Opinion No. 64-05

January 21, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Wayne C. Wolf, Assistant Attorney General

TO: Alexander F. Sceresse, District Attorney, Second Judicial District, County Court House, Albuquerque, New Mexico

QUESTION

QUESTIONS

1. Does the Land Subdivision Act apply to land which prior to the effective date of the Act, was divided into twenty-five or more parcels for the purpose of country living if the purchasers do not want the roads made public?

2. Does the Act apply to a subdivision which has been in operation for several years and which originally contained more than twenty-five parcels but now contains less than twenty-five parcels?

3. Under Section 2 (a) does the Act cease to apply to lots larger than five acres, ten acres, twenty acres or lots of other sizes?

4. Is the owner of a large ranch, consisting of hundreds or even thousands of acres, required to comply with the Act if he desires to sell a portion of his ranch consisting of more than twenty-five parcels?

5. Does Section 4-D of the Act require the seller to actually determine the depth of subterranean water by drilling or would an engineer's opinion be sufficient?

6. May the seller meet the requirement of Section 4-D by stating unequivocally that he does not know the average depth of which subterranean sources of water are available?

7. Section 8 of the Act provides for action to be brought after complaint by an individual alleging injury or upon the initiative of the Attorney General or the District Attorney. Since the purpose of the Act is to protect the purchaser is there any waiver possible where the purchaser wants to purchase the parcel for a special purpose?

8. What type road constitutes "legal access" within the meaning of Section 3 and do the county commissioners have the discretion to waive the requirement that "legal access" be provided to each lot?

CONCLUSIONS

1. See analysis.

2. No, but see analysis.

3. See analysis.

4. See analysis.

5. See analysis.

6. See analysis.

7. See analysis.

8. See analysis.

OPINION

ANALYSIS

In your first question you ask if the Land Subdivision Act applies to land which was subdivided before the Act became effective. In those instances where the subdivision was completed and all lots were sold before the effective date of the Act, we are of the opinion that the owner or subdivider does not have to comply with the Act. We are of the opinion that the Act applies, however, to those situations, where the land was divided into 25 or more parcels before the effective date of the Act and portions of it were being offered for sale or lease at the time of the effective date of the Act. For example, if the land were subdivided prior to the effective date of the Act with but one lot left for sale on the effective date then the Act applies and the subdivider should comply with its provisions. See Section 70-3-9, N.M.S.A., (Supp. 1963).

In answer to your second question we refer to Attorney General's Opinion No. 63-154 which deals with the definition of subdivided land. In that opinion this office interpreted the Act to apply to land actually divided into twenty-five or more parcels or land which is subject to a definite proposal of subdivision. We enclose a copy of that opinion for your convenience. As a supplement to that opinion we would now say that the Act, by its own terms, cannot apply to a tract composed of less than twenty-five parcels. See Section 70-3-2A, N.M.S.A., (Supp. 1963). We also reiterate that Section 70-3-9, N.M.S.A., (Supp. 1963) requires compliance only from those owners or subdividers of subdivided land presently being offered for sale or lease. Therefore we conclude that the Act does not apply to a particular parcel of land unless it was "subdivided land" on the effective date of the Act and parcels of it were thereafter offered for sale or lease.

Your third question asks if the application of the Land Subdivision Act is in any way dependent upon the size of the lots involved. The statutory definition applied to tracts divided into twenty-five or more parcels. It does not mention the effect of the size of the

particular parcels. We are of the opinion that the size of lots alone does not effect the definition. We stress, however, in accordance with Attorney General's Opinion 63-154, that whether or not a particular tract of land is a subdivision depends on the facts of each particular case. If the land is divided, for the purpose of sale or lease, into twenty-five or more specific parcels, the definition applies.

Your fourth question was specifically treated in Attorney General's Opinion 63-154. Suffice it to say here that we doubt that a large rancher would make such a definite proposal so as to be subject to the Act.

The portion of Section 4 of the Act pertinent to your fifth question reads as follows:

"It shall be unlawful to sell or lease until there has been disclosed in writing to the purchaser or lessee of a lot or parcel in the subdivided land, the following:

* * *

D. If water is available only from subterranean sources the average depth of such water within the subdivision."

You have asked how the subdivider might indicate the average depth of water. The answer to your question depends on what would be a recognized method of estimating the average depth of water in a particular tract. We are of the opinion that the drilling of a well might not be sufficient to indicate the average depth for the entire tract and the evident purpose of the statutory requirement is to inform the prospective purchaser of the probable depth of water below his particular lot. We feel that the opinion of a qualified expert such as a qualified ground water hydrologist would be more appropriate than the estimate of the subdivider based on the actual drilling of a well. No more can be expected than that which would suffice as an opinion in our courts. We therefore conclude that the opinion of a qualified expert on the average depth of subterranean water is sufficient to comply with the mandate of the Act.

The answer to your sixth question also turns on the wording of the portions of Section 70--3-4D quoted above. The statute says that, if there is no other source, the average depth of subterranean water shall be disclosed. The wording is mandatory. A statement that the subdivider does not know the average depth is not a compliance with the mandate. It is incumbent on him to disclose the average depth of subterranean water. Only in this manner can the purpose of the Act be fulfilled.

Turning to your seventh question we face a consideration of the enforcement provisions of the Act. Pertinent to our inquiry is Section 8 which reads as follows:

"Whenever the attorney general of the state of New Mexico or any district attorney of a judicial district of the state of New Mexico, after a complaint has been filed by any individual alleging injury hereunder, or upon his own initiative, after investigation made, believes any officer, agent or employee of any firm or corporation or other person is

knowingly violating or authorizing violation of any part of this act, he shall bring an action to enjoin the violation in any district court **regardless of whether criminal charges are filed."** (Emphasis added).

The emphasized portion of the section just quoted obviously is subject to the interpretation that the filing of criminal charges is discretionary with the enforcing authority. Enjoining the violation, on the other hand, appears to be mandatory. We are of the opinion that this statute leaves the filing of charges to the discretion of the district attorney if he is otherwise permitted to exercise discretion.

The courts in several other states have faced the question although our own court has not. The general rule appears to permit the exercise of discretion by the district attorney so long as he acts in good faith, and not arbitrarily, after a careful and accurate investigation. See **State ex rel., McKittrick v. Wallach,** 182 S. W. 2d 313, 155 A.L.R., 1 (Mo. 1944). In Watts v. Gerking, 111 Or. 654, 228 Pac. 135, it was urged that a failure to prosecute would subject the district attorney to criminal charges. The court answered by saying that the district attorney is a quasi-judicial officer and as such possesses a certain discretion as to when, how and against whom to proceed. In New Mexico the district attorney is also recognized as a quasi-judicial officer. **Ward v. Romero,** 17 N.M. 88, 125 Pac. 617. As such we feel that he must have a certain amount of discretion about filing criminal charges. On the other hand we do not think he can overlook clear-cut violations. In fact his discretion is probably more stringently limited. For cases involving this abuse of discretion see the annotation at 155 A.L.R. 10. We are of the opinion that so long as the district attorney acts in good faith and not arbitrarily, he may refuse to bring criminal charges for violation of the Land Subdivision Act.

Your last question seeks a definition of "legal access" as that term is used in Section 3 of the Act. Section 3 of the Act prohibits the sale of subdivided land until "legal access" from each lot to an existing public way has been dedicated and accepted by the county commission. We turn to the Fourth Edition of Black's Law Dictionary and quote therefrom:

"In real property law, the term 'access' denotes the right vested in the owner of land which adjoins a road or other highway to go and return from his own land to the highway without obstruction.

* * *

The right of 'access' as applied to a private wharf on public lands merely means that there may not be built an obstruction separating the lands from the navigable highway."

These definitions have been approved in **Stoner Mfg. Corp., v. Young Mens Christian Ass'n of Aurora,** 13 Ill. 2d 162, 148 N.E. 2d 441; **City of Oakland v. Hogan,** 41 Cal. App. 2d 333, 106 P.2d 987; and **City of Fort Worth v. Southwest Magazine,** 358 S.W. 2d 139 (Tex. Civ. App.). We are of the opinion that the definitions are applicable to Section 3 of the Act.

As applied to Section 3 we think the definitions require that the owner or prospective owner of each lot should have the unrestricted opportunity to go and return, by automobile, from his lot to an existing public way. We also are of the opinion that the statutory section contemplates that the road be shown on the plat of the subdivision and shall become a dedicated road when the plat is approved by the county commission. Since Section 3 provides that it shall be unlawful to sell any lot until the road is dedicated we are of the opinion that this requirement may not be waived by the county commission.