

## Opinion No. 73-68

October 16, 1973

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** The Honorable Raymond G. Sanchez Representative, State of New Mexico 7622  
Rio Grande Blvd., N.W. Albuquerque, New Mexico 87101

### QUESTIONS

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What is the effect of Ch. 348, Laws of New Mexico, 1973 (New Mexico Subdivision Act), on municipal extraterritorial planning, platting, zoning and subdivision regulation?

#### CONCLUSION

See analysis.

### OPINION

#### {\*134} ANALYSIS

The sections of the Municipal Code concerning the municipal functions with which you are concerned indicates that planning, platting, zoning and subdivision regulation are separate and distinct concepts. It is essential that this be kept in mind in determining what effect, if any, the Subdivision Act has upon these functions. A brief review of the section of the Municipal Code to which we have referred will point up the distinctions among the concepts.

Section 14-18-1, N.M.S.A., 1953, recognizes the concept of planning and states that "A municipality is a planning authority." In Section 14-18-5 municipalities are given certain "planning and platting jurisdiction," seemingly indicating that planning and platting are separate functions. Section 14-18-6 further recognizes distinctions between subdivision regulation, planning, and platting by stating that a "planning authority of a municipality shall adopt regulations governing the subdivision of land within the planning and platting jurisdiction of the municipality." Finally, in 14-70-1, N.M.S.A. 1953, it is provided that a "municipality is a zoning authority."

The distinctions apparent in the Municipal Code were refined in **City of Carlsbad v. Caviness**, 66 N.M. 230, 346 P.2d 310 (1959). The issue in **Caviness** was whether the law conferring planning and platting authority upon municipalities, (then 14-2-1 through 14-2-34, N.M.S.A. 1953, containing provisions similar to the present 14-8-1, 5 and 6, **supra**), was intended by the legislature to include zoning powers. The court made the distinction between planning and platting at 66 N.M. 233:

"These same sections of the statutes which grant planning jurisdiction also include provisions for 'platting' authority, a 'plat' being a map or representation on paper of a piece of land subdivided into lots, with streets alleys, etc., usually drawn to scale." Black, **Law Dictionary** (4th Ed. 1940)

The opinion also recognized a statement from **Kiska v. Skrensky**, 145 Conn. 28, 139 A.2d 1523 (1958) to the effect that "While there is a definite and harmonious relationship between 'planning' and 'zoning', the two are distinguishable." The court went on to generally define the two concepts, taking a definition from **State ex rel. Kearns v. Ohio Power Co.**, 163 Ohio St. 451, 127 N.E.2d 394 (1955):

"'Zoning' and 'planning' are not synonymous; zoning is concerned chiefly with use and regulation of buildings and structures, whereas planning is of broader scope and significance and embraces the systematic and orderly development of a community with particular regard for streets, parks, industrial and commercial undertakings, civic beauty and other kindred matters properly included within police powers." 66 N.M. at 234.

It is equally important to note that the court in **Caviness** referred to what is now 14-18-6, **supra**, (formerly 14-2-25, N.M.S.A. 1953) which, as previously mentioned, confers subdivision regulation authority upon municipalities. In its reference to that section, the court said at 66 N.M. 233 "the legislature entitled that Section 'Subdivision Regulations' and the question of subdivision is not involved in this case." In summary, the court in the **Caviness** case separately defined planning, platting and zoning and recognized that subdivision regulation is not to be equated with any of those concepts.

The above review of the nature of the concepts of planning, platting, zoning and subdivision regulation should serve to ease the task of analyzing the precise nature and limits of the authority conferred by the New Mexico Subdivision Act and determining its effect, if any, upon municipal powers.

The authority granted to counties by the Act concerns only subdivision regulation and platting. Section 9A provides that "The board of county commissioners of each county shall **regulate subdivisions** within the county's boundaries" (emphasis added). That section makes further provision for the adoption of regulations setting forth the county's requirements for water availability, water quality, liquid and solid waste disposal, sufficient and adequate roads, terrain management, disclosure requirements, fees and other matters "relating to subdivisions." Under the authority granted in the Act, these regulations come into play only when the board of county commissioners is determining whether to approve a subdivision plat {<sup>\*</sup>135} proposed by a subdivider. For example, § 11B of the Act states:

"Prior to approving the plat (the plat proposed by the subdivider) for a type-one or a type-two subdivision, the board of county commissioners of the county in which the subdivision is located shall:

\* \* \*

(2) determine whether or not the subdivision will conform with the county regulations."

Sections 12A and 13A contain similar requirements for approval of types three, four, and five subdivisions respectively.

To summarize, the Act contemplates so far as your question is concerned, that counties have only the authority: 1) to develop regulations governing information and services to be provided by the subdivider to purchasers, and 2) to pass upon the adequacy of the subdivider's provisions for these services by refusing to approve his proposed plat. By granting the power to approve a proposed plat (which as previously noted is merely a map of subdivided land), the Act also allows counties to exercise platting authority. Prior to passage of the Act, counties possessed these same kinds of powers, although they were more limited. Section 14-19-5, **supra**, gave counties jurisdiction over all territory not within the boundary of a municipality "for the purposes of approving the subdivision and platting of land." However, that provision did not give the county authority to issue regulations, and a county's authority to deny approval of subdivision plats was limited to the factors set forth in § 14-19-6, N.M.S.A. 1953; to-wit: conformity of streets, definition of streets by permanent monuments, and definition of boundaries of the subdivision by permanent monuments. Thus, the authority conferred upon counties by the Act merely involves more extensive subdivision regulation than previously provided.

The most significant possible conflict presented by the Act involves municipal extraterritorial subdivision regulation and platting powers conferred by § 14-19-5, **supra**. This jurisdiction extends from three to five miles from the boundaries of most municipalities depending upon size (14-19-5[1] and [2], N.M.S.A. 1953). These three to five mile areas are within the subdivision and platting authority of both the municipality and the county. As to these areas, § 14-19-5C, N.M.S.A. 1953 gives the municipality and county "concurrent jurisdiction." Dual approval of a subdivision plat within the area is required by § 14-19-8, N.M.S.A. 1953.

Section 41 of the Act provides that nothing shall be construed as limiting the municipal extraterritorial subdivision and platting jurisdiction provided for in § 14-19-5, **supra**. The effect of Section 41 is that a plat of a proposed subdivision in an area within a municipality's extraterritorial subdivision and platting jurisdiction must be approved by both the appropriate municipal authority and the appropriate county authority; this is precisely the situation which existed prior to the passage of the Act. Finally, it should also be mentioned that Section 21(3) of the Act excludes from coverage subdivisions within the boundaries of a municipality or which are annexed by a municipality at the time of approval by the municipality. It is clear, therefore, that the planning, platting, zoning, and subdivision regulation authority of a municipality over lands within municipal boundaries are in no way affected by the operative provisions of the Act.

The scheme of land use control contemplated by the Act does not involve zoning as defined in the **Caviness** case, **supra**, and as contemplated by our statutes. Zoning, as generally defined in **Caviness**, is primarily concerned with the use and regulation of buildings and structures. More specifically, our zoning statutes allow municipalities to

prescribe the present and future use of land for industrial, commercial, residential and other uses; provision is also made for regulation of height and size of buildings, amount of open space, and density of population (14-20-1, N.M.S.A. 1953). Examination of the Subdivision Act reveals that no such powers are conferred upon counties.

Our statutes presently provide for county zoning authority and the Act leaves the present statutory framework untouched. County zoning authority is found in § 14-20-1, N.M.S.A. 1953, which provides that "a county or municipality is a zoning authority." However, 14-20-2, N.M.S.A. 1953 limits a county's zoning authority to areas within the county "not {\*136} within the subdividing and platting jurisdiction of a municipality." This section precludes counties, acting alone, from zoning in the area within a municipality's extraterritorial subdividing and platting jurisdiction conferred by 14-19-5, **supra**.

The procedure for zoning within a municipality's extraterritorial platting and subdividing jurisdiction is set forth in 14-20-2.1, N.M.S.A., 1953. This section provides that any zoning ordinance adopted by a municipality which is "applicable to any portion of the territory within the subdividing and platting jurisdiction of the municipality but which is situated outside the corporate boundaries of such municipality" shall not become effective until submitted to and approved by a special extraterritorial zoning commission. It is also provided that the commission shall consist of appointees of both the municipal zoning authority and board of county commissioners. Therefore, zoning of lands within a municipality's extraterritorial subdividing and platting jurisdiction can only be carried out through the cooperative efforts of municipal and county representatives.

Similarly, the Act contains no provision conferring planning authority upon counties. County planning authority is contained in § 15-58-1, **et seq.**, N.M.S.A. 1953. Section 15-38-3, N.M.S.A., 1953 limits county planning jurisdiction to the area outside the area in which a county or a municipality have concurrent jurisdiction for other land use purposes. The definition of planning in the **Caviness** case, **supra**, characterizes that concept as embracing the "systematic and orderly development of a community." New Mexico's planning statutes corroborate this characterization by requiring planning commissions to prepare and adopt "a master plan" with the "general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality" (14-18-9A, N.M.S.A. 1953). In contrast to this provision, the Subdivision Act authorizes only the promulgation of regulations, the requirements of which must be met by one who proposes to subdivide land. No authorization is given to counties to implement "a master plan" which is a primary function of planning commissions under our planning statutes. Therefore, the Act has no effect upon municipal extraterritorial planning jurisdiction conferred by § 14-18-5, N.M.S.A. 1953, and the present statutory authority concerning planning is left intact.

In conclusion, although the Subdivision Act confers much broader powers to counties in regard to subdivision regulation and correspondingly provides for platting authority, it specifically provides for non-interference with similar municipal powers within a municipality's extraterritorial subdivision regulation and platting jurisdiction. With reference to zoning and planning, the Act confers no authority on counties. Accordingly,

it is the conclusion of this office that the Subdivision Act has no effect upon presently existing municipal planning, platting, zoning and subdivision regulation.

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