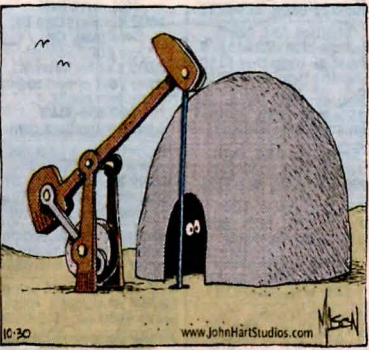
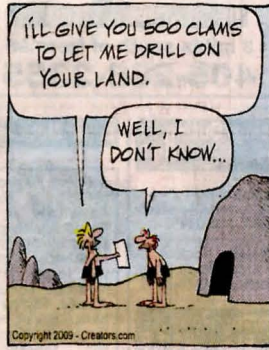


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WELL SITE SAFETY ZONE ACT: NEW LIFE FOR ACT

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Summary of Holding

On March 26, 2009, the Oklahoma Attorney General, in Opinion 09-5 (the “AG Opinion”), interpreted the impact of the 2006 legislative recodification of a 2003 Act (the “Well Site Safety Zone Act”).¹ The AG Opinion declared that the 2006 recodification clarified and confirmed that there was indeed a prohibition on the location of a habitable structure within 125 feet of an oil and gas wellbore, and within 50 feet of related surface equipment, “regardless of whether the structure is located on the surface land on which the oil and gas well is located or on adjacent lands”.²

The apparent public purpose for the creation and maintenance of a safety zone is for the convenience and safety of the oil and gas operator who must continually have access to the well site, and for the safety of the home occupants who will find themselves being neighbors with a pump jack, tank battery, and other oil field equipment.

This AG Opinion makes it clear that through the 2006 recodification the legislature had successfully overruled an earlier 2006 Oklahoma Supreme Court decision.³ The 2006 court holding had severely limited the impact of the Well Site Safety Zone Act by concluding that this safety zone was created only in the instance where the surface interest on which the house was about to be built was owned by the same person who held title to the surface on which the well site sat. Under this 5 to 4 Supreme Court ruling, if the surface land on which a house was to be built was owned by someone other than the owner of the land under the well site itself, the 125-foot safety zone limitation did not apply. Consequently, a subdivision developer could avoid this construction limitation by conveying the home construction site to a builder or other third party, thereby creating a difference in ownership of the two tracts. Making such conveyance is the standard practice, and its result helps achieve a developer’s primary goal which is to maximize the land available for residential development purposes.

Specifically, the AG Opinion held:

Because 52 O.S.Supp.2008, §320.1 is no longer part of the Oklahoma Surface Damages Act, it must be read as an independent statute, prohibiting a habitable structure from being located within 125 feet of an active oil and gas well, or within 50 feet of surface equipment necessary to the operating of an active oil and gas well, absent the written agreement of the surface owner and the operator otherwise. The prohibition of a habitable structure in Section 320.1 applies regardless of whether the structure is located on the surface lands on which the oil and gas well is located, or on adjacent lands.

Step-by-Step Summary of the Analysis

The sequence of events leading to the Attorney General’s conclusion is as follows:

1. The Surface Damages Act was enacted in 1982, providing for payment-- by the oil and gas operator to the owner of the title to the surface lands underlying the well site-- of compensation to offset the diminution in value of the surface, caused by the intrusion of a well site.⁴

2. The Well Site Safety Zone Act was enacted in 2003, providing for a prohibition against the location of a habitable structure (e.g., a house) within 125 feet of the wellbore.⁵
3. The Oklahoma Supreme Court issued an opinion in 2006 (the “YDF Case”) declaring that due to the section numbering the 2003 Well Site Safety Zone Act was part of the 1982 Surface Damages Act and, due to the definitions language of the Surface Damages Act, there would not be a safety zone created in the situation where the lot owner or builder who was seeking to construct a home on his own land within 125 feet of a wellbore did not also own the surface under the well site.⁶
4. Within days after the YDF Case decision was handed down, the Oklahoma Legislature began the drafting and enactment of legislation which had the sole function of recodifying (i.e., renumbering) the Well Site Safety Zone Act to move its location within the statutes away from its previous position adjacent to the Surface Damages Act. Specifically, the Surface Damages Act was initially codified at 52 O.S. §§318.2 to 318.9, and the Well Site Safety Zone Act was renumbered from 52 O.S. §318.10 to become §320.1.⁷
5. As of March 26, 2009, the impact of the 2006 recodification of the Well Site Safety Zone Act was examined and explained by this new AG Opinion. The Well Site Safety Zone Act, as of the date of its recodification in 2006, prohibits the construction or location of any habitable structure within 125 feet of the well bore, without regard to who owns the surface under the planned structure.⁸

Consequences of Attorney General Opinion

The state constitution establishes the Office of the Attorney General (“AG”), and the AG’s duties and responsibilities are prescribed by statute.⁹ The AG is the chief law officer of the state.¹⁰

As the state’s “chief law officer,” the AG has been entrusted with the duty of providing legal guidance to public officers and advising them on questions of law which relate to their official duties.¹¹

In analyzing the weight to be given to an AG’s Opinion, the opinions are “persuasive authority”, making them the equivalent of an opinion of the Court of Civil Appeals.¹²

An AG’s opinion is binding upon the state officials whom it affects. Public officers have the duty to follow those opinions until they are judicially relieved of compliance.¹³

It is the duty of local public officers, including county officers, to follow and not disregard, the advice of the AG.¹⁴

Hereafter, any and all state bodies, for example the Corporation Commission, and any and all counties and cities, including those approving subdivision plats and zoning applications

and issuing residential building and occupancy permits, are on notice that they must abide by this pronouncement.

A public officer's failure to heed the AG's advice to perform a duty required by law may result in civil penalties; while one who acts in conformity with the AG's advice is afforded the law's protection from civil liability, as well as from forfeiture of office.¹⁵ Whether this new AG Opinion will rise to the level of being "advice to perform a duty required by law" is as yet unclear, but it certainly breathes new life into the Well Site Safety Zone Act. Other unanswered questions also remain, such as what to do about violations arising between 2006 and the present, and who bears the liability for financial loss for the homeowner's diminution in value upon resale, or for the costs for relocation of the home or well.

This AG Opinion confirms that the Well Site Safety Zone Act acts as a sword in the hands of oil and gas operators attempting to beat back encroachments around their operating wells,¹⁶ and as a shield to subsequent challenge if the surface owner and operator reach a written agreement to allow development closer than 125 feet.¹⁷

¹ A copy of this Attorney General Opinion 09-5 may be found online at: <http://www.oag.state.ok.us/>, click on "Opinions", click on "Recent Attorney General Opinions", and click on Attorney General Opinion 09-5.

Legal research on this matter was provided to the Attorney General' office, through the requesting state representative, by this attorney author, Kraettli Q. Epperson, OKC. Mr. Epperson gratefully acknowledges receiving input in the development of such research from attorneys Doug Wilguess and Shawn Roberts, both of OKC, and University of Oklahoma law student Blaine Dyer.

² 52 O.S.Supp.2003 §318.10, recodified as 52 O.S.Supp.2006 §320.1, provides:

- A. After the effective date of this act, it shall be unlawful to locate any habitable structure within:
 - 1. A radius of one hundred twenty-five (125) feet from the wellbore of an active well; or
 - 2. A radius of fifty (50) feet from the center of any surface equipment or other equipment necessary for the operation of an active well, including, but not limited to, hydrocarbon and brine storage vessels, tanks, compressors, heaters, separators, dehydrators, or any other related equipment.
- B. Provided, however, the provisions of this section shall not prohibit an operator and surface owner from agreeing in writing to setback provisions with distances different from those set forth in this section.

³ YDF v. Schlumer, Inc., 2006 OK 32, 136 P.3d 656

⁴ The "Surface Damages Act," 52 O.S.Supp. 2001 and Supp.2008 §§318.2-318.9

⁵ The "Well Site Safety Zone Act," 52 O.S.Supp. 2003 §318.10

⁶ YDF, 2006 OK 32, 136 P.3d 656

⁷ 52 O.S.Supp. 2003 §318.10 and 52 O.S.Supp.2006 §320.1

⁸ OK AG Opin. 09-5; it should be noted that the Well Site Safety Zone Act includes language in part B allowing the oil and gas operator and the owner of the residential construction site to modify this 125-foot rule, presumably to allow the reconfiguration of the circular area into a rectangular zone which better fits the topography, the equipment layout, and the access needs of the parties.

⁹ OK Const. Art. VI, §1; 74 O.S. §18b(A)(5) and (A)7, and 75 O.S. §26.1

¹⁰ 74 O.S. §18

¹¹ Hendrick v. Walters, 1993 OK 162, ¶19, 865 P.2d 1232, 1243

¹² National Cowboy Hall of Fame and Western Heritage Center v. State of Oklahoma Ex Rel. The Oklahoma Human Rights Commission, 1978 OK 76, ¶11, 579 P.2d 1276, 1279

¹³ Hendrick v. Walters, 1993 OK 162, ¶20, 865 P.2d 1232, 1244

¹⁴ Rasure v. Sparks, 1919 OK 231 ¶¶0, 7, 183 P. 495, 496 and 498

¹⁵ Hendrick v. Walters, 1993 OK 162, ¶20, 865 P.2d 1232, 1244

¹⁶ 52 O.S.Supp.2006 §321.0(A)

¹⁷ 52 O.S.Supp. 2006 §321.0(B)