

**City of Leawood
Planning Commission Minutes
July 12, 2011
Meeting - 6:00 p.m.
Dinner Session – No Discussion of Items – 5:30 p.m.
Leawood City Hall Council Chambers
4800 Town Center Drive
Leawood, KS 66211
913.339.6700 x 160**

CALL TO ORDER/ROLL CALL: Pateidl, Roberson (joined after the meeting began), Jackson, Rohlf, Williams, Elkins, Strauss and Ramsey. Absent: Neff-Brain

APPROVAL OF THE AGENDA:

A motion to approve the agenda was made by Ramsey; seconded by Williams. Motion approved with a unanimous vote of 6-0. For: Pateidl, Jackson, Williams, Elkins, Strauss and Ramsey.

CONTINUED TO JULY 26, 2011 MEETING:

CASE 114-10 – LEAWOOD DEVELOPMENT ORDINANCE AMENDMENT – SECTION 16-4-6 – PERMANENT SIGN REGULATIONS – Request for approval of an amendment to the Leawood Development Ordinance. **PUBLIC HEARING**

CASE 60-11 – AT&T MOBILITY – WIRELESS ANTENNAE – Request for approval of a Special Use Permit for a wireless antennae and associated equipment, located south of I-435 and east of Mission Road. **PUBLIC HEARING**

CASE 61-11 – AT&T MOBILITY – WIRELESS ANTENNAE – Request for approval of a Special Use Permit for a wireless antennae and associated equipment, located north of 135th Street and east of Nall Avenue. **PUBLIC HEARING**

CONSENT AGENDA:

CASE 58-11 – ONE NINETEEN – GLACE ARTISAN ICE CREAM SIGN – Request for approval of a Final Sign Plan, located at the southeast corner of 119th Street and Roe Avenue.

A motion to recommend approval of the Consent Agenda was made by Jackson; seconded by Williams. Motion approved with a unanimous vote of 6-0. For: Pateidl, Jackson, Williams, Elkins, Strauss and Ramsey.

NEW BUSINESS:

CASE 53-11 – IRONHORSE CENTRE PADDY O'QUIGLEY SIGN – Request for approval of a Final Sign Plan, located south of 151st Street and east of Nall Ave.

Staff Presentation:

Assistant Director Mark Klein made the following presentation:

Mr. Klein: Madame Chair and members of the Planning Commission, this is Case 53-11 – Ironhorse Centre – Paddy O'Quigley. The applicant is requesting approval of a Final Sign Plan for one wall sign located directly over the main entrance of the tenant space. This is the location of the Blue Moose that just recently went out. The applicant is proposing two lines over the main entrance, which reads "Paddy" on one line and "O'Quigley" on the other. The sign is approximately 3 feet, 10 inches in height for both lines. The maximum

letter height shown is the "P", which is 21 inches. The rest of the letters are smaller at 13 and 14 inches. The average letter height is about 17.1 inches. Staff is recommending approval of this application; however, per the sign criteria for the development, the maximum letter height permitted is 18 inches. We have added a stipulation which would require them to reduce the largest letter to meet this requirement.

Comm. Williams: So the "O" and the "Q" are within the 18 inches?

Mr. Klein: I believe they are both 18 inches.

Applicant Presentation

Judy Intfen, Paddy O' Quigley, 6625 W. 101st Terrace, Overland Park, KS, appeared before the Planning Commission and made the following comments:

Ms. Intfen: All the letters are under the required height. The "P" is less than 21 inches, and it is the same for all of our sign logos that we have on our existing locations on 119th Street. If it is reduced, the logo will be distorted and will look different than it does on all our printed material and current buildings.

Chair Rohlf: Is the sign at Camelot Court grandfathered in?

Mr. Klein: Camelot Court has different sign criteria. Some developments use average letter height; this one did not. The maximum letter height is 18 inches in Ironhorse.

Comm. Williams: Is the height of the "P" the same elevation as the "d"?

Ms. Intfen: I am not sure. I was told all the letters are within the 18 inches except for the "P".

Comm. Pateidl: You reference this as a logo. Is this a copyrighted logo?

Ms. Intfen: Yes, it is.

Comm. Pateidl: So as it is represented here is copyrighted?

Ms. Intfen: Yes, it is.

Chair Rohlf: Any other questions of the applicant or follow-up questions of staff?

Comm. Williams: If the sign criteria for the development limit it to the 18 inches, do we even have the ability to make an adjustment?

Mr. Klein: With the LDO, if no deviations are allowed, you really have no other option. This is through the sign criteria of the development. In the past, you have been able to grant a deviation if you felt the request was reasonable. It would still have to be approved by the Governing Body.

Comm. Williams: On other developments, haven't we had other sign criteria brought to us for approval before we've seen deviations?

Mr. Klein: Yes, and this is the preferred route so that it is tied to the overall development as opposed to being tied to one applicant.

Comm. Williams: Has there been any input from the developer?

Mr. Klein: They approved this particular sign.

Chair Rohlf: Were they aware of the larger letter? It is hard to tell in our documents.

Mr. Klein: It is, and I tried to include a sign on the back to show the letter height.

Comm. Williams: This answers the question I was trying to ask the applicant, which is that the relationship of the top of the "P" to the "d" shows a slight height difference. My second question was going to be about the bottom of the "P" relative to the bottom of the "y" so that, in essence, it was contained and uniform.

Mr. Klein: One option would be to see if the applicant would be willing to continue the case to see if the developer would be willing to come back with a modification to the sign criteria.

Chair Rohlf: Is there any sign up currently?

Mr. Klein: I believe it is just a temporary banner.

Comm. Williams: I think the sign looks fine even with the slight difference in the "P" because it doesn't jump out as some signs do. I would be supportive of it. It would just be a question if we could pass it or whether we have to amend the criteria.

Mr. Klein: It would probably be cleaner if we had the criteria amended.

Comm. Jackson: That would prevent us having to see these every time, also. Let the developer decide what he wants.

Comm. Ramsey: Do we want to table this, then?

Chair Rohlf: We would want to continue it, but I need to make sure the applicant understands what we're asking. A representative of the development would need to ask for a revision to the sign criteria.

Ms. Intfen: Yes, that would be fine.

Chair Rohlf: What meeting would it be?

Mr. Klein: It would probably be August. It just depends on the agenda, but I can try.

A motion to continue CASE 53-11 – IRONHORSE CENTRE – PADDY O'QUIGLEY – Request for approval of a Final Sign Plan – located at 3317 West 151st Street – to a future Planning Commission Meeting was made by Ramsey; seconded by Williams. Motion approved with a unanimous vote of 6-0. For: Pateidl, Jackson, Williams, Elkins, Strauss and Ramsey.

CASE 67-11 – LEAWOOD DEVELOPMENT ORDINANCE AMENDMENT TO SECTION 16-4-2, PROHIBITED USES – Request for approval of an amendment to the Leawood Development Ordinance, pertaining to oil and gas exploration. PUBLIC HEARING

Staff Presentation

Assistant Director Mark Klein made the following presentation:

Mr. Klein: Madame Chair and members of the Planning Commission, this is Case 67-11 – Leawood Development Ordinance – Amendment to Section 16-4-2 – Prohibited Uses, pertaining to oil and gas wells.

This case is before you tonight because it came to our attention that oil and gas wells are not addressed in the current LDO; it was addressed in the previous LDO that went to December of 2002. In that ordinance, it was allowed as a permitted use in three different zoning districts: RP-85, which is five-acre lots, planned rural density residential; RP-A, which is planned large-lot, single-family residential, which no longer exists anymore as of the last ordinance in December of 2002; and the AG district. Staff is recommending this ordinance amendment, which would prohibit oil and gas exploration within the City of Leawood. The reason is that staff feels the city is developed enough, and a large amount of agricultural land has been rezoned since 2002. The RP-A no longer exists, and only one section of the city is RP-85. At the June 6th meeting of Governing Body, a moratorium on oil and gas drilling was approved, and staff was directed to come forward with an amendment to prohibit oil and gas wells within the city. I'll be happy to answer any questions.

Comm. Elkins: Is there a time limit on the moratorium in place currently?

Mr. Klein: There is no limitation; it was just to be until the matter is resolved.

Comm. Elkins: With respect to the status of the current Kansas Corporation Commission docket, I understand that the commission issued an order approving the portion that is within their jurisdiction. Have there been any post-hearing motions filed, or is it a final decision by the commission?

Ms. Shearer: There is a fifteen-day protest period. It is our understanding that one person is filing a petition for reconsideration. Once the commission makes the order on that petition, there is another window for an appeal. It looks like this may go on for a while longer with the commission.

Comm. Elkins: So it is not concluded at this point.

Ms. Shearer: They were granted their exceptions and have also applied for intent to drill. The fifteen-day window has not elapsed yet, so it is not in effect yet.

Comm. Pateidl: Although our LDO currently does not contain provision on oil and gas drilling, there are a number of structures involved, water retention and various and sundry pieces of construction that have to be done in conjunction with this drilling effort. Do any of those identified efforts require a Special Use Permit or application before this commission in conjunction with the drilling of a well?

Mr. Klein: As far as the actual drilling, nothing is addressed in the LDO, so there is no permit. There would be accessory structures, and they are not listed in the current LDO, which states that anything not listed is prohibited. Oil and gas wells are not addressed in the current LDO. A section in the Table of Uses states that if it isn't listed in the Table of Uses, for the use to be allowed, it would have to come before the Planning Commission and City Council to seek a classification that would allow the use. That has not been done.

Comm. Pateidl: Does that mean that, should this intended well proceed, some application would have to come either before this body or the Governing Body?

Mr. Klein: My understanding is the KCC (Kansas Corporation Committee) is the one who has a process in place. The city has no process. I don't think the city has a permit that would be required at this time.

Comm. Pateidl: I'm trying to understand what our ordinances are. You're saying if it's not covered by an ordinance, it has to be approved by either the Governing Body or this commission?

Mr. Klein: Yes.

Comm. Pateid: That would imply to me that, before any drilling could happen, some application or proposal should come before one of those two entities.

Mr. Klein: Yes, a request to have it added as a use to the Table of Uses within the City of Leawood.

Comm. Roberson joined the meeting.

Comm. Williams: Obviously, this is drilling and use and operation of an oil and gas well. This would not prohibit drilling for such things as geothermal systems, which is what found this gas to start with, correct?

Ms. Shearer: No, it would not prohibit that.

Comm. Elkins: In the testimony given to us that was filed with the KCC is a reference to gas wells in the city limits of Olathe. Do you know if those are residential or production?

Mr. Klein: I do not.

Comm. Ramsey: They're residential wells.

Comm. Elkins: In the current activity we're in, am I correct in understanding that we're acting in our legislative capacity as opposed to our judicial capacity?

Ms. Shearer: Are you asking me if we have jurisdiction to adopt this amendment?

Comm. Elkins: No, really I am wondering what, if anything, we need to justify our decision here. It seems like the standard is one thing if we're legislating; it is another if we are adjudicating. My sense would be that we are legislating, but I wanted to confirm that.

Ms. Shearer: The answer to that is yes.

Chair Rohlf: Are there other questions at this time? This case does require a Public Hearing.

Public Hearing

Kurt Brack, Attorney with Holbrook and Osborn, representing Vivek and Namita Sahgal, appeared before the Planning Commission and made the following comments:

Mr. Brack: We are here speaking in opposition to this amendment to the Leawood Development Ordinance. I think it might be helpful to give background of how we got in this position. My clients built a house in Leawood at 2600 W. 143rd Street. Construction began in 2009. They ran into a problem with the builder, who was ultimately terminated. They hired Forner-LaVoy to finish the house. During construction, they had a geothermal system put in, and the loop system to heat and cool the house struck natural gas. They have tried to investigate this to determine if it's usable natural gas, and from everything they've been told thus far, it is. They applied to the KCC for a license for a residential gas permit, which is allowed under KCC rules. Then they completed construction and moved into the house with their two children in March of 2011. They have applied for and received from the KCC a well location exception, which is probably what you saw in your packet. If your property is less than ten acres, KCC and the Kansas law require you to get an exception so you can put a gas well in. They did that, and after a contested hearing in front of the commission in which evidence was presented and expert witnesses were called, the commission, in June of 2011, issued an order approving their well location exception. Construction on the well has begun, and there was some discussion back and forth among the commission members about what remains to be done in front of the KCC. I'm one of the lawyers handling that, and I would be happy to answer questions you

might have about the status of that. We have a KCC order that has been entered. The petition for reconsideration time has not expired, as Counsel said. In checking with KCC, there have been no petitions filed for reconsideration filed as of yet, but we do expect one. The KCC is currently holding a PIT Permit and a Notice of Intent Permit.

We seek to persuade you that this amendment should be denied, and there are several reasons for that. We believe the ordinance conflicts with Kansas law and the jurisdiction of the KCC. By way of background, the KCC has been around for 125 years. It regulates all oil and gas in the state of Kansas, and we believe that the outright ban that the city is proposing via this ordinance provides that it would be in violation of Kansas law to proceed. State law provides a topic called Economic Waste with regard to the oil and gas industry. Economic waste is defined as having a resource and being unable to use it. One of the concerns the KCC has is to avoid economic waste. In fact, state law says that economic waste is prohibited. I would suggest that to ban oil and gas wells and exploration would violate this statute. I mentioned a hearing at the KCC. The KCC found that waste would occur if the application were not granted. The city seeks a total ban on all oil and gas. My clients don't seek to export this gas anywhere. They want to use it to heat and cool their home. The KCC heard testimony from a driller who has been engaged by my clients to drill the well, which has begun. They also heard testimony from a petroleum engineer named Dwayne McCune, who was hired by a lawyer named Mathew Keenan, who has a letter in your packet. All the experts in this case indicated that the well could be operated safely. They also said it is not a question of pollution, either. They further testified that the gas well posed no more risk than someone using propane. I suggest that the KCC was in the best position to judge the safety of the well and whether or not it could be done safely with no danger to the surrounding area and no pollution danger. The testimony in the KCC case was that gas wells are very common. In fact, there are over 100 gas wells in Johnson County alone. Olathe is dotted with them. Generally, the gas wells are more prevalent in the southern part of the state. It is not unusual to have gas wells in residential areas, either. That issue has come before the KCC before. In fact, in their order, they cited some of the examples of gas wells being allowed. The city of Merriam had this issue come up in 2006. The KCC approved a gas well near an apartment complex known as the Fox Run Apartments. There is precedent for allowing gas wells in residential areas.

Attached to your packet was a letter from a lawyer by the name of Mr. Keenan, who provided information. I would suggest to you that a number of facts in that letter are not exactly accurate. Mr. Keenan owns a lot four lots away from my client with no house on it. He is a subject of a bar complaint filed because of some of his actions in this case. He represents that fracking is a dangerous thing and will occur in this case. That is simply not the case. The KCC specifically found no danger of pollution or contamination of the water supply. The testimony was that, if the safety precautions are all followed by my clients, there is no danger of that at all. My clients intend to follow those precautions. Mr. Keenan also claimed to have opposed this from the onset. That is also false. When this first began, he contacted my clients, seeking an easement over their property. When that was refused, he developed opposition to this gas well. He also claimed that the gas well would result in property values being affected. There is no evidence of that. In fact, the property values have probably gone up in the area. This is an 11,000-square-foot house in that area. People are always afraid of something they may not understand or have enough information about. The KCC is expert in this area and found that the well should be allowed. Mr. McCune, the expert hired by Mr. Keenan, testified that the well would be safe. He also testified that there was little, if any, danger of pollution. The driller who has begun drilling the well said it was safer than the Kansas Gas Service, which supplies gas to most of the homes in this area. What are we really concerned about here? If it is safety, KCC said it was safe. If it is pollution, KCC said there was no risk of that. We would propose that there would be no structure aboveground with regard to this well. It will not be visible, nor will the gas be used anywhere else. Now, we're faced with an ordinance and a moratorium enacted by the city with no notice to my clients. The outright ban is improper under Kansas law. I think it steps on the shoes of the KCC, and it would probably lead to more heartburn between the parties. My clients went through a day-long hearing with the KCC, the experts in this area, and they granted the application. They have put away concerns about danger and pollution. Are we concerned about something being unsightly? It will be buried.

I would suggest that this is overkill, and I would ask you to deny it. I am happy to stand for questions any of you might have.

Chair Rohlf: Mr. Brack, we will finish the Public Hearing, and then we may have some specific questions.

Stan Lewis, 2640 W. 143rd St., Leawood, KS, appeared before the Planning Commission and made the following comments:

Mr. Lewis: Thank you for the opportunity to speak. I am going to group my concerns into four general categories and make my comments brief. The first area of concern is that the standards and requirements for drawing a well were not met, thus the exception request through the KCC. There were several homeowners protesting the request, and still, the exception was approved for a residential area. I would ask why we even have these minimum standards of ten acres and 330 feet from boundaries if it can still be constructed, even with residents' protesting. The second area of concern has to do with the reason cited for the approval, which is to prevent waste. Apparently, waste is more important than safety and correlative rights in a residential area. I and several other protesters have concerns about unanswered questions on safety. Just because it said it is safe doesn't mean it is safe. It is somebody's opinion that it is safe, and there are quite a few unanswered questions about the safety and the ongoing monitoring of the well operation. The third area of concern is what I categorize as non-compliance with procedures. Despite the fact that the intent to drill has not been approved and the reconsideration period has not expired, drilling was surprisingly started on a long holiday weekend, even though there is no apparent urgency. There is concern on behalf of the residents on the area as to why those requirements were not met and why it was started so suddenly. The last area of concern has to do with what appears to be an increasingly large number of concerns being raised nationwide about exploration for gas. If any of you watched 60 Minutes on Sunday night, you would have seen issues surfacing. There are many reports in the media about concerns on fracking and other aspects of safety related to gas wells. This says that maybe there are concerns about safety that either are not identified or have not surfaced. I am concerned as a nineteen-year resident of Leawood that, if this is not stopped now, Leawood could become inundated with requests for gas wells. It looks like the KCC would just rubber-stamp them in order to prevent waste because it seems to be their only concern. I don't think any of us who are residents of this community ever intended to have this happen. I would suggest that, if this goes forward and is approved, it could lead to every property owner in the city deciding to drill for a gas well and apply for a well exception, regardless of safety. Then suddenly, we're dotted with wells all over Leawood. I don't think any of us, speaking for myself, has that kind of vision for our community. Do you have questions?

Chair Rohlf: We will take the rest of the comments and then possibly give opportunities to people again. This is an unusual Public Hearing.

Sean Graves, 2620 W. 143rd St., Leawood, KS, appeared before the Planning Commission and made the following comments:

Mr. Graves: I came here tonight trying not to be about preventing the Sahgals to put the well in. Frankly, I was a little surprised, when I discussed this with friends and neighbors, that Leawood had nothing in regards to regulations for gas and oil wells. We had no recourse but to appeal to the KCC in an attempt to prevent the well from being put in. The main concern was they only have three acres of land, and my property is within the 330-foot limit of the well. I would argue that, in this city, if somebody decided to dig a well, he would have to go to the KCC every time. As Mr. Lewis alluded to, the KCC specifically stated in their order granting the exception that waste was the primary concern with them. They only are concerned with three things: waste, correlative rights of property owners to use their property the way they want and natural water supply. If any of those have conflicts, waste wins out. Seeing as this body and the Council do not have regulations, essentially, the city is allowing the KCC to decide that the only thing of concern with this issue is

waste. I feel that's not true. We are in a residential area, and other concerns should outweigh the concern of waste. I don't know much about the law, but I do know a city can make laws, and the laws can be enforced, even if the state has a law that might conflict with it. That would be an issue of the courts. I don't know if the city decides it. Because there is a lack of ordinance, it needs to be addressed. I just would have liked to see another way for the city to say, "Come before us. Get a permit and get it approved." I do think the city is giving up responsibility and rights as a governing body over the city to the KCC if they do not make some kind of decision in this matter. That is my biggest concern with this. I have one last concern, which is that of the three things mentioned by the KCC, safety was not included. As a matter of fact, the KCC does not check for safety; they are not responsible for that. Their sole goal is to measure how much gas or oil is being produced, and that is it. They regulate how the well is produced, also, but safety would be left up to the city. I think the city really needs to address the issue of no regulations about the subject.

Mike Jarvis, 14121 Meadow Lane, Leawood, KS, appeared before the Planning Commission and made the following comments:

Mr. Jarvis: We have lived in Leawood for about eleven years. We are well within the 330 feet that has been discussed here. I would like to bring to your attention a letter from July 5th from the KCC. A copy was sent to the mayor. Do you have that?

Ms. Shearer: I do not believe you have that letter in your packet.

Chair Rohlf: If it is from July 5th, it was probably too late to include it.

Ms. Shearer: The letter relates to the KCC telling the Sahgals that they needed to cease drilling, and the materials in this packet had to do with this amendment, so I felt the issue was separate.

Chair Rohlf: The issue being what, Ms. Shearer?

Mr. Jarvis: The issue being that they started without permission to drill.

Chair Rohlf: Because of the moratorium.

Mr. Jarvis: there were two moratoriums: a motion for reconsideration and then an appeal to the district court.

Ms. Shearer: We're fine with you seeing it. I just wanted to explain the reason that it is not in the packet is we wanted to include reasons for the text amendment and not every procedural issue in the case.

Chair Rohlf: We really don't need copies of it, then.

Mr. Jarvis: The reason I come forward is the concerns of Mr. Lewis and the other gentleman. Their counsel says that they will ensure that certain things will be done. They haven't followed the law yet, in that they started drilling over the long weekend. They buried a pipe in concrete that cannot be taken out. They are supposed to see that this well is shut-in to prevent the escape of fluids. Have they done so? How do they intend to do so? On Page Two of their application, they indicated they were going to use steel bits, but it's been found that earthen bits appear to have been used. These are the people who assure us, through their attorney, that we should have no worries about safety, etc. People who do not comply with their own application are suspect. People who commence drilling without permission, who do not follow their own application rules do not lend a lot of credence that they will in the future. The letter goes on to say that they should immediately cease all drilling. Then it says that the driller and the applicants must ensure that the well is left in a state that ensures environmental protection and public safety. How? How do they intend to

do that? Secondly, who is going to oversee it? Will it be the driller who has started working for them? We do not know. The staff goes on to point out that the wrong bits were used, and apparently they have 25 feet of pipe cemented in already. Also, 25 feet of surface casing had been set on July 4th, from Page 1, Paragraph 2. I believe that we should not pass the buck, so to speak, to the KCC and that the city should have an ordinance that protects the residents who are well within 300 feet. Also, the lake worries me. If there is any type of oil or gas that escapes to the pond, it is directly behind my house and many others' in the association. It could be very detrimental, and we have no assurances except that they and the experts they've retained feel that it will not happen. I believe we should have more protection than that.

Namita Sahgal, 2600 W. 143rd St., Leawood, KS, appeared before the Planning Commission and made the following comments:

Mrs. Sahgal: We are the people who are asking to drill the gas well. I just wanted to say that I'm very sorry to have this situation with our neighbors. We were hoping to start living in this new neighborhood on a much more pleasant note. To address some of the comments, the safety of this well was inspected on Tuesday, July 5th by a man from the Gardner office of the KCC. He came out, got on the platform, checked the well, checked the pipes, checked the casing and checked every single thing. He was the one who said we had to stop, and we stopped right then. He looked at how it was sealed up, and nothing was coming out of the pit. When the drilling was stopped, it was stopped in a completely safe fashion to address some of the concerns about how the pipe was left. It was closed in accordance with what the gentleman from the KCC said. He was on the platform for two hours, investigating how they set everything up and turned it off. There was a question about fracking. I went out to Wichita at the KCC hearing, and from what I understand, you can have two levels of gas: shale gas, which is much more superficial and is found around the 200-foot level, and then gas that is associated below sand or along with sand and is found around the 400-foot level. KCC also had a geologist and an engineer who has done surveys of soil, mining and gas exploration for well over fifteen years. He has given a testimony, also, in the KCC report. He felt the natural gas present here is at the 400-foot level, and he and our driller both said there would be no need to do any fracking and that they would go straight down to the sand level. In terms of safety, we are the ones who are right next to the well. Why would we want to expose ourselves and our home, which we've built at great expense to ourselves after losing a lot of money with the builder we had to fire, to a disaster that is ten feet from us? The lake is not exposed at all. The KCC had very clear guidelines about what we could and could not do. I remember going through all these questions with the KCC staff and the lawyers who were representing Mr. Lewis and Mr. Keenan about safety precautions. The driller went through the whole list and agreed to every single thing. It is on record, and she has agreed to all precautions. There will be no fracking. We will take no lake water and will truck in the water that will be required for the drilling process. The intent for the drilling was filed in April, and we're told that within 24 hours of filing, it is accepted. We got the driller out there as soon as we got the approval. We didn't realize the intent had been put on hold. No one from KCC told us that. The way the approval letter is framed, it does not say that we cannot drill until the fifteen-day grace period is over. I'm not a lawyer and don't understand the legal language. It said the order of approval was done, and it did not say we couldn't do anything for fifteen days. That is why we gave them approval to do the drilling. We thought the long weekend would allow time for the trucks and other machinery to be brought in so that we would cause the least inconvenience to surrounding people. Regarding some of the comments about the feet, Mr. Graves was concerned about it not being 300 feet. That was when it was in the original location closer to the road. We moved the location back to accommodate the 300 feet from his site. I am trying to address everyone's concerns and be safe at the same time. The driller has instituted a protocol for all of the safety requirements we are responsible for, and the KCC representative from Gardner said he would be coming out once drilling restarted to check on the actual process on a routine basis every two or three days. I assume they will keep a watch on how things are going, and we have to prepare a report on the checks that we are doing for the gas. We only moved to Leawood in March, but the last thing I would want to do is to be accused of trying to ruin Leawood. This is our new home. We don't plan to leave here, and we want to do the best we can for everyone here and for the community. That is why we moved here.

Chair Rohlf: Typically, we would close the Public Hearing at this point, but Mr. Brack, is there anything you would like to say to follow up with the neighbors' comments?

Mr. Brack: One of the concerns raised by the neighbors was that the KCC was not concerned with safety. Paragraph 17 of their order approving the application reads, "The commission finds that the well can be operated safely and does not pose a greater risk than, for example, using propane." It goes on to explain that Ms. Glaze, the drilling contractor, testified that residential gas wells can be operated safely. Mr. McCune, a protesting witness, agreed that a residential gas well can be operated safely if all the proper safety measures are taken. It goes on to say that Dr. Sahgal testified that the well would be monitored on a periodic basis and that an odorizer and regulator would be installed. It's not exactly correct to say that safety was not a concern of the KCC. Having satisfied all those requirements from the KCC and the terms of their order, we believe that this particular ordinance that bans all storage, drilling of any oil or natural gas is inappropriate. We would ask that you deny this application.

Chair Rohlf: Ms. Shearer, if the commission has questions for the applicant, the attorney, the homeowners, do we keep the Public Hearing open? I believe some of the questions will be directed to Mr. Brack.

Ms. Shearer: I think that is fine. It is really at your discretion.

Chair Rohlf: I think we'll keep it open because I'm sure there will be questions.

Mr. Lewis: Since he had an opportunity to respond, will we have that same chance?

Chair Rohlf: We could ping-pong this back and forth, but I would like to have the commission ask questions; maybe yours will be answered. Before I close it, I will make a determination on allowing more comments.

Ms. Shearer: For the record, the city is the applicant in this case. This is our text amendment. The Sahgals are not the applicant; the city is.

Chair Rohlf: Thank you for clearing that up. We'll proceed with questions.

Comm. Pateidl: I think we're getting sidetracked dramatically to the individual case of this particular well when, in fact, we are here to discuss an ordinance as it relates to the practice of drilling. My question for the gentleman is if he recognizes the name Jim Hemmen.

Mr. Brack: Yes, I believe he is a staff geologist employed by the KCC.

Comm. Pateidl: Did he testify before the KCC?

Mr. Brack: Yes, he provided both written pre-filed testimony and actual testimony at the hearing.

Comm. Pateidl: And I assume you agree with his testimony.

Mr. Brack: Yes, I agree with his testimony.

Comm. Jackson: Mark, does the city have any staff that would be able to assist in monitoring these wells, determining whether they were under continued safe operation during the long term they might be operated, to ensure that, if the property was vacated, someone would close up the well properly? Does the city have expertise in that?

Mr. Klein: Honestly right now, I can't answer that question with certainty. It is my suspicion that the person would need a number of certifications in order to monitor those wells. I don't think the city currently has anybody on staff that has those certifications.

Comm. Jackson: Is there any idea of the extent of monitoring that would be necessary or the expense of monitoring these things?

Mr. Klein: I know that in the previous ordinance adopted in 2002, there were a number of requirements. It required that they go through Planning Commission and City Council to get approval for a well. It also had the ten-acre requirement as part of that and considerations that had to be addressed, including proximity to residential, proximity to property lines and safety considerations. There was a substantial amount of review of those before it could go on. They were limited to three zoning classifications, all on fairly large lots. The RP-A was a minimum of one acre, and that was the smallest lot, outside of AG. I went back to see what area the RP-A was, and it was actually Mission Farms.

Comm. Jackson: Any idea on the amount of noise caused by the drilling? Is it within the ordinance?

Mr. Klein: Currently, we allow a maximum of 60 db at the property line. Noise was another consideration with the previous ordinance with regard to the drilling.

Comm. Jackson: It sounds like there is a great deal of trekking going back and forth while the drilling process is going on. Are there city ordinances that apply to that?

Mr. Klein: Again, if it was a review that went through the Planning Commission and City Council, there would be stipulations that limit hours of access to the site.

Comm. Roberson: Do we have any oil and gas wells in Leawood?

Mr. Klein: Not to my knowledge.

Comm. Elkins: Mr. Klein, you spoke a moment ago in response to Commissioner Jackson's comments about portions of the LDO prior to the 2002 version that related to oil and gas wells. Do I correctly understand that, under that version of the ordinance, what was contemplated was a use of property for oil and gas wells under the provisions of a Special Use Permit?

Mr. Klein: Correct, the Special Use Permit was required.

Comm. Elkins: So that called on a case-by-case basis for review of a particular application for an oil and gas well and an individual determination made by this commission and Governing Body.

Mr. Klein: Correct.

Comm. Elkins: Did staff consider bringing forth a proposal that would provide for this kind of use of property within Leawood under the authority of a Special Use Permit?

Mr. Klein: That was considered.

Comm. Elkins: Can you tell us why an outright prohibition was preferable to a use under the provisions of a Special Use Permit?

Mr. Klein: There have been quite a few properties that used to be agriculture or RP-A that have been rezoned to other uses. For instance, Leabrooke used to be Ag and was rezoned to a number of different residential uses, including R-1, RP-2, RP-3 and even a small neighborhood of commercial retail. More land was on the 135th Street corridor that was Ag as well, but as you know from being on the commissions, quite a few applications and plans exist on that corridor. There is still some land available as Ag. There is also Ag land that contains churches and schools, which are allowed in any zoning district.

Comm. Elkins: Did the prior version of the LDO distinguish between commercial and domestic wells?

Mr. Klein: I don't believe it did.

Comm. Elkins: Do you know if wells have existed in Leawood at any time in the past?

Mr. Klein: I don't have any knowledge of that.

Comm. Elkins: Mr. Brack, you made the point that, under the statutes under which the KCC operates with respect to oil and gas, there is an issue of commercial waste that is of concern to the commission.

Mr. Brack: That is correct.

Comm. Elkins: At the same time, the commission specifically commented on the authority of the city to regulate the uses of real estate within the confines of the city limits, did they not?

Mr. Brack: I'll answer yes and no. There is a very cryptic paragraph in the order granting the application. I'm referring to Paragraph 19 on Page 4. In one sense, they don't want to interfere with Leawood and the passage of their ordinances, and they go on to say that the commission is not the proper venue for addressing Leawood zoning or development rules; those rules are for the City of Leawood to interpret and enforce. The curious language is, "The commission will not address the authority of the City of Leawood to regulate oil and gas development within its borders if those regulations conflict with state statutes or commission regulations since that event has not occurred."

Comm. Elkins: The bottom line is that the commission did not make a ruling or express an opinion, at this point, about our authority to regulate the use of property within the Leawood city limits.

Mr. Brack: They did not; that is correct, but that last sentence in there says something. Whether it's a state agency trying to protect its own turf or basically saying that oil and gas belong to them, I don't know.

Comm. Elkins: Are you familiar with any controlling or even applicable legal authority that addresses the issue of that potential conflict between the commission's statutory obligation to avoid waste and the statutory basis under which we operate in the LDO, which is legislated by the city and incorporates many other policy concerns that aren't, as you mentioned, the concerns of the KCC?

Mr. Brack: There is no doubt there is a clash of policies. On one hand, you have a city that is trying to govern its own affairs clashing with the KCC, charged with preventing waste and using natural resources to the best of their ability that will not allow for pollution or safety issue. I do know that there is a specific statute on the books in Kansas that absolutely prohibits economic waste, which is defined as having a resource and being unable to utilize it. In this particular case, having a resource and being unable to utilize it, regardless of Leawood's position in this, puts it in conflict with Kansas state law.

Comm. Elkins: Wouldn't you also agree, though, that there are policies identified under the home rule statutes that are of our concern that are specifically not addressed in the underlying legislation for the KCC and its obligations to exploit, in a reasonable and safe fashion, the mineral resources that we have?

Mr. Brack: Right, and where you're coming from, obviously, is this city's police power under the health, safety and welfare. I talked about that in my remarks because we already have a finding by the KCC with regard to the safety issues in this case, specifically, this well. Let's be honest about it; this ordinance was drafted specifically with my clients in mind. The moratorium passed by the city on June 6th, without any notice to my clients, is a problem for this city. We would like to put a well in. KCC has given us permission to do that. We've started this process; however, KCC has held up a couple permits.

Comm. Elkins: We could get into this argument all night, but I would not concede that what we are considering here was drafted specifically with your client in mind. I think your client's situation identified a potential gap in our LDO and the way we've chosen to address land use within the city limits, and that is what we are considering tonight. I want to emphasize that this is not a rehearing of the rightness or wrongness of what they're doing; it is an exercise of our legislative power to exercise the city's police power in determining how it is that real estate is going to be used in the city limits.

Mr. Brack: You asked your counsel a moment ago if this was legislative or judicial. As you probably are aware, that is a slippery slope that can go either direction. In one, you have much more discretion than you do in the other. I would suggest to you that the ban that is being proposed here moves dangerously toward the judicial function, i.e., banning any particular drilling or storage or use of natural gas under the proposed ordinance. That, I think, is problematic for the city.

Comm. Elkins: Do the KCC or state regulations or statutes propose an obligation for any greater level of liability insurance upon individuals such as your clients as they are building and operating an oil or gas well for domestic use, as contrasted with commercial production use?

Mr. Brack: There is not a specific regulation that imposes you must have \$2 million or \$5 million in coverage; however, we have represented to the KCC throughout all these proceedings that we are willing to carry excess insurance coverage to satisfy those particular requirements.

Comm. Elkins: Is that an issue that would be addressed by the KCC in its permitting process, or is that story yet to be told as to what level of liability insurance is appropriate for your clients to hold to protect the surrounding landowners?

Mr. Brack: That is not an issue that I've seen in any of the regulations before the KCC. They don't mandate, for example, a specific level of insurance coverage. They do require certain things of my client when this well is complete; for example, an odorizer and a regulator while it's being drilled. There are certain physical requirements that have to go in. When it's all done, it will be buried and not visible at all. My clients are keenly aware of the safety concerns, and they don't want anything unsafe in this city.

Comm. Elkins: I'd like to lay this fracking issue to rest. At this point in time, your clients don't anticipate using the fracking technology to extract gas from their property; is that correct?

Mr. Brack: Yes, that is correct. There is what is called hydraulic fracking, and my understanding is once the well is drilled, they put it under pressure and put sand in the well. That sand basically has the way of perforating the end of the well to allow the natural gas to seep up. That is very common, but a lot of people understand fracking to mean dumping harmful chemicals of some kind. That is absolutely not the case, and they have no intention of doing anything like that. There is a pond in the area, and they don't want to harm it or anything else.

Comm. Elkins: I understand that, but the follow-up question is, under the rules of the KCC as they exist today, if the results of the test drilling your clients are about to be engaged in if everything goes as they hope would indicate that some sort of fracking technology would enhance their ability to extract the minerals, would they be obligated to go back to the commission to get an additional license or approval? Or once the permit is issued, the use of technology is strictly up to them?

Mr. Brack: I think it's the latter. I'm not aware of any requirement that they would have to go back to the KCC and apply for additional authority for that.

Comm. Elkins: You heard earlier about some of the limitations we have under our LDO with respect to sound limitations. Do you know at what level the noise would be during the drilling as contrasted with once it goes into production?

Mr. Brack: My understanding is that it is not something that would exceed the sound ordinances. I don't believe we have had complaints about the noise of the drilling thus far. With regard to production, I understand that no sound comes out of it as a result of production. There is an odorizer contained on it, and it is to add odor so that, in the event of a leak, people could smell it and take steps to follow up.

Comm. Roberson: Normally when you drill a gas well, the gas coming out of the well is not usable in its form; it has to be scrubbed. Is your client using a scrubber, and if so, where will the wastewater go?

Mr. Brack: I can answer part of that question, but you've probably exceeded my expertise in the oil and gas side of it. I don't know about the scrubbing, but I understand that when you're drilling a gas well, you try to drill it so that you do not get down into the water level within the soil or sandstone. You drill on top of it where there is no water. If they do hit water, the idea is that there would be a waste tank buried in the ground so it would not be visible that would collect the water and be removed.

Comm. Roberson: In many cases, but not all, when natural gas comes out of the ground, it has to be scrubbed before it can be utilized. I'm curious if this is the case here.

Mr. Brack: I don't know. The person who discovered the gas was the contractor who was doing the loop system for the geothermal. He noted the level at which the gas was discovered, but other than noting it, he did not do any test to determine the quality of the gas. We don't know the answer to that question yet and won't know until the well is completed.

Comm. Williams: Does the KCC have the jurisdiction over coal?

Mr. Brack: They have jurisdiction over motor vehicles, oil and gas, but I don't believe they have it over coal.

Comm. Williams: I was only asking because some of your comments are about the gas related to waste, and there was a comment about a layer of coal. I don't think the city would want to see any strip mining to remove the coal because it might be an economic waste. I have no further questions.

Chair Rohlf: We have gone beyond some of the scope of what we're here to do tonight, but I wanted to give everybody an opportunity to speak about what's going on here. I would ask at this time for a motion to close the Public Hearing.

A motion to close the Public Hearing was made by Williams; seconded by Ramsey. Motion approved with a unanimous vote of 7-0. For: Pateidl, Roberson, Jackson, Williams, Elkins, Strauss and Ramsey.

Chair Rohlf: This takes us up to final discussion and questions of staff or counsel.

Mr. Jarvis: I would like to confirm that oil and gas wells have been prohibited in Leawood up to the 2002 LDO, except for agricultural land uses. Is that correct?

Mr. Klein: Yes, basically prior to the 2002 LDO, we had the ordinance in place. I went back further with a previous LDO and didn't see it addressed there, either. Since that time, it has not been a listed use in the current ordinance. It's possible it inadvertently wasn't listed or wasn't listed because we felt there would not be any more oil and gas drilling, as the city had changed enough. To be clear, this case is here because the city became aware of the issue with this case and wanted to address it for any related cases.

Comm. Elkins: Could you give us some guidance as to why staff has chosen to go down the route of an absolute prohibition as opposed to an analysis by case under a Special Use Permit?

Mr. Klein: It is because the city has seen so much more development since 2002 that it was difficult to see where a well would be something the city would want to see. There is not a lot of agricultural land, other than maybe along 135th Street and some other pockets where it would make sense, and I don't believe the city is interested in seeing churches and schools operating a gas well.

Comm. Elkins: Madame Chair, would you entertain comments?

Chair Rohlf: We can ask questions or make comments.

Comm. Elkins: I'll make some comments. I am in a dilemma here because I absolutely agree with the idea that to promote oil and gas exploration and production within the city limits of Leawood is contrary to the nature and character of the community that has been built over the last 60-70 years. Having said that, I have to acknowledge that there is a distinction between oil and gas exploration and exploitation for commercial purposes and what I am hearing with respect to oil and gas exploration for an individual homeowner. I find myself in this dilemma because it seems self evident that the mineral rights are part and parcel to a property owner's property rights and are included. In this case, I'm not looking at commercial value, but at personal value in which the way that landowner might provide energy to their home. I find myself very reluctant to support an ordinance that outright bans that use without giving the landowner the opportunity to demonstrate to our community that he/she can use the mineral rights in a fashion that would not be contrary to the character of our community and would not unduly endanger the health, safety and welfare of the neighbors of our community. I would much prefer a regulation or ordinance that regulates the use under the auspices of a Special Use Permit so that we would have the opportunity to evaluate each case. Frankly, I'm not quite sure exactly how I'm going to vote, but I am struggling with finding a way to support an ordinance that constitutes an absolute ban.

Comm. Ramsey: How do we protect the adjoining property owners' mineral rights? How do we know, if we allow this on a case-by-case basis, and it is in a small area, that it is not impeaching on the neighbors' mineral rights in and of itself?

Comm. Elkins: That is easy for me because that is not within our jurisdiction. In my view, the question of correlative mineral rights is specifically statutorily charged to the KCC. What I am concerned about and what I think is appropriately in the scope of our concern is the health, safety and welfare of the surrounding property owners and the character of the community as a whole.

Comm. Ramsey: So why would the mineral right of the homeowner be of any concern to you to begin with?

Comm. Elkins: Because I question our ability to deprive that homeowner of the value of that property right.

Comm. Ramsey: That truly is a slippery slope, and there is no stopping once you hit it. In this case, I am going to vote in favor of this proposal because oil and gas have no business in a residential community. Leawood is a residential community; it is not an industrial, agricultural, gas-producing, economic entity. The idea that we would allow gas and oil wells is absurd in Leawood and absolutely without any merit whatsoever. There is nothing that would convince me that an oil or gas well has any continuing interest for the community as a whole, other than the convenience of one individual over the rest of the community.

Chair Rohlf: Mark, if the language from the prior LDO as it applied to those districts had been carried over, whether it was an inadvertent omission or whatever, would this have come under any of those areas?

Mr. Klein: It doesn't meet the zoning or size requirement. I tried to see what the property was zoned as far back as I could tell with our GIS, and it looks like it was R-1 about the time the new ordinance was approved. I have a map that will let you see the zoning. (*Places map on the overhead*). This is zoning as of 2010. The Reed's Addition application came in with the RP-5 district, and the commission decided to keep large lots. The Ag is shown in various areas such as Prairie Star School. The Ag would have been the area you have most likely seen a well in the past. (*Shows a map from 2000*) Another large piece of Ag property has the United Methodist Church. As far as the 135th Street Corridor, the city is looking at mixed use or commercial development. Once you get past 133rd Street to the north, there is not much except the sewer plant close to I-435. The RP-A which no longer is in the current zoning ordinance was the Mission Farms development.

Comm. Jackson: Commissioner Elkins, I think you are correct if there are larger, untapped areas in the community. Leawood is so built out at this point, and I think it's an unusual case for most towns because our boundaries are stopped and most things have been built out. After hearing Mark, I don't see any place in the community where I would accept the drilling. As you know, you watch any of these drilling operations, and nothing is ever perfectly safe. We're talking mainly small lots, but at what point would it be large enough to allow a pumping facility? We're also talking about possibly having to store water runoff for the pump, so now we also have potentially pollutant water in some sort of container underground. We all know that, at some points, those may leak. Is the city going to be able to successfully monitor any and all of that, and for how long? If there is no definitive timelines, does the city have to monitor these forever? Again, who is going to cap them off and make sure it is done properly and safely? The long-term potential for issues sets Leawood up for accidents due to the small nature of lots and what has been built out in the community already. It was stated that there is nothing on the record to say that they could be unsafe, but Mr. McCune looks at the need for locked fences and for potential brine in the water. We all know that the gas can leak, which is why it is mandatory to add an odorant. While there are standards that would have to be met, we all know mistakes can be made and drilling can cause issues. Who knows what they're going to hit? You can't have precautions for everything, and our community is too small and too tight with no large areas left to give enough room for a mistake like that.

Comm. Williams: I may echo comments already made and apologize for taking the time. The KCC has somewhat limited authority as has been discussed. They have concerns about waste, but they leave safety and land-use issues to the jurisdiction of the city, which is appropriate. We have a development ordinance in part because of state statute requirements. We look at a number of factors within the community that we are trying to create, which is why we have an LDO. We monitor roof types, colors and land use. I remind our colleagues of a car dealer who wanted to come to our community, and we didn't feel it was an appropriate land use for that particular site at the time, so it didn't go forward. The city has the right and responsibility to look at appropriate land use and to address city concerns. As the city is approaching a near build-out, the nature of our community does not fit well with the operation of natural gas or oil wells, whether for single residential use or commercial use. In that respect, I'm in full favor of the proposed ordinance

before us tonight. I think it is particularly appropriate for the entire community, and I think that is what we have to look at, as we do with any other Leawood Development Ordinance. Times have changed in this city since 2002, and the city will change even more in years to come. We will change ordinances to meet the needs at the time. Just a few weeks ago, we addressed recycling bins and addressed issues. We now have regulations on those that, in some cases, have a greater distance of separation from neighbors than what this particular well in question would present. I think we're clearly within our jurisdiction to have an outright ban on oil and gas. I would throw coal in if it were an issue.

Comm. Roberson: I agree with Commissioner Ramsey; he said it about as strongly as I would say it. I would say that no way should we have oil and gas drilling. As a proud owner of three oil wells, I have seen the mess and disasters that can happen. I have to admit that was back in the '80's. Drilling is a messy business; I don't care how you do it. Quite frankly, anything can happen. In our situation, we hit saltwater and ended up having to shut the wells in because of the massive amount of water that came out. There are always issues with oil and gas drilling. I am adamantly opposed to allowing any oil and gas drilling in Leawood for any reason.

Comm. Pateidl: Just one final comment: I found I particularly interesting that Mr. Bradley began his comments on the issue of safety. Throughout his entire presentation, I wish I had counted the number of times the word came up. I read through the documentation we received and specifically the comments of Mr. Hemmen from the KCC. The question was raised of Mr. Hemmen, "In your experience, does the KCC regulate the public safety aspects of the drilling and operation of gas wells, whether residential or commercial?" I found his answer interesting. He says, "KCC regulations generally do not address public safety aspects of drilling and operation of gas wells. However, in my experience, staff has always taken into account the safety of well operators and homeowners or landowners, who, in enforcing the general rules and regulations for the conservation of crude oil and natural gas, by relaxing certain aspects of those regulations when the strict enforcement of the regulation may result in danger to public safety; for example, a well testing requirement may be altered if the performance of the test would carry the risk of harm to public safety." Put another way, it says to me that the KCC wouldn't pull the trigger to find out if the gun is loaded if they had to for the interest of safety, but they'll leave the gun on the side of the road. We can't rely on KCC regulations and rules to regulate the public safety of our community. Beyond the basic issues of drilling and the safety associated with the drilling, we all face the issues of natural disaster. We had a tornado hit at 143rd and Nall. If the tornado hits a gas line, the gas line can be shut down. If the tornado hits this gas well, what do you do? Is our public safety operation trained to address those kinds of situations? And if not there, where else within the community? I agree with everything that has been said with respect to the development of the community and where we stand as a city in our rights to restrict activities of this nature, and I fully support a total ban on drilling within the City of Leawood.

Chair Rohlf: Thank you. If there is no further discussion, I would ask for a motion.

A motion to recommend approval of CASE 67-11 – LEAWOOD DEVELOPMENT ORDINANCE AMENDMENT TO SECTION 16-4-2 – PROHIBITED USES – PERTAINING TO OIL AND GAS WELLS – was made by Williams; seconded by Ramsey. Motion approved with a unanimous vote of 7-0. For: Pateidl, Roberson, Jackson, Williams, Elkins, Strauss and Ramsey.

MEETING ADJOURNED.