

Opinion No. 81-02

January 27, 1981

OPINION OF: Jeff Bingaman, Attorney General

BY: Janice M. Ahern, Assistant Attorney General

TO: Honorable Joseph H. Mercer, New Mexico State Senator, 507 Roma, N.W.,
Albuquerque, NM 87102

PROPERTY LAW

A county cannot, by regulation, redefine "subdivision" in a manner inconsistent with the definition set forth in the New Mexico Subdivision Act.

QUESTIONS

Can Article II of the Bernalillo County Subdivision Ordinance which defines "succeeding subdivisions" prohibit a landowner from dividing and selling or leasing five or more parcels without complying with the provisions of the New Mexico Subdivision Act, Section 47-6-1, **et seq.**, NMSA 1978, if more than five parcels are subdivided and sold or leased within a five-year period?

CONCLUSIONS

No.

ANALYSIS

The subdivision activity governed by the 1973 New Mexico Subdivision Act, Section 47-6-1 **et seq.**, NMSA 1978 (Act) is the division of the surface of an area of land in New Mexico which has been divided by a subdivider into five or more parcels within three years for the purpose of sale or lease. Section 47-6-2 NMSA 1978. The Act establishes the minimum requirements for county approval of a subdivision before the lawful sale or lease of subdivided land.

OPINION

Section 47-6-9 NMSA 1978 of the New Mexico Subdivision Act directs the board of county commissioners of each county to regulate subdivisions within county boundaries and to adopt regulations setting forth county requirements relating to water, liquid and solid waste disposal, roads, terrain management, disclosure statements, fees and summary approval procedures. The county commissions have also been given a general grant of authority to regulate other matters relating to subdivisions so long as

these regulations are necessary to ensure that "development is well planned, giving consideration to population density in the area." Section 47-6-9(A)(10) NMSA 1978.

Pursuant to this grant of authority the Board of County Commissioners of Bernalillo County has adopted a comprehensive subdivision ordinance. Article II of the ordinance entitled "Definitions" defines "succeeding subdivision" as follows:

"SUCCEEDING SUBDIVISIONS. The surface of land is divided as part of a single, continuous process if the same property has been divided on more than one occasion in the same five-year period, resulting in five or more parcels."

This definitional section is not addressed in any other article or provision of the Bernalillo County Subdivision Ordinance. No {206} particular benefit or detriment is conferred upon divisions of land which fall within the definition of a succeeding subdivision. In addition, the definition of succeeding subdivision in the ordinance is not consistent with the definition of succeeding subdivisions in the Act. Section 47-6-16 NMSA 1978 defines succeeding subdivisions and authorizes a county commission to combine proposed subdivisions with approved subdivisions, for classification purposes, if the former subdivision was filed within the preceding three-year period.

The apparent effect of the provisions of "succeeding subdivision" in the ordinance would be to define a "subdivision" for Bernalillo County and to prohibit the division and sale or lease of five or more parcels within a five-year period without first complying with the Bernalillo County Subdivision Ordinance. The ordinance conflicts with the definition of subdivision under the Act. The Act, Section 47-6-2 NMSA 1978, prohibits the division and sale or lease of five or more parcels of land within three years. Since the Act sets forth a three-year time limit, the County Commission cannot, by regulation, extend the definition of "subdivision" to divisions over five years. A board cannot adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty. **State ex rel. McCulloch v. Ashby**, 73 N.M. 267, 387 P.2d 588 (1963).

The subdivision activity or duty imposed by the Act is triggered by the creation of a subdivision defined as the division of land by a subdivider into five or more parcels within three years for the purpose of sale or lease. The County Commission cannot extend the three-year period and, in effect, attempt to redefine the legislative definition of subdivision activity to include five or more divisions over a five-year period. The promulgation of an ordinance or regulation that establishes a time limitation on the sale of subdivided land not found in the statute would be an impermissible attempt to legislate rather than to regulate subdivision activity.

A similar issue was addressed in the Opinion of the Attorney General No. 77-22 in which a county, by regulation, attempted to exempt certain subdivision activity from regulation. In that opinion it was stated that the New Mexico Subdivision Act contains a detailed and comprehensive framework of substantive and procedural requirements for subdivision activity in New Mexico. The regulatory power granted to the counties by the

Act does not allow a county to ignore these requirements by inconsistent or contradictory regulations. A county cannot redefine the subdivision activity defined by the Act.

Therefore, the Bernalillo County Commission cannot adopt a regulation setting forth a time limitation which defines a "subdivision" in a manner which extends or modifies the subdivision activity defined in the New Mexico Subdivision Act.

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