This article will familiarize the reader with some of the unique issues, local laws, and customary practices that should be considered in connection with the acquisition of commercial real estate in Oklahoma. Real estate continues to be one of the substantive areas of the law where it remains critical to get the advice of local professionals. The variation among states concerning particular issues can be significant. These variations are often the result of specific state constitutional and statutory provisions, case law, or simply the result of the development of customary practices over a period of time. Failure to recognize and address these variations can result in unnecessary expenditure of time and money or, worse, the incurrence of significant unexpected liabilities or costs.

While this article will not necessarily address all the nuances of Oklahoma real estate law, it will highlight and discuss those variations which, in the author’s experience, are some of the more significant unique aspects of Oklahoma law in order to sensitize out-of-state buyers to these issues. In addition, this article will provide some initial guidance to a buyer as to how to navigate these issues in connection with the possible acquisition of Oklahoma commercial real estate and hopefully avoid any “gotcha” instances where the buyer experiences an unwelcome surprise due to an unexpected issue.

1. ISSUES RAISED BY THE “OIL PATCH” NATURE OF OKLAHOMA

Several of the unique aspects of Oklahoma commercial real estate law arise as a direct result of Oklahoma’s historical oil and gas development practices. For example, in Oklahoma landowners commonly “sever” the rights to the underlying minerals from the rights to the surface of the real property. Further, it is very common in Oklahoma for the mineral estate underlying a particular surface estate to eventually be fractionalized among a number of different mineral owners.

The holder of the “mineral estate” in Oklahoma is entitled to the minerals and related rights, including the right to access and extract the minerals. The holder of the “surface estate” retains the balance of the rights related to the property. The mineral estate is the “dominant estate” in Oklahoma, meaning that the surface owner must allow the mineral owner reasonable access to develop the minerals underlying the surface estate, which includes the right to use so much of the surface of the land as is reasonably necessary to explore for and extract oil and gas from beneath the surface.1 Many potential out-of-state buyers are initially concerned about how oil and gas development activity may adversely affect the surface estate to be acquired, especially if they are not from a jurisdiction with similar oil and gas development activity.

Buyers of real property in other states frequently attempt to mitigate this exposure, to the extent they are concerned with the possibility of development of the mineral estate, by securing title insurance coverage for damages caused by the extraction or development of the oil, gas, or other minerals. For example, in some jurisdictions the ALTA Endorsement 35.1-06 (Minerals and Other Subsurface Substances – Improvements) (Adopted 04-02-12), and other similar state-specific endorsements, can provide insureds some protection against such damage.

In 1984, however, the Oklahoma Insurance Commissioner issued an opinion that such coverage falls within the definition of “property insurance”, rather than “title insurance” and, therefore, is outside of the title insurer’s Certificate of Authority issued by the Oklahoma Insurance Commissioner.2 As a result of that opinion, the
Without access to title insurance coverage, many times out-of-state buyers will consider ascertaining the owner(s) of the mineral estate and securing agreements from them not to engage in activities detrimental to the surface estate. While it is certainly possible to perform a mineral estate title examination to identify the various mineral owners, the fractionalization of mineral interests often makes obtaining agreements with all fractional mineral owners and lessees extremely difficult, if not impossible, to secure. Moreover, even if the number of mineral owners and lessees is relatively small, they have little incentive to cooperate. These difficulties, combined with the time and cost associated with a mineral estate title examination, frequently result in surface owners relying on other legal mechanisms and considerations to help alleviate the concerns associated with the development of the mineral estate.

One such legal mechanism is the application of the Oklahoma Surface Damage Act (the “Surface Damage Act”) which provides surface owners some protection by establishing a framework for measuring (and providing compensation for) damages caused to the surface estate due to the drilling of an oil and gas well. The Surface Damage Act was enacted to balance the conflicting interests of the mineral owner and the surface owner. Generally, an operator must provide notice to the surface owner of the operator’s intent to drill a well on the surface owner’s property, which notice must contain “a designation of the proposed location and the approximate date that the operator proposes to commence drilling.” Within five days thereafter, the operator and surface owner must enter into good faith negotiations to determine the amount of damages owed. If the operator and surface owner cannot reach an agreement regarding the amount of damages owed, the Surface Damage Act provides a mechanism for appraisal and possible litigation to determine the appropriate amount of damages.

The Surface Damage Act does not specify the type of damages for which the surface owner is to be compensated and does not provide guidelines for imposing liability. However, case law indicates that the proper (and primary) measure of damages is the diminution in fair market value of the surface resulting from the drilling operations. Courts consider the following factors in determining the effect of drilling operations on the fair market value of the surface estate: (1) the location or site of the drilling operations; (2) the quality and value of the land used or disturbed by the drilling operations; (3) incidental features resulting from drilling operations which may affect use and further enjoyment; (4) inconvenience suffered as a result of the land by the operator; (5) whether the damages are temporary or permanent in nature; (6) changes in physical condition of the land; (7) irregularity of shape and reduction, or denial, of access to the land; and (8) the destruction or loss of native grasses or growing crops caused by drilling operations. Further, the Oklahoma Court of Civil Appeals has recognized that the detrimental effect that perceived limitations on potential use, caused by a nearby oil or gas well, may have on the fair market value of property is a proper consideration in determining damages.

Certain state and local regulations may also alleviate a surface owner’s concerns that an oil and gas operator might drill a well and place related equipment on his property. At the state level, Title 52, Section 320.1 of the Oklahoma Statutes prohibits the location of a habitable structure within a radius of 125 feet from the wellbore of an active well. Notably, Section 320.1 focuses on the location of a habitable structure in proximity to an existing well, rather than addressing the drilling of a new well within 125 feet of an existing habitable structure. However, the Oklahoma Supreme Court has recognized that the purpose of the prohibition contained in Section 320.1 is the “welfare and safety of the public.” Thus, an Oklahoma court could certainly interpret Section 320.1 so that it would be unlawful to locate the wellbore of an active well within a radius of 125 feet from an existing habitable structure.

Oklahoma counties also frequently impose restrictions on the location of oil and gas wells and equipment. For example, in Oklahoma County, “a minimum separation of 300 feet is required between any primary residential structure and all primary and incidental oil and gas drilling operations, including, but not limited to, oil and gas wellheads, oil and gas storage apparatus and tank
batteries, and equipment.” In Tulsa County, “oil and gas wells and related storage tanks shall be located 200 feet or more from any residence.”

At the municipal level, Oklahoma City and Tulsa have identical provisions relating to the permissible location of an oil and gas well. Each city prohibits an oil and gas well or associated equipment from being located “nearer than 300 feet to any occupied or unoccupied dwelling or any other building used or designed and intended to be used for human occupancy unless the applicant has obtained written permission for the location of the well from all owners and lessees whose dwellings or other subject buildings are within 300 feet of the proposed well.” The phrase “building used... for human occupancy” would appear to be considerably broader than either “primary residential structure” or “residence,” and, ostensibly, would include facilities used for commercial purposes.

In 2015 and apparently in response to attempts by municipalities to enact more stringent oil and gas regulations, the Oklahoma legislature passed Section 137.1 of Title 52 of the Oklahoma Statutes which places limits on county and municipal regulation of oil and gas operations. More specifically, counties and municipalities are expressly allowed to enact reasonable ordinances concerning road use, noise, and odors incidental to oil and gas operations and establishing setbacks and fencing requirements for oil and gas work site locations. The regulation of all other oil and gas operations is made subject to the exclusive jurisdiction of the Oklahoma Corporation Commission. While there are no reported cases addressing this statute, there is an Oklahoma Attorney General Opinion providing some clarification, including recognition that Section 137.1 is intended to allow counties and municipalities to regulate only those specifically enumerated areas. However, the county and municipal ordinances dealing with well site locations would appear to fall within the statutory grant of regulating authority to counties and municipalities.

While it is certainly understandable that an out-of-state buyer may initially have some concerns about how the development of the mineral estate may affect the real property it is contemplating acquiring in Oklahoma, most buyers ultimately get comfortable with this issue for the reasons discussed above. Drilling technologies, including horizontal or slant drilling techniques, have also evolved to a point where interference with the surface estate can frequently be minimized.

2. AD VALOREM TAXES

Oklahoma’s ad valorem tax framework consists of both constitutional and statutory provisions. The Oklahoma Constitution contemplates that the Oklahoma legislature may create different classes of property for ad valorem tax purposes. Based on this provision, the Oklahoma legislature created various classes of property, including real property and personal property. Section 2806 of Title 68 of the Oklahoma Statutes provides that “[r]eal property, for purposes of ad valorem taxation, shall be construed to mean the land itself, and ... all buildings, structures and improvements and other fixtures.”

Based on this classification, the Oklahoma Supreme Court rejected a claim that a leasehold estate should be subject to ad valorem taxation stating that:

“Under the taxing scheme presently in force, tax liability for all cognizable interests in land is borne by the fee owner. Each parcel of property is treated as a unit; one value is assigned to it and one tax assessed. ... The statutory scheme calls for assessment of land for ad valorem purposes against the person or entity identified by the record as the fee owner.”

The Oklahoma Supreme Court in Rockwell Int’l Corp. v. Clay reaffirmed its ruling in Barnes by stating that “[t]he Oklahoma Supreme Court hold[s] today that leasehold interests in real property may not be taxed ad valorem separately from the fee estate.” Thus, in Oklahoma the owner of the land and improvements is the party responsible for ad valorem taxes on such real property.

Except with respect to property of public service corporations, utilities, and railroads which is centrally assessed by the State Board of Equalization, the county assessors in Oklahoma are charged with determining the fair cash value of the real property as of January 1 of the year in question. If the assessor increases the valuation over the preceding year, it must notify the taxpayer in writing of such increase. The taxpayer has 30 days from the date the notice was mailed within which to appeal the increase by filing a complaint with the assessor. From that point forward, there is an administrative appeal process that culminates in
the right to appeal to district court de novo should the matter not be resolved.21

Oklahoma ad valorem taxes are paid in arrears with the taxes being due on November 1 and delinquent on December 31; provided, however, if one-half of the taxes is paid by December 31, the remaining one-half can be deferred until March 31.22 As a rule of thumb, ad valorem taxes in Oklahoma range from 1% to 1½% of the value of the property per year, but this can vary somewhat by county. The invoices are generally sent out by the county treasurer sometime in October.

If a sale of real property closes before October, the county assessor will typically send the invoice for the ad valorem taxes for that year to the buyer. Conversely, if the sale closes in October or later, the county assessor will send the invoice to the seller. If the sale closes prior to October and the property is part of a larger tax parcel, the county assessor will generally create a new tax parcel for the property being sold and send the invoice for that property to the buyer. However, in the situation where property constituting a portion of a tax parcel is sold in October or later, the parties should consider either paying the taxes for that year in connection with the closing or, alternatively, escrowing their respective portion of such taxes to ensure they are timely paid as the county assessor will likely not be able to generate separate invoices for the new tax parcel covering the property sold and the existing tax parcel covering the remainder of the property.

Article X, § 8B of the Oklahoma Constitution caps increases in fair cash value for ad valorem tax purposes to five percent per year,23 but provides that the cap is lifted if title to the real property is transferred, changed, or conveyed to another person or when improvements have been made to the property. While the Oklahoma Statutes allow for certain related-party transfers of title to take place without lifting of the cap,24 a buyer of significantly appreciated Oklahoma property in a more traditional acquisition should be cautioned that the acquisition of the property could result in a significant increase in the ad valorem taxes on the property.

Such an increase can be particularly troublesome if the property the buyer is purchasing is subject to a triple net lease that excludes from the definition of operating expenses, or otherwise prohibits the landlord from passing back to the tenant, ad valorem taxes that result from a change in ownership of the leased property.

While such a lease provision may not necessarily be common, some sophisticated tenants may negotiate for the inclusion of such a provision in their leases. If a tenant is successful in that regard, this can present one of those “gotcha” instances to a buyer of the leased property, especially if the buyer only becomes aware of its inability to pass back such increase in ad valorem taxes after the closing without any advance discussions.

In certain instances where real property has been owned by the same entity over a number of years and the property has significantly increased in value over those years, a buyer might consider the acquisition of the equity interests in the owner entity as opposed to the acquisition of the property. Such a strategy would likely only be practically possible if the owner entity is a special purpose entity with its only asset being the property in question. One possible advantage to a buyer of such a structure would be to avoid the increase in ad valorem tax valuation due to sale of the property.

Another reason parties may ultimately agree on a sale of equity structure as opposed to a more traditional real property conveyance structure is a situation where the owner entity may have certain permits or contractual rights which are uniquely advantageous and perhaps difficult or impossible for a buyer to retain or replicate if it were to acquire the real property directly from the owner entity. In addition, as more fully discussed in Section 3 of this article, the Oklahoma documentary stamp tax is generally not applicable to a sale of equity interests in an owner entity. Because the documentary stamp tax is customarily paid for by the seller, this is more of an advantage to the seller but would obviously be taken into consideration by the parties in negotiating the entirety of the transaction. Finally, depending on the circumstances, there may also be certain unique Oklahoma income tax advantages to a seller in selling the equity of an entity that owns real property in Oklahoma as opposed to the sale of the underlying real property but a discussion of those rules is rather complex and beyond the scope this article.25

Oklahoma has a number of exemptions from ad valorem taxation. In particular, Oklahoma provides a five year ad valorem tax exemption for a qualifying manufacturing concern that constructs any new or expands or acquires any existing manufacturing facilities provided certain requirements are met.26 This particular exemption can provide significant financial advantages and is frequently cited as a reason for
out-of-state manufacturers locating new manufacturing facilities in Oklahoma.

Further, any property used exclusively for religious or charitable purposes or for nonprofit schools or colleges is also exempt from ad valorem taxation. For purposes of this latter exemption, the usage of the property for the exempt purpose is determinative to establish the exemption and not the ownership of such property. So, for instance, in In re Real Property of Integris Realty Corp., a case handled by our firm, the Oklahoma Supreme Court reaffirmed that title to the property in question is irrelevant when determining whether the property is “used exclusively” for charitable purposes within the meaning of article X, Section 6 of the Oklahoma Constitution, and the focus is on the physical use of the property in question.

3. DOCUMENTARY STAMP TAX AND SALES TAX

Oklahoma imposes a transfer tax on sales of real property where the consideration exchanged exceeds $100. The tax is equal to 75 cents for each $500 of consideration. The seller usually pays for the documentary stamp tax, although the Oklahoma Statutes allow either the seller or the buyer to pay the tax. The requisite stamps are affixed on the face of the deed at the time of recording and the county clerk must be presented an affidavit, contract, closing statement, or other evidence establishing the purchase price. The local newspaper, brokers, and other business publications are then able to report on significant land sales by simply reviewing the recorded deeds weekly since the purchase price is readily determinable by reviewing the recorded deed. The Oklahoma Statutes provide for exemptions from the tax for specified conveyances. If a conveyance is exempt from the Oklahoma Documentary Stamp Tax, the deed should contain a reference to the statutory basis for the exemption. Any person who willfully fails to purchase and affix the exact amount of requisite documentary stamps commits a criminal offense.

A purchaser of property will often receive a questionnaire from a county assessor with regard to a recent acquisition of property. Because the documentary stamps are affixed to the deed, the county assessor may use this valuation as a starting point for valuing the property for ad valorem tax purposes. However, the county assessor will want to know if there were other circumstances surrounding the sale that may impact the valuation. For example, valuation could be impacted if the sale was between related parties or either the seller or buyer was involved some unique situation at the time that may have impacted the negotiated consideration. Further, although the documentary stamp tax is based on the consideration exchanged for the real property, sometimes taxpayers erroneously include consideration exchanged for property other than real property, i.e., fixed assets, inventory, or intellectual property, and these questionnaires are intended to ferret out these circumstances as well. Taxpayers are obligated to respond to such requests for information.

The Oklahoma documentary stamp tax statutes contain an express exclusion from imposition of the documentary stamp tax for “deeds pursuant to which property is transferred from a person to a partnership, limited liability company or corporation of which the transferor or the transferor’s spouse, parent, child, or other person related within the second degree of consanguinity to the transferor . . . are the only owners of the partnership, limited liability company or corporation.” However, the statutory provision further contains an express statement that if the ownership of the equity interests in the newly-created entity is transferred within one year to any other third party, the owner entity transferring those interests is obligated to pay the Oklahoma documentary stamp tax that would have otherwise been due on the transfer to the newly-created entity but for this exemption.

The logistics of paying the applicable documentary stamp taxes on the transfer of equity interests are not exactly certain as the deed to the newly-created entity will have already been recorded, presumably with the reference to the applicable statutory exemption referenced on the deed. Thus, it is unclear how the payment of the tax would be evidenced on the recorded deed. In that regard, however, one should bear in mind that as previously noted it is a criminal offense to willfully fail to pay and affix the requisite documentary stamps.

Oklahoma also imposes a state sales tax on the sale of tangible personal property that is not otherwise exempt. The state sales tax rate is 4.5% of the gross proceeds or gross receipts from the sale of taxable tangible personal property. Any county of Oklahoma may levy a sales tax not to exceed 2% of the gross proceeds or gross receipts derived from sales in the county on which the state levies a sales tax. Finally,
incorporated cities and towns may also levy a sales tax.\textsuperscript{41} So, for example, in Oklahoma City, Oklahoma County, Oklahoma, the current aggregate state, county and city sales tax rate is 8.375%. The sales tax is paid by the buyer and collected and remitted by the seller to the Oklahoma Tax Commission.\textsuperscript{42}

The Oklahoma Statutes contain exemptions from Oklahoma sales tax for transfers of tangible personal property to corporations, partnerships, and limited liability companies in connection with the organization of such entities under certain specified situations.\textsuperscript{43} The Oklahoma Tax Commission Administrative Rules make it clear that unless exempted by statute transfers between related entities are subject to Oklahoma sales tax.\textsuperscript{44} Unlike the Oklahoma documentary stamp tax statute, the Oklahoma Statutes do not expressly address the sales tax consequences, if any, of a subsequent transfer of the equity interests of a newly-created entity to which tangible personal property was contributed in connection with the organization of such entity. However, Oklahoma sales tax is only due on transfers of tangible personal property, and equity interests such as stock and membership interests are not tangible personal property but rather intangible personal property.\textsuperscript{45} As a result, a literal reading of the governing statutes and guidance could support the position that no Oklahoma sales tax would be due on such a transaction. As is always the case with tax statutes, one would need to pay particular attention to ensuring that all aspects of the transaction squarely fit the statutes and rules to make the best case for the intended result.

Several potential “gotchas” can result in unwelcome sales tax surprises to an out-of-state buyer. Unlike many states, Oklahoma does not have an isolated or occasional sales tax exemption. This can become important in transactions where real property is being transferred as a part of a sale of a business or there is tangible personal property being sold along with the real property. In such instances, Oklahoma sales tax will generally be due on the transfer of any tangible fixed assets or other tangible personal property. Also, a buyer of the assets of an Oklahoma business including real property should be aware that the Oklahoma Tax Commission may deny the issuance of a sales tax permit to such buyer if the seller has delinquent sales tax liabilities, a circumstance which would obviously create significant operational issues to the buyer post-closing.\textsuperscript{46}

## 4. REAL PROPERTY TRANSACTION COSTS — CUSTOMARY ALLOCATION BETWEEN THE PARTIES

The typical transaction costs incurred in connection with a real property acquisition include the Oklahoma documentary stamp taxes, possibly Oklahoma sales tax, abstracting costs, title examination fees, title insurance premiums and associated escrow or closing fees of the title company, filing and recording fees including, if applicable, the Oklahoma real estate mortgage tax, surveyor’s fees, environmental consultant’s fees, and land use consultant’s fees.

This article has already noted that the Oklahoma documentary stamp tax is almost always paid by the seller and that the Oklahoma sales tax, if applicable, is the responsibility of the buyer but collected and remitted to the taxing authorities by the seller. The allocation of other transaction costs is typically subject to negotiation by the parties. While every transaction is obviously different depending on the facts and circumstances, in the author’s experience the buyer typically pays the recording fees.

The recording fees in Oklahoma are relatively nominal. County clerks charge $5 for each deed, mortgage, or other instrument to be recorded.\textsuperscript{47} In addition, there is a flat charge of $8 for the first page of an instrument and $2 each additional page of an instrument.\textsuperscript{48} If the instrument is non-conforming,\textsuperscript{49} the charges per page are increased to $25 for the first page and $10 for each additional page of such non-conforming instrument.\textsuperscript{50}

As noted above, Oklahoma levies a tax on real estate mortgages and deeds of trust.\textsuperscript{51} The amount of the tax is based on the amount of the debt secured by the mortgage and the term of the debt.\textsuperscript{52} The tax is ten cents for each $100 and any part thereof secured where the mortgage is for five years or more.\textsuperscript{53} The tax decreases by two cents for every year down to two cents for each $100 and any part thereof secured where the mortgage is for less than two years.\textsuperscript{54} Since July 2001, the tax can be paid by the mortgagor, mortgagee, or any interested party but prior to that time it was unlawful for a mortgagee to charge or otherwise exact this tax from the mortgagor.\textsuperscript{55} A mortgage cannot be recorded unless the tax is paid, and a mortgage that is subject to the tax cannot be released, discharged of record, or received in evidence in any action or proceeding unless the tax has been duly paid.\textsuperscript{56} Finally, no judgment or final order in any action...
for the foreclosure or enforcement of the mortgage or the debt or obligation secured can be entered unless the tax is paid.\textsuperscript{57} In situations where a buyer is financing the acquisition of multiple properties that are in various states or counties in Oklahoma, the buyer will want to consider specifying the indebtedness secured by each of the mortgages to be recorded in Oklahoma in order to avoid unnecessarily paying a very large mortgage tax.

The premiums for the owner's policy of title insurance and any other required endorsements as well as associated title company costs are not mandated by statute as they are in some other states. Rather, these costs are frequently negotiated and it is important to obtain a quote from the title insurance company, or perhaps several title insurance companies, in advance of selecting the title company for the transaction. Many times parties can negotiate favorable reissue rates or simultaneously-issue rates for a leasehold policy of title insurance or a mortgagee’s policy of title insurance issued in connection with an owner’s policy of title insurance.

The premium for the owner's policy of title insurance is frequently negotiated with the seller sometimes agreeing to cover that cost. Frequently, the buyer will be responsible for any specifically requested endorsements to the owner's policy of title insurance as well as any expenses related to its financing. In Oklahoma, there will be abstracting costs associated with the preparation of the title commitment and the seller is generally responsible for these abstracting costs. Buyers should also be aware that in many rural counties in Oklahoma there can be delays in the preparation of a title commitment due to time necessary to complete the abstracting process, particularly in counties with only a single abstracting company. Costs associated with the survey, any environmental or land use reports are also negotiated but with the buyer frequently being responsible for such costs. The parties generally split the title company’s escrow or closing fees.

Most negotiated commercial real property purchase agreements will contain a specific section addressing the allocation of these transaction costs between the parties. This is recommended to avoid the uncertainty created by the “kicking the can down the road” approach of simply providing that these costs will be allocated in accordance with customary practices or something similar which creates the possibility of the parties disagreeing on the allocation in the future.

\textbf{5. FORMS OF CONVEYANCE INSTRUMENTS; EXECUTION FORMALITIES; AND LOT SPLITS}

In Oklahoma, the three most commonly used forms of deeds are the general warranty deed, the special warranty deed, and the quitclaim deed. The statutory form of general warranty deed and quitclaim deed are set forth in Title 16, Sections 40 and 41 of the Oklahoma Statutes, respectively. The statutes do, however, provide that a deed “substantially” in the statutory form will suffice to effectuate the conveyance.

A general warranty deed in substantial compliance with the statute is deemed to convey the whole interest of the grantor in the property and by including the statutory language, “and warrant title to the same” includes implied warranties that: (1) the grantor has title and possession of the subject property; (2) the grantor has the right and authority to convey the subject property; (3) there are no encumbrances on the subject property other than what is disclosed in the deed; (4) the grantee will have quiet and peaceable possession of the subject property; and (5) the grantor will defend the title to the subject property.\textsuperscript{58} As in other states, in Oklahoma, a general warranty deed will commonly have an exhibit that enumerates or discloses the exceptions to the title warranty. This exhibit will typically tie back to the exceptions in the title commitment. Some sellers, especially in transactions where the parties are not represented by legal counsel, try to simply refer to matters of record as the title exception language. A buyer should resist such a general reference to matters of record and limit the exceptions to those specified on the exhibit if possible.

The quitclaim deed conveys all right, title, and interest of the grantor in and to the property.\textsuperscript{59} Quitclaim deeds are more typically used in connection with title curative conveyances. Oklahoma does not have a statutory form for a special warranty deed although such deeds are frequently used in commercial real property transactions where the buyer is obtaining title insurance. The special warranty deed will typically provide that the grantor only warrants and covenants to defend title against matters arising by, through, or under the grantor. This is most typically accomplished by the modification of the warranty of title clause in the statutory general warranty deed to read something like the following: “... and warrant title to the same to be free, clear, and discharged of and from all former grants, charges, taxes, judgments, liens and encumbrances
of whatsoever nature created by, through or under grantor, but not otherwise.\textsuperscript{60} Notwithstanding the limited nature of the title warranty in a special warranty deed, a special warranty deed in Oklahoma customarily includes an exhibit listing all title exceptions even those exceptions that were not created by the grantor.

As discussed more thoroughly in Section 1 of this article, it is common in Oklahoma for the mineral estate to be severed, perhaps completely, from the surface estate. Further, it is common for surface owners in Oklahoma to have no knowledge whether they own any of the mineral estate. Thus, in real property transactions in Oklahoma concerning the surface estate, the general warranty deed or special warranty deed will typically contain language either carving out the mineral estate from the property being conveyed or clarifying that the conveyance is only of the surface estate or, alternatively, eliminating the mineral estate from the warranties in the deed. The exact language for the carve-out can come in various forms and will depend on the intent of the parties. Many times, however, deeds will contain language that reads something like “less and except all interests in oil, gas, casinghead gas, distillate, coal, metallic ores and other minerals therein, thereon, or thereunder, previously reserved or conveyed” immediately after the reference to the property description. In any event, the deed should be carefully drafted to ensure that the intent of the parties is properly reflected.

The execution formalities in Oklahoma for deeds and other instruments affecting real estate differ depending on the type of entity executing the deed or instrument. For a corporation, such a deed or instrument must be executed by the president, vice-president, chairman or vice-chairman of the board of directors, or by an attorney-in-fact.\textsuperscript{61} Further, such a deed or instrument must be acknowledged in substantially the form set forth in Title 16, Section 95 of the Oklahoma Statutes or substantially in the form provided in the Uniform Law on Notarial Acts in Oklahoma which is codified in Title 49, Sections 111 – 121 of the Oklahoma Statutes.\textsuperscript{62} Although it could be difficult for a corporation to avoid the enforcement of a real property purchase agreement on such a technical defect in execution, prudent practice would dictate that such real property purchase agreements executed by corporations should be executed and acknowledged in accordance with these statutes.

With regard to limited liability companies, the Oklahoma Title Examination Standards provide that a title examiner is entitled to presume that a manager of a limited liability company was authorized to act on behalf of the limited liability company.\textsuperscript{63} As a result, it is recommended that all such instruments affecting real estate that are to be recorded should be executed by a manager of the limited liability company. The comments to this standard indicate that it is sufficient if signatory party is identified in the instrument as a “Manager and Member,” “Member Manager” or “Managing Member.” For out-of-state owners who operate in a member-managed limited liability company or a limited liability company which is accustomed to having officers sign documents on behalf of the limited liability company, this standard can sometime create issues with respect to documents to be filed of record in an Oklahoma real estate transaction.

The Oklahoma Constitution prohibits one spouse from selling the homestead without the consent of the other spouse.\textsuperscript{64} The Oklahoma Statutes also specifically allow a husband or wife to convey or make any contract related to real estate belonging to him or her other than the homestead without being joined by the other spouse.\textsuperscript{65} In order to avoid marketable title issues concerning whether the property is or is not homestead property, deeds and other instruments relating to real estate to be executed by an unmarried individual should clearly recite that such person is unmarried. If the person is married, in order to vest marketable title in the grantee the spouse should join in executing any instrument related to real estate. Frequently, as a matter of customary practice the non-owner spouse will join in the deed as a part of a special phrase after the habendum clause as opposed to being a grantor in such deed which will suffice for purposes of conveying marketable title.\textsuperscript{66}

While the failure of the spouse to join in or otherwise execute the deed by the special phrase following the habendum clause will cause title to be unmarketable, if no legal action is commenced within ten years following such conveyance, marketability of title is no longer impaired.\textsuperscript{67} Further, a title company may be willing to offer affirmative coverage to a buyer in this instance if the grantor furnishes an affidavit of non-homestead status and associated indemnity that satisfies the title company with regard to such matters.
Instruments affecting real estate may be executed by an attorney-in-fact pursuant to a power of attorney that is executed, acknowledged, and recorded in the same manner required for deeds. Such a recorded power of attorney remains in effect until an instrument revoking such power of attorney is recorded in the same office where the power of attorney was recorded.

Except as discussed above with regard to corporations, no acknowledgement is required in order for a deed or other instrument relating to real estate to be effective between the parties. However, no such deed or instrument is valid against third parties unless acknowledged and recorded. Further, Oklahoma has no statutory requirement for a subscribing witness for deeds, leases, or other instruments relating to real estate.

As noted in Section 4 of this article, the recording fees will differ depending on whether the instrument to be recorded is conforming or non-conforming. In this regard, the Oklahoma Statutes contain some fairly detailed requirements with regard to formatting including being in the English language and being no larger than 8 1/2 inches by 14 inches and a top margin of at least one inch and other margins of at least one-half inch. An instrument that is an original or certified copy of an original, legible without aid of magnification and xerographically reproducible by the county clerk’s equipment but that somehow fails to meet the other specified formatting requirements is deemed non-conforming, requiring the payment of the additional per page charges of $25 for the first page and $10 for each additional page.

One final point related to name changes and mergers or consolidations involving entities owning real property in Oklahoma should be noted. Corporations undergoing a name change or surviving a merger or consolidation are required to file the certificate of name change or merger or consolidation in each county where such corporation has an interest in real property. Further, the Oklahoma Title Examination Standards provide that a title examiner is entitled to rely on recitals in a recorded title document as to name changes of a corporation or succession by merger or consolidation in the absence of recorded evidence to the contrary such as a certificate of name change or merger containing conflicting information.

Similarly, partnerships and limited partnerships surviving a merger are required to file the statement of merger in the county where such other entity that was a party to the merger has any real property in order to effectuate such property becoming property of the surviving partnership or limited partnership. The Oklahoma Title Examination Standards also make it clear that the identification of succession through merger involving a surviving partnership or limited partnership must be evidenced of record by the filing of a statement of merger.

Finally, with respect to limited liability companies, the Oklahoma Title Examination Standards contain similar provisions entitling the title examiner to rely on recitals in recorded title documents as to name changes and succession by merger or consolidation for limited liability companies in the absence of recorded evidence to the contrary. However, unlike corporations, limited partnerships, and partnerships, there is no express statutory requirement to file a certificate of name change or certificate of merger or consolidation for surviving limited liability companies.

Like most other states, Oklahoma has various statutes and municipal ordinances regulating the platting and subdividing real property. This regulatory scheme can be confusing as the rules are different depending on the location of the property, so a buyer purchasing real property in Oklahoma should familiarize itself with these regulations to ensure that unexpected hurdles or delays to closing are avoided. In general, these issues tend to arise where an existing tract of real property is being divided into more than one tract as a result of the contemplated transaction and, particularly, when one of those tracts is five acres or less. In that regard, it is important to recognize that these regulations might be triggered even if the tract that is being conveyed is more than five acres if the remaining tract owned by the grantor is five acres or less.

For example, Title 11, Section 47-116 of the Oklahoma Statutes provides that where a city has a population of 200,000 or more and a deed conveying five acres or less must be approved by the City Planning Commission and such approval must be evidenced on the deed, unless there is an existing deed already of record the evidences the previous approval by the City Planning Commission. Further, any deed not in compliance with this statute is not entitled to be recorded nor does it import notice. There are also statutes that allow the creation of a metropolitan area planning commission between a city and a county which
provide for similar regulation on conveyances of real property within their jurisdiction. The Tulsa Metropolitan Area Planning Commission is an example of such a commission. Section 863.10 of Title 19 of the Oklahoma Statutes makes it unlawful for a grantor to convey any tract of land of five acres or less or to convey any tract which results in a remainder tract of five acres or less without obtaining the written approval of the metropolitan area planning commission by its endorsement on the deed. This statute further provides that a deed without such approval is not valid and, if recorded, does not import notice.

Finally, to complicate matters many cities may have their own regulatory schemes that apply to the so-called lot splits, as may counties with regard to unincorporated areas within their boundaries. The point is that buyers should pay particular attention to these requirements to avoid any surprises in preparation for a closing.

6. Inspection or Free-Look Periods; Liquidated Damages; and Attorneys’ Fees

Similar to other states, a buyer of Oklahoma real property frequently wants to negotiate into the real property purchase agreement a time period to evaluate the property before becoming contractually committed to close. Such provisions have become fairly common, but the exact language chosen by the parties to implement such a provision can vary widely. However, in general, these provisions grant the buyer some time period to engage in due diligence activities and, then, make a determination within that period whether to proceed with the transaction. If the buyer terminates within this time period, any earnest money deposited by the buyer is generally returned to the buyer and the parties go their separate ways.

The discussion below concerning Oklahoma case law illustrates the importance of carefully choosing the language to be included in the real property purchase agreement to implement such a concept. As an initial matter, the buyer should consider whether it wants the unfettered right to terminate in its sole discretion or for any or no reason during this time period or whether the buyer must have some sort of justification or reason for such a termination.

No reported Oklahoma cases address the ramifications of a buyer including in a real property purchase agreement the unfettered right to terminate the agreement in its sole discretion or for any or no reason during this time period. However, there are several cases imposing limitations on a buyer’s discretion to terminate a real estate purchase agreement or to otherwise not proceed to closing based on other language in the agreement.

More specifically, in Davis v. Sonat Exploration Co., the court addressed a clause in the agreement that provided that the buyer’s obligation to purchase the property was subject to the buyer’s satisfaction with the results of its full and complete due diligence. The court stated that in construing the term “satisfaction” as used in the agreement in question there were two possible constructions that fall into these categories: “(1) those that call for satisfaction as to ‘commercial value or quality, operative fitness, or mechanical utility,’ which are interpreted under a reasonableness standard, and (2) those that require the consideration of a ‘multiplicity of factors’ and involve ‘fancy, taste, or judgment,’ which should be analyzed under a good faith standard.”

The Davis court concluded that the good faith standard applied in that particular instance, reasoning that there was a “multiplicity of factors” present in determining whether Sonat was satisfied with its due diligence, including the potential environmental condition of the properties, the cost of remediating existing or potential environment conditions and future potential liability.

The Davis court recognized that in Ledford v. Wheeler the Oklahoma Court of Civil Appeals similarly applied the good faith or subjective standard to a clause that allowed the buyer to terminate the real property purchase agreement if the buyer’s examination of title proved unsatisfactory. Further buttressing its decision, the Davis court quoted with approval the following language from the Ledford case: “the [b]uyer could only back out because of a good faith concern about the title. While satisfaction was to be judged by the [b]uyer, this satisfaction was one determined in good faith and not by whim.”

However, very recently in Group One Realty, Inc. v. Dahr Properties-Memorial Springs, LLC, the Oklahoma Court of Civil Appeals refused to apply the good faith or subjective standard, but rather ruled the objective reasonableness standard should be applied to a provision in a real estate purchase agreement where the buyer’s obligation to close was conditioned on the satisfactory resolution of all issues with respect to proposed pipelines on the property. The court...
emphasized that there was no language in the agreement subjecting the buyer's right to terminate to a good faith standard and stated that it was unwilling to impose that standard as a matter of law.\textsuperscript{92} The buyer's satisfaction contingency in Group One was limited to issues related to proposed pipelines on the property and did not cover the buyer's overall satisfaction with its due diligence efforts or its feasibility studies related to the property. A court could be more likely to apply the subjective good faith standard in situations where the satisfaction contingency is broader in nature than that at issue in Group One.

In any event, under the rationale of the Davis, Ledford, and Group One cases an Oklahoma court would apply either the objective reasonableness test or the subjective good faith standard in analyzing whether a buyer properly exercised a termination right that was contingent on the buyer being "satisfied" in some respect with the property or its diligence efforts with regard to the property depending on the precise language used in the real estate purchase agreement. Consequently, buyers should be cautioned to carefully choose their words with regard to such inspection, due diligence, or feasibility periods and any termination rights.

If, on the other hand, a buyer desires to have a free-look period during which the buyer has the unfettered right to terminate the agreement in its sole discretion or for any or no reason, the buyer should recognize that doing so may raise questions as to the enforceability of such agreement on grounds that it is illusory.\textsuperscript{93} Such a buyer may want to consider including in the agreement specific and separate independent consideration supporting the enforceability of an agreement containing such a provision. While there are no reported cases in Oklahoma addressing the enforceability of a real estate purchase agreement where, in exchange for independent consideration, the buyer is granted such broad termination rights, the Oklahoma courts have generally not questioned the sufficiency of the consideration "[w]henever it appears that the parties to a trade have knowingly and deliberately fixed upon any price, however great, or however small," so long as no evidence of fraud other circumstances exists that would cause the amount of the consideration to "shock the conscience."\textsuperscript{94}

In the absence of a liquidated damages clause, Title 23, Section 28 of the Oklahoma Statutes statutorily fixes the seller's damages for breach of a real estate purchase agreement as "the amount due the seller under the [agreement] less the value of the property." However, in Oklahoma a real estate purchase agreement commonly includes a liquidated damage clause limiting the buyer's liability for damages for a breach of the agreement to forfeiture of the earnest money deposit.

Oklahoma does have some fairly specific statutes addressing liquidated damages that should be considered in drafting a real estate purchase agreement. Generally speaking, when a contract contains a liquidated damages provision, that provision is governed by Title 15, Section 215(A) of the Oklahoma Statutes, which provides that a liquidated damages provision is valid if, under the facts and circumstances of the case, "it would be impracticable or extremely difficult to fix the actual damage." However, in 1985, the Oklahoma legislature enacted Section 215(B) to Title 15, establishing a per se rule for fixed damages provisions in real estate purchase agreements by providing that if the amount of fixed damages does not exceed 5% of the purchase price, the provision is automatically valid and outside of the authority of Title 23, Section 28 of the Oklahoma Statutes.\textsuperscript{95} That statute goes on to provide that if the fixed damages are more than 5% of the purchase price, the provision "shall be held invalid and a penalty unless the party seeking to uphold the provision establishes that such amount is reasonable."\textsuperscript{96} If the liquidated damage clause providing for fixed damages of more than 5% of the purchase price is ultimately determined to be invalid, the damages would likely be determined under the general rule provided for in Title 23, Section 28 of the Oklahoma Statutes.

One final point concerning liquidated damages should be mentioned. Oklahoma case law indicates that a liquidated damage remedy may not need to be exclusive and the parties may contractually provide for both liquidated damages and other remedies. More specifically, in Olzman Homes, Inc. v Mirkes,\textsuperscript{97} the court noted than an alternative damages provision in a contract for the sale of a custom residential property gave the seller the right to choose between liquidated damages and any other remedy available at law or in equity and concluded this provision gave the seller the right to seek damages under two mutually exclusive measures.\textsuperscript{98} Thus, if the buyer intends the fixed damages to be sole remedy available to the seller for a breach by the buyer, the buyer should specifically state that in the liquidated damages provision.
Lastly, Oklahoma follows the “American Rule” with regard to attorney’s fees, which provides that attorney’s fees are generally awarded only where they are “autho-
rized by agreement of the parties, by statute, or where the fee is an item of damage caused by the wrong itself rather than an item of expense incurred in attempting to secure redress for the wrong.”

Exceptions to this rule are few, and courts typically construe them narrowly. Further, litigants in Oklahoma have largely been unsuccessful when they attempt to incorporate other attorney’s fees statutes to recover attorney’s fees related to a real estate purchase agreement that did not include an attorney’s fees provision.

Notes
1 See 52 Okla. Stat. § 803(A). A website that is useful to locate Oklahoma constitutional and statutory provisions and Oklahoma cases is www.oscn.net. This website is maintained by the Oklahoma State Courts Network, which is under the control of the Oklahoma Judicial Branch.
3 52 Okla. Stat. § 318.2 et seq.
6 Davis Oil Co. v. Cloud, 766 P.2d 1347, 1352 (Okla. 1988).
9 Oklahoma County Zoning Regulations, Article II, § 4.C.4.e.
10 Tulsa County Zoning Code, § 1224(a).3.
11 See Oklahoma City Municipal Code, Chapter 37, Article III, § 37-81; Tulsa Code of Ordinances, Article 42-A, Chapter 6, §600. The 300-foot distance requirement is calculated from the well bore or other equipment to the closest exterior point of the dwelling or other subject building.
12 2015 OK AG 12, ¶¶ 5-6 and 15 (Opinion 2015-12, Nov. 30, 2015).
17 It should be noted, however, that in State ex rel. Cartwright v. Dunbar, 618 P.2d 900, 906 (Okla. 1980), the Oklahoma Supreme Court ruled that a private entity holding a leasehold interest from a public trust is subject to ad valorem taxation if the lease is in reality an executory contract for the sale of the property to the private entity lessee stating that “[t]he Oklahoma Supreme Court find[s] the fact that legal title to the properties in the case at bar is in [the public trust] is not of itself determinative of the tax exemption under the ‘property of’ portion of [Article X, § 6 of the Oklahoma Constitution]. The determinative factor is ‘ownership.’ Therefore, [the Oklahoma Supreme Court] must determine the quantum of interest which [the lessees] have in the properties.” However, this ruling is not separately taxing the leasehold estate but rather concluding that under the lease documentation in question the lessee is in fact the owner of the property for Oklahoma ad valorem tax purposes.
18 See 68 Okla. Stat. § 2817(B) and 68 Okla. Stat. § 2802(18).
20 68 Okla. Stat. § 2876(D). The Oklahoma County Assessor has a very good website, www.oklahomacounty.org/assessor/, that includes forms of the Notice of Change in Value of Real Property OTC Form 926 as well as the County Assessor Informal Protest OTC Form 974. The website also allows one to search for properties in Oklahoma County by address and record owner and provides a significant amount of insurance for each such property. Some of the other more populated counties in Oklahoma have similar websites including Tulsa County, www.assessor.tulsacounty.org/, and Cleveland County, www.clevelandcountyassessor.org/.
22 68 Okla. Stat. § 2913.
23 The cap is 3% for property qualified for the homestead exemption or classified as agricultural land.
24 See 68 Okla. Stat. § 2817.1 and 68 Okla Stat. § 2802.1(A)(4). While the constitutionality of this statutory carve-out from the lifting of the 5% cap has been challenged in two cases, the courts in each of these cases upheld the constitutionality of the statutes with respect to the particular facts at issue in the cases. In In re Assessments for Year 2005 of Certain Real Property Owned by Askins Properties, L.L.C., 161 P.3d 303 (Okla. 2007), the Oklahoma Supreme Court upheld these statutes against a constitutional attack, emphasizing that while legal title to the property may have been transferred, the equitable/beneficial title or ownership remained in the same two individuals before and after the transfer in question. Similarly, in In re Assessments for Year 2003 of Certain Properties Owned by Affordable Residential Communities 7, L.L.C. and Affordable Residential Communities 8, L.L.C., 150 P.3d 399 (Okla. Civ. App. 2006), the Court of Civil Appeals rejected a constitutional challenge, reasoning that the same ultimate parent entity retained ownership and control over the properties before and after transfers between subsidiary entities within the same group controlled by the parent entity. Nevertheless, it should be noted that there is language in both of these cases that could be viewed as indicating that in other factual contexts these statutes may be more suspect to a constitutional challenge.
25 See generally 68 Okla. Stat. § 2358(F).
27 58 P.3d 200, 206 (Okla. 2002).
29 Id.
31 68 Okla. Stat. § 3203(B) and Okla. Admin. Code § 710:30-1-10(2).
33 Okla. Admin. Code § 710:30-1-3(c) and § 710:30-1-10(5).
34 68 Okla. Stat. § 3206.
37 Id.
41 68 Okla. Stat. § 2701.
48 28 Okla. Stat. § 32 (A)(1) and (2).
49 Section 5 of this Article discusses the distinction between conforming and non-conforming instruments.
50 28 Okla. Stat. § 32(A)(13) and (14). Section 5 of this Article, addressing execution formalities, contains a discussion of what causes an instrument to be non-conforming for this purpose.
51 In Oklahoma, every deed of trust on real property intended as security is subject to all statutory provisions and laws relating to mortgages. See 46 Okla. Stat. § 1.1 and 68 Okla. Stat. § 1901.
55 68 Okla. Stat. § 1904(C).
56 68 Okla. Stat. § 1907.
57 Id.
60 See generally Whayne v. MCBirney, 157 P.2d 161 (Okla. 1945).
64 Okla. Const. art. XII, § 2.
70 16 Okla. Stat. § 15.
71 Id. There is an exception, however, for leases not longer than one year accompanied by possession.
73 19 Okla. Stat. § 298.
74 19 Okla. Stat. § 298(C) and 28 Okla. Stat. § 32(A)(13) and (14).
75 18 Okla. Stat. § 1144.
77 54 Okla. Stat. § 1-907.
80 See also 11 Okla. Stat. § 47-101.
82 See 19 Okla. Stat. § 863.10.
83 Id.
85 Id.
86 Id.
88 Davis, supra, 951 F. Supp. at 188.
89 Id.
91 Id. at 9.
92 Id.
96 15 Okla. Stat. § 215(B).
98 Id.
100 Id. ¶ 16.
101 See generally Oltman Homes, supra, 190 P.3d at 1191-1192 (Okla. Civ. App. 2008) (overruling trial court’s award of attorney’s fees, reasoning that the case at issue was one related to a breach of a real estate purchase agreement and not a breach of contract for the sale of labor or services as concluded by the trial court).