October 17, 2001

OPINION
OF
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Attorney General

Opinion No. 01-02

BY: Patrick T. Simpson
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TO: The Honorable Dede Feldman
State Senator

The Honorable Pauline K. Gubbels
State Representative
State Capitol Building
Santa Fe, NM 87503

QUESTION:

Can New Mexico counties own valid conservation easements?

ANSWER:

Yes.

ANALYSIS:

Conservation easements are property interests in land that allow the easement owners to protect, for example, open space, farmlands and unique cultural resources. If a county could own a conservation easement, then the county could purchase from the landowner an easement interest under which the land would be protected while ownership of the land would remain with the private party. The Land Use Easement Act, NMSA 1978, Sections 47-12-1 through 47-12-6 (1991), neither affirmatively includes nor excludes counties or other public entities as potential owners of such easements. Since conservation easements are valid property interests that may be owned, used or transferred in the same manner as any other property interests, and since counties are otherwise authorized by law to

own, use or transfer valid property interests, counties possess the authority to acquire and own conservation easements.[1]

NMSA 1978, Section 4-37-1 (1975), states that counties have the same powers as municipalities unless restricted by statute or the constitution. NMSA 1978, Section 3-18-1(C) (1965), authorizes municipalities to acquire and hold real property, so counties have that same power. An easement is a property interest, but is a right of use rather than a possessory interest. See State v. Begay, 63 N.M. 409, 320 P.2d 1017 (1958), cert. denied 357 U.S. 918 (1958). See also § 47-12-2(B) (defining "land use easement" as a nonpossessory interest in real property). As such, easements are somewhat distinct from other interests in land. This distinction does not, however, make a material difference in this context, as the following statutes demonstrate legislative recognition of county authority to own easements.

For example, the Secretary of Energy, Minerals and Natural Resources is directed to assist local governments, including counties, with development of nature trail easements pursuant to NMSA 1978, Section 16-3-5(A)(4) (1973). This necessarily acknowledges the legislature's recognition that counties may acquire such easements. Also, acequia associations, political subdivisions under the law, are presumed to own easements pursuant to NMSA 1978, Section 73-2-64 (1923), on private lands served by acequias so that the associations may maintain the dams, headgates and conveyances on the system. Counties also have the authority to acquire county road "[r]ights of way," which share with easements the characteristic of a limited use right, pursuant to NMSA 1978, Section 67-4-12 (1921). All of these statutes that recognize county and political subdivision easement ownership predate the Land Use Easement Act, which the legislature passed in 1991. See 1991 N.M. Laws ch. 15, § 1. In interpreting statutes, the courts presume the legislature knows the existing law. See In re the Petition of PNM Gas Servs., 2000-NMSC-012, ¶ 73, 129 N.M. 1, 25. It thus stands to reason that the legislature, when stating in Section 47-12-6(A) that the Act did not invalidate otherwise legal easements, was mindful of the type of easements counties could own.

The Land Use Easement Act does not otherwise effect a contrary result. Section 47-12-2(B) of the Act states the purposes of land use easements include many conservation-related goals such as "agricultural, forest, recreational or open space use or protecting natural resources ...." Section 47-12-3(A) broadly authorizes the creation and conveyance of land use easements in the manner of any other easements. Section 47-12-2(A) omits express reference to political subdivisions within the definition of a "holder" of an easement. However, the focus should remain on the breadth of the Section 47-12-3(A) grant of authority to create and convey easements, the Act's purpose and its other relevant provisions. Indeed, as indicated above, Section 47-12-6(A) states that nothing within the Act, including Section 47-12-2(A), invalidates what is otherwise a legal land use, or conservation, easement. Further, Section 47- 12-6(C) prohibits political subdivisions from acquiring conservation or preservation restrictions by eminent domain. This is a legislative policy choice against unilateral government imposition of such restrictions without the consent of the servient estate owner. It nevertheless also implies that such restrictions are appropriate if the owner consents to a voluntary sale. In turn, this implication assumes the validity of public ownership of land use easements generally.

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[1] We wish to express our gratitude to the law students at the University of New Mexico who provided us a thorough and helpful research memorandum on this topic.

We must analyze the Land Use Easement Act in its entirety and within the context of other legislation to achieve a harmonious result. See In re Conservatorship of Chisholm, 1999-NMCA-025, ¶ 8, 126 N.M. 584, 586, cert. quashed 128 N.M. 590 (1999). We use this analysis because the courts look upon repeal by implication with disfavor, and will employ every reasonable construction in reconciliation of statutes in order to avoid repeal by implication. See State ex rel. State Park and Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 19-20, 411 P.2d 984, 997-998 (1966). See also N.M. Const. art. IV, § 18 (statutes may not be revised or amended by reference).

Based on the foregoing, it is our opinion that counties may acquire and hold conservation easements assuming they do so consistent with other laws applicable to public purchases of real property and do not do so by eminent domain.

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