

Opinion No. 76-09

March 19, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Ted A. Hopkins, Assistant Attorney General

TO: Morris Stagner, Chief Assistant District Attorney, Chaves County Courthouse, Roswell, New Mexico 88201

QUESTIONS

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1. An owner of a tract of land within the extraterritorial jurisdiction of Roswell proposes to construct a trailer park with spaces to lease or rent. Does this fall under Roswell municipal, or Chaves County subdivision regulations, or any other regulations?

2. With regard to the construction of condominium units on a tract of land within the extraterritorial jurisdiction of Roswell and assuming each unit is being sold to a separate owner pursuant to declaration under the Building Unit Ownership Act, Sections 70-4-1 to 70-4-27, N.M.S.A. 1953 Comp. (1975 Supp.):

(A) does this fall under Roswell municipal, or Chaves County subdivision regulations, or any other regulations; and

(B) does a mobile home condominium, modular unit condominium, or townhouse units made by stacking modular units, change the interpretation in any way?

CONCLUSIONS

1. See analysis.

2. (A) See analysis.

(B) No.

OPINION

{*58} ANALYSIS

QUESTIONS 1

The question of the applicability of county subdivision regulations to the construction and lease or rental of trailer spaces has been considered in Attorney General Opinions Nos. 70-84 and 74-37. Opinion 74-37 concluded that such {*59} construction, when

located outside the boundary of a municipality but within the municipality's extraterritorial jurisdiction, would qualify as a subdivision as defined in the New Mexico Subdivision Act, § 70-5-2(l), N.M.S.A. 1953 (1975 Supp.), and is therefore subject to county regulations promulgated thereunder. We hereby reaffirm that conclusion.

On the question of municipal regulation, Opinions 70-84 and 74-37 concluded that the division of land for lease or rental would not qualify as a subdivision. We believe that this conclusion is incorrect and therefore overrule those portions of Opinions 70-84 and 74-37 which are inconsistent with this opinion. Copies of Attorney General Opinions 70-84 and 74-37 are attached for your information.

Section 14-19-1, N.M.S.A. 1953 (1975 Special Supp.), states:

"Subdivide' or 'subdivision' for the purpose of approval by a municipal planning authority means the division of land into two [2] or more parts by platting or by metes and bounds description into tracts of less than five [5] acres in any one [1] calendar year for the purpose of:

- (1) Sale for building purposes;
- (2) Laying out a municipality or any part thereof;
- (3) Adding to a municipality;
- (4) Laying out suburban lots; or
- (5) Resubdivision."

Opinions 70-84 and 74-37 were based on the theory that § 14-19-1, **supra**, specifically included division for the purpose of sale but did not mention division for the purpose of lease or rental, and therefore, such a purpose would be beyond the scope of the regulations. However, subsections (2), (3) and (4), § 14-19-1, **supra**, indicate a broader scope for municipal subdivision regulation. These subsections indicate that the purpose of Article 19 of the Municipal Code (being Chapter 14, N.M.S.A. 1953 (1975 Special Supp.)) is to provide municipalities with the means to exert some control over the development of lands contiguous with, but outside, the municipal boundaries. As stated in § 14-18-6 of the Municipal Code, **supra**, regulations governing the subdivision of land within the planning and platting jurisdiction of a municipality may provide for the harmonious development of the municipality and its environs and the coordination of the subdivision with the master plan of the municipality. "The [master] plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality. . . ." Therefore, the purpose of § 14-19-1, **supra**, is not simply to regulate the division of land which is to be sold as opposed to leased or rented, but to regulate the division of land as it affects municipal development.

The definition of subdivision as stated in § 14-19-1(4), **supra**, encompasses the kind of development proposed. A suburb is the outlying part of a city which is used for business or residential purposes or both, **Villalobos v. Holguin**, 208 S.W.2d 871 (Tex. Sup. Ct. 1948); the term "lots" in its ordinary meaning includes that portion of land measured and set apart for individual private use and occupancy, **State of California v. United States**, 169 F.2d 914 (9th Cir., 1948); and the term "lot", as applied {60} to real estate is an allotted or set-off portion of land, whether great or small, **Pilz v. Killingsworth**, 20 Ore. 432, 26 P. 305 (1891). It is not material to these definitions that the land is leased rather than sold, and therefore, the same application of municipal subdivision regulations would result in either event. Consequently, if the division of land under discussion results in two or more portions of land delimited by platting or by metes and bounds description into tracts of less than five acres in any one calendar year, it is subject to municipal regulation as a subdivision.

Section 14-19-5 of the Municipal Code, **supra**, states that:

"A. For the purpose of approving the subdivision and platting of land:

(1) the jurisdiction of a county includes all territory not within the boundary of a municipality;

(2) the jurisdiction of a municipality having a population of twenty-five thousand [25,000] or more persons according to the most recent census includes all territory within five [5] miles of the boundary of the municipality and not within the boundary of another municipality.

...

C. The county and municipality shall exercise concurrent jurisdiction over territory within the platting jurisdiction of both the county and the municipality."

Since your question is concerned with land that is beyond the municipal boundaries but within the extraterritorial jurisdiction of Roswell, subsection (C) above provides that both Roswell municipal and Chaves County subdivision regulations apply concurrently.

Although your request for opinion does not indicate whether the land in question is in an area designated as "flood prone", it should be noted that § 14-17-5.1 of the Municipal Code, **supra**, states that a county or municipality may by ordinance review subdivision proposals and other new developments within a designated flood or mudslide hazard area for certain designated purposes. Section 14-17-5.1(C), **supra**, provides that:

"A county or municipality shall have exclusive jurisdiction over permits issued under its respective ordinance and inaccordance with this section, and so long as it is enforced by an approved inspector pursuant to the Construction Industries Licensing Act (67-35-1 to 67-35-63). Notwithstanding Section 14-17-5, NMSA 1953, when a municipality adopts an ordinance pursuant to paragraph (2) subsection A of this section, the municipality's

jurisdiction under this ordinance **shall take precedence** over a respective county ordinance within the municipality's boundary and **within the municipality's subdividing and platting jurisdiction.**" (Emphasis added.)

Paragraph (2) of § 14-17-5.1(A), **supra**, concerns standards for constructing, altering, installing or repairing buildings and other improvements. If the land under discussion has been designated as flood prone, both Roswell municipal and Chaves County regulations shall apply concurrently, except **{*61}** as noted above. In the noted areas, municipal ordinances preempt county ordinances.

QUESTION 2

a. Municipal Regulations

The foregoing discussion concerning § 14-19-1(4) is equally applicable to your second question, since the rationale for municipal regulation of trailer parks logically extends to condominiums as well. Notwithstanding the fact that the rationale is the same, there are significant differences between condominiums and trailer parks. The relevant distinctions are that the land on which condominiums are built may be held by the condominium unit owners as undivided interests in common, and that the condominium units may all be located within a single structure.

In regard to the first distinction, the Building Unit Ownership Act, **supra**, provides in § 70-4-5 that "each unit owner shall be entitled to sole ownership and possession of his unit." "Unit" is defined as "a part of the property intended for residential, professional, commercial, industrial or any type of independent use. . . .", § 70-4-2 (A), **supra**. Insofar as federal subdivision regulations are concerned, a recent decision held that such an undivided interest in land, when coupled with the right to exclusive use of a specific plot of land, was included in the definition of "lot". **Assn. of Outdoor Recreation Clubs, Inc. v. Secretary, Housing and Urban Development**, Civil No. C75-198T (W.D. Wash., filed December 10, 1975). Therefore, the common, undivided ownership distinction is not controlling.

In those instances in which the condominium units are located in a single structure, the question turns on whether the land has been divided. In our opinion, if two or more units incorporate a portion of land reserved to the sole ownership and possession of the individual owners of those units, land has been divided for the purpose of laying out suburban lots. In that event, the final condition which must be met before municipal subdivision regulations become applicable, is that the parcels of land must be described and the division must be delimited by platting or metes and bounds description, § 14 - 19 - 1, **supra**. Therefore, if the declaration described in § 70-4-11, **supra**, or the deeds of units described in § 70-4-12, **supra**, or the floor plans described in § 70-4-13, **supra**, which are to be recorded pursuant to § 70-4-15, **supra**, contain a description of two or more parcels of land by platting or metes and bounds description, Roswell's municipal subdivision regulations will apply.

b. County Regulations

The purpose of the county subdivision regulations is to provide for the harmonious development of unincorporated areas, for the coordination of rights-of-way, for adequate space for traffic, recreation, light and air, and for a distribution of population density. See Article II, Chaves County Land Subdivision Regulations (filed September 11, 1973). An additional purpose of county subdivision regulation, that of protecting the purchaser of subdivided lands, may be inferred from § 70-5-17 of the New Mexico Subdivision Act, §§ 70-5-1 through 70-5-29, N.M.S.A. 1953 (1975 Supp.). This section requires the disclosure, in writing, of certain information, to permit the prospective purchaser or lessee to make an informed decision about the purchase {^{*}62} or lease of land. The rationale for the application of county subdivision regulations is therefore not that same as that for municipal regulation. Further, § 70-5-2 (l), **supra**, specifically exempts from the definition of subdivision the sale or lease of apartments, offices, stores or similar space **within a building** (emphasis added). Therefore, if the condominium units are part of a structure or building, the manner of construction, whether of mobile homes, modular units, or townhouse modular is immaterial; the county subdivision regulations will not apply. However, where five or more condominium units incorporate a portion of land reserved for the sole ownership and possession of the unit owner pursuant to § 70-4-5, **supra**, the exception granted for apartments does not apply, and the Chaves County Subdivision Regulations would apply.