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State Securites Law: A Valuable Tool for Regulating Investment Land Sales

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STATE SECURITIES LAW: A VALUABLE TOOL FOR REGULATING INVESTMENT LAND SALES

INTRODUCTION

The development and sale of subdivided land is an important industry in the United States today. Because of increases in real estate values in recent years, undeveloped land like that in New Mexico is often promoted as an investment. Although most land developers are reliable, the sales and business practices of a few have resulted in a disproportionately large number of complaints and suits for relief.[1] The bases for complaints about sales of undeveloped land vary widely, but many can be grouped under two general descriptions: (1) misrepresentation by the offeror of the present level of improvement or future development, or (2) failure or inability of the offeror to fulfill promises to develop the land because of lack of capital or inability of the area to provide the proposed population with sufficient jobs, schools, sanitation, and other services.[2]

Although some offerings resemble securities as they are defined in state blue sky laws or the federal Security Act of 1933,[3] these sales have not generally been regulated by securities law.[4] Proper application of existing state securities laws to sales which come within the definition of a security could effect significant changes in a few

1. Since 1972, official complaints about sales of subdivision lots have totaled hundreds per year in many states. *Real Estate: New American Land Rush,* Time (Feb. 28, 1972) at 72. The Attorney General of New Mexico estimates "roughly one billion dollars worth of fraudulent sales over the past ten years in New Mexico." El Paso Times (Nov. 15, 1975) at 1; KOB-TV, "On Your Behalf" (Sept. 16, 1976). Annual reports of major land developers reveal many suits, both public and private. For example, Great Western Cities, Inc., reported settlement in 1975 of a suit claiming $700,000,000 in damages. 1975 Annual Report, Great Western Cities, Inc. Both the Consumer Protection Division and the Land Fraud Division of the New Mexico Attorney General's Office have received hundreds of complaints about subdivision sales; since the state filed suit against one major developer in August, 1976, the volume of such mail has increased dramatically, indicating the seriousness of the problem for New Mexico.

2. It is unlikely that all the communities planned for New Mexico could realistically be expected to be developed in the reasonably foreseeable future. There is serious doubt whether enough employment could be generated and enough water imported to allow the proposed growth. In addition, the cost to existing taxpayers for schools, road maintenance and other services could be enormous. What You Should Know About Buying Land in New Mexico, Commerce Clearing House (1975).

3. 15 U.S.C. § 77b (1970).

4. Loyd, *State Securities Regulation of Interstate Land Sales,* 10 Urban L. Ann. 271 (1975).

crucial industry practices and could alleviate these problems, at least in part. This comment will discuss the regulation of investment land sales as securities. It will first define such sales, then compare the effectiveness of the New Mexico Securities Act[5] and other laws in solving investor problems. Finally, it will analyze relevant state and federal case law to show that investment land sales are properly within the scope of the New Mexico Securities Act.

SPECIAL CHARACTERISTICS OF INVESTMENT LAND SALES

"Investment land sales" can be distinguished from ordinary real estate transactions by several factors. Buyers of investment land sales place their capital at risk in a venture controlled by others, and rely substantially on the efforts of others to increase the actual value of their investment. Much of the land is sold in an unimproved condition. The buyer typically pays more for the land than its intrinsic value warrants at the time of sale.[6] In exchange for this consideration, which constitutes risk capital,[7] the buyer receives assurances that the land will be developed into a complete community with utilities, roads, sewers, water lines, and all the features pictured in a master plan.[8] In addition to an agreement for deed, the buyer generally receives options to trade the purchased lot for another of different size, designation, or location, of equal or greater value.[9]

The buyer is usually obliged to join a property owners' association or improvement association. The officers of the group collect dues from members and ostensibly must spend the accumulated funds on community facilities. By virtue of membership in such an association

5. N.M. Stat. Ann. § 48-18-16 et seq. (Supp. 1975).

6. For example, some land was purchased during the 1960's for about $55 per acre. Udall, *Land Speculation: Investment in the Future . . . or Downpayment on Dust?*, Field and Stream (Dec. 1972) at 66. This same land sells today for as much as $2000 to $24,000 per ¼ acre lot, without improvements.

Usually a small portion of the total offering (as little as 1%) is provided with paved roads and utilities and is suitable for building. Udall, *Land Speculation, supra.* Owners of some undeveloped lots can exchange theirs for lots in this so-called "development core," if they agree to build within a limited time. Availability of such exchange lots is subject to the discretion of the seller, who charges for the improvements at current cost at the time of the exchange. The remainder of the offering is sold "as is."

7. Risk capital is discussed in text accompanying note 49 *infra.*

8. In a typical investment land sale, the seller creates a master plan, resembling a map, that subdivides hundreds of acres of open land into a future community. The proposed community is frequently composed of quarter-acre lots, and includes plans for single- and multiple-family dwellings, commercial areas, parks and recreational facilities. Schools and industrial parks may also be included in the plan.

9. These trade and exchange rights suggest that the buyer has an interest in other lots owned by the seller. As such, the buyer's interest is not so much in receiving title to any particular lot as it is in maximizing profits by switching ownership to whatever real estate asset of the company promises the greatest return.

the buyer enjoys a beneficial interest in title to any property held by the association for community use.

Typically, the buyer lives far from the site and knows little about its characteristics or about land sales in general. The land is purchased for investment rather than for immediate use.[10] In addition, the small size of most parcels and the high cost of individual development generally force the buyer to rely on the seller to develop the land. Until the community is complete and the venture is successful, the buyer's investment is at risk.[11] These features, in turn, affect the value of the other "rights" the buyer purchases, because trading and exchange rights depend on the extent to which the seller improves the lots and creates a market for them. The value of the investor's interest in community facilities depends on the improvement association, which frequently is also controlled by the seller because of the large number of lots it retains, and because most individual lot owners cannot actively participate in decision-making from long distances.

Investment land sales, therefore, entail more than a mere conveyance to the buyer of fee simple title to a particular lot; the buyer in effect has an interest, represented by the agreement for deed, in the company that owns and subdivides the land.[12] Long after execution of the contract buyers must rely on the seller's managerial and mar-

10. However, the mere fact that the buyer intends an investment does not create a security. For example, an individual who buys an undeveloped lot outside a city limit with the hope that future development in the area will increase its value, has made an investment. But expectation of a profit on resale because of a normal rise in land values or because of events beyond individual control does not create a security. The buyer does not furnish risk capital to another, and does not expect the seller to use his capital to develop land to make a profit for the buyer. Similarly, subdivision lots are not to be considered securities merely because the efforts of someone could increase their value. The buyer of investment land sales pays for, and expects, a portion of land with value greater than that of grazing land, and the increase in value is expected to come from the seller's efforts.

11. Little, if any, secondary market exists for the quarter-acre undeveloped lots far from the development core; the parcels are too small to be sold for grazing, recreational, or other purposes and, in any case, the restrictive covenants in the sales contracts prohibit such use. Realtors hesitate to list such lots for resale because they would thereby compete with the original seller, which usually spends a substantial amount of its income on marketing and sale promotions.

12. "[M]any companies are marketing land in a manner which, in the final analysis, is not the sale of an individual parcel of land, but is in fact an investment in a land company. Most cases occur where the value of the land sold is dependent upon the marketing and developing program of the company combined with such activities as the trading of lots from an undeveloped to a 'developed' area. It is our analysis that such activities are the sale of a security rather than simply the sale of an interest in a lot, and in such a case, the application of state securities law is appropriate." Letter from David Metz McArthur, Assistant Attorney General, Land Subdivision Division, Office of the Attorney General, Santa Fe, N.M., to Willian H. Griffing, Chief, Consumer Protection Division, Office of the Attorney General, Topeka, Kansas (Aug. 30, 1976), on file in the Land Subdivision Office.

keting skill to make the investment profitable; their investments are linked with the success or failure of the enterprise as a whole.

COMPARISON OF LAWS CURRENTLY REGULATING SUBDIVISION SALES

An ideal law to protect the buyer of investment land sales might include provisions for: effective disclosures clearly outlining possible benefits and all risks; prospective and remedial statewide administrative regulation using established standards; reasonable burdens of proof; adequate remedies including actual and punitive damages and injunctive relief, available to private citizens and public law enforcers.

The laws which now regulate land sales[13] satisfy certain of these conditions, yet fail to protect the investor for two reasons. Lack of funds and insufficient regulatory agency staff preclude effective enforcement.[14] More importantly, these laws were not designed to solve the special problems inherent in investment land sales. They address predominantly environmental rather than securities issues. For example, the New Mexico Subdivision Act[15] requires the filing of plats for subdivisions of five or more parcels. It gives county commissioners authority to request technical and scientific data from state agencies in order to form regulations and to rule on plans submitted. However, many counties fail to request such information or to perform thorough reviews of plats.[16] Rigorous enforcement of the act by the counties[17] could benefit investment land sales by helping to insure that the enterprise in which they invest will not fail because of lack of water, inadequate sewage disposal or severe erosion from improper grading. But the ability of the land to support the proposed project is just one of the many factors that contribute to the success or failure of a subdivision venture.

13. The legislature could, arguably, enact new laws specifically for this purpose. However, public pressure from local taxpayers who benefit from payment of taxes by absentee lot-owners could render passage of any new restrictive laws unlikely. See, Resolution of the Chamber of Commerce of Belen, New Mexico (August 12, 1976), criticizing the suit by the Attorney General against a major land developer with a large subdivision in Belen. The resolution describes the sizeable contribution made by buyers of the lots ("... whereas 78% of the tax money received by the school district is paid by property owners in [the subdivision], a very small percentage of this property requires any services of the school district [because although there are approximately 170,000 lots in the subdivision, only about 625 families live there now]").

14. Letter of D. McArthur, *supra* note 12.

15. N.M. Stat. Ann. § 70-5-1 et seq. (Repl. 1961, Supp. 1975).

16. See text accompanying footnote 14 *supra*.

17. The Act provides no individual cause of action. The county officials may enjoin sale of unsold portions of an unapproved plat; violation of the act may otherwise result in criminal penalties (fines). N.M. Stat. Ann. § § 70-5-25, -26, -27 (Repl. 1961, Supp. 1975).

The New Mexico Unfair Practices Act[18] can also be used to regulate land sales.[19] It provides injunctive relief and civil penalties for misrepresentation or unconscionable practices. The attorney general may investigate and request injunction of unfair practices, and obtain restitution for private citizens in connection with an assurance of discontinuance.[20] But this law, like most others, requires court action for relief; it does not operate prospectively to prevent unconscionable schemes because it does not require official approval of all offerings prior to sale.

The Federal Interstate Land Sales Full Disclosure Act,[21] which is designed to ensure disclosure of objective data about the land sold, also regulates subdivisions in New Mexico. Under that Act, the seller must register subdivisions of more than fifty lots with the Secretary of Housing and Urban Development and, before sale, furnish to buyers a property report which describes such environmental data as availability of utilities and terrain characteristics. But the seller is not required to inform the buyer of its financial condition, speculative aspects of the enterprise, or other data about the offering company. In addition, the Act provides only a civil remedy and does not allow punitive damages or criminal penalties for violations. Most important, the Act focuses on disclosure only and not the substance of the subdivision offering; it fails to give the Secretary of HUD discretionary power to disapprove a subdivision because of inadequate planning or poor environment or because there is a high probability the venture will fail.

Each of these three laws regulate some aspect of the commodity sold and the manner of sale. Nevertheless, the laws are inadequate to protect investment land sale buyers because they are oriented to other objectives such as limited disclosure, environmental management, and fraud prevention. They also lack consistent statewide application of minimum quality standards.

NEW MEXICO SECURITIES ACT

The New Mexico Securities Act, applied to investment sales, would complement existing law. The Act regulates securities sold in New Mexico; like most blue sky laws, the Act defines a security by

18. N.M. Stat. Ann. § 49-15-1 et seq. (Repl. 1966, Supp. 1975).

19. The 1977 Legislature amended this law, using language indicating that unimproved real property is covered by the Act.

20. N.M. Stat. Ann. § § 49-15-7, -7.1, and -9 through -13 (Repl. 1966, Supp. 1975). The Act is concerned more with state than with private enforcement.

21. 15 U.S.C. § 1701 et seq. (1970).

listing several general terms such as "investment contract" and "beneficial interest in title to property," without elaboration.[22]

The Act requires registration of all offerings with the state office unless a valid exception exists. As a member of the Mid-West Securities Commissioners Association, New Mexico applies the guidelines promulgated by that organization.[23] The Commissioner of Securities reviews each proposed offering; he considers the capitalization of the enterprise, the skill and experience of the management and its personal investment in the venture. Undercapitalization, thin capitalization, conflict of interest or inadequate planning, for example, could prevent approval of an offering.[24] In addition, the Act requires full disclosure of these and other factors to buyers in a prospectus.[25] The mere delivery of a prospectus should emphasize the buyer's continuing dependence upon the developer's management skill and should warn the buyer that the success of his or her investment depends on more than the physical and geographic characteristics of the land itself.[26]

However, there are also some potential disadvantages to the appli-

22. N.M. Stat. Ann. § 48-18-17(H) (Repl. 1966, Supp. 1975):
Security means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation . . . transferable shares, investment contract, voting-trust certificate or beneficial interest in title to property.

23. These include: minimum capital contribution by the offerors, escrow or impoundment of proceeds until sufficient capital is accumulated to insure successful completion of the venture, and prohibition against cheap stock, options and warrants and dishonest or unethical practices. L. Loss & E. Cowett, Blue Sky Law at 71-72, 325 (1958). *See also* Hueni, *Application of Merit Requirements, infra* note 24.

24. In this sense, blue sky laws differ from federal securities law, which is designed merely for full disclosure and does not give the Commissioner of the Securities and Exchange Commission comparable power to approve or disapprove an offering because of its merit. L. Loss & E. Cowett, Blue Sky Law at 18, 37 (1958). New Mexico, Kansas, Missouri, Michigan have a fair, just and equitable test. Kans. Stat. Ann. § 17-1260(a) (1964); Mich. Comp. Laws Ann. § 451-706(E) (1967); Mo. Rev. Stat. § 409-306(a)(E) (Supp. 1966); N.M. Stat. Ann. § 48-18-19.8 (1966). Eighteen states of the twenty-seven which do not have the Uniform Securities Act have a fair, just and equitable test (Arizona, California, Florida, Illinois, Iowa, Louisiana, Minnesota, Mississippi, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin). The twenty-three states and District of Columbia which have the Uniform Securities Act use its test—that is, whether the offering has worked or tended to work a fraud upon the purchasers, or would so operate. Hueni, *Application of Merit Requirements in State Securities Regulation,* 15 Wayne L. Rev. 1417 (1969).

25. A prospectus would include at least the following: value of the offering, number of shares, prior expertise of management and records of prior earnings or success; disclosure of risk factors, i.e. past profitability, capital shortages, need for additional financing, dividends; subsidiaries and other activities of the company; advertising programs; competition; relevant legislation and regulations; customers; property; litigation and other legal matters. *See* N.M. Stat. Ann. § § 48-18-19.3, -19.4, -19.7 (Repl. 1966, Supp. 1975); 15 U.S.C. § 77aa (1970).

26. Interview with Andrew M. Swarthout, Commissioner of Securities, State of New Mexico (September 14, 1976).

cation of state securities law. Information as presented in the prospectus may not be fully understood or appreciated by the reader because of its complexity or technical nature.[27] Buyers unable to judge independently whether a given venture has a reasonable chance of success may overly rely on the approval of the Commissioner of Securities. Compliance with regulations cannot guarantee a successful investment; rather, it merely provides a reasonable safeguard against a few important risks. Additionally, the remedies under the Act are somewhat limited.[28]

Practical considerations may also limit the usefulness of the Act. If it is applied to investment land sales, the volume of work generated by this industry alone could overwhelm the available workforce and dilute the effectiveness of the law. More of New Mexico's administrative resources would be required to regulate developers and this allocation could meet with resistance.[29] Also, guidelines are only now being developed to help sellers know when their land sales should be registered as securities,[30] and until such rules are approved and promulgated, it would be difficult to compel compliance.

Although there are some practical limits on the benefits that application of the Securities Act to investment land sales[31] can achieve,

27. This problem also hinders the effectiveness of the Property Report required by ISLSFDA. Telephone conversation with John Mennitt, Regional Investigator, Office of Interstate Land Subdivision Regulation, Albuquerque, N.M. (Sept. 1, 1976); communication from David Metz McArthur, Office of the Attorney General, Land Subdivision Division.

28. The Act provides for injunctive relief, criminal penalties and a rescission option (the latter limited to two years), but there is no express provision for punitive or exemplary damages which might act as a deterrent. Punitive damages might also have the effect of encouraging suits by consumers enforcing the Act as private attorneys general. However, consumer enforcement might be better effected via the class action. At present, New Mexico Rules of Civil Procedure do not provide for class actions except for shareholder derivative suits. Order Revoking the Adoption of Rule 23(a) and (c) of Rules of Civil Procedure For District Courts of State of New Mexico, 20 N.M. St. B. Bull. 1362 (July 22, 1976). See also this issue Comment, *The Future of the Class Action in New Mexico*, 7 N.M. L. Rev. (1977).

29. See Resolution of the Chamber of Commerce of Belen, N.M., *supra* note 13.

30. Interview with Commissioner Swarthout, *supra* note 26.

31. Other states already do regulate investment land sales under their securities law: California, Maine, Missouri, Ohio, Tennessee, Vermont and Washington regulate certain subdivision lot sales under their securities law. Cal. Bus. & Prof. Code § 10238.4-49.4 (Deering Cum. Supp. 1973); *id.* § 11000-21 (Deering 1960), *as amended* (Deering Supp. 1975); Me. Rev. Stat. Ann. tit. 32 & 751 (1965), *as amended* (Supp. 1975); Mo. Rev. Stat. § 409.401 (Supp. 1975); Ohio Rev. Code Ann. § 1707.01(B), 1707.33 (Page Supp. 1975); Tenn. Code Ann. § 48-1602(J) (1964), *as amended* (Supp. 1974); Vt. Stat. Ann. tit. 9 § 4202(9) (1971); Wash. Rev. Code § 21.20.005(12) (Supp. 1973). Loyd, *State Securities Regulation of Interstate Land Sales*, 10 Urban L. Ann. 271, n. 4 (1975).

Generally, states have been more concerned with regulating out-of-state rather than in-state subdivisions. They seem to believe that buyers will be familiar enough with land conditions within their home states that some of the risks of land buying will be reduced. They fail to see that investment land sales have more in common with securities transactions than with real estate sales, and that more information is needed by such buyers than mere

the advantages to be derived from such an application of existing law are greater than those derived from current practices or from proposing new legislation.[32]

SCOPE OF THE SECURITIES ACT

The Securities Act regulates transactions that fit within its definition of a security. The next step is to examine the Act and supporting cases to determine whether investment land sales fit within its scope. Although no New Mexico courts have considered application of the Act to investment land sales, they should find this a logical step toward comprehensive application of the Act. Because of the similarity of the definition of securities in many blue sky laws and the Securities Act of 1933,[33] decisions of other state and federal courts should be considered. These tend to support the inclusion of investment land sales within the scope of the Act.

The test of an investment security enunciated in a recent decision by the Supreme Court of Hawaii[34] appears well suited to investment land sales. The Court held that:

> An investment contract [security] is created whenever:
> 1. An offeree furnishes initial value to an offeror, and
> 2. a portion of this initial value is subjected to the risks of this enterprise, and
> 3. the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above initial value, will accrue to the offeree as a result of the enterprise, and
> 4. the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.[35]

The facts of investment land sales fit well within this definition: investors furnish money to developers based partly on representations that the undeveloped lots, with very low initial intrinsic value, will gain substantially in value through effort of the developers. The

familiarity with climate and geophysical characteristics. *See* Florida Realty, Inc. v. Kirkpatrick, 509 S.W.2d 114 (Mo. 1974).

32. See note 22 *supra*. The Act does not expressly include investment land sales; the New Mexico courts will have an opportunity to consider the question whether this section applies to them in the suit filed in August, 1976, by the Attorney General against a major land developer. The complaint alleges violation of the New Mexico Securities Act. Other similar suits are in progress in the state and federal courts in New Mexico.

33. L. Loss & E. Cowett, Blue Sky Law (1958).

34. State v. Hawaii Market Center Inc., 52 H.642, 485 P.2d 105 (1971).

35. *Id.* at 648-9, 485 P.2d at 109; Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 W. Res. L. Rev. 367 (1967).

investors have no practical control over the marketing and management decisions of the company. They furnish essential risk capital to the developing corporation and the value of their investment depends largely on the success of the enterprise as a whole. Without the utilities, roads and other improvements, which would probably be too expensive for an individual to install, the land has limited uses and value.

The *Hawaii Market* test is valuable for another reason. It synthesizes two major lines of cases defining securities, in an attempt to create a more comprehensive test that is meaningful in terms of actual investment schemes being promoted today.

Some of the elements of the *Hawaii Market* test are derived from *S.E.C. v. W. J. Howey Co.*,[36] a 1946 case involving the sale of real estate in which the Supreme Court first enunciated a test for an investment contract. That decision held that an investment contract required an investment of money in a common enterprise with the expectation of profits to come solely from the efforts of others.[37] The Court noted that any formula must be:

> . . . flexible, rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.[38]

In part, the Court in *Howey* relied on an earlier decision, *S.E.C. v. C. M. Joiner Leasing Corp.*,[39] another case involving real estate. The Court refused to accept the defendants' allegations that sale of oil leases, which were real property under Texas law,[40] were mere leaseholds and not securities because the defendants sold the agreements with the inducement of promises to drill a well.

> The drilling of this well was not an unconnected or uncontrolled phenomenon to which salesmen pointed merely to show the possibilities of the offered leases. The exploration enterprise was woven into these leaseholds, in both an economic and a legal sense; the undertaking to drill a well runs through the whole transaction as the thread on which everybody's beads were strung.[41]

As the *Howey* Court restated the *Joiner* principle, in determining

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36. 328 U.S. 293 (1946).
37. *Id.* at 301.
38. *Id.* at 299.
39. 320 U.S. 344 (1943).
40. Prof. T. Parnall, U.N.M. School of Law.
41. 320 U.S. at 348.

whether a security exists form should be disregarded and emphasis placed on the economic reality.[42]

Federal courts have subsequently modified the *Howey* test. Now the test requires that the investor expect a profit or other benefit based on substantial but not necessarily exclusive efforts by the seller.[43] The *Howey* definition has continued to be applied to interests in real property.[44] In a recent decision the Tenth Circuit Court of Appeals held that plaintiffs would be allowed to amend their complaint to include a claim under the Securities Act of 1933 where the transactions involved were investment land sales similar to those described here.[45] The Court noted that "the lots, absent fulfillment of [the land company's] promises to improve them, had little or no value,"[46] and it refused to rule that the contracts were not securities.

The other line of cases on which the *Hawaii Market* test is based began with *Silver Hills Country Club v. Sobieski,*[47] a California Supreme Court decision holding that sales of memberships in an unfinished country club which offerors expected to complete with the proceeds of such sales were securities under the California Securities Law.[48]

The Court used the "risk capital" test: if the offerors solicited risk capital with which to develop a business for profit and used the investors' capital to fund the development and operation of the venture, subjecting it to the dangers of the failure of the enterprise, then the sales were securities. The Court noted that the memberships were "attended by the very risks that the corporate securities act was designed to minimize."[49] It acknowledged that merit requirements are an important part of state security regulation, saying that the object of such laws and therefore of any test interpreting them, is to afford those who risk their capital "at least a fair chance of realizing their objectives in legitimate ventures."[50]

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42. 328 U.S. at 298. Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation,* 24 Okl. L. Rev. 135 (1971). Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?, supra* note 35.

43. Lino v. City Investing Co., 487 F.2d 689 (2d Cir. 1973).

44. *But see* United Housing, Inc. v. Foreman, 421 U.S. 837 (1975); Happy Inv. v. Lakeworld Prop., Inc., 396 F. Supp. 1975 (N.D. Cal. 1975); Davis v. Rio Rancho Estates, Inc., Fed. Sec. L. Rep. (CCH) ¶ 95,249 (S.D.N.Y. 1975).

45. McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975).

46. *Id.* at 209.

47. 55 Cal.2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961).

48. *Id.* at 812, 13 Cal. Rptr. at 187, 361 P.2d at 907.

49. *Id.*

50. *Id.* at 813, 13 Cal. Rptr. at 188, 361 P.2d 908. *See,* Hamilton Jewelers v. Department of Corps., 37 Cal. App. 3d 330, 112 Cal. Rptr. 387 (1974); State v. Consumer Business Sys.,

Other states with securities laws similar to California and New Mexico have adopted the risk capital test from *Silver Hills.*[51] A very recent Michigan administrative decision modified the risk capital test, stating *inter alia* that the test need not be restricted to furnishing initial capital for a new business, but rather that the relevant question should be whether the offeror is soliciting money to finance an enterprise.[52]

A few business persons and corporate attorneys are critical of the attempt to include investment land sales within securities laws. They see in this trend a threat to small developers, whom they claim can ill afford the expense of registration. They fear a deterrent effect on new enterprises, especially the small ones, because of uncertainty as to the status of the offering.[53] Other writers favor interpretation of present laws to include investment land sales. They are wary of creating overly specific definitions in the law because they do not want to make it easy for ingenious entrepreneurs to contrive means to avoid the laws.[54] As the Oregon District Court described the problem:

> In this particular of the law, to insist upon a strict application of a definition would inevitably lead to exploitation of loopholes created by that definition.[55]

In addition, the law provides protections for small corporations by granting certain exemptions to them and relieving them, in some cases, of the necessity to register with the Securities Commissioner.

This brief review of the relevant cases demonstrates that investment land sales properly belong within the scope of the New Mexico Securities Act, because they have many of the characteristics of the more traditionally-recognized securities. Buyers of investment land

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Inc., 482 P.2d 549 (Ore. App. 1976); Hurst v. Dare to Be Great, Inc., 474 F.2d 483 (9th Cir. 1973); Mr. Steak, Inc. v. River City Steak, Inc., 324 F. Supp. 640 (D. Colo. 1970).

51. In re Vacation Internationale, Ltd., 3 Blue Sky L. Rptr. (CCH) ¶ 71,287 (Michigan Division of Corporations and Securities Bureau 1976).

52. Mofsky, *Some Comments on the Expanding Definition of Securities,* 27 U. Miami L. Rev. 392 (1973); Tew and Freedman, *In Support of S.E.C. v. W. J. Howey Co.: A Critical Analysis of the Parameters of the Economic Relations Between an Issuer of Securities and the Securities Purchaser,* 27 U. Miami L. Rev. 407 (1973); Berman and Stone, *Federal Securities Law and the Sale of Condominiums, Homes and Homesites,* 30 Bus. Law 411 (1975).

53. Comment, *Securities Regulation of Real Estate Programs,* 27 Ark. L. Rev. 651 (1973); *See also* Student Symposium, *Interpreting the Statutory Definition of a Security: Some Pragmatic Considerations,* 6 St. Mary's L. J. 95 (1974).

54. S.E.C. v. Glenn W. Turner Enter., Inc., 348 F. Supp. 766, 774 (D. Ore. 1972).

55. Generally it may be said that the purpose of blue sky laws is to "protect the public against the imposition of insubstantial schemes and the securities based upon them." Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917).

sales invest capital in an enterprise and expect profits or benefits solely or substantially from the efforts of the seller or its agents. Their money may form either the initial or operating capital of the business, and it is subject to the risk of the venture. Buyers of investment land sales do not merely buy a commodity—they join in a common enterprise with the company and risk their capital in the security of the company and the skill of its management. Comprehensive securities regulation requires that investment land sales receive the same treatment as stocks, bonds, and other traditional securities, if the concept of merit regulation and protection for the investor on which the Act is based is to be fully realized.

CONCLUSION

Because of the special needs of investment land sale buyers, serious consideration should be given to including these transactions within the scope of the New Mexico Securities Act. Despite the practical limitations on enforcement and remedies, the Act provides the full disclosure of financial and operational data and the minimal protection of merit regulation that investors of any kind need. Statewide enforcement can avoid not only the problems of inadequately funded and staffed local regulation but also the defects of out of state federal supervision. Other state courts and federal courts have interpreted securities law similar to New Mexico's to include transactions with features like those of investment land sales: investment of risk capital in a common venture with the expectation of benefits to come substantially from the efforts of others without significant opportunity for the buyer to control the enterprise.

The Southwest is the focus of the undeveloped land subdivision industry and New Mexico is particularly attractive to developers because it is one of the few states with large expanses of relatively inexpensive land that can easily be platted into hundreds or thousands of lots.[5 6] Because New Mexico land is involved in many investment sales, it is appropriate for New Mexico to regulate the industry and protect the investors. For these reasons the courts and the legislature of this state should encourage vigorous enforcement of the New Mexico Securities Act to help prevent and to remedy some of the inequities arising from investment land sales.

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56. Udall, *Land Speculation, supra* note 6. In New Mexico alone, one hundred companies control more than one million acres and the lots they have platted, if fully occupied, would triple the population of the state. *See also Real Estate: New American Land Rush, supra* note 1.