., at 12 (2009), *available at* http://www.house.state.tx.us/committees/charges/81interim/interim-charges-81st.pdf.

332. *Supra* Part IV.B.1.

333. *Supra* Part IV.B.1.

power, but would resolve arguments as to local ordinance preemption by state law.

However, other factors, such as insufficient funding and the need for more inspectors, could hinder the Commission's ability to enforce additional regulations.[334] While increased funding would clearly be the best remedy, in its absence, the legislature should consider granting the Commission authority to adopt a mandatory model ordinance to be enforced by local governments.[335] A model ordinance would not only dispose of confusion resulting from inconsistent local ordinances, but would also provide the protections sought by cities and local residents.[336]

Given the current state of affairs, a significant likelihood exists that the legislature will grant the Commission more authority over urban drilling.[337] The current system of regulation cannot support safe and efficient exploration, production, and transportation of oil and gas in urban areas. With years of experience, the Railroad Commission of Texas is in the best position to protect the competing, albeit essential, interests of producers, Texas citizens, and local governments.

334. R.R. COMM'N OF TEX., SUNSET ADVISORY COMMISSION: COMMISSION DECISIONS 1–2 (2011), *available at* http://www.sunset.state.tx.us/82ndreports/rct/rct_dec.pdf ("This current funding model also limits the agency's ability to react as fluctuations in the industry occur, such as the need for more inspectors when drilling unexpectedly expands."). Furthermore, this request for funding comes at a time when "oil and gas exploration continues to move into urban and suburban areas of the state, followed by public outcries against such development." *Id.* at 1.

335. *Supra* Part IV.B.2.

336. *Supra* Part IV.B.2.

337. *Supra* Part IV.C.