

Opinion No. 77-22

July 15, 1977

OPINION OF: Toney Anaya, Attorney General

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SUBDIVISIONS-SERIAL SUBDIVISION-NEW MEXICO SUBDIVISION ACT-Santa Fe County Subdivision Regulation Article XII entitled "Serial Subdivision" does not allow a landowner to subdivide and sell or lease five or more parcels of land without complying with the New Mexico Subdivision Act, 70-5-1, **et seq.**, N.M.S.A. (1975 Supp.) if no more than four parcels of land are subdivided within a 12-month period and the New Mexico Subdivision Act, **supra**, does not authorize Santa Fe County to adopt such a subdivision regulation.

QUESTIONS

1. Is a "subdivision" created under the New Mexico Subdivision Act, 70-5-1, **et seq.**, N.M.S.A. (1975 Supp.) if a partnership purchases a tract of land, subdivides and sells four parcels and, upon dissolution, divides the remaining area of land between the two partners who thereafter propose to further subdivide and sell their respective parcels?
2. Does Article XII of the Santa Fe County Subdivision Regulations, entitled "Serial Subdivision" allow a land owner to subdivide and sell or lease five or more parcels of land without complying with the provisions of the New Mexico Subdivision Act, **supra**, if no more than four parcels are subdivided and sold or leased within a 12-month period?
3. Does the New Mexico Subdivision Act, **supra**, authorize Santa Fe County to adopt such a subdivision regulation that would allow a land owner to subdivide and sell or lease five or more parcels of land without complying with the provisions of the New Mexico Subdivision Act, **supra**, if no more than four parcels are subdivided and sold or leased within a 12-month period?

CONCLUSIONS

1. Yes. A "subdivision" subject to the provisions of the New Mexico Subdivision Act, **supra**, is created if a fifth parcel is subdivided and sold or leased by either of the former partners.
2. No.

3. No.

ANALYSIS

1. You have requested an opinion concerning the applicability of the New Mexico Subdivision Act, 70-5-1, et seq., N.M.S.A. (1975 Supp.) and the Santa Fe County Subdivision Regulations to a certain division and sale of land in Santa Fe County. The particular subdivision in question originated with the purchase of a single tract of land comprising 63 acres by a partnership of two individuals in May of 1976. Prior to March of 1977 the partnership subdivided and sold four parcels from within the original tract and retained ownership over the remaining acreage in the name of the partnership. Thereafter in March of 1977 the partnership was dissolved and the remaining property that was held by the partnership was divided between the two former partners through an exchange of quit claim deeds. Each partner now proposes to further subdivide and sell his respective parcel.

OPINION

Two questions are presented here. First, has the existing division and sale of land by the partnership created a "subdivision" which is subject to the New Mexico Subdivision Act, supra (hereinafter cited as Act), and second, if not, would the proposed future division and sale or lease by the former partners render the entire subdivision subject to the Act? The answers to both questions lie in the definition of a "subdivision" under the Act which defines the term in Section 70-5-2(I) to mean "an area of land the surface of which has been divided by a subdivider into five (5) or more parcels for the purpose of sale or lease." Exempted from the term "subdivision" by Section 7-5-2(I)(1) is "any land retained by the subdivider after subdivision but which has not been divided for a subdivision."

{*144} Thus, the existing divisions and sales do not now constitute a "subdivision" within the meaning of the Act. Only four parcels have been subdivided and sold by the partnership. Although a further division took place into two parcels upon dissolution of the partnership, such division would not be for the purpose of sale or lease, so long as it was retained by the owners of the original tract. It remains exempt from consideration as part of a subdivision because the division of the land did not result in a fifth sale or lease to a third party. However, if either former partner subdivides and sells or leases one more parcel from within the original tract the entire tract would become a "subdivision" within the meaning of 70-5-2(I) and would be subject to the provisions of the Act. Each former partner participated in the subdivision and sale of the first four parcels, either directly or through his interest in the partnership, and each partner thereby falls within the definition of a "subdivider" upon his sale or lease of a fifth parcel from within the original tract. Section 70-5-2(H) broadly defines "subdivider" to encompass "any person creating a subdivision, or any person engaged in the sale or lease of subdivided land which is being sold or leased by the owner in the ordinary course of business." (emphasis added.)

Therefore, before either former partner can subdivide and sell or lease one more parcel from within the original tract, the entire tract and the four previously subdivided and sold parcels must be platted by the subdivider and approved as a legal subdivision by the Santa Fe County Commission pursuant to Section 70-5-8 of the Act.

2. The former partners further propose to wait 12 months before subdividing and selling or leasing any more parcels from within the original tract. This raises the question of whether Article XII of the Santa Fe County Subdivision Regulations entitled "Serial Subdivision" permits the division and sale or lease of five or more parcels of land without constituting a "subdivision" under the Act, if no more than four parcels are subdivided and sold or leased within a 12-month period.

Section 70-5-9(A) of the Act authorized each county to promulgate subdivision regulations in furtherance of the Act and to regulate subdivisions within its boundaries. The Board of County Commissioners for Santa Fe County has adopted such regulations which govern the subdivision of land within Santa Fe County. Article III, Section 1 of the Santa Fe County Subdivision Regulations defines the terms "subdivider" and "subdivision" in a manner identical to the Act, and Article XVI(A) mandates that:

No person shall sell or lease land that is a part of a subdivision before the plat has been approved and recorded . . . nor violate any other provision of the New Mexico Subdivision Act. (emphasis added.)

However, appearing separately in the Santa Fe County Subdivision Regulations is Article XII(A) which bears the title "Serial Subdivision" and provides:

A. The surface area of land is divided as a part of a single, continuous process if the person dividing it has:

{*145} (1) Divided the same piece of land on more than one occasion in the same 12-month period.

(2) All land divided has been divided as part of a common promotional scheme.

(3) The number of parcels resulting from all of the divisions within the 12-month period is five or more.

This definitional regulation stands isolated as a separate article unrelated to any other article or provision in the Santa Fe County Subdivision Regulations. The term "serial subdivisions" appears nowhere else in the regulations nor is the term mentioned anywhere in the Act. Article XII(A) itself is not referred to in, or expressly connected to, any other article or provision of the Santa Fe County Subdivision Regulations. Article XII(A) makes no mention of the significance of a "serial subdivision" nor does it explain in any way the effect that such a subdivision has upon any other provision of either the Santa Fe County Subdivision Regulations or the Act. No particular benefit or detriment is conferred upon subdivision activity that falls within the definition of a "serial

subdivision." Article XII(A) stands alone within the statutory scheme as unconnected, surplus language of no significance.

Through no stretch of the rules of construction can Article XII(A) be interpreted to mean that Santa Fe County permits the division and sale or lease of five or more parcels of land without constituting a "subdivision" and without complying with the Santa Fe County Subdivision Regulations and the Act if no more than four parcels are subdivided and sold or leased within a 12-month period. On the contrary, both the Act and the Santa Fe County Subdivision Regulations clearly make it illegal to subdivide and sell or lease five or more parcels of land at any time without first filing a subdivision plat approved by the Santa Fe County Commission. Neither the Act nor the Santa Fe County Subdivision Regulations have a provision which sets a time limit on counting the number of divisions and sales of land for the purpose of determining whether a "subdivision" has been created. The length of time between the sale of subdivided parcels of land by a "subdivider" is immaterial to the application of the Act or the Santa Fe County Subdivision Regulations.

Therefore, notwithstanding the definition of a "serial subdivision" found in Article XII(A), any further subdivision and sale or lease by either of the partners of a fifth parcel from within the original tract of land at any time in the future would render the land divisions subject to the Act and the Santa Fe County Subdivision Regulations, and would require that the subdivision be approved by the Santa Fe County Commission.

3. The final question to be addressed is whether the New Mexico Subdivision Act, *supra*, authorizes or empowers Santa Fe County to adopt a regulation that would, in fact, exempt from coverage by the Act and the Santa Fe County Subdivision Regulations the subdivision and sale or lease of five or more parcels of land if no more than four parcels are subdivided and sold or leased within a 12-month period. The Act itself provides for no such time {**146*} limit exception. Indeed, the subdivision and, sale or lease of five or more parcels at any time constitute a "subdivision" under Section 70-5-2(I) of the Act.

Section 70-5-9(A) delegates to the county commissioners of each county the responsibility of regulating subdivision activity and authorizes each county to promulgate regulations setting forth county requirements relating to water, liquid and solid waste disposal, roads, terrain management, disclosure statements, fees and summary approval procedures. In addition to these specified areas, the county commissions have been given a general grant of authority in 70-5-9(A)(10) to regulate "any other matter relating to subdivisions which the board of county commissioners feels is necessary to ensure that development is well planned, giving consideration to population density in the area." The New Mexico Legislature by enacting the New Mexico Subdivision Act, *supra*, has established the minimum requirements for the subdivision and sale of land in New Mexico. What is contemplated by the legislature in this grant of regulatory authority to the counties is that county commissioners are free to promulgate more stringent requirements than those provided for in the Act which would

be responsive to the particular needs of each county as determined by the prescribed hearing procedures set forth in Section 70-5-10 of the Act.

However, the county commissioners are not free to adopt regulations that alter or change the state statute that expressly grants the county this regulatory authority. It is well established that a county, as a political subdivision of the state, and its board of commissioners, as creatures of statute, have only such powers as are expressly conferred upon them by the state legislature together with those powers necessarily implied to implement those express powers. *El Dorado at Santa Fe, Inc. v. Board of County Commissioners of Santa Fe County*, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976); *Dow v. Irwin*, 21 N.M. 576, 157 P. 490 (1916). The legislature cannot delegate to the county commissions the authority to adopt rules or regulations which abridge or modify the minimum requirements of the Act. *State ex rel. McCulloch v. Ashby*, 73 N.M. 267, 271, 387 P.2d 588, 590 (1963). Santa Fe County is subordinate to the legislature, and to promulgate a regulation that would establish a time limit on the sale of subdivided land not found in the statute would be an impermissible attempt to legislate rather than regulate subdivision activity.

A regulation which permitted the subdivision and sale or lease of five or more parcels without complying with the Act if no more than four parcels are subdivided and sold or leased within a 12-month period would establish an exemption not provided for in the Act. Regulations which have similarly created new exemptions not found in the enabling statute, or included within a specified exemption therein, have been declared void by the New Mexico Supreme Court. *State ex rel. McCulloch v. Ashby*, supra.

The New Mexico Subdivision Act, supra, is a statute that contains a detailed and comprehensive framework of substantive and procedural requirements for subdivision activity in New Mexico. The regulatory power granted to the county by the Act does not allow the county to ignore these requirements {**147*} by inconsistent or contradictory regulations. To permit the Santa Fe County Commission to create by regulation time limitations for exempting subdivision activity would be to allow the Santa Fe County Commission to, in effect, amend or repeal key provisions of the Act. The Commission could so exempt subdivision activity (i.e., four parcels a week) that it would be able to render the Act meaningless and of no effect in Santa Fe County. Clearly, the legislature did not intend to vest such unbridled or arbitrary regulatory power in the Santa Fe County Commission.

Therefore, the Santa Fe County Commission may not adopt by regulation any time limitation on subdivision activity which exempts such activity from the requirements of the New Mexico Subdivision Act, supra.

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