Opinion No. 86-04

October 15, 1986

OPINION OF: Paul Bardacke, Attorney General

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QUESTIONS

1. Must the developers of a subdivision, the plat for which was approved under the 1963 Land Subdivision Act, Sections 47-5-1 **et seq.,** NMSA 1978 (the "1963 Act"), apply to the county board of commissioners for approval of a new subdivision plat pursuant to the 1973 Subdivision Act, Sections 47-6-1 **et seq.,** NMSA 1978 (the "1973 Act") and current county subdivision regulations if:

(a) No lots have been sold in the subdivision?

(b) Some lots have been sold, but no development has taken place in the subdivision?

(c) The subdivision, is partially developed, but some portions remain unsold and unimproved?

(d) Lot lines are redrawn, and the subdivision is replatted?

2. Must the developers of the subdivision comply with any other requirements of the 1973 Act or current county subdivision regulations prior to the sale or lease of lots in the subdivision?

CONCLUSIONS

The answers to these questions involve a resolution of the interrelationship between the 1963 Act and the 1973 Act as they apply to subdivisions approved under the 1963 Act. Generally, we conclude that the 1973 Act was not intended to operate retrospectively so as to "undo" a county's approval of a plat reviewed under the 1963 Act. The only exception to that general rule would be if the subdivision were at some point replatted so as to create a new "subdivision" as defined under the 1973 Act. Since the 1973 Act operates prospectively, however, upon later sales in subdivisions approved under the 1963 Act, we conclude that developers of those subdivisions must follow the post-approval requirements of the newer statute.

The specific answers to the questions presented are as follows:

1. (a) No.

(b) No.

(c) No.

(d) Yes, but only if the replatting results in an increase in the number of lots in the subdivision or changes the type of subdivision as defined under the 1973 Act.

2. All advertising must comply with the requirements of Section 18 of the 1973 Act. In addition, the developer must comply with several other specified post-approval requirements of the 1973 Act prior to any future sales. Those requirements are set forth in Sections 8, 11, 17 and 19 of the 1973 Act.

FACTS

The Los Altos Subdivision, which consists of 47 lots on 26.9 acres, was created by Mr. Eliu Romero near Arroyo Seco in Taos County sometime in 1966. A plat for the subdivision was approved by the Taos County Board of Commissioners on August 8, 1966, after review under the 1963 Act, Sections 47-5-1, **et seq.,** and Section 14-19-6, NMSA (1976 Supp.). Based on the facts we have been given, we presume that the subdivision did comply with the requirements of the 1963 Act and Section 14-19-6 at that time, **i.e.,** there was a dedicated and accepted means of legal access from an existing public way to each lot; proposed streets conformed to adjoining streets; streets were defined by permanent monuments; and the boundaries of the subdivision were defined by permanent monuments.

During the next almost twenty years, few if any sales were made, and no development took place within the subdivision. On May 9, 1985, Mr. Romero conveyed the entire subdivision to Sudoxe, Inc., a New Mexico corporation. Los Altos Associates, a limited partnership apparently affiliated with Sudoxe, has initiated development of the subdivision for the eventual sale of homes.

We understand that the current developers are planning to provide a community water system to the subdivision, with "cluster wells" each situated so as to serve several lots. It may be necessary for Los Altos to reduce the number of lots in the subdivision, by redrawing lot lines or combining some lots, in order to meet Environmental Improvement Division ("E.I.D.") Liquid Waste Disposal Regulations and/or water quality and supply regulations issued by E.I.D. and the State Engineer.

ANALYSIS

A. **Statutory Background**.

Prior to passage of the 1973 Act, subdivisions lying outside the boundaries of a municipality were governed by former Section 14-19-6 and the 1963 Act. A county was

then required to approve the plat for a subdivision once the county determined that there were sufficient access to each lot, proposed streets conformed to existing roadways, and streets and boundaries were defined by permanent monuments. Section 14-19-6, NMSA (1976 Supp.), and Section 47-5-3, NMSA 1978. See **El Dorado at Santa Fe v. Board of County Commissioners,** 89 N.M. 313 (1976).

The 1973 Act directed the counties to promulgate regulations imposing new requirements for the approval of subdivisions. Pursuant to Section 9 of the 1973 Act (now Section 47-6-9, NMSA 1978), counties were directed to impose standards for water quantity and quality, liquid and solid waste disposal, adequacy of roads, terrain management, and other matters to ensure well-planned development. Depending upon the size of the subdivision, the developer's proposals for meeting these requirements would be reviewed by several state agencies. Section 47-6-11. Discretion lay, however, with the county board of commissioners to approve or disapprove any subdivision. **Parker v. Board of County Commissioners,** 93 N.M. 641, 643 (1979).

The 1973 Act's requirements were intended to take effect immediately and to apply to all subdivisions approved after the Act's effective date. The only conditions placed on the Act's effect were temporary, to account for counties which might not be able to adopt promptly new regulations pursuant to the new Act. Thus, as part of the original 1973 Act, the legislature passed the following provision, found at Laws at 1973, Chapter 348:

Section 29. TEMPORARY PROVISION - TRANSITION

A. The New Mexico Subdivision Act [**i.e.,** the 1973 Act] applies to any subdivision approved after the effective date of the New Mexico Subdivision Act when the approval occurs within a county with subdivision regulations adopted pursuant to the New Mexico Subdivision Act. Except as provided in Subsection B of this section, the New Mexico Subdivision Act does not apply to the filing of plats or to the sale or lease of subdivided lands occurring within a county which has not adopted the subdivision regulations required by the New Mexico Subdivision Act.

B. Six months after the effective date of this act, the provisions of Section 18 [now 47-6-18, setting forth advertising standards] shall apply to sales or leases of subdivided land irrespective of when the subdivision plat was approved and the provisions of Sections 26 and 27 [now 47-6-26 and 47-6-27, setting forth remedies of mandamus, injunctive relief and criminal penalties] shall apply to enforce Section 18. [Bracketed explanations added.]

The same bill also repealed former Section 70-3-9, 1953 Compilation, relating to the applicability of the 1963 Act, and enacted in its place the following provision (now Section 47-5-9);

The Land Subdivision Act [**i.e.,** the 1963 Act] applies to all subdivisions except where the subdivision is located within a county for which subdivision regulations have been

adopted as provided in the New Mexico Subdivision Act [**i.e.,** the 1973 Act]. [Bracketed citations added.]

Thus, pursuant to temporary Section 29 of the 1973 Act and permanent Section 47-5-9 of the 1963 Act, the Land Subdivision or 1963 Act remained applicable only during the transition period in 1973, **i.e.,** when each county was formulating, and following the procedures necessary to adopt, its subdivision regulations. The 1963 Act continued in effect in a county only so long as that county failed to adopt regulations under the 1973 Act. Of course, all counties in New Mexico have long since adopted such regulations.

Approval of a plat for any subdivision submitted during the transition period, unless affected by a proper moratorium on such approvals, was to be reviewed and approved under the 1963 Act. Similarly, all sales or leases of subdivided lots taking place within the transition period were to be governed by the disclosure requirements of the 1963 Act, and were generally exempted from the disclosure and other pre-sale requirements of the 1973 Act.

The only exception to the inapplicability of the 1973 Act during the transition period was advertising, an issue which the legislature apparently felt warranted immediate statewide effect. Pursuant to Subsection (B) of Section 29, the advertising standards established by the 1973 Act were to be followed throughout the state no later than six months after the effective date of the legislation, regardless of whether the county in which the advertised lots were located had promulgated regulations within that time period.

Once the transition period had passed, and each county had adopted subdivision regulations, the 1973 Act became fully applicable to all subdivisions. With respect to subdivisions approved by a county after adoption of its subdivision regulations, both Section 29 and Section 47-5-9 leave no doubt that both the plat approval process and all other requirements, **e.g.,** the disclosures applicable to all sales, are governed by the 1973 Act. It is the applicability of the 1973 Act to subdivisions the plats for which were already approved under the 1963 Act that is at issue in this opinion.

B. **Analysis of 1973 Act Requirements**.

Before considering the scope of the 1973 Act's applicability, it is important to distinguish between those requirements which a developer with a plan for a subdivision must meet to obtain general plat approval, and those requirements which a subdivider with an approved plat must meet to make subsequent sales of subdivided lots.

Under the 1973 Act, a developer seeking approval of the plat for a planned subdivision must furnish the board of county commissioners, or other person or agency reviewing the subdivision application, with the following:

1) A plat meeting the requirements of Section 3 (now 47-6-3) and 4 (now Section 47-6-4) of the Subdivision Act.

2) Sufficient information to permit the board of county commissioners to determine that the subdivision will conform to the requirements of the Subdivision Act and the county's subdivision regulations. Sections 47-6-11(D), 47-6-12(B) and 47-6-13(B).

3) For a type-one or type-two subdivision, such additional information as may be necessary to permit the board to determine whether or not the subdivider can fulfill the proposals in his disclosure statement. Section 47-6-11(D).

4) A schedule for road development. Section 47-6-19(A).

5) If required by the board, a schedule of compliance with the county's subdivision regulations. Section 47-6-24.

As part of the approval process, a county's subdivision regulations may require, depending upon the type of subdivision, submission of a preliminary plat as well as a final plat; written analyses or reports on hydrology, geohydrology, surface drainage, subsurface drainage and soil types; plans for water quantity, water quality, solid and liquid waste disposal, and terrain management; and the payment of a fee. Section 47-6-9. In the case of type-one and type-two subdivisions, various state agencies are called upon to review the adequacy of the subdivider's plans and proposals under the Subdivision Act and the county subdivision regulations. Section 47-6-11(E). Only after evaluating all of these submittals, plans, reports and opinions may the board of county commissioners approve the plat for the subdivision. Sections 47-6-11(B), 47-6-12(A) and 47-6-13(A).

A subdivider will in most cases expend the bulk of his development costs in obtaining or fulfilling conditions of plat approval. However, the subdivider's obligations under the 1973 Act do not end with approval of the plat.

A subdivider with an approved subdivision plat must meet the following additional requirements in the course of selling or leasing lots:

1) For a type-one, type-two or type-four subdivision, all corners of all parcels and blocks must be permanently marked with metal stakes in the ground and a reference stake placed beside one corner of each parcel. Section 47-6-8(C).

2) For a type-one, type-two or type-four subdivision, the subdivider must provide a written disclosure statement to each prospective purchaser or lessee. Section 47-6-17.

3) For a type-one or type-two subdivision, the subdivider must provide the quantity and quality of water, liquid and solid waste disposal facilities, and terrain management as promised in the disclosure statement, and must provide satisfactory roads. Section 47-6-11(A).

4) Roads in the subdivision must conform to minimum county safety standards. Section 47-6-19(B).

5) All advertising must conform with the requirements of Section 47-6-18.

These latter, post-approval requirements, in contrast with the land use planning concerns addressed by counties and state agencies in reviewing the plat for a proposed subdivision, emphasize disclosure and performance, the staples of consumer protection. These provisions provide direct benefits to purchasers and prospective purchasers of lots in an approved subdivision, independent of how the subdivision has been platted and planned.

The analysis which follows is based on the foregoing distinctions between pre-plat approval and post-plat approval requirements of the 1973 Act, and the differing effects those requirements have upon developers of subdivisions approved under the 1963 Act.

C. **Effect of 1973 Act Upon Approved Status of 1963 Act Subdivisions**.

The first question requiring consideration is whether the 1973 Act requires that all subdivisions with plats approved under the 1963 Act must obtain re-approved plats under the 1973 Act prior to development. Clearly a county has an interest in preventing development of a subdivision which might not meet current land use standards. It is also clear, however, that vested rights are protected by the law, and subdivision developers have valid interests in avoiding the retroactive imposition of new plat approval requirements.

Subjecting previously approved subdivisions to new plat approval review under current subdivision regulations would involve, in effect, a retrospective application of the 1973 Act. We question whether the 1973 Act was intended to have that effect.

Statutes are generally construed, in New Mexico and most other jurisdictions, to operate prospectively. As was stated by the Court in **Psomas v. Psomas,** 99 N.M. 606, 609 (1983):

. . . well-settled New Mexico law presumes a statute to operate prospectively unless a clear intention on the part of the legislature exists to give the statute retrospective effect.

Neither Section 47-5-9 of the 1963 Act nor Section 29 of the original 1973 Act manifests a clear legislative intent that the 1973 Act be given retrospective effect as to plat approval requirements. Section 47-5-9 does state that, once a county has adopted subdivision regulations, the 1963 Act is no longer applicable in that county. That could arguably extend to plat approval requirements. It does not compel the conclusion, however, that subdivisions approved under the 1963 Act thereby automatically lost their approved status. For example, Section 29 of the 1973 Act stated that the new requirements did "**not** apply to the filing of plats or to the sale or lease of land" until subdivision regulations had been adopted in a county. (Emphasis supplied.) Certainly if the legislature had intended a retrospective application of the 1973 Act it would not have required counties to continue to approve subdivisions under the 1963 Act during the transition period, only to revoke those approvals when subdivision regulations were

promulgated. Rather, the guiding principle seems to have been that any plat approved, or sale made, prior to the effective date of the 1973 Act, would not be affected by that Act. Then, once counties adopted their regulations, the 1973 Act and the new regulations would govern both as "to the filing of plats" and as to the "sale or lease" of any subdivided lots. **Id.**

There is no case in New Mexico which has clearly considered the possible retrospective applicability of the 1973 Act to subdivisions approved under the 1963 Act. **El Dorado at Santa Fe v. Board of County Commissioners, supra,** addressed issues raised by the 1963 Act, but not the applicability of the 1973 Act to plats approved under the 1963 Act. Specifically, the **El Dorado** court held that (1) Santa Fe County's decision to approve a subdivision under the 1963 Act was ministerial, not discretionary, and therefore subject to an order of mandamus; and (2) subdivision regulations promulgated by the County in 1971, prior to the enactment of the 1973 Act, were void because they were not then authorized by the 1963 Act, the only relevant law in effect in 1972. **El Dorado, supra,** at 319-320.

Subdivision regulations later promulgated by Santa Fe County under the 1973 Act came into play neither in the controversy which gave rise to the **El Dorado** litigation nor in the Court's decision resolving that litigation. The Court's much-quoted statement that a subdivider acquired "vested rights" once his subdivision complied with the requirements of the 1963 Act was incident only to the Court's holding that the plat approval process under the 1963 Act was non-discretionary. The **El Dorado** Court did not determine whether the legislature could divest, or had through enactment of the 1973 Act divested, a subdivider's rights to develop and sell his subdivision as previously approved.

To the extent this office has previously cited **El Dorado** for the proposition that a county cannot require review, under its subdivision regulations promulgated under the 1973 Act, of a subdivision approved under the 1963 Act, we believe that citation is misplaced. As noted, the court in **El Dorado** simply did not address or decide that issue.

In sum, based upon the apparent lack of clear legislative intent to "disapprove" subdivisions approved under the 1963 Act, and given the lack of any other authority to the contrary, we conclude that subdivisions properly platted and approved under the 1963 Act can be developed in accordance with that approved plat without obtaining further plat approvals from the applicable county. As discussed below, however, this does not mean that the post-approved requirements of the 1973 Act are not applicable to subdivisions approved under the 1963 Act.

D. **Application of 1973 Act to Sales in 1963 Act Subdivisions**.

In subsection (B) of this Opinion we listed certain requirements of the 1973 Act which apply in connection with sales in an approved subdivision. The next issue to be considered is whether these post-approval requirements apply to all approved subdivisions, or only those subdivisions approved under the 1973 Act.

In contrast with the plat approval requirements of the 1973 Act, we view the application of these post-approval requirements to subdivisions approved under the 1963 Act as only being prospective. They do not apply retroactively to sales which have already taken place; to the contrary, they apply only to future sales. These post-approval requirements in no way subject the developer to further review of the subdivision plan by the county. In addition, none of these provisions affects or interferes with the developer's right to build out or sell the subdivision as it was originally platted, so long as the developer discloses what the subdivision will or will not include, provides safe roads, and otherwise furnishes what he has promised the subdivision would include. Accordingly, application of the 1973 Act to lot sales, as opposed to plat approvals, is prospective, and the 1973 Act governs.

An argument could be made that Section 29 of the original 1973 Act expressed the legislature's intent that 1963 Act subdivisions should be grandfathered even as to these pre-sale requirements of the 1973 Act. The first sentence of that Section on its face seems to limit application of **all** provisions of the 1973 Act to subdivisions approved after the effective date of the Act. Subsection B of Section 29 further provides that only the advertising provisions of the 1973 Act should be applied "irrespective of when the subdivision plat was approved."

However, Section 29 was expressly enacted to cover only the period during which counties were devising subdivision regulations, emphasizing that until regulations were promulgated by a particular county the 1973 Act would have no effect in that county. We conclude that if the legislature wished to deny application of the 1973 Act to future sales in previously approved subdivisions it would have provided so expressly. Instead, it did the opposite. The legislature not only limited the 1963 Act's applicability to the transition period, but explicitly amended the 1963 Act to provide that once counties promulgated regulations under the 1973 Act, it was that Act which would govern. Section 47-5-9, NMSA 1978.

Based on the above, it is our conclusion that future development and sales in the Los Altos Subdivision are subject to the above-enumerated post-plat approval or pre-sale requirements of the 1973 Act.

E. **Effect of Prior Sales or Development**.

In light of our opinion that the 1973 Act does not require re-approval of the plat for the Los Altos Subdivision, it makes no difference whether the subdivision is completely unsold or partially sold, completely undeveloped or partially developed. Similarly, compliance by Los Altos with post-approval requirements of the 1973 Act should not be affected by the number of previous sales or the extent of previous development; those requirements apply currently as a matter of law, regardless of whether they have been met in connection with previous sales or development activity in the subdivision. If prior violations have occurred, they are subject to the appropriate enforcement provisions of the 1973 Act.

F. **Replat as New Subdivision**

The question has also been asked as to whether the replatting of the subdivision to comply with environmental regulations which apply independently of the subdivision laws will result in the creation of a new subdivision requiring plat approval under the 1973 Act. The answer turns on the Act's definition of a subdivision.

Section 47-6-2(I)(7) provides an exception to the definition of "subdivision" as follows:

Subdivision does not include . . . the alteration of parcel boundaries within a previously approved subdivision where parcels are altered for the purpose of increasing or reducing the size of contiguous parcels and where the number of parcels is not increased nor [sic] the type of the subdivision changed.

Our Office has previously interpreted this provision in Attorney General Opinions 77-24 and 82-11. Upon review of those opinions in relation to the issue presented here, we have concluded that they conflict with each other in a material respect which we should here resolve.

In Attorney General Opinion 77-24, this office expressed its opinion that, where lot lines in a subdivision previously approved under the 1963 Act were adjusted so as to increase the number of lots in the subdivision or change the type of subdivision as defined in Section 47-6-2, an entirely new subdivision was created requiring review under the 1973 Act and then-current county subdivision regulations. By contrast, this office determined in Attorney General Opinion 82-11 that a subdivider should obtain approval of a new plat under the 1973 Act and subdivision regulations only if the replatting affected one or more of the land use concerns expressed in Section 47-6-9 of the 1973 Act. If the County determined that none of these land use concerns was implicated, according to Opinion 82-11, then the new plat need only comply with the standards of the 1963 Act, regardless of the fact that the replatting met the definition of a new "subdivision" under the 1973 Act.

In deciding whether Los Altos and Sudoxe have in fact created a new subdivision under the 1973 Act, we feel the County should follow the interpretation of Section 47-6-2(I)(7) found in Attorney General Opinion 77-24. If a new subdivision has, by definition, been created, then a new plat should be submitted to the county for approval under its current subdivision regulations. A new plat approval should be required regardless of whether the county feels that the replat will impact water, waste disposal, drainage patterns or other land use concerns. On the other hand, if no new subdivision is created under the statute, approval of a replat under the standards which originally applied to review of the subdivision is sufficient. This approach is not only simpler for the counties to follow but more consistent with the plain language of the Subdivision Act. It applies the plain meaning of the "subdivision" definition, and it avoids the inherent difficulties posed by Opinion 82-11 in making subjective and potentially arbitrary judgments on the land use impacts of various factors.

In conclusion, therefore, if the proposed replatting of the Los Altos Subdivision results in a subdivision of more than 47 parcels or less than 25 parcels (thereby changing the subdivision from a type-two to a type-three), then the County should require that a new plat be filed and approved under the 1973 Act and current Taos County Subdivision Regulations. On the other hand, if the replatting will reduce the subdivision to between 25 and 47 parcels, the County should require only that the replat remain consistent with the requirements of the 1963 Act which formed the basis for the County's original approval of the subdivision.

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