

**April 16, 2013 Advisory Letter -- Opinion Request - Soil and Water Conservation  
Districts & Subdivisions**

The Honorable John Sapien  
New Mexico State Senator  
1600 West Ella Drive  
Corrales, NM 87048

**Re:** Opinion Request - Soil and Water Conservation Districts & Subdivisions

Dear Senator Sapien:

You have requested our advice regarding the authority of the Coronado Soil and Water Conservation District ("Coronado District") and other soil and water conservation districts to review proposed subdivision land transactions. This request was recently re-assigned to me to research and complete.

Your request cites to NMSA 1978, Section 47-6-11 of the New Mexico Subdivision Act for the grounds that a soil and water conservation district must review all proposed subdivision land transactions for a determination on terrain management and drainage issues. Your request states: "The Town of Bernalillo has indicated that they are exempt and do not have to abide by this [s]tatute. Sandoval County does not forward all proposed development[s]" to the Coronado District for review. As discussed below, based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude that the Coronado District is required to review a proposed subdivision land transaction under Section 47-6-1 only when Sandoval County has sole or concurrent jurisdiction over the transaction. The requirements of Section 47-6-11 do not apply to the Town of Bernalillo.

In 1965, the New Mexico Legislature added several new sections to the state laws that govern municipalities (called the "Municipal Code" or "Code") regarding municipal oversight of subdivision land transactions. See NMSA 1978, §§ 3-19-1 to -12 (1965, amended through 2003); NMSA 1978, §§ 3-20-1 to -16 (1965, amended through 1998). The provisions cover topics such as the creation of a municipal planning commission, a "subdivision" definition, the subdivision application process and approval process. The Code expressly reads: "Each municipality shall have jurisdiction over the territory within its boundary." NMSA 1978, § 3-20-5(B) (1998).

The Code provides that a county's jurisdiction "for the purpose of approving the subdivision ... of land ... includes all territory not within the boundary of a municipality." NMSA 1978, § 3-20-5(A)(1) (1998) (emphasis added).<sup>1</sup> However, a county has concurrent jurisdiction with a municipality over territory within the municipality's "extra-territorial" zone. The size of a municipality's extra-territorial zone depends on the municipality's population. "For the purpose of approving the subdivision and platting of land ..., the jurisdiction of a municipality having a population of less than twenty-five thousand persons ... includes all territory within three miles of the municipal

boundary...." Id. § 3-20-5(A)(3) (1998); see also NMSA 1978, § 3-19-5(A)(2) (1998). If the population of the municipality is more than twenty-five thousand persons, the municipality's jurisdiction includes territory within five miles of the municipal boundary. See NMSA 1978, § 3-20-5(A)(2) (1998); see also NMSA 1978, §3-19-5(A)(1) (1998).

Except for Albuquerque, "the county and a municipality shall exercise concurrent jurisdiction over territory within the platting jurisdiction of both the county and the municipality," i.e., the municipality's extra-territorial zone. NMSA 1978, § 3-20-5(D) (1998). This means that "[a]ny person seeking the approval of a plat of a subdivision within the ... [extra-territorial zone] ... shall secure an endorsement of approval of both the board of county commissioners and the planning authority of the municipality...." NMSA 1978, § 3-20-9 (1965).

In 1973, the New Mexico legislature adopted the New Mexico Subdivision Act ("NM Subdivision Act" or "Act"), which governs county oversight of subdivision land transactions. See NMSA 1978, §§ 47-6-1 to -29 (1973, amended through 2013). The Act's definition of "subdivision" is different than the definition found in the Code.<sup>2</sup>

The Act expressly states: "The board of county commissioners of each county shall regulate subdivisions within the county's boundaries." NMSA 1978, § 47-6-9(A) (2003). The Act then clarifies that "[n]othing in the [Act] ... shall be construed as limiting the municipal extraterritorial subdivision and planning jurisdiction provided for in [the Code]." Id. § 47-6-29 (1995).

In determining whether a proposed subdivision meets the Act's requirements, a board of county commissioners must request an opinion from, among other state and public agencies:

the soil and water conservation district to determine: (a) whether the subdivider can furnish terrain management sufficient to protect against flooding, inadequate drainage and erosion; and (b) whether the subdivider can fulfill the proposals contained in the subdivider's disclosure statement concerning terrain management.

NMSA 1978, § 47-6-11(F)(4) (2009) (emphasis added).

While the Act requires a county to request the specified opinions, the county is not bound by their conclusions. "In the last analysis ... the final decision whether or not to approve the subdivision clearly rests with the county. Under the Act, a county is to apply its own discretion in 'weighing' state agency opinions along with other evidence and make its own decision...." C.F.T. Development LLC v. Board of County Com'rs, 2001-NMCA-069, 25, 130 N.M. 775, 32 P.3d 784.

Under the laws discussed above, an opinion from a soil and water conservation district is required only for subdivisions within a county's jurisdiction. In this case, we understand that the Coronado District is located in Sandoval County. When a

subdivision is proposed within Sandoval County's jurisdiction, the County, pursuant to NMSA 1978, Section 47-6-11, must submit documents for review to the Coronado District. However, under Section 3-20-5(A)(1) of the Code, a county's jurisdiction does not include territory within the boundaries of a municipality. Consequently, if a subdivision is proposed within the boundaries of the Town of Bernalillo, the Act, including Section 47-6-11, does not apply and the Town is not required to submit documents to the Coronado District.

Next, we address the question of a land transaction within a municipality's extra-territorial zone. According to the U.S. Census Bureau, the Town of Bernalillo has a population of 8,482 citizens and thus has a three-mile extra-territorial zone. See U.S. Census Bureau Department website, [www.census.gov](http://www.census.gov). Generally, when a proposed subdivision lies within the extra-territorial zone, it must be reviewed separately by both the municipality and county. See NMSA 1978, § 3-20-5(D).<sup>3</sup> However, this may not always be true, depending on whether the land transaction falls under the definition of "subdivision" in the Act, the Code or both. To resolve jurisdictional issues stemming from the location of a subdivision within the extra-territorial zone, New Mexico case law and Attorney General's Opinions have provided for a two prong test: (1) Where is the land transaction? (2) Does the land transaction fall within the Act and Code's definitions of a subdivision? See Sandoval County Bd. of Comm'rs v. Ruiz, 119 N.M. 586, 893 P.2d 482 (Ct. of App. 1995); El Dorado at Santa Fe, Inc. v. Board of County Comm'rs 89 N.M. 313, 551 P.2d 1360 (1976); N.M. Att'y Gen. Op. No. 82-4 (1982); N.M. Att'y Gen. Op. No. 76-9 (1976); N.M. Att'y Gen. Op. No. 74-37 (1974); N.M. Att'y Gen. Op. No. 70-84 (1970). There have been a variety of results under this test, including but not limited to, the county having no authority, the county and city having concurrent authority and the county having sole authority.

In 1970, a state legislator asked whether a land transaction was subject to any subdivision laws. See N.M. Att'y Gen. Op. No. 70-84 (1970). The legislator did not identify where the land transaction was located. The Opinion started with the first possible scenario that if the land was "within a municipality the sections on subdivision law within the municipal code will be applicable." Id. The Opinion looked at the definition of a "subdivision" in the Code and concluded this particular land transaction was outside the definition. This meant the transaction was not subject to municipal subdivision laws and the property owner did not have to submit documents for approval to the city. "However, the above is only the case if this parcel of land is situated within a municipality. If this parcel of land is not situated within a municipality and if the land is divided ... [in a certain manner] ... the ... Act...will be applicable." Id. The Opinion then looked at the definition of a "subdivision" found in the Act and concluded this particular land transaction was within that definition. This meant the transaction was subject to county's subdivision laws and to the county's jurisdiction.

In 1974, a district attorney asked whether a certain land transaction was subject to any subdivision laws. See N.M. Att'y Gen. Op. No. 74-37 (1974). This time, the land transaction was located "outside the municipal boundary limits of Gallup but within the three mile zone...." Id. The Opinion stated the land transaction was within Gallup's

extraterritorial zone, but concluded this particular land transaction was outside the Code's definition of a "subdivision." This meant the transaction was not subject to the Code's subdivision provisions. The Opinion conducted the same analysis for McKinley County. The Opinion concluded that the land transaction was within McKinley County and within the Act's definition of "subdivision." The Opinion concluded: "It follows that the McKinley County subdivision regulations apply to this proposed subdivision." Id. This meant the County had sole jurisdiction.

In 1976, another district attorney asked whether a land transaction was subject to any subdivision laws. See N.M. Att'y Gen. Op. No. 76-9 (1976). The land transaction was located outside the municipal boundary limits of Roswell "but within the extraterritorial jurisdiction of Roswell...." Id. The Opinion followed the same analysis as in the 1974 opinion. The Opinion concluded the land transaction was within Roswell's extraterritorial zone and, this time, was within the Code's definition of subdivision. This meant the Code's provisions applied to the transaction. The Opinion then conducted the same analysis for Chaves County and reached the same conclusion. It cited to what is now NMSA 1978, Section 3-20-5(D) which, as discussed above, reads: "[t]he county and municipality shall exercise concurrent jurisdiction over territory within the platting jurisdiction of both the county and the municipality." Id. Based on that provision, the Opinion concluded: "Since your question is concerned with land that is beyond the municipal boundaries but within the extraterritorial jurisdiction of Roswell, ... both Roswell municipal and Chaves County subdivision regulations apply concurrently." Id.

In 1982, the Lea County Commission asked whether a land transaction was subject to any subdivision laws. See N.M. Att'y Gen. Op. No. 82-4 (1982). The land transaction was located outside the municipal boundary limits but "within the five-mile extraterritorial" jurisdiction of Hobbs. The Opinion conducted the same analysis as above, but this time, concluded that land transaction was within the Code's definition of "subdivision" but outside the definition as found in the Act. This meant that "approval of any division ... must be obtained from the City of Hobbs" and the county had no jurisdiction. Id.

In 1995, the New Mexico Court of Appeals issued an opinion regarding jurisdiction over a land transaction in what appeared to be an extra-territorial zone. See Sandoval County Bd. of Comm'rs v. Ruiz, 119 N.M. 586, 893 P.2d 482 (Ct. of App. 1995). "[T]he property was located in Sandoval County ... outside the municipal boundaries of the Village [of Corrales]. The tract, however, was situated within a three-mile area adjacent to the Village boundaries." Id. at 587. The landowner contested whether the land transaction fell within the statutory definitions of "subdivision" in the Code and the Act. The County disagreed and sued to enforce its powers "and during the pendency of the ... action, the Village annexed Defendants' property." Id. The Court ruled that the land transaction fell within both definitions. The Court, like the 1976 Opinion, cited to the statute regarding concurrent jurisdiction and concluded the land transaction "constituted a subdivision" within the jurisdiction of the County and the Village. Id. at 590.

The Court noted, however, that the facts had changed and "[b]ecause of the annexation of their property by the Village, Defendants are correct in asserting that they are no longer required to comply with the County's ordinances...." *Id.* This meant the annexation had converted the land from being in the extra-territorial zone to within the municipality's boundaries. This gave the Village of Corrales exclusive jurisdiction over the subdivision.

In summary, the statutory framework governing the regulation of subdivisions requires Sandoval County to send documents to the Coronado District to review if the land transaction is covered by the Act's definition of "subdivision" and the County has sole or concurrent jurisdiction over the transaction. In contrast, the Town of Bernalillo is governed by the Code's subdivision provisions, which do not require the Town to obtain a review by or seek an opinion from the Coronado District for proposed subdivisions within the Town's jurisdiction. Finally, where the Town of Bernalillo and Sandoval County have concurrent jurisdiction within the Town's extra-territorial zone, they will each conduct a separate review under their respective governing laws. When concurrent jurisdiction exists, the County, but not the Town, will be required to submit documents to the Coronado District for review.

Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ZACHARY  
Assistant Attorney General

SHANDLER

[1] See also *El Dorado at Santa Fe, Inc. v. Board of County Comm'rs*, 89 N.M. 313, 315, 551 P.2d 1360, 1362 (1976) (county has sole jurisdiction over subdivision land transactions within the county and more than five miles from any city).

[2] The Act generally defines a "subdivision" as: "the division of a surface area of land, including land within a previously approved subdivision, into two or more parcels for the purpose of sale, lease or other conveyance or for building development, whether immediate or future...." NMSA 1978, § 47-6-2(M) (2013). Excluded from the definition are thirteen types of land division and other land transactions. The Code defines "subdivide" or "subdivision" for purposes of approval by a municipality as: "(1) for the area of land within the corporate boundaries of the municipality, the division of land into two or more parts ... into tracts" for the purposes specified in the definition; and "(2) for the area of land within the municipal extraterritorial ... jurisdiction, the division of land into two or more parts...into tracts of less than five acres in any one calendar year" for the purposes specified in the definition. NMSA 1978, § 3-20-1(A) (1979).

[3] See also Sandoval County Subdivision Regulations, Section 1.4 ("The County and a municipality shall exercise concurrent jurisdiction over the territory within the ... jurisdiction of both the County and the municipality...."); Town of Bernalillo, Ordinance #155, Section 7C ("Any proposed subdivision ... outside the corporate limits of the Town, but within ... 3 miles from Town boundary ... shall conform to the requirements of these regulations as well as the provisions of the Sandoval County Land Subdivision Regulations...").