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Land Use Planning—New Mexico's Green Belt Law: N.M. Stat. Ann §§72-2-14.1 to 14.4 (Supp. 1976).

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LAND USE PLANNING—NEW MEXICO'S GREEN BELT LAW*

Even though New Mexico has made significant advancements toward increased and diversified industrialization, it remains basically an agricultural state. Major evidence of this fact is apparent when one considers the use of the state's 77,760,000 acres of land area. Slightly over 90 per cent of the total acreage is used for livestock grazing, about 3½ per cent is farmed, and the remainder is made up of inaccessible areas, urban centers and national parks.[1]

Although the major land use in the state is agricultural, the urbanization process moves ahead at a rapid pace. More than 65 per cent of the population resides in the urban centers and the state continues to reflect the national trend of movement from the small community to the urban center.[2]

Transition of land from agricultural use to urban use poses many problems which have been the subject of legislation in New Mexico since 1884.[3] On one hand there is the ever increasing need of the urban areas to expand their boundaries; on the other, there is the equally important concern for preserving a basic industry—agriculture. The "irreversibility" of any resulting change in use makes the problem much more critical.[4]

New Mexico's attempt to deal with at least one of these problems is contained within the popularly titled Green Belt law.[5] The apparent object of the law is to allow continued use of the present agricultural land for agricultural purposes. This is accomplished by

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* N.M. Stat. Ann. §§ 72-2-14.1 to 14.4 (Supp. 1967).

1. U.S. Dep't. of Agriculture, Conserving New Mexico's Soil and Water 1, 2 (1958); U.S. Dep't. of Interior, Natural Resources of New Mexico 28, 29 (1964).

2. D. Rider, New Mexico Municipal League, Municipal Development in New Mexico 1 (1964).

3. New Mexico's first subdivision planning statutes. N.M. Laws 1884, ch. 39 §§ 6, 7; D. Rider, *supra* note 2, at 10.

> The structure and organization of New Mexico's cities, towns, and villages are governed by statutes adopted before the turn of the century to enable local governments to serve a rural economy. During the years, these basic laws with some new enabling legislation adopted in response to changing needs, have been subjected to a patchwork of amendments in efforts to update them to fit the requirements of an urban society.

4. Ciriacy-Wantrup, *The "New" Competition For Land and Some Implications For Public Policy,* 4 Natural Resources J. 252, 254 (1964).

5. The Green Belt law was enacted by the 28th Legislative Legislature of New Mexico on March 15, 1967, and became effective immediately under the Emergency Measures section of the Constitution. N.M. Laws 1967 ch. 85 §§ 1-6; N.M. Const. art. 4, § 23.

granting a preferential tax assessment to lands which qualify under its terms.

The theory behind the law is that if high taxes on undeveloped land tend to accelerate the movement of land into higher use categories, lower taxes will decelerate this trend. The preferential tax abatement is an attempt to adjust the agriculturalist's tax burden more closely within his ability to pay, by relating it to the current income from the property.[6]

The purpose of this Comment is to discuss the recent legislation within the context of its objective, and to determine whether it may create unwanted side effects and have a detrimental influence on the state's property taxation scheme.[7] Also the possibility of using the Green Belt law to further the general purposes of land use planning will be considered.

The Green Belt law consists of four sections, two of which are relevant to this discussion. The first of these sets up the classification which is to be used for assessment purposes. It states that the assessed value of *unsubdivided land* which has been principally used for agriculture for at least five successive years preceding the tax year is to be based on the capacity of the land to produce agricultural products.[8] Since "subdivided" land is not defined by the Green Belt law, the meaning would presumably come from the 1965 Municipal Code.[9]

The 1965 Municipal Code essentially defines a subdivider as any person who divides land into two or more tracts of less than five acres for "the purpose of sale for building purposes."[10] Apparently the Code applies to all land within the planning and platting jurisdiction of a municipality or a county, and thus all real property

6. Note, *Preservation of Open Spaces Through Scenic Easements and Green Belt Zoning*, 12 Stan. L. Rev. 638, 649 (1960).

7. N.M. Stat. Ann. § 72-2-2 (1953).

> Property real, personal and intangible shall be assessed in proportion to its value.

8. N.M. Stat. Ann. § 72-2-14.1 (Supp. 1967).

9. N.M. Stat. § 14-19-1 (Supp. 1967).

10. *Id.*

> . . . division of land into two [2] or more parts . . . of less than five [5] acres . . . for the purpose of:
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> A. Sale for building purposes;
>
> B. Laying out a municipality or any part thereof;
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> C. Adding to a municipality;
>
> D. Laying out surburban lots; or
>
> E. Resubdivision.

within the state.[11] It would appear then that the minimum size tract conveyed since 1965 that is capable of qualifying under the present subdivision law for Green Belt classification would be five acres. The State Tax Commission has, however, established the minimum at one acre.[12] Therefore, since small tracts, of less than five acres but more than one acre, which were acquired before the present subdividing law was enacted would not be considered "subdivided," they would qualify. But, recently subdivided parcels of less than five acres supposedly would not qualify.

The second section[13] of the Green Belt law defines "agricultural use of land." It is defined to include land that is devoted to the production for sale of plants, crops, trees or forest products[14] including orchard crops, and animals useful to man. It requires that gross sales of products from the land must have averaged at least $100 a year during the two year period immediately preceding the tax year in issue, *or* that there must be clear evidence of anticipated yearly gross sales amounting to at least $100 a year within a reasonable time. The income requirement can be made up in part from payments received under a federal soil conservation program. The act states no provisions for filing an application or making proof of gross sales from production. Officials in one county merely require the landowner to sign his name to an affirmation which states "that the . . . land has been used for at least five (5) successive years immediately preceding the assessment date, devoted principally and primarily for [*sic*] agricultural use, and that such land has produced gross income of $100 per year."[15] The form seems vague and it is not strictly in harmony with the wording of the statute. It does not cover, for instance, the situation in which the applicant has not had the required past production. No proof is asked of the person to substantiate the elements of his affirmation, and the law contains no penalty provision for making an invalid claim. To keep the prefer-

11. N.M. Stat. Ann. §§ 14-1-1 to 14-56-3 (Supp. 1967). Certain inequities apparent in the 1965 Municipal Code are the subject of a thorough discussion in 6 Natural Resources J. 135 (1966). For corrective action taken by the next legislature, see N.M. Stat. Ann. § 14-19-14.1 (1966).

12. Interview with Mr. Edward V. Balcomb, Bernalillo County Commission Chairman, in Albuquerque, New Mexico, October 5, 1967.

13. N.M. Stat. Ann. § 72-2-14.2 (Supp. 1967).

14. *Id.* "Forest Products" includes nut crops, thus a landowner could qualify under the terms of the law by selling pinon nuts.

15. Green Belt Application Form used by Bernalillo County Tax Assessor's Office.

ential assessment in force, annual re-application is necessary.[16] If a change in use of the land occurs, the owner is "expected" not to apply the next year.

In response to a request by the Bernalillo County Commissioners, the State Tax Commission issued a memorandum[17] implementing the new law. It defines two classes of agricultural land and determines their value for tax purposes. Irrigated land is to be valued at $500 an acre; dry land is valued at $25 an acre. Such a mechanical process of evaluation is of course expedient, but provides doubtful compliance with the wording of the Green Belt Law,[18] which sets up a "productivity" standard of valuation.

The distinction made by the Green Belt law between agricultural and non-agricultural lands and the resulting assessed valuation are important items on which many tax dollars depend. The law is not intended to inadvertently subsidize the land speculator or developer. Bernalillo County officials admit there is nothing to prevent this from occurring.[19]

A hypothetical set of circumstances will best illustrate the potential for subsidizing speculators. Suppose that a subdivider owns 40 acres of unsubdivided dry land, either in one tract or in separate tracts (the law makes no distinction), which he is holding for eventual development or speculation. If he can satisfy the five previous years' agricultural use requirement, either from his own use or that of his predecessor in title, he can easily meet the gross sales from production requirement of $100. For example, he could place a hen house on the land and stock it with a dozen good laying hens. If each of the hens produced one egg a day and the landowner sold them to a processor for 35 cents a dozen, his gross sales for the year would be $125.40. Because of the land's potential for development, the value might currently be, at least, $200 per acre. Under the Green Belt law the owner's assessment valuation would be $25 per acre,[20] lowering the total assessment from $8000 to $1000. An advantage such as this could certainly make it less expensive for the subdivider to hold the land in the lower use category until he could obtain the optimum sale price. This does not meet the intended purpose of the legislation.

16. Interview with Mr. George W. Beach, Bernalillo County Tax Assessor, in Albuquerque, New Mexico, October 5, 1967.

17. New Mexico State Tax Commission Memorandum, May 8, 1967.

18. N.M. Stat. Ann. § 72-2-14.1 (Supp. 1967).

19. *See* note 12 and note 16, *supra.*

20. *See* note 17 *supra.*

A question which arises from that section of the law defining agricultural use and specifying the gross sales from production standard, is whether a person who owns few acres is held to the same standard as one who owns a larger number of acres.[21] At no place in the law is the gross sales requirement correlated to acreage or to the type of land (irrigated or dry) the person owns. Unless there is some clarification of this point, the person with a large amount of acreage, possibly irrigated, has a larger and more productive land base from which to meet the requirement. A gross sales from production standard that increases the value of gross sales required in proportion to the acreage involved would be more equitable.

Presently, the Green Belt law and other 1967 tax laws are being challenged as unconstitutional.[22] Any action of this type necessarily raises fragile issues of constitutional law, such as equal protection of the laws and uniformity of taxation.[23] Generally, every presumption is indulged in favor of the validity and regularity of a legislative enactment.[24] As long as the tax valuation is established by some standard and is levied by a standard, the tax meets the requirements of being uniform and equal upon all subjects of a particular class.[25] If the classification set up by the tax law is reasonable, it is valid.[26]

There has been no prior judicial interpretation of the new law in New Mexico, and very little in other states with similar legislation. The Supreme Court of Nevada has recently held unconstitutional a Green Belt type law setting up a different class of persons and permitting the owner of land, used exclusively for agricultural purposes but having a greater value for other purposes, to contract with the county tax assessor for assessment and payment of taxes at the "value for agricultural purposes."[27]

Several other methods are employed by other states to control

21. N.M. Stat. Ann. § 72-2-14.2 (Supp. 1967).

22. Speer v. State Tax Commission, 2d Judicial District, Bernalillo County, Docket No. 38816.

23. U.S. Const. amend. XIV, § 1; N.M. Const. art. 8, § 1; N.M. Const. art. 2, § 18.

24. Gruschus v. Bureau of Revenue, 74 N.M. 775, 399 P.2d 105 (1965).

25. Gerner v. State Tax Commission, 71 N.M. 385, 378 P.2d 619 (1963).

26. A determination as to the reasonableness of the classification contained in the Green Belt law, capacity of the land to produce agricultural products, is beyond the scope of this Comment. See Davy v. McNeill, 31 N.M. 7, 240 482 (1925); Hemphill v. Washington State Tax Commission, 65 Wash. 2d 889, 400 P.2d 297 (1965), *appeal dismissed,* 383 U.S. 103 (1966). On the general subject see Annot., 111 A.L.R. 1486 (1937).

27. Boyne v. State, 80 Nev. 160, 390 P.2d 225 (1964).

land use. Some give a tax credit to agricultural lands within school districts,[28] while others have "open spaces" legislation that preserves places of great natural scenic beauty, or places whose retained state of openness enhances the value of surrounding urban land.[29] Agricultural zoning is used in many states, and in some is accompanied by a lower assessment rate.[30]

It is possible for the Green Belt law to become an important tool in the field of land use development in New Mexico. The 1965 Municipal Code allows a municipality to establish a planning authority[31] capable of optimizing its land use. A municipality may also develop a master plan for the future development of the area within its jurisdiction.[32] This plan could provide the county assessor with an opinion of that authority on which lands are best suited for agriculture in regard to overall municipal growth. Those areas not suited for agriculture might not be given the lower assessment available under the Green Belt law. Such treatment would encourage the use of those areas for residential and other urban development. Already, uncontrolled growth has caused some of the better agricultural lands to pass into non-agricultural uses. In short, master use plans could encourage more efficient use of available land.[33]

28. Iowa Code Ann. §§ 426.1 to 426.10 (Supp. 1966).

29. Md. Ann. Code art. 66C, § 357A (Supp. 1967); Cal. Gov't. Code §§ 6950-54 (Supp. 1960); Cal. Gov't. Code § 35009.1 (West Supp. 1966); Cal. Rev. & Tax. Code § 402.1 (West Supp. 1966). On California laws see material cited in note 6 *supra*.

30. Cal. Gov't. Code § 35009.1 (West Supp. 1966); Cal. Rev. and Tax. Code § 402.1 (West Supp. 1966). Of the methods mentioned, zoning has the longest history and is the most commonly used. A. Rathkopf and C. Rathkopf, The Law of Zoning and Planning 1-13 (3d ed. 1959). Basically, zoning is a legal and administrative procedure by which a municipal or county government can control against indiscriminate land use. Agricultural as well as urban lands can be zoned. However, agricultural zoning could be properly applied only to land which would be adaptable to agricultural use at the time of the restriction, since zoning for purposes other than those for which land can presently be adapted has been held arbitrary. Courthouts v. Town of Newington, 140 Conn. 284, 99 A.2d 112, 38 A.L.R.2d 1136 (1953). Under the 1965 New Mexico Zoning Regulations, municipalities and counties do have zoning authority. N.M. Stat. Ann. § 14-20-1 (Supp. 1967). However, few municipalities or counties have exercised this authority. Cooperative Extension Service, N.M. State University, Circular 402 at 7, 8 (March 1967). The effect of authorizing zoning jurisdiction at the local level is to leave the land use allocation to those closest to the regulated areas; however, this is the level which is most susceptible to pressures of interested parties.

31. N.M. Stat. Ann. § 14-18-1 (Supp. 1967).

32. N.M. Stat. Ann. § 14-18-9 (Supp. 1967).

33. D. Rider, *supra* note 2, at 36.

Encouragement should be given to the establishment of such a program at the municipal level.[34] It could be the nucleus of legislation leading to the establishment of a State Land Use Commission, with its own statewide master use plan similar to that adopted in Hawaii.[35]

For the Green Belt law to function as a precise and constructive instrument, however, certain changes should be made. A minimum acreage should be specified. A figure of five acres would avoid conflict with the subdivision statutes. Inserting a five acre minimum would not be likely to produce significant adverse effects on the agriculture in the state. The picture which comes to mind of a small farmer trying desperately to subsist on a meager parcel of land is not accurate in New Mexico where 90 per cent of the land is used for grazing and the average ranch is over 2000 acres.[36] Many of the "typical farmers" are actually absentee owners whose diversified business interests have long since removed them from the farm.

Next, the gross sales from production requirement should be tied to both the amount of acreage involved and to whether or not the land is irrigated. It is manifestly unfair to require the same amount from each landowner without considering the characteristics of the acreage held.

In addition, "teeth" should be put in the law. Land use legislation that provides no means of enforcement can be a meaningless academic effort. A possible sanction, in addition to recapturing the tax that should have been paid, might be the imposition of a penalty of 25 per cent of the tax saving provided by the law with interest at the rate of 6 per cent per annum from the date the taxes should have been paid. A provision such as this would discourage owners from trying to take unfair advantage of the tax preference afforded by the present law. It would also encourage compliance with the requirements of the law.

Land use planning may be at a critical stage in New Mexico. What is done with this, the first law we have passed on the subject of agricultural lands as a separate class, could determine the course

34. *Id.* at 37.

35. Act 205, Session Laws of Hawaii (1961).

36. *See* note 1 *supra*, at 2.

of any future action we may wish to take. New Mexico can either develop a comprehensive and integrated system or a hodgepodge of differing procedures that limit local initiative and innovation.[37]

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37. W. Doebele, Recommended Enabling Legislation for Regional, County and Municipal Planning in the State of New Mexico, State Planning Office 232 (1960); W. Doebele, *Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico,* 2 Natural Resources J. 321, 353 (1962).