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To: Board of County Commissioners  
From: County Attorney’s Office  
Date: April 11, 2023  
Re: Chapter 90: Reciprocal Setbacks – Variances and Alternatives

**I. INTRODUCTION**

Members of the public have voiced concerns about the impact of reciprocal setbacks on the development potential of their existing parcels that already contain oil and gas development. Specifically, some have suggested that the combination of multiple wells on their property with the small size/unique shape of their property will render placement of a single-family residence (that is compliant with the reciprocal setbacks) impossible. Theoretically, we acknowledge that this is a possibility. In that case (and other similar situations in which desired future uses may be impossible to comply with the new reciprocal setbacks), the existing variance process could provide relief in appropriate situations. However, during the Planning Commission meeting, it was noted that the variance process could be a burden for the parcel owner impacted by the reciprocal setback. In addition to satisfying the criteria discussed below, the owner must file a variance, appear before the Board of Adjustment (BOA), and receive an affirmative vote from at least four (4) of its members.

If the Board wishes to consider various alternatives related to reciprocal setbacks, some options are discussed in Section III below.

**II. CURRENT OWNERS MAY SEEK RELIEF THROUGH A VARIANCE**

The opportunity for a variance is generally available to all types of land use permit applicants, and oil and gas development is not an exception. The County’s code sets forth seven standards (in the form of required findings) that must be satisfied by the BOA in order to grant a variance. The required findings are as follows:

**A. Hardship.** This criterion requires a finding by the BOA that: “Specific development standards, applied to the property in question, create an unnecessary, nonmonetary hardship for the owner, as distinguished from an inconvenience, financial hardship or self-imposed hardship.”

**B. Special circumstances.** This criterion requires a finding by the BOA that: “Special conditions and circumstances exist which are peculiar to the land and facilities involved and are not applicable to other lands and facilities. The special conditions do not result from the actions of the applicant or a previous owner of the subject property.”

**C. No special privilege.** This criterion requires a finding by the BOA that: “Granting the variance will not confer on the applicant any special privilege that is denied by this code to other lands or facilities.”

**D. Comparison with other properties.** This criterion requires a finding by the BOA that: “The literal interpretation of the provisions of this code would deprive the applicant of rights commonly enjoyed by other similarly situated properties.”

**E. Variance minimum.** This criterion requires a finding by the BOA that: “The variance granted is the minimum variance possible to make reasonable use of the land or facilities.”

**F. Conforms with goals and purpose.** This criterion requires a finding by the BOA that: “The granting of the variance will be in harmony with the general goals and purpose of this code.”

**G. Not injurious to public.** This criterion requires a finding by the BOA that: “The variance will not be injurious to the neighborhood involved or detrimental to the public welfare, require extraordinary public expense, or create nuisances.”

### III. Options Related to Reciprocal Setbacks

If the Board is dissatisfied with relying on the existing variance process, the following are possible options:

**A. Eliminate reciprocal setbacks.** As previously noted, reciprocal setbacks are not a State requirement because the State lacks jurisdiction to permit development that occurs subsequent to installation of the oil and gas facility.

**B. Reduce the distance.** As you are aware, setbacks are designed to prevent, reduce, or alleviate the negative impacts of oil and gas activities on public health, safety, welfare, the environment, and wildlife in the surrounding community. These impacts include not only health concerns but also nuisance factors such as noise, vibration, odor, light, dust, and safety hazards. The smaller the setback distance, the greater the potential for conflict and adverse impacts. Initially, Chapter 90's draft proposed a reciprocal setback of 500 feet. However, based on the Board's instructions, Version 3 now proposes a setback of (a) 400 feet between the working pad surface and residential or high-occupancy buildings, (b) 300 feet between the working pad surface and commercial or industrial buildings, public or private playgrounds, parks, permanent recreational fields, or similar places of public assembly or community spaces, and (c) 50 feet between flowlines or pipelines and residential or high-occupancy buildings.

While the Board could choose to reduce the distance further, it should not reduce the distance from flowlines or pipelines to less than 50 feet nor should it reduce the distance between the wellbore and any structure to less than 200 feet as 200 feet is a safety standard.

**C. Further limit the type of uses to which the reciprocal setback applies.** In Version 3, the reciprocal setback applies to the following types of uses that are created/constructed after the oil and gas facility exists:

**400 feet:**

Dwelling units: A separate living or dwelling area intended for occupancy by an individual, family or a group of tenants in common sharing living, eating, cooking, sleeping and/or sanitation facilities.

High occupancy building units: (a) Any school, nursing facility, hospital, life care institution or correctional facility, provided the facility or institution regularly serves 50 or more persons; (b) an operating Child Care Center, or (c) a multifamily dwelling unit with four or more units. (various legal citations omitted)

**300 feet:**

Commercial buildings: A structure used for activity involving the sale of goods or services carried out for profit.

Industrial buildings: A structure used by an establishment involved in the research, design, manufacturing, processing, fabrication, packaging, or assembly of goods. . . Goods are generally not displayed or sold on site, but if so, they are a subordinate part of sales (typically ten (10) percent or less of the gross floor area). Relatively few customers come to the site.

Public or private playgrounds, parks, permanent recreational fields or similar places of public assembly or community spaces. Some of these uses are within the State’s broader definition of “designated outside activity area” but are not specifically defined.

**D. Make (some or all) by right uses exempt from reciprocal setbacks.** For instance, the Board could determine that the reciprocal setbacks do not apply to proposals for new by right uses on any legal lot of record that existed prior to August 1, 2023 (or other applicable effective date of Chapter 90). There are nuances to “legal lot of record” but, roughly, the provision could be similar to:

*“On a legal lot of record that exists before August 1, 2023 (the effective date of the new chapter 90 regulations), the minimum setbacks required by subparagraphs 70-6.IV.C.1-3 shall not apply to any proposed development that does not require a land use permit pursuant to section 66-3”.*

This change would allow a single home (under 66-3.I.A and B) and some ADUs (under 66-3.I.J) to be placed on existing legal lots of record without having to meet the reciprocal setbacks. Additionally, a few commercial and industrial uses (including AgPlus) would also be exempt from reciprocal setbacks on existing legal lots of record under 66-3.I and II. If any party wishes to create new lots, regardless of whether they are related to existing uses or not, the reciprocal setbacks would still apply.

However, there may also be cases where the reciprocal setback should apply even for new construction on legal lots of record. For example, the Board may want new schools, childcare centers, nursing facilities, hospitals, life care institution, or multifamily dwelling units with four or more units to comply with the reciprocal setback, even if they are built on a legal lot of record. If the Board decides to adopt this option, the staff will need to analyze whether the reciprocal setbacks

would apply if an owner of an existing legal lot of record wishes to create a new use, modify the existing use, or expand the use.

**E. Apply reciprocal setbacks only to new subdivisions.** Opting for this alternative would likely be the most straightforward to administer. It would not require any determination of whether a particular lot is "legal", "of record" or involve changes to or expansion of uses of existing lots. Instead, the only factor to consider is whether a subdivision occurred after August 1, 2023.