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COUNTY REGULATION OF LAND USE AND DEVELOPMENT

In New Mexico, a county is "a body corporate and politic."[1] It should not be equated with a municipal corporation, being in the strictest sense distinguishable from such a corporation, but rather is more correctly termed a quasi-municipal corporation.[2] It has only such powers as are expressly or impliedly given to it by constitutional or legislative provisions.[3] As originally adopted in 1911, the New Mexico Constitution was silent as to the powers of counties. In the ensuing years it has been amended to allow for the formation of two special types of counties constitutionally having powers at least as broad as those of municipalities.[4] However, only one specialized county has yet been authorized[4a]—and no others appear likely in the near future—so that with this one exception all counties existing for the next few years are likely to remain dependent on legislative grants for their powers.[5]

By statute, all counties are empowered:

> First. To sue and be sued.
>
> Second. To purchase and hold real and personal property for the use of the county.
>
> Third. To sell and convey any real or personal estate owned by the county and make such order respecting the same as may be deemed conducive to the interests of the inhabitants.
>
> Fourth. To make all contracts and do all other acts in reference to

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1. N.M. Stat. Ann. § 15-36-1 (1953).
2. Mountain States Tel. & Tel. Co. v. Town of Belen, 56 N.M. 415, 422-23, 244 P.2d 1112 (1952).
3. *Id.* at 420, 244 P.2d at 1115; *see also* Agua Pura Co. v. Mayor and Board of Aldermen of City of Las Vegas, 10 N.M. 6, 60 P. 208 (1900).
4. *See* N.M. Const. art. X, §§ 4 and 5.

4a. On Dec. 10, 1968, the voters of Los Alamos County voted to incorporate their county in accordance with N.M. Const. art. X, § 5. Insofar as regulation of land use and development is concerned, the effect of this is to constitutionally grant to Los Alamos County the same powers to regulate land use and development as are granted to municipalities by statute. Since the legislature had for all practical purposes already given the county these powers, see N.M. Stat. Ann. § 15-36-13 (Supp. 1967), the incorporation will not have any immediate effect on the powers of the county to control and regulate the use of land.

5. On Nov. 5, 1968, the New Mexico electorate authorized the convocation of a constitutional convention to rewrite New Mexico's outmoded constitution. It is quite possible that a new constitution would have provisions dealing with the powers of counties. However, the mechanics of preparing and adopting a new constitution are such that at least several years must pass before a new constitution can be accepted by the people of the state.

> the property and concerns necessary to the exercise of its corporate or administrative powers.
>
> Fifth. *To exercise such other additional powers as may be specially conferred by law.*[6]

This Note will be concerned with those powers specially conferred by the legislature which give counties the right to make and enforce regulations concerning land use and development. County regulation of land use and development is relatively new in New Mexico, having come into existence within the last ten years.[7] Although the use and development[8] of land may be controlled in a number of ways,[9] the most readily apparent regulatory devices that a county may use are planning authorities, zoning laws, subdivision regulations, and building codes.

The extent of county power to regulate land use and development by each of these devices will be explored in some detail. Variations in the powers of individual counties will be noted, and comparisons will be made with equivalent powers granted to municipalities and other political subdivisions and instrumentalities of the state. Finally, certain limitations and shortcomings in existing enabling legislation will be noted, and possible corrective measures suggested on occasion.

I
THE PLANNING FUNCTION

Comprehensive planning is required to ascertain (1) why land use and development should be regulated, and (2) how and to what extent such regulation should occur. Planning in New Mexico occurs at three levels: state, regional, and local. Regional planning may encompass the combined efforts of counties, municipalities, and special districts, and is directed toward control of the development of an area or region which cuts across the boundaries of political subdivisions such as municipalities and counties. Local planning is done by municipalities, counties, and special districts, and is limited in the usual case to areas within the jurisdiction of a particular political sub-

6. N.M. Stat. Ann. § 15-36-1 (1953). Emphasis added.

7. The first such regulatory powers appear to have been granted by N.M. Laws 1959, ch. 271 § 1 which allowed counties in which were located cities with a population of 25,000 or more to adopt and enforce zoning ordinances, rules, and regulations within certain limits.

8. As used here, development refers primarily to the placing of structures on the land; however, it is not meant to be restricted only to this usage.

9. Certain less direct methods involve refusal to provide utility or other services, tax adjustments, health regulations, and restrictions on financing.

division. However, there may be considerable overlap in such jurisdiction.[10] Such overlap only emphasizes the need for effective regional planning.

In 1959 a state planning office was created by the State Planning Act.[11] One of the basic purposes of this office is to "function as the governor's staff agency in planning for the long-range, comprehensive, balanced development of the state's natural, economic and human resources. . . ."[12] At the direction of the governor the planning office shall:

> Co-operate with and provide planning assistance and advice, including but not limited to surveys, land-use studies, urban renewal plans, technical services and other planning work to county, municipal and other local governments, instrumentalities or planning agencies.[13]

Furthermore, the planning office is required to make copies of its annual report and any special reports available to local planning agencies.[14] The legislature took pains to emphasize that nothing in the State Planning Act shall operate in derogation of planning powers conferred on departments or agencies of state or local government by any existing state or local law.[15]

While the state planning office in no way regulates the activities of local planners, it can have considerable influence on state enabling legislation having to do with local planning. This results from the fact that it is required to submit recommended legislation to the legislature or any of its committees in connection with studies relevant to state planning and development.[16] The state planning office has already played a significant role in the development of county authority to regulate land use and development. In 1960 it caused to be prepared a study[17] which included a detailed review of existing

10. In New Mexico municipalities have certain extraterritorial jurisdiction insofar as both zoning and subdivision regulation are concerned. Depending on the population of the municipality, this jurisdiction extends three or five miles outside the municipal boundary. Since counties have a certain amount of concurrent jurisdiction in these areas, it is logical that both municipality and county take into consideration the areas where overlapping jurisdiction occurs. For a more detailed examination of extraterritorial zoning and subdivision control by municipalities, see the text accompanying footnotes 72-84 and 102 *infra*.

11. N.M. Laws 1959, ch. 255.

12. N.M. Stat. Ann. § 4-20-2 (Repl. 1966).

13. N.M. Stat. Ann. § 4-20-3(B) (Repl. 1966).

14. N.M. Stat. Ann. § 4-20-7(D) (Repl. 1966).

15. N.M. Stat. Ann. § 4-20-2 (Repl. 1966).

16. N.M. Stat. Ann. § 4-20-3 (Repl. 1966).

17. For a discussion of this study, see Doebele, *Improved State Enabling Legislation for the Nineteen-sixties: New Proposals for the State of New Mexico*, 2 Natural Resources J. 321 (1962).

New Mexico enabling legislation pertaining to control of land use and development and which also suggested a number of new enabling acts in this area. These proposed acts, when taken together with existing legislation, "were intended to constitute the basic working material for a comprehensive updating of the state's legislation."[18] The proposed acts included:

(1) Enabling legislation for regional planning;
(2) Enabling legislation for county planning commissions;
(3) An act defining the content and preparation of the master plan;
(4) An act clarifying county and municipal subdivision control powers;
(5) A subdivision prospectus act;
(6) Enabling legislation for extraterritorial zoning;
(7) Enabling legislation for the preservation of historical areas through zoning or through acquisition of property interests;
(8) An act clarifying the right of neighboring property owners to enforce zoning regulations;
(9) An act to permit counties to zone less than their entire area;
(10) Enabling legislation permitting "official maps" for the purpose of reserving land designated for subsequent public acquisition;
(11) Enabling legislation for boards of adjustment;
(12) Enabling legislation relating to non-conforming uses of land, structures, and signs;
(13) An act relating to the disclosure of real estate holdings by public officials;
(14) Enabling legislation for county building codes;
(15) An act relating to public utility easements;
(16) Enabling legislation to permit acquisition of public conservation and other easements.[19]

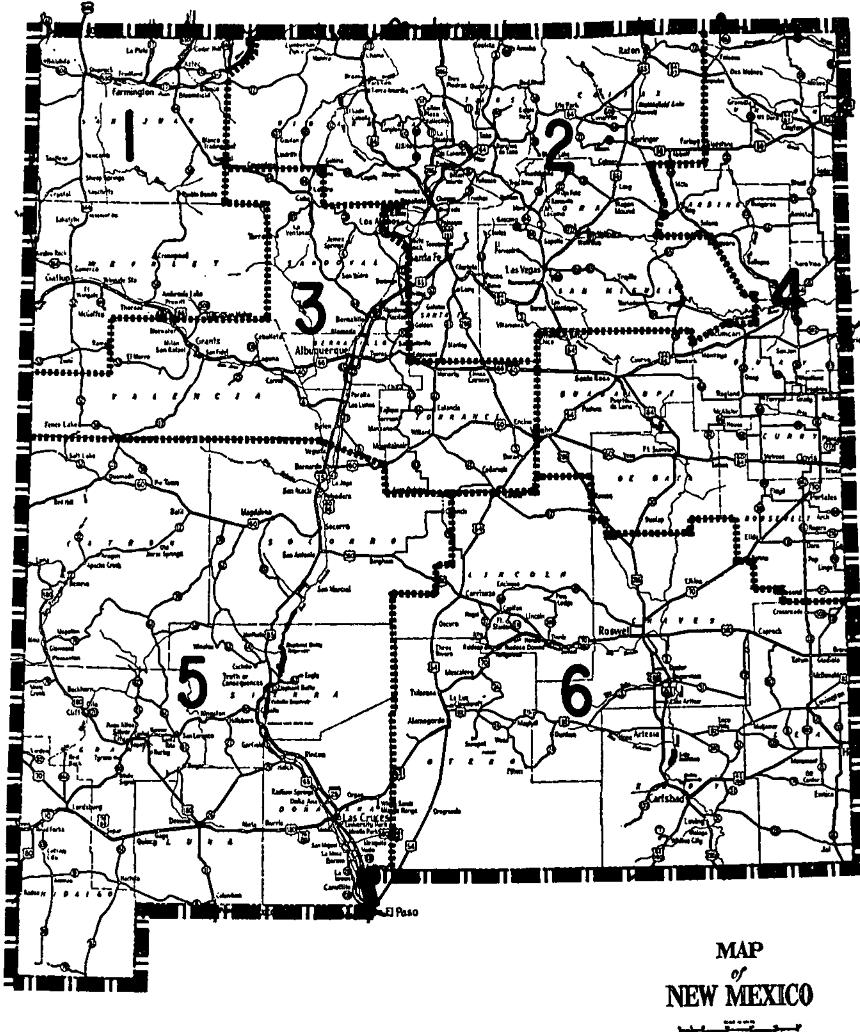
Much of this proposed legislation directly affected the powers of counties to regulate land use and development, and all of it had the potential to affect it. Since 1960 a number of these proposals have been enacted into law in one fashion or another.[20] However, as will be shown later in this Note, insofar as counties are concerned it is doubtful that much of this later enabling legislation actually accomplished the purposes suggested in the planning office study.

During 1967, the planning office initiated a plan that may well have

18. *Id.* at 323.
19. *Id.* at 323-4.
20. *See, e.g.,* N.M. Stat. Ann. §§ 14-57-1 through -9 (regional planning); §§ 15-58-1 through -3 (county planning commission); §§ 14-19-1 through -14.1 (county and municipal subdivision control); §§ 14-20-1 through -12 (extraterritorial zoning); §§ 14-21-1 through -5 (preservation of historical areas); and §§ 14-20-13 through -24 (special zoning districts encompassing less than entire county) (Repl. 1968).

important long-term implications for local and regional regulation of land use and development. Under this plan the state has been divided into six districts for planning, development, and state administrative purposes. These districts are shown in Figure 1. The districts are designed to provide: 1) the organizational basis for regional planning; 2) the organizational basis for economic development districts; 3) the area basis for channeling all federal aid programs, other than those on a municipal or county basis; and 4) the planning

FIGURE 1. STATE PLANNING DISTRICTS.



and administrative basis for state agency programs that are not administered statewide.[20a] In at least one instance, this districting plan has already caused a regional planning group to expand its efforts to include all of a state planning district.[20b] It is reasonable to expect that future county regulation of land use and development in New Mexico will be increasingly oriented around plans and programs set forth by these state planning districts.

Counties and municipalities within a particular region may by agreement of their governing bodies create a regional planning commission if:

> (a) the municipality having the greatest population within the regional planning area is a party to the agreement; and (b) the number of counties and municipalities party to the agreement equals all of the total number of counties and municipalities within the region.[21]

Requirement (b) seems to imply that all counties and municipalities within the regional planning area must agree to the formation of a regional planning commission. However, if it is so interpreted it makes requirement (a) superfluous, since clearly the largest municipality in the area would be included under (b). Such an interpretation also appears inconsistent with the fact that additional counties and municipalities within the regional planning area may become parties to the agreement at the invitation of the regional planning commission.[22] Indeed, requirement (b) if so interpreted appears contrary to the overall intent of the Regional Planning Act.[23] Nonetheless, it is difficult to explain it in any other fashion than as requiring agreement by all counties and municipalities within the region for the formation of a regional planning commission.

Such a commission shall prepare plans for the development of the region based on studies of physical, social, economic, and governmental conditions and trends. The plans shall be for the purpose of coordinating development of the region so as to promote the general

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20a. State Planning Office, Discussion Draft of Preliminary Recommendations for Dividing the State of New Mexico into Districts for Planning, Development and State Administrative Purposes (1967). Although a final draft of this report was scheduled to be published early in 1969, as of April 1, 1969, it had not yet been released by the planning office.

20b. See text between footnotes 30 and 30a *infra.*

21. N.M. Stat. Ann. § 14-57-2(A) (Repl. 1968).

22. N.M. Stat. Ann. § 14-57-2(B) (Repl. 1968). Section 14-57-2(B) may possibly have been designed, however, to allow for participation in the regional planning commission of counties and municipalities created after the formation of the regional planning commission.

23. *See generally* N.M. Stat. Ann. §§ 14-57-1 through -9 (Repl. 1968).

health, welfare, convenience, and prosperity of its people.[24] Any municipality or county may delegate any or all of its planning powers and functions to the commission.[25] All comprehensive regional plans must be approved by the commission after public hearings. Such plans shall be implemented by the parties to the agreement.[26]

A regional planning agreement places certain limitations on the powers of local governments and special districts to control land use and development. At the minimum, any such agreement requires that they file with and allow the regional planning commission to comment on any local

> current and proposed plans, zoning ordinances, official maps, building codes, subdivision regulations and project plans for capital facilities and amendments and revisions of any of them as well as copies of their regular and special reports dealing with planning matters.[27]

Alternatively, the regional planning agreement may require that as a condition precedent to the adoption of any proposed local plans, zoning, subdivision, and platting ordinances, regulations, and capital facilities projects, the regional planning commission determine that they are in conformance with the relevant regional plan. However,

> [t]he sole power to adopt proposed plans, ordinances, regulations or projects remains with the local governing body or special district proposing them.[28]

Counties seeking to enter into regional planning agreements thus seem to have several options open to them. The most conservative is to enter into such an agreement while (1) delegating none of their planning powers or functions to the regional planning commission, and (2) making certain that local regulation of land use and development is not contingent on approval of the regional commission. Under this approach, the county is required to file proposed and current land use regulations with the commission, but is not in any way bound by the comments of the commission concerning them. At the same time, the county would still be able to cooperate with and obtain planning assistance from the commission.[29]

A second option is to delegate some or all of the county planning

24. N.M. Stat. Ann. § 14-57-5 (Repl. 1968).
25. N.M. Stat. Ann. § 14-57-2(A) (Repl. 1968).
26. N.M. Stat. Ann. § 14-57-6 (Repl. 1968).
27. N.M. Stat. Ann. § 14-57-8 (Repl. 1968).
28. *Id.*
29. N.M. Stat. Ann. § 14-57-5(E) (Repl. 1968).

powers to the regional planning commission. Using this approach, the regional plan becomes that of the county and all regulations pertaining to land use and development are as a matter of course made in conformance with the regional plan. A third and somewhat similar option is for the county to enter into a regional planning agreement which requires the approval of the regional planning commission before new land use regulations can be issued. This approach varies from the second option in that it gives the county somewhat more freedom in developing its own planning concept, while yet allowing the regional planning commission a veto power. This veto power is useful in that it is a means of keeping the county in general conformity with the regional plan without requiring it to adopt it absolutely.

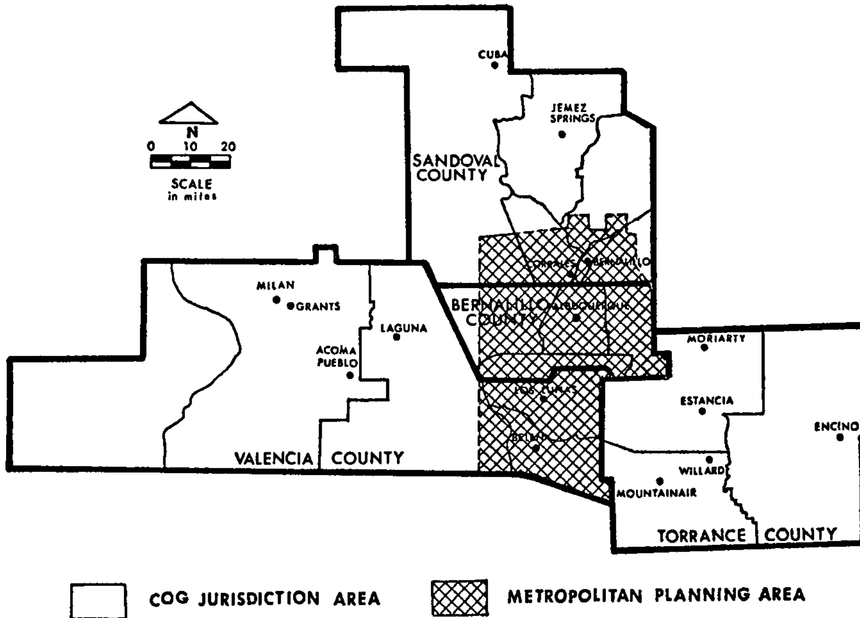
It seems clear that the alternative approaches permitted the parties to a regional planning agreement by the Regional Planning Act are not conducive to rigid adherence to a regional plan by local governments and special districts. The first option mentioned above is almost totally permissive and dependent on the voluntary cooperation of the parties to the agreement. The second and third options, while seeming to require the local government to abide by the wishes of the regional planning commission, provide no penalties or sanctions for failure to do so. Perhaps in the long run it is the self-interest of counties, municipalities, and special districts that will ultimately lead to the success of regional planning. But the concept is as yet too new in New Mexico for its advantages and shortcomings to have been fully explored.[30]

Regional planning has been started in at least one instance, however. The Middle Rio Grande Council of Governments of New Mexico (COG) was established under the Regional Planning Act on June 29, 1967. Its original membership consisted of the city of Albuquerque and Bernalillo County, with the later addition of the Albuquerque Public Schools. Although the initial concern of COG was a metropolitan area spreading across the urbanizing portions of three counties, its jurisdiction has since been extended to include all of the four counties in state planning district 3 (see Figures 1 and 2). Figure 2 also indicates the metropolitan planning area which was the original planning region for COG.

During the latter part of 1968 COG was in the midst of a five-month, $89,000 program covering five major activities: 1) review of applications for federal loans and grants for the planning and construction of various projects in the region under the Demonstration

30. The Regional Planning Act was enacted by Laws 1967, ch. 239.

FIGURE 2. MIDDLE RIO GRANDE COUNCIL OF GOVERNMENTS OF NEW MEXICO (COG) REGIONAL PLANNING AREA.



Cities and Metropolitan Development Act of 1966;[30a] 2) an economic base study for Sandoval, Torrance, and Valencia counties; 3) a metropolitan soil survey interpretation in cooperation with the U.S. Soil Conservation Service;[30b] 4) a metropolitan monuments survey within the cross hatched area shown on Figure 2; and 5) development of a work program for 1969.[30c] If its present emphasis continues, there is little doubt that the work being done by COG will have a direct and powerful influence on county regulation of land use and development in state planning district 3.

Local planning is characterized by the dichotomy that exists between the planning powers of counties and municipalities. Although any county or municipality is a planning authority,[31] the differences in what a county planning authority and a municipal planning authority can do—at least insofar as most New Mexico counties are

30a. 80 Stat. 1255 (Codified in scattered sections of 11, 12, 15, 16, 40, 42 U.S.C.).

30b. This survey will have a direct application to the regulation of land use by the counties, in that it can be used to determine to a considerable extent the best use for large areas of the counties involved.

30c. Letter, dated Dec. 13, 1968, to the author from Mr. Stephen George, Jr., executive director of COG.

31. N.M. Stat. Ann. §§ 14-18-1 and 15-58-1 (Repl. 1968).

concerned—appear to be more marked than the similarities. According to the Municipal Code, any county or municipality may by ordinance establish a planning commission.[32] There is considerable doubt, however, whether certain counties do in fact have the power to establish planning commissions by ordinance. The problem is that their ordinance-making powers have been specifically limited by the legislature and do not include the power to establish planning commissions.[33] This and similar problems caused by conflicting legislative enactments regarding the powers of counties will be discussed in more detail later in this Note.[34]

A municipal planning commission may be delegated

> (1) The power, authority, jurisdiction and duty to enforce and carry out the provisions of law relating to planning, platting and zoning; and (2) other power, authority, jurisdiction and duty incidental and necessary to carry out the purpose of [those] sections [dealing with municipal planning and platting].[35]

However, there is no statutory provision which expressly provides that a county planning commission can be delegated such power.[36]

Both county and municipal planning commissions are to plan for the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the county or municipality which will, in accordance with existing and future needs, best promote health, safety, morals, order, convenience, prosperity, or the general welfare of the county or municipality.[37] A municipal planning commission is required to

> prepare and adopt a master plan for the physical development of the municipality and the area within the planning and platting jurisdiction of the municipality which in the planning commission's judgment bears a relationship to the planning of the municipality.[38]

No such requirement exists with respect to county planning commissions.

32. *Id.*
33. *See* N.M. Stat. Ann. § 15-36-35 (Repl. 1968).
34. See text accompanying footnotes 91-100 *infra.*
35. N.M. Stat. Ann. § 14-18-1(B) (Repl. 1968).
36. N.M. Stat. Ann. §§ 15-58-1 through -3 (Repl. 1968) dealing with county planning commissions are silent concerning such delegation. Since counties have only such powers as are expressely granted or can be implied, it must be concluded that if counties can delegate such powers to their planning commissions, it is only by means of an implied grant. This is another example of the differing treatment of counties and municipalities by the legislature.
37. N.M. Stat. Ann. §§ 14-18-9 and 15-58-2 (Repl. 1968).
38. N.M. Stat. Ann. § 14-18-9 (Repl. 1968).

Once a municipal master plan has been approved and adopted, the approval of the planning commission is necessary to construct, authorize, accept, widen, narrow, remove, extend, relocate, vacate, abandon, acquire, or change the use of any: (1) park, street or other public way, ground, place or space; (2) public building or structure; (3) utility, whether publicly or privately owned, within the area covered by the master plan. However, if the planning commission disapproves a proposal, a two-thirds vote of the members of the governing body of the municipality will overrule it.[39]

This gives an approved municipal master plan considerable legal effect. Suppose, for example, that the master plan provided for regulation of land use and development within so many feet of a major arroyo and that a particular land development did not comply with the master plan in this respect. The planning commission has authority to provide for such regulation in the master plan if it is clearly for the health, safety, or general welfare of the municipality. It might well be possible for the planning commission to enforce such regulation by refusing to accept streets or other public ways which would require public maintenance. Thus, indirectly, the commission, provided more than one third of the governing body agreed, could have a very real ability to enforce regulation of land use and structures as called out by the master plan.

It is doubtful that a county planning commission would have such power, however. Section 15-58-2, New Mexico Statutes Annotated (Supp. 1967), delineates the powers and duties of a county planning commission. It has such powers as are necessary and proper to carry out county planning which will best promote health, safety, morals, order, convenience, prosperity, or the general welfare as well as efficiency and economy in the process of development. It may:

> (1) make reports and recommendations for the planning and development of the county to any other individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency of the state or any other legal entity or their legal representatives, agents or assigns.
> (2) recommend to the administrative and governing officials of the county, programs for public improvements and their financing.

This specific enumeration of powers does not seem to complement the proviso that the commission has such powers as are necessary to carry out and promote county planning. Rather, it appears to be a

39. N.M. Stat. Ann. § 14-18-11 (Repl. 1968).

limitation of the commission to those powers expressly called out. Otherwise, there would have been no need to expressly enumerate certain powers since they would have been included in the general proviso.[40]

Municipalities have exclusive planning and platting jurisdiction within their boundaries,[41] and each county has exclusive planning jurisdiction within its boundaries except as to any area exclusively within the planning and platting jurisdiction of a municipality.[42] Municipalities have extraterritorial planning and platting jurisdiction: (1) including all territory within five miles of their boundaries if they have a population of 25,000 or more; and (2) including all territory within three miles of their boundaries if they have a population of less than 25,000.[43] Within these contiguous zones there is no express grant of concurrent planning jurisdiction to counties; whether the existence of such jurisdiction can be implied from the grants of power given to counties in the subdivision and zoning statutes is uncertain. Thus, although for the purpose of approving the subdivision and platting of land, the jurisdiction of a county includes all territory not within the boundary of a municipality,[44] it is unclear on just what grounds a county could disapprove a subdivision or plat.[45] Also, a county may not zone territory that is within the subdividing and platting jurisdiction[46] of a municipality.[47] However, to a considerable extent it may control the manner in which the municipality zones in the contiguous zone.[48]

The power given to counties to form planning commissions seems almost an afterthought on the part of the legislature. Although municipalities have had planning powers in one form or another for

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40. It can perhaps be argued that the general grant of power to a county planning commission is so imprecise that it is necessary and helpful to suggest certain specific powers that come within the general grant. However, if this is indeed the case, the legislature could easily have stated that the enumerated powers were intended as examples of those permitted by the broad grant and that the enumeration was not intended as a limitation on the general grant. Since it chose not to do so, the opposite implication seems warranted.

41. N.M. Stat. Ann. § 14-18-5 (Repl. 1968).

42. N.M. Stat. Ann. § 15-58-3 (Repl. 1968).

43. N.M. Stat. Ann. § 14-18-5 (Repl. 1968).

44. N.M. Stat. Ann. § 14-19-5 (Repl. 1968).

45. This particular problem is treated in the text accompanying footnotes 107-114 *infra*.

46. The subdividing and platting jurisdiction of a municipality is the same as its planning and platting jurisdiction. *Cf.* N.M. Stat. §§ 14-18-5, 14-19-5 (Repl. 1968).

47. N.M. Stat. Ann. § 14-20-2 (Repl. 1968).

48. *See* N.M. Stat. Ann. § 14-20-2.1 (Repl. 1968).

two decades,[49] county planning was first authorized in 1967.[50] Strangely enough, the legislature saw fit to give counties zoning power in 1965,[51] even though

> [s]tate history has demonstrated that the harmonious and coordinated development of real property for urban uses can only be achieved through strict regulation by qualified planning authorities operating at the local level.[52]

The legislature had some awareness of this problem because any county zoning regulations or restrictions were required to be in accordance with a comprehensive plan.[53] How counties were to go about doing this when they had not yet been given express planning powers does not seem to have bothered the legislature too much. In retrospect, one can say that requiring county zoning to conform to a comprehensive plan clearly implied the power to make such a plan and hence is a sufficient grant of planning powers. Nonetheless, this piece-meal approach leaves much to be desired.

Both municipal and regional planning commissions must prepare and adopt plans for the areas within their respective jurisdictions.[54] These plans can only be adopted after public hearings.[55] County planning commissions may prepare such plans but are not required to do so. Nor are they expressly required to hold public hearings before approving such plans.[56]

Why these differences in the powers and limitations of municipal and county planning commissions should exist is unclear. While there may be good reasons why enforcement powers may be granted to municipal but not to county planning commissions,[57] there seems to

49. Municipalities were first authorized to create planning commissions by N.M. Laws 1947, ch. 204.

50. Counties were given the power to establish planning commissions by N.M. Laws 1967, ch. 150. The legislature originally passed an act enabling counties to establish planning commissions in 1959, but it failed because of clerical omission of an enacting clause. *See* Doebele, *Improved State Enabling Legislation for the Nineteen-sixties: New Proposals for the State of New Mexico,* 2 Natural Resources J. 321 n. 4 (1962).

51. By N.M. Laws 1959, ch. 271, counties in which were located cities with a population of more than 25,000 were given the power to zone. Section 14-20-1 (Repl. 1968) of the Municipal Code, enacted by N.M. Laws 1965, ch. 300, declares that "a county . . . is a zoning authority" without placing any limitations on which counties may exercise the power.

52. Comment, 6 Natural Resources J. 135 (1966).

53. N.M. Stat. Ann. § 14-20-3 (Repl. 1968).

54. *See* N.M. Stat. Ann. §§ 14-18-9, 14-57-5 (Repl. 1968).

55. *See* N.M. Stat. Ann. §§ 14-18-10 and 14-57-6 (Repl. 1968).

56. N.M. Stat. Ann. § 15-58-2 (Repl. 1968).

57. No reason which would apply to all counties has been found for this limitation. Historically, however, the legislature has been reluctant to allow county governing bodies to delegate enforcement powers while yet allowing municipal governments to so delegate.

be no valid reason why the same administrative and procedural safeguards should not apply to both forms of planning commission. It is paradoxical that the legislature should treat counties and municipalities in a similar fashion in defining certain of their regulatory powers,[58] but not in the same way in defining their planning powers.

II
ZONING LAWS

A municipality or county is a zoning authority for the purpose of promoting health, safety, morals, or the general welfare. Regulations and restrictions of the county or municipal zoning authority are to be in accordance with a specific plan and designed, among other things, to secure safety from fire, panic, and other dangers. A zoning authority may divide the territory under its jurisdiction into such districts as are necessary to carry out the purpose of the zoning statutes. A zoning authority may regulate (1) height, number of stories, and size of buildings and other structures; (2) percentage of a lot that may be occupied; (3) size of yards, courts, and other open space; (4) density of population; (5) the location and use of buildings, structures, and land for trade, industry, residence, or other purposes; and (6) the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land in each district. Regulation may vary from district to district but must be consistent for any class or kind of buildings within a particular district.[59]

In addition, counties and municipalities have been granted certain special zoning powers. Thus, by the Historic District Act,[60] they are empowered to create historic districts

> . . . designating certain areas as historical areas, and may, for the purpose of preserving, protecting and enhancing such historical areas, adopt and enforce regulations and restrictions within such district or districts relating to the erection, alteration and destruction of those exterior features of buildings and other structures subject to public view from any public street, way or other public place.[61]

Regulations governing historic districts apparently become a part of the general zoning regulations.

The Municipal Airport Zoning Law[62] empowers the legislative or

58. *See e.g.,* text accompanying footnotes 59-61 *infra.*
59. N.M. Stat. Ann. §§14-20-1 and -3 (Repl. 1968).
60. N.M. Stat. Ann. §§ 14-21-1 through -5 (Repl. 1968).
61. N.M. Stat. Ann. § 14-21-3 (Repl. 1968).
62. N.M. Stat. Ann. §§ 14-40-14 through -24 (Repl. 1968).

governing body of any county or municipal or political subdivision in New Mexico to formulate and adopt an airport approach plan regulating the approaches to any publicly owned[63] airport within its corporate or political limits. Once such a plan has been adopted, the county, municipality, or political subdivision is required to

> adopt, administer and enforce, under the police power . . . airport zoning regulations . . . which . . . shall divide the [airport approach] area into zones and within such zones, specify the land uses permitted, regulate and restrict the height to which structures and trees may be erected or allowed to grow, and impose such other restrictions and requirements as may be necessary to effectuate the . . . approach plan. . . .[64]

Airport zoning regulations may be made a part of general zoning regulations, but such regulation may not limit the effectiveness or scope of the airport zoning regulations. If airport zoning regulations are made a part of general zoning regulations, the general regulations must conform to the airport approach plan.[65]

Under both the general zoning laws and the Municipal Airport Zoning Law it appears that the zoning authority may (1) act as a zoning commission; (2) designate the planning commission to act as a zoning commission; or (3) appoint a zoning commission.[66] But whereas under the general zoning laws, a decision, ordinance, resolution, or regulation may be administratively appealed to the zoning authority,[67] the Municipal Airport Zoning Law requires such appeal to be made to a special appeals board.[68] The Municipal Airport Zoning Law provides that "where a zoning board of appeals or adjustment already exists, it may be appointed as the board of appeals."[69] There is nothing in the general zoning laws, however, which either expressly or impliedly grants to zoning authorities the power to appoint zoning boards of appeals or adjustment. On the contrary, as noted above, administrative appeal is expressly to be made to the zoning authority itself. Thus it is doubtful that zoning authorities

63. Private airports are apparently exempted under the Municipal Airport Zoning Law. In view of the growth in popularity of such airports, this may prove to be a serious limitation on the zoning powers of local governments.

64. N.M. Stat. Ann. § 14-40-18 (Repl. 1968).

65. *Id.*

66. *See* N.M. Stat. Ann. §§ 14-20-5 and 14-40-20 (Repl. 1968).

67. N.M. Stat. Ann. § 14-20-6(B) (Repl. 1968).

68. N.M. Stat. Ann. § 14-40-20(C) (Repl. 1968).

69. N.M. Stat. Ann. § 14-40-20(D) (Repl. 1968).

presently can delegate to a zoning board of appeals the power to hear and pass on appeals concerning general zoning regulations.[70]

A county zoning authority may adopt a zoning ordinance applicable to all or any portion of the territory within the county that is not within the subdividing and platting jurisdiction of a municipality.[71] Municipalities may zone all territory within their subdividing and platting jurisdiction[72] (within their boundaries and within five miles of their boundaries if their populatons are 25,000 or more or within three miles of their boundaries if their populations are less than 25,000).[73] While a county cannot zone within this three or five mile range, it has considerable power over the manner and extent to which municipalities may zone within it.

Before an extraterritorial zoning ordinance adopted by a municipality can become effective it must be approved by an extraterritorial zoning commission consisting of three members appointed by the municipal zoning authority, and three members (who are not residents of the municipality) appointed by the county commissioners of the county in which the territory sought to be regulated is located. If a majority of this commission cannot agree to approve or disapprove the ordinance, it is to be submitted to a special three-man arbitration board whose decision concerning approval or disapproval is final.[74]

Extraterritorial zoning power is new in New Mexico,[75] and the procedures for extraterritorial zoning are even newer.[76] As yet, no cases or attorney general opinions concerning the constitutionality of extraterritorial zoning or construing the provisions of the zoning statutes relating to it have been reported. However, the validity of

70. N.M. Stat. Ann. § 14-20-6(A) (Repl. 1968) requires the zoning authority to provide by resolution the procedure to be followed in considering appeals. Arguably, the zoning authority could institute procedures requiring appeals to be made to a zoning board of appeals. However, had the legislature intended to allow the appointment of such appeals boards, it would seem that § 14-20-6(A) would have been worded: "Any aggrieved person . . . may appeal to the zoning authority [or to such appeals board as may be designated by the zoning authority]." The bracketed words are not included in the section as it is now worded. Further, if the zoning authority can appoint an appeals board, as § 14-20-6(B) is now worded, an aggrieved party may still appeal to the zoning authority. This would set up two levels of administrative appeal. There is nothing to indicate that this was the intent of the legislature.

71. N.M. Stat. Ann. § 14-20-2 (Repl. 1968).

72. The zoning, subdividing, and platting and planning jurisdictions of municipalities are identical. *Cf.* N.M. Stat. Ann. §§ 14-18-5, 14-19-5 (Supp. 1967) and 14-20-2 (Interim Supp. 1968).

73. N.M. Stat. Ann. § 14-20-2 (Repl. 1968).

74. N.M. Stat. Ann. § 14-20-2.1 (Repl. 1968).

75. The power was granted to municipalities by N.M. Laws 1966, ch. 64.

76. N.M. Laws 1967, ch. 121.

enabling legislation for extraterritorial zoning has been upheld in several decisions in other states.[77]

Although a county is in itself a zoning authority, a special zoning district may be created in unincorporated areas of a county or counties when the following conditions are met: (1) one hundred and fifty single family dwellings are within the area; (2) 51% or more of registered electors residing in the area petition for a special zoning district; and (3) the signed petition and a plat of the area involved is filed in the office of the clerk of the county or counties involved. The purpose of a special zoning district is to promote the health, safety, morals, and general welfare of residents of the district. It has power, within the district, to regulate and restrict, among other things, the location and use of buildings and structures and the use of lands for trade, industry, residence, or other purposes.[78]

With municipalities having extraterritorial zoning jurisdiction, counties being zoning authorities, and the residents of certain unincorporated areas within counties having the ability to form special zoning districts, the possibility of producing conflicting zoning requirements for the same area is real. Section 14-20-9, New Mexico Statutes Annotated (Repl. 1968), is designed to meet this possibility:

> If any other statute or regulation or other local ordinance, resolution or regulation adopted under authority of sections 14-20-1 through 14-20-12 [the general zoning laws] . . . is applicable to the same premises, the provision shall govern which requires . . . higher standards.

Section 14-20-9 is susceptible of several meanings, but is perhaps best interpreted in the following way. If the provisions of (1) any other statute,[79] (2) any other local regulation, or (3) any local ordinance, resolution, or regulation adopted pursuant to the general zoning

77. Walworth Co. v. City of Elkhorn, 27 Wis.2d 30, 133 N.W.2d 257 (1965); Schlientz v. City of North Platte, 172 Neb. 477, 110 N.W.2d 58 (1961); City of Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870 (1957). For a review of certain decisions involving extraterritorial jurisdiction, see Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development,* 1966 Wash. U.L.Q. 1; and F. Sengstock, *Extraterritorial Powers in the Metropolitan Area,* Legislative Research Center, The University of Michigan Law School (1962).

78. *See* the Special Zoning District Act [N.M. Stat. Ann. §§ 14-20-13 through -24 (Repl. 1968)].

79. *See, e.g.,* N.M. Stat. Ann. § 75-28-4 (Repl. 1968) which gives a conservancy district power "to make improvements, to remove, and to regulate and prescribe the location of improvements upon land."

laws conflict, the provisions requiring the higher standards prevail.[80]

Section 14-20-9 does not expressly cover a local regulation or ordinance adopted under the Special Zoning District Act.[81] Consequently, it is unclear what the effect would be if a municipality sought to preempt a zoning ordinance created by a special zoning district located within the subdividing and platting jurisdiction of the municipality. Such preemption could occur by the expedient of the municipality adopting a more stringent zoning ordinance covering the same area and subject. If the special district ordinance falls under the category of "any other local regulation" mentioned above, then it would seem that § 14-20-9 comes into operation and the municipal ordinance would prevail. However, so long as a municipality has not zoned within its subdividing and platting jurisdiction located outside its boundaries, there appears to be nothing to prevent a special zoning district from zoning the area even though a county could not.[82]

This is apparently not true in Bernalillo County because of the singular position it holds as the only class "A" county in New Mexico:[83]

> No local public body shall be organized within a five-mile radius of the corporate limits of the municipality having the greatest number of inhabitants in a class A county, unless the governing body of such municipality consents thereto. No local public body shall be organized beyond such five-mile radius in a class A county, unless the governing body of such county consents thereto.[84]

A "local public body" is defined as "every political subdivision . . . empowered to receive or expend public money from whatever source derived."[85] A special zoning district seems to meet this criterion, so that in Bernalillo County, the approval of the county of the city of Albuquerque is required before such a district can be formed.

Zoning ordinances are enforced by the zoning authority having jurisdiction as municipal ordinances are enforced.[86] In addition, the zoning authority may institute any appropriate action or proceedings to prevent, abate, or restrain the violation.[87] A municipality may en-

80. This interpretation is based on a reading of § 14-20-9 as it was originally enacted. *See* N.M. Laws 1927, ch. 27, § 10.

81. N.M. Stat. Ann. §§ 14-20-14 through -19 (Repl. 1968).

82. N.M. Stat. Ann. § 14-20-16 (Repl. 1968) indicates that a special zoning district can be created in any area outside the boundaries of an incorporated municipality.

83. *See* Table I.

84. N.M. Stat. Ann. § 14-58-14 (Repl. 1968).

85. N.M. Stat. Ann. § 14-58-3 (Repl. 1968).

86. N.M. Stat. Ann. § 14-20-8 (Repl. 1968).

87. N.M. Stat. Ann. § 14-20-21 (Repl. 1968).

force such ordinance by imposing a fine of $300 or less, or imprisonment for not more than 90 days, or both.[88] A violation of an ordinance made under the Special Zoning District Act is a misdemeanor, but no particular penalty is stated.[89] A crime is a misdemeanor if it is so designated by law or if upon conviction thereof imprisonment in excess of six months but less than a year is authorized.[90] It would thus seem that a greater penalty may be exacted for violation of a special zoning district ordinance than for violation of a municipal ordinance.

Counties having zoning authority may enact ordinances to carry out that authority, the same as a municipality, with the same penalties for violation, except where such enactment would be inconsistent with statutory or constitutional limitations placed on counties.[91] Unfortunately, such limitations appear to exist with regard to a number of counties in New Mexico. Counties are classified in the following fashion:[92]

Classification	*Assessed Valuation*	*Population*
Class "A"	More than $75,000,000	100,000 or more
Class "B"	More than $75,000,000	Less than 100,000
Class "C"	More than $45,000,000	Less than 100,000
First Class	More than $14,000,000	****
Second Class	$8,250,000-$14,000,000	****
Third Class	$6,500,000-$8,250,000	****
Fourth Class	$4,750,000-$6,500,000	****
Fifth Class	Less than $4,750,000	****

Any county which covers an area of not more than 144 square miles is a class "H" county.[93] Class "H" and class "A" counties have the same power to enact ordinances as do municipalities, except that class "A" counties do not have ordinance-making powers that are inconsistent with statutory or constitutional limitations placed on counties.[94] It would seem that such limitations would also apply to class "H" counties; however, the statutory provision[95] granting ordinance-making power to class "H" counties does not so state. But under the Municipal Code both class "H" and class "A" counties appear to have a zoning power comparable to that of incorpo-

88. N.M. Stat. Ann. § 14-16-1 (Repl. 1968).
89. N.M. Stat. Ann. § 14-20-21 (Repl. 1968).
90. N.M. Stat. Ann. § 40A-1-6 (Repl. 1964).
91. N.M. Stat. Ann. § 14-20-11 (Repl. 1968).
92. N.M. Stat. Ann. § 15-43-1 (Repl. 1968).
93. N.M. Stat. Ann. § 15-43-3.1 (Repl. 1968).
94. N.M. Stat. Ann. §§ 15-36-13 and -26 (Repl. 1968).
95. N.M. Stat. Ann. § 15-36-13 (Repl. 1968).

rated municipalities. At the present time, Los Alamos County is the only class "H" county, and Bernalillo County is the only class "A".

Although the six class "B" counties listed in Table I[96] may enact ordinances, the purposes for which they may do so are severely limited. Those purposes do not include zoning.

> Class B counties are granted the same powers to enact ordinances that are granted to municipalities . . . [*p*]*rovided that the enactment of ordinances shall be limited to the following purposes:*
>
> A. prescribing safety regulations and speed limits for county roads;
>
> B. prescribing legal dump sites and sites for refuse disposal and providing penalties for dumping of refuse at sites other than those prescribed by the ordinance; and
>
> C. providing for county park and recreation commissions, and prescribing their powers and duties.[97]

There is no provision in the powers-of-counties statutes[98] concerning the ordinance-making powers of class "C" counties or counties of the first, second, third, fourth, or fifth classes. Since under the general zoning laws counties are granted power to enact zoning ordinances except where such power would be inconsistent with statutory or constitutional limitations placed on counties, it appears that these latter classes of counties can enact zoning ordinances, but that class "B" counties cannot.

This interpretation of the zoning powers granted to counties is difficult to reconcile with the practical needs of counties. Why, for example, should the very largest and the smaller counties be given the power to enact and enforce zoning ordinances, but six intermediate sized counties be denied this power? The answer is that it is doubtful that the legislature actually intended this result. Rather, the general zoning laws enacted as part of the Municipal Code demonstrate an intent to grant counties, if not full equality, at least some parity of zoning power. As noted earlier, the powers-of-counties statutes are silent as to the ordinance-making powers of certain classes of counties. At the time the Municipal Code was adopted,[99] this silence extended to class "B" counties. It was only in 1967 that the ordinance-making powers of class "B" counties were detailed in

96. This table was supplied by the Local Government Division, New Mexico Department of Finance and Administration.

97. N.M. Stat. Ann. § 15-36-35 (Repl. 1968).

98. N.M. Stat. Ann §§ 15-36-1 through -40 (Repl. 1968).

99. N.M. Laws 1965, ch. 300.

the powers-of-counties statutes.[100] It seems fairly obvious that the 1967 act was passed without any realization that it would—by the way that it was worded—take away the powers of class "B" counties to enact zoning ordinances. Unfortunately, however, it appears clearly to have done precisely that.

TABLE I.
1969-70 CLASSIFICATION OF NEW MEXICO COUNTIES.

	1967 *VALUATION**	1960 *POPULATION†*	*SQUARE MILES†*
A-CLASS (over $75 million, over 100,000 population)			
Bernalillo	$ 367,999,997	262,199	1,169
B-CLASS (over $75 million, under 100,000 population)			
Chaves	82,836,518	57,649	6,095
Dona Ana	95,211, 921	59,948	3,804
Eddy	131,695,917	50,783	4,180
Grant	93,103,969	18,700	3,970
Lea	251,612,162	53,429	4,394
San Juan	120,725,237	53,306	5,516
C-CLASS (over $45 million, under 100,000 population)			
Curry	48,899,682	32,691	1,404
McKinley	53,856,820	37,209	5,461
Santa Fe	61,280,065	44,970	1,909
Valencia	56,639,553	39,085	5,658
1st CLASS (over $27 million but under $45 million)			
Luna	33,273,857	9,839	2,957
Otero	37,267,430	36,976	6,638
Rio Arriba	36,769,242	24,193	5,883
Roosevelt	27,702,882	16,198	2,457
Taos	27,830,225	15,934	2,257
1st CLASS (over $14 million but under $27 million)			
Colfax	23,699,449	13,806	3,771
Guadalupe	14,206,819	5,610	2,999
Hidalgo	14,522,354	4,961	3,447
Lincoln	21,972,526	7,744	4,859
Quay	25,479,535	12,279	2,883
Sandoval	14,130,741	14,201	3,717
San Miguel	22,822,347	23,468	4,767
Socorro	20,624,159	10,168	6,626
Torrance	16,683,197	6,497	3,355
2nd CLASS(over $8¼ million but under $14 million)			
Sierra	12,866,347	6,409	4,219
Union	13,613,336	6,068	3,817

100. *See* N.M. Laws 1967, ch. 77.

TABLE I (cont.)

	1967 *VALUATION**	1960 *POPULATION*†	*SQUARE MILES*†
3rd CLASS (over $6½ million but under $8¼ million)			
Catron	7,100,149	2,773	6,898
De Baca	8,243,751	2,991	2,366
Mora	6,799,578	6,028	1,944
4th CLASS (over $4¾ million but under $6½ million)			
None			
5th CLASS (under $4¾ million)			
Harding	4,064,539	1,874	2,133
H-CLASS (under 144 square miles)			
Los Alamos	21,574,260	13,037	108
	$ 1,775,108,564	951,023	121,666

* Final valuation for 1967 certified by State Tax Commission in 1968.
† U.S. Department of Commerce, Bureau of the Census, 1965.

III
SUBDIVISION REGULATIONS

"Subdivision" means the division of land into two or more parts by platting or by metes and bounds description into tracts of less than five acres in any one 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.[101] For the purpose of approving the subdivision and platting of land, the jurisdiction of a county includes all territory not within the boundary of a municipality. Municipalities have jurisdiction over the territory within their boundaries and over all territory within five miles of their boundaries if they have populations of 25,000 or more or within three miles if they have populations of less than 25,000. Within these contiguous zones counties also have concurrent jurisdiction.[102] However, no procedure is set forth for the operation of such concurrent jurisdiction.

Plats of subdivisions within the jurisdiction of a municipality must be approved by the planning authority of the municipality.[103] The planning authority shall adopt regulations governing the subdivision of land within the municipal jurisdiction. These subdivision regula-

101. N.M. Stat. Ann. § 14-19-1 (Repl. 1968).
102. N.M. Stat. Ann. § 14-19-5 (Repl. 1968).
103. N.M. Stat. Ann. § 14-19-7 (Repl. 1968).

tions, which must be approved by the governing body, may govern land use and development as well as other matters necessary to carry out the purposes of the Municipal Code.[104]

A plat of any subdivision located within the unincorporated area of a county must be approved by the county commissioners of that county.[105] If the subdivision is also located within the platting jurisdiction of a municipality, then both the county commissioners and the municipal planning authority must approve.[106] Presumably, the approval of the municipal planning authority is dependent on whether or not the plat of the proposed subdivision conforms to the subdivision regulations of the municipality. The same cannot be said, however, concerning the approval of the county commissioners.

The provisions of the Municipal Code dealing with the platting and subdivision of land are silent as to whether or not a county may adopt and enforce subdivision regulations. Nonetheless, it is clear that certain minimum requirements must be met before county approval can be given. The county commissioners cannot approve a plat unless:

> A. Proposed streets conform to adjoining streets;
>
> B. Streets are defined by permanent monuments to the satisfaction of the . . . commissioners; and
>
> C. Boundary of the subdivision is defined by permanent monuments.[107]

But can the county commissioners require a subdivision plat to meet additional or more stringent requirements? This particular question does not seem to have been litigated in New Mexico. Nor has the broader question, namely, what discretion does the governing body of a county have where power to do an act is conferred upon the county in general terms without describing the mode of exercising it?

The latter question has been answered, both in New Mexico and elsewhere, however, in a number of cases dealing with the powers of municipalities. The general rule appears to be that where a power is conferred on a municipality and the mode of exercising it is prescribed, such mode must be followed, but if no mode is prescribed, the power is to be exercised in such reasonable manner as municipal

104. N.M. Stat. Ann. § 14-18-6 (Repl. 1968).
105. N.M. Stat. Ann. § 14-19-6 (Repl. 1968).
106. N.M. Stat. Ann. § 14-19-8 (Repl. 1968).
107. N.M. Stat. Ann. § 14-19-6 (Repl. 1968).

officials, in their discretion, shall determine.[108] By analogy, the same rule should apply to county officials in the exercise of powers conferred on counties.

Despite this, a strong argument can be made for the view that the "minimum" requirements mentioned above for approval of a subdivision plat by county commissioners are not minimal at all but are in fact the *only* requirements the commissioners can set or look to. The rationale of this argument is somewhat as follows. County subdivision regulations can only be adopted by following the guidelines and procedure set forth in the Municipal Code for the adoption of municipal subdivision regulations.[109] Such procedure calls for a public hearing on the adoption of a subdivision regulation, but unlike the procedure set forth in the general zoning laws does not provide any method for resolving conflicts that might occur between county and municipal subdivision regulations. Because counties and municipalities have concurrent jurisdiction in contiguous zones around municipalities, such conflict might well occur if county commissioners at their discretion saw fit to adopt subdivision regulations with different requirements than those set forth in the municipal regulations. If possible, the statutes pertaining to subdivision regulation should be construed to avoid possible conflict between county and municipal jurisdiction. If the requirements noted earlier[110] are construed as the only ones a county may look to in approving or disapproving a subdivision plat, then the possibility of such conflict is greatly diminished and perhaps even avoided altogether. This being the case, they should be so construed.

Further, the history of the statutory provisions dealing with county approval of subdivisions in unincorporated areas strongly supports this view. These provisions[111] were originally enacted together with the declaration that:

> All avenues, streets, alleys, parks and other places designated or described as for public use on the . . . plat . . . shall be deemed to be public property and the fee thereof be vested in the county, and the acknowledgment and recording of such plat shall operate as a dedication to the public use of such portion of the premises platted as is on such plat set apart for streets or other public use.[112]

108. Page v. Gallup, 26 N.M. 239, 245, 191 P. 460, 461 (1920); Webb v. City of Meridian, 195 So.2d 832, 835 (Miss. 1967); City of Des Moines v. Reiter, 102 N.W.2d 363, 367 (Iowa 1960); Leischner v. Knight, 337 P.2d 359, 361 (Mont. 1959); Petition of City of Liberty, 296 S.W.2d 117, 123 (Mo. 1956).

109. N.M. Stat. Ann. § 14-18-6 (Repl. 1968).

110. See text accompanying footnote 107 *supra*.

111. They were the forerunners of the present § 14-19-6.

112. Laws 1939, ch. 84. The quoted section is the forerunner of the present § 14-19-10.

Since the county would be responsible for the maintenance and upkeep of such streets and avenues, there is a natural inference that the approval of the subdivision plat by the county commissioners be predicated on the proposed streets and avenues conforming to adjoining streets and on their being defined by permanent markers.[113] There is nothing in this enabling act, however, that would suggest that the intent of the legislature was to allow counties to regulate subdivisions in any other way.

If this argument is accepted, then counties not only cannot adopt subdivision regulations within the subdividing and platting jurisdiction of municipalities, they cannot adopt such regulations in any unincorporated areas outside such jurisdiction. The wording of the subdivision regulation statutes, unlike that of the general zoning laws, is heavily weighted toward this view.[114]

Bernalillo County, however, has chosen the alternate view that "approval" clearly implies the power to regulate and has proceeded to do exactly that.[115] By ordinance,[116] it has enacted a rather elaborate set of subdivision regulations that provide design standards not only for streets but also for alleys, easements, blocks, and lots. The manner in which plats are to be prepared and the information required to be shown on a plat are also called out in considerable detail. All land within the county and outside municipalities is governed by the regulations. They also provide for concurrent jurisdiction over territory within the platting jurisdiction of both county and municipality. How such jurisdiction is to be exercised is not spelled out.[117]

As long as the city of Albuquerque and Bernalillo County have reasonably similar requirements, the subdivider will not suffer too much from this concurrent jurisdiction. It is just possible, however, that he could find himself in the odd position of having seemingly identical requirements to meet for both the city and the county and yet having one accept his plat and the other reject it because they place differing interpretations on the same or very similar language. Even assuming that the county and the city will continue to volun-

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113. *See* N.M. Stat. Ann. § 14-19-6 (Repl. 1968).

114. *See generally* N.M. Stat. Ann. §§ 14-19-5 through -9 (Repl. 1968).

115. This may be because the Bernalillo County subdivision regulations were planned by the planning staff of the city of Albuquerque, which would naturally be oriented toward thinking in terms of the planning and subdividing powers of municipalities.

116. Bernalillo County, N.M. Ordinance 24, April 15, 1968. This subdivision ordinance is the first one ever passed by the county.

117. According to Mr. E. V. Balcomb, Chairman, Bernalillo County Commission, conflicts between city and county subdivision regulations are resolved by review and acceptance from both entities. Letter to the author, dated December 13, 1968.

tarily agree on the subdivision regulations to apply in the five-mile-wide zone of concurrent jurisdiction, there is nonetheless an inherent possibility of conflict in this scheme of things.[118] Should such conflict in fact arise, a subdivider could well be required to resort to the courts to determine which regulations to abide by.

Under existing statutory authority, one possible solution to this problem is for both the county and the city to become parties to a regional planning agreement.[119] Under such an agreement, all comprehensive "subdivisions[120] and platting regulations" must be approved by the regional planning commission after public hearings and then certified to all local governments and special districts within the region.[121] Since the regional planning commission presumably would seek to have a uniform set of subdivision regulations for particular areas within the region if not the whole region itself, an agreement by the city and county to abide by the subdivision regulations decided on by the regional planning commission could negate the problem.

A more preferable solution, since it avoids any requirement of joint voluntary action on the part of a municipality and a county, would be for the legislature to amend the statutory provisions dealing with the subdivision of land. Such amendment could perhaps be along the line of the existing procedure for handling extraterritorial zoning. Its purpose, however, should be to do away with the concept of concurrent jurisdiction.

Subdivision regulations are enforced somewhat differently than zoning regulations. Transfer or sale of a lot by reference to a plat of an unapproved subdivision is a misdemeanor punishable by a penalty of $100 for each lot so transferred or sold. Such transfer or sale may be enjoined by a county or municipality.[122] Any official of a municipality or public utility company who serves or connects land within an unapproved subdivision in the planning and platting juris-

118. Regardless of this fact, the Bernalillo County Commissioners see no need for legislation to resolve county and city conflicts concerning subdivision regulation, as no conflicts have yet existed and they foresee none. *See* footnote 117 *supra.* At the time of this writing, the county subdivision regulations have been in existence for less than a year and it is much too early to suggest that complete and harmonious cooperation between city and county in this area will continue indefinitely.

119. Both the city and the county are members of the Middle Rio Grande Council of Governments of New Mexico (COG), which is a regional planning group organized in accordance with the Regional Planning Act. However, COG has only been in existence since June 29, 1967, and while one of its purposes is to resolve area-wide land use problems it has as yet not sought to develop comprehensive land use regulations for areas within the region.

120. It may well be that this should instead be "subdivision."

121. N.M. Stat. Ann. § 14-57-6 (Repl. 1968).

122. N.M. Stat. Ann. § 14-19-13 (Repl. 1968).

diction of a municipality with any public utility is guilty of a misdemeanor.[123] The penalty for this crime is not announced. Interestingly, it apparently ceases to be a crime the instant the land is removed from the planning and platting jurisdiction of a municipality. Why areas solely within county jurisdiction should not come within the sanction of this provision is another of those little mysteries that abound in the Municipal Code. Perhaps it inevitably follows, therefore, that a municipality but not a county may require any utility connected to land in an unapproved subdivision to be disconnected.[124]

IV
BUILDING CODES

A municipality has the power to protect generally its property and that of its inhabitants.[125] It may by ordinance prescribe standards for constructing and altering buildings.[126] More specifically, a municipality may adopt by ordinance various codes, including building, electrical, health, housing, and plumbing codes, or any other code not in conflict with the laws of New Mexico or valid regulations issued by any board or agency of New Mexico authorized to issue regulations. Any code so adopted must have minimum requirements at least equal to the state requirements on the same subject. Model or uniform codes may be adopted by reference to the proper title and date of the code only and may include any exception or deletion to the code by setting forth such exception or deletion.[127] Violation of any code so adopted is punishable by a fine of not more than $300 or imprisonment for not more than 90 days or both.[128]

Minimum standards are set in accordance with the provisions of the Construction Industries Licensing Act.[129] All political subdivisions of the state are subject to the provisions of codes adopted and approved under this act. Such codes constitute a minimum requirement for the codes of political subdivisions.[130] However, more stringent requirements may be adopted as desired. The minimum standards are set by three trade boards: the electrical board, the mechanical board, and the general construction board. Generally, they must be substantially equivalent to those in general use in a

123. N.M. Stat. Ann. § 14-19-14 (Repl. 1968).
124. *Id.*
125. N.M. Stat. Ann. § 14-17-1 (Repl. 1968).
126. N.M. Stat. Ann. § 14-17-5 (Repl. 1968).
127. N.M. Stat. Ann. § 14-16-5 (Repl. 1968).
128. N.M. Stat. Ann. § 14-16-1 (Repl. 1968).
129. N.M. Stat. Ann. §§ 67-35-1 through -63 (Supp. 1967).
130. N.M. Stat. Ann. § 67-35-52 (Supp. 1967).

clearly defined region of the United States and must give due regard to physical, climatic, and other conditions peculiar to New Mexico. They must also embody applicable provisions of standards promulgated by a nationally recognized standards association.[131]

Unlike their powers with respect to zoning and subdivision regulation, municipalities are given no extraterritorial jurisdiction with regard to their building codes.

The New Mexico statutes contain no express provisions dealing with the powers of counties to establish building codes. However, as noted above, counties—as political subdivisions of the state—are subject to the provisions of codes adopted and approved by the trade boards. Thus, the state through these agencies sets certain minimum standards which are enforced by state inspectors[132] outside municipal boundaries.

Two counties, Bernalillo and Los Alamos, are indirectly given the power to set and enforce building codes. This power results from the fact that they may enact ordinances the same as municipalities.[133] Since municipalities may by ordinance prescribe standards for constructing and altering buildings, it follows ipso facto that these two counties can do the same. All other counties, however, must rely solely on the state for the enforcement of minimum building standards.

CONCLUSIONS

> "[T]he problems surrounding the subdivision, platting and [planning?] jurisdiction of local government is (sic) exceedingly more complex than anticipated. . . ."[134]

Viewed as nothing more than an exercise in English, this statement by the legislature is atrocious. However, it contains more than a grain of truth. Recent experience has indeed indicated that the problems pertaining to local regulation of land use and development are more complex than anticipated. Although passage of the Municipal Code in 1965 represented an ambitious effort to update and expand the regulatory powers of local governments, the code has not resolved all such problems and in fact has created certain new ones.

The Municipal Code has greatly expanded the authority of both

131. *Id.*

132. N.M. Stat. Ann. § 67-35-49 (Supp. 1967).

133. They are the only class A and class H counties. See text accompanying footnote 94 *supra*.

134. Laws 1966, ch. 64, § 1.

counties and municipalities to regulate land use and development in unincorporated areas. But, with the possible exception of zoning, there has been a failure on the part of the legislature to adequately determine the relative roles to be played by county and municipality —particularly in the unincorporated areas that are closely contiguous to the boundaries of municipalities.

The federal Advisory Committee on Intergovernmental Relations has recommended that:

> where effective county planning, zoning, and subdivision regulation do not exist in the fringe area, State legislatures should enact legislation making extraterritorial planning, zoning, and subdivision regulation of unincorporated fringe areas available to their municipalities, with provision for the residents of the unincorporated areas to have a voice in the imposition of the regulations.[135]

The legislature has clearly taken cognizance of this recommendation, as shown by the manner in which it has granted municipalities extraterritorial powers to control land use and development. Again with the possible exception of zoning, it has failed, however, to fully appreciate the possibilities of conflict inherent in this approach as counties do begin to effectively regulate their land. It would be desirable to develop methods for mediating conflicts of this type and for determining final solutions. The procedures now in effect for extraterritorial zoning can perhaps serve as a useful guide in this endeavor.

EDWARD C. WALTERSCHEID

135. Committee on Government Operations, *Unshackling Local Government*, 89th Cong., 2d Sess., House Report 1643, p. 29 (1966).