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Rural Development Considerations for Growth Management

Anita P. Miller

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Rural Development Considerations for Growth Management

ABSTRACT

Growth and development is occurring in New Mexico’s rural areas, threatening an agricultural lifestyle and economy that many communities would like to maintain. Planning is merely advisory in New Mexico, but rural communities should develop coordinated comprehensive and regional planning processes as the basis for implementation of land use regulatory strategies that will protect the rural agricultural values these communities revere.

INTRODUCTION

Many of New Mexico’s rural communities are experiencing growth. Some of this growth is suburban. Some is related to development at the Mexican border. Other rural growth is a result of discovery of that region as a resort or second home destination. Whatever the impetus for growth, most of the growth now occurring in New Mexico has major implications concerning availability of water. An increasing number of rural residents are considering strategies to protect their rural lifestyles. The ongoing drought in New Mexico may provide an impetus for planning at the state and local levels, as well as more widespread consideration of growth management through land use regulatory tools in New Mexico’s rural areas.

Comprehensive planning, with incentives from Community Development Block Grants, and regional water planning, guided by the New Mexico Interstate Stream Commission, provide a beginning for a statewide planning consciousness. Subdivision regulation, with an increased emphasis on availability of water and the impact of subdivision development on traditional land uses, can provide a second step towards water conscious growth management. Formation of special zoning districts and utilization of non-traditional land use regulatory techniques, as applied in Rio Arriba and Mora counties, provide an even...
more effective method of protection of rural land uses when used with subdivision regulation. Other concerns, such as the over-cutting of timber and mining, are also being addressed in Rio Arriba and Santa Fe counties using unique land use regulatory tools.

The U.S. Department of Agriculture’s Land Evaluation and Site Assessment System (LESA) program provides a basis for a defensible agricultural protection strategy, when used as a support for other regulatory techniques. Transfer or purchase of development rights and conservation easements provides individual property owners with financial incentives to preserve agricultural land and water. This article will examine these land use regulatory tools and give examples of how they are presently being used in New Mexico.

I. THE CONTEXT OF RURAL GROWTH IN NEW MEXICO

A. What Is the Nature of Rural Growth in New Mexico?

The four county region surrounding Albuquerque, including Torrance County, Sandoval County, Valencia County, and southern Santa Fe County, is rapidly urbanizing as developers take advantage of lower land prices and less stringent development controls than those in Albuquerque and Bernalillo County. Santa Fe County, as well as San Miguel County and Rio Arriba County, located in the northern central area of New Mexico, reap the benefits of the City of Santa Fe’s high land and home prices and stringent land use regulations. Taos and Taos County, in northern New Mexico, also are growing in a context of increasing conflict between their traditional land uses and development related to their character as a resort and tourist destination. Doña Ana County, in southern New Mexico, receives overflow from Las Cruces and is also encouraging growth on the Santa Teresa Border with Mexico.

The Moreno Valley, in Colfax County, in the northeast region of the state, is also experiencing resort and tourism related growth and has many lots in old antiquated subdivisions that are now being developed. Antiquated subdivisions are those that were subdivided before subdivision regulations went into effect in New Mexico and do not meet today’s standards for roads, water supply, liquid waste disposal, terrain management, etc. Antiquated subdivision lots are also being developed in Luna and other rural counties.

New resort subdivisions, some with little water, are being created on ranch lands that are increasingly being sold in a context of drought and ranch unprofitability. The land brings in more tax revenue
than it did as agricultural land,1 so counties are not thinking about the long-range financial effects of such development once the lots are built out.

In other New Mexico areas where there has not been much growth and where the last working coal mines have closed (for example, Colfax County), the need for immediate economic development is mixed with concern that such development might compete with existing agricultural water uses for a dwindling water supply.

II. STATE PLANNING EFFORTS

The state of New Mexico has several mechanisms by which local municipalities may garner assistance for planning. Even though planning is only advisory in New Mexico, these state programs focus on addressing deficiencies in infrastructure and capital improvements planning and in regional water coordination. Linking these state programs with the techniques discussed below is imperative in order to protect the agricultural lifestyle and economy of New Mexico.

A. CDBG Grants

The Local Government Division of the New Mexico Government Services Administration administers federal Community Development Block Grants (CDBG),2 which are made available to New Mexico municipalities and counties for comprehensive planning. The grants of $25,000 each are usually not sufficient to actually implement the planning policies adopted.

The Local Government Division also makes CDBG grants available to local governments for infrastructure improvements, requiring that they adopt capital improvement plans as a condition of receiving such grants. These capital improvement plans are not necessarily tied to a comprehensive consideration of the jurisdiction's future growth, however.

B. Regional Water Plans

Recognition that there may not be sufficient water in the Rio Grande and Pecos River to meet obligations to existing holders of water rights and to Texas and Mexico under water compacts, as well as to accommodate increasing urbanization, has led to a regional water planning effort. This effort is administered by the Interstate Stream

commission, a division of the New Mexico State Engineer's Office. In the course of this planning, task forces in the various regions of the state must identify existing water supply and current and future demand for water in agriculture, urban, extractive, and other uses and project future growth. Usually, the future need for water is projected in terms of "public welfare," which includes maintaining water in agriculture and providing for population growth. The need to provide for increasing urbanization without sacrificing present water uses makes it difficult to come to an agreement on how a limited water supply should be allocated.

III. ENHANCING PLANNING IN NEW MEXICO'S RURAL AREAS

A. Comprehensive Plans

Effective management of growth should begin with comprehensive planning for the future of a rural municipality, county, or region. The plan should consider future land uses in the context of availability of water, economic development, population growth, housing needs, and environmental sustainability, among other issues. The New Mexico Court of Appeals, most recently in West Bluff Neighborhood Association v. City of Albuquerque, has determined that master plans and comprehensive plans are advisory guides, setting forth broad priorities, providing guidelines, and making recommendations. Since they are adopted by resolutions, rather than enacted as ordinances, the court held that they do not have the force of law.

A bill passed by the 2003 New Mexico Legislature provided the basis for subdivision regulations. The bill was sponsored by development-connected organizations and would have affirmed by law that planning is only advisory and non-binding in New Mexico. The bill was amended to eliminate the advisory provision.

The interests that opposed the advisory language in the bill hoped to work with the bill's sponsors prior to the 2004 legislative session to encourage planning legislation that would require that zoning, subdivision, and development regulations be consistent with comprehensive plans and that would make comprehensive planning mandatory in all New Mexico jurisdictions. This would ensure that local comprehensive planning would be more than an abstract exercise.

3. Telephone Interview with Mary Helen Follingstad, Manager, Regional Water Planning Program, New Mexico Interstate Stream Commission (Mar. 19, 2003).
4. 50 P.3d 182 (2002).
B. Regional Water Plans

A few counties have addressed growth management in the context of water planning. A White Paper, prepared by planner/lawyer Robert Odland, addresses growth management issues in a land use context as part of the Jemez y Sangre Regional Water Plan, which covers Santa Fe and Santa Fe County, Espanola, Los Alamos, four Pueblos, and several acequia associations. The actual water plan contains strategies that would implement suggestions in the White Paper.

Rural counties should follow the example of Colfax County in considering future land uses in the context of water planning. The county's regional water plan, which was approved by the Interstate Stream Commission in April 2003, is the first to address drought planning and agricultural conservation, as well as land use and growth management issues. Most of the regional water plans, however, are more concerned with merely utilizing whatever water they have in current use.

The need for economic development in rural New Mexico preempts growth management in the context of regional water planning. Mary Helen Follingstad, Manager of the Regional Water Planning Program of the Interstate Stream Commission, believes that a new round of water planning will have to address land use and growth management because of the prolonged drought. For example, the city of Santa Fe and Santa Fe County are currently taking water conservation measures. They have no available water to accommodate future growth and will have to figure out how to supply existing water users.

If a county desires to maintain its agricultural economy, it should develop policies both in its water plan and in its comprehensive plan that reflect the desirability of protecting water rights currently devoted to agriculture and derivative agricultural uses, such as dairies, meat packing, and other food processing. It can augment these policies by developing land use regulations such as those in Rio Arriba and Mora Counties, discussed below, which can keep land in agricultural uses while not preventing other development in appropriate areas.

In regard to other land use issues, the draft Colfax Regional Water Plan, for example, under the heading "Integrate Land Use and Water," states the following policies:

- Incorporate water decisions in land use process

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7. Interview with Mary Helen Follingstad, supra note 3.
8. Id.
Timing, location of new developments
- Designs that incorporate water conservation
  - Incorporate water service decision into land use plans (i.e., size pipes large enough for future growth, wastewater planning)
  - Can require developers to provide water rights
  - Can adopt impact fees to cover the costs of providing rights and infrastructure
  - Inexpensive and financially efficient (i.e., doesn't require more infrastructure than can be maintained)

IV. SUBDIVISION REGULATIONS

Subdivision regulations provide the only mandatory land use controls in New Mexico. All municipalities and counties in New Mexico are required to adopt subdivision regulations, pursuant to the Municipal Subdivision Act and the New Mexico Subdivision Act, which is applicable to counties. Of particular relevance to rural development are the 1995 amendments that were added to the New Mexico Subdivision Act. Prior to 1996 and 1997, when the 1995 amendments went into effect, land could be subdivided into four lots without any review by the county or by state agencies as required by the New Mexico Subdivision Act. Ingenious schemes resulted in which subdivisions of hundreds of lots could be created through the division of a large tract of land into four lots and the subsequent re-division of each lot into four more lots, and on and on.

Of particular relevance to rural growth management is the provision now in the New Mexico Subdivision Act that allows counties to enact more stringent requirements for such issues as water supply and water quality, wastewater, and terrain management than those set forth in the statute if they have enacted a comprehensive plan. This enables a county, which has adopted a comprehensive plan that, for example, clearly states that it wishes to retain water in irrigated agriculture, to adopt stringent requirements applicable to subdivision water supply.

11. Id. § 47-6-1 et seq.
12. Id. § 47-6-9(C).
A proliferation of domestic wells in a new subdivision can impair the water supply of a neighboring ranch. Although domestic wells are permitted by the State Engineer's Office, they are not further regulated. A county that has adopted a comprehensive plan that contains a policy concerning the impairment of agricultural water supply by domestic wells could therefore regulate domestic wells, and thus preserve agricultural water use. Bills to enable the state engineer to increase regulation of domestic wells failed in the 2002 and 2003 state legislative sessions.

The 1995 amendments also authorized counties to require that a subdivider prove sufficient water to serve the needs of the subdivision. Counties may require that the subdivider obtain a permit from the State Engineer assuring that this water supply is available. If a county has a comprehensive plan, it may require a water supply for a given number of years, such as 100 years.

Model subdivision regulations were drafted for counties after the 1995 amendments to the New Mexico Subdivision Act were passed by the legislature. It was hoped that each county would then adopt regulations that specifically reflected its own particular concerns. Rio Arriba and Valencia counties, among others, have done so. A comprehensive plan and subdivision regulations reflecting county growth issues are merely a beginning in developing a rural growth management strategy.

V. THE "Z" WORD: CAN IT BE USED IN RURAL NEW MEXICO?

Although all of New Mexico's cities and some of its smaller municipalities and counties have adopted traditional zoning, zoning is not a popular concept in many of New Mexico's rural areas. The old Western rule that "a person can do what he wants with his land" still prevails. The type of "Euclidean" zoning that characterizes regulation of land uses in urban areas—dividing a city into single-use districts, each of which has height, bulk and setback regulations, among other restrictions—is generally frowned upon. When a proposed new use comes before the county commission, however, such as a private waste disposal facility or a water guzzling power plant, rural residents suddenly realize that subdivision regulations are not sufficient to protect all of their interests and are ready to consider additional levels of land use regulation.

A. Special Zoning Districts

A private power plant was proposed in Socorro County, south of the Valencia County line, in an agricultural area in the Rio Grande Valley. Valencia County has zoning; Socorro County does not. Residents near the proposed plant asked the Socorro County Commission to develop some sort of regulation to assure that new use would not impair their agricultural water supply.

When it became clear that most county residents were not ready to accept comprehensive zoning of the entire county, residents in the area of the proposed plant petitioned the county clerk to form a Special Zoning District under the Special Zoning District Act. This statute enables a special zoning district to be created within a county that has not adopted a countywide comprehensive zoning ordinance. The special zoning district must consist of an area of no more than 20,000 acres outside the boundaries of a municipality when there are at least 150 single-family dwellings within the area defined by the district. At least 51 percent of the registered electors within the defined district must sign a petition to create the district; the petition is then filed with the county clerk.

The county commission must hold an election for members of a zoning commission once the petition has been filed. “The commission shall adopt a comprehensive zoning plan or ordinance for the district that includes a master land use plan.” If the county later adopts a comprehensive zoning ordinance, any special zoning district in existence at that time may continue to exist, but no new ones may be formed.

The Special Zoning District in Socorro County is now up and running and is in a position to exert control over its agricultural future.

B. By Any Other Name

When a rural municipal council or county commission reaches consensus on the adoption of an additional level of land use regulation, having been inspired by a local threat to the area’s traditional lifestyle or water quantity or quality that cannot be addressed by subdivision regulation alone, there are options other than the traditional zoning ordinance. The ordinance usually will not use the “z” word.

17. Id. § 3-21-18(B).
18. Id.
19. Id. § 3-21-21.
20. Id. § 3-21-18 (D).
Rio Arriba County adopted a comprehensive plan as part of its *Rio Arriba County Design and Development Regulation System.* The major concern in the county was the proliferation of subdivisions and other land uses that threatened both surface water supply and quality in areas traditionally used for agriculture. The document states,

Surface water in Rio Arriba County is used primarily for agricultural uses and is delivered by both the Rio Chama and Rio Grande River and their tributaries. As the population of the County increases, some surface water may be used to support residential, commercial and industrial development. Water is a vital link, which if severed from the land, will also alienate our people from their land. The allocation of our limited water resources should favor traditional agricultural activities over other types of land uses. The County will seek to eliminate existing identified ground and surface water contamination problems, prevent water rights from being severed from the land or leaving our County and strive to protect the quality and supply of water resources in the County. Rio Arriba County recognizes the value and historical significance of the acequia system and will encourage enhancement of both the physical and political components of acequias.

Rather than dividing the county into zoning districts, the Ordinance designates the entire county as a County Rural Agricultural District (CRAD), allowing agricultural uses, single family dwellings, parks and recreation areas, mobile homes, and roadside stands (which require a permit) anywhere in the county. All other proposed uses such as commercial, industrial, and large planned residential communities must go through a permitting process. This process includes staff review and public hearings before the County's Planning and Zoning Committee and a final approval by the County Commission and also provides variance and appeal procedures.

Rio Arriba County utilizes performance standards in order to assure that uses other than those allowed in the CRAD will not interfere with traffic or with existing uses on property in adjacent areas. Performance standards are criteria for development that are concerned

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22. *Id.* at 11-12.
23. *Id.* at 37.
24. See *id.*
25. See *id.* at 29-36.
more with the impact of a proposed new use on existing uses and with environmental conservation than they are with the actual use of the land.

In a pure performance zoning system, a parcel of land is analyzed for its environmental features, such as floodplains, woodlands, and steep slopes. Such areas are excluded from the developable site. A development proposal is then subjected to a set of criteria, or standards, approved by the jurisdiction, such as buffers from neighboring property, floor area ratio (the ratio of built structure to open space on a lot), parking requirements, traffic flow requirements, water availability, waste water disposal, solid waste storage and disposal, lighting requirements, etc. The proposed development is analyzed by the jurisdiction's planning staff, which determines whether it meets the adopted performance standards. If the standards are met, the development can be administratively approved. The public and elected officials are involved in the creation and amendment of performance standards, rather than the day-to-day approval of specific development proposals. There are appeal procedures, however, to assure due process.

Performance zoning is usually combined with some traditional zoning and with subdivision regulations. Performance standards are adopted in advance for a few districts, such as a residential district, which includes all residential types, and commercial and industrial districts. There are more stringent performance standards for heavy industrial uses that might pollute air and water and create other hazards. Usually there is a permitting process requiring public hearings before a planning/zoning commission and, ultimately, the city council or county commission.

Rio Arriba County's ordinance is not pure performance zoning, since a permit is required for all land uses except for those allowed in the CRAD. All applications for permits for such uses have a public hearing before the Rio Arriba County Planning and Zoning Committee and must ultimately be approved by the County Commission. 26

Rio Arriba County's ordinance also includes a procedure for a "Compatibility Assessment," which allows affected neighboring property owners to provide input on a proposed development early in the approval process. 27 The planning director coordinates a meeting with these property owners and the developer. If consensus is not reached, then the Planning and Zoning Committee conducts a public hearing to determine what conditions should be attached to the proposed project to make it compatible and harmonious with the goals and policies of all applicable land use regulations. 28

26. Id. at 30-37.
28. Id.
Mora County had adopted a similar system, the *Mora County Development Guidance System*, in 1997, after a comprehensive planning process, but it has not been implemented to the extent of Rio Arriba County’s *Design and Development Regulation System*. Mora County’s system was based on *The Development Guidance System* of Hardin County, Kentucky, which was one of the first rural jurisdictions to develop an alternative to zoning in order to guide its growth and future development. The use of the terms “Development and Design System” or “Development Guidance System” immediately remove the suspicion that zoning is involved.

In 2002, Rio Arriba County amended its subdivision ordinance in order to protect and enhance agricultural lands, acequia systems, and the ground and surface water resources of the county. The county designated all irrigated agricultural land in a new zone, the Cluster Development Agricultural Overlay Zone. In this zone, no additional lot may be created that is less than 1.5 acres. There is a graduated scale setting forth the number of new lots that can be created by subdivision. A parcel of 1.5 to 2.99 acres may only be subdivided into two lots; a parcel of 3.0 to 3.99 acres may only be divided into three lots; a parcel of 4.0 to 4.99 acres may only be divided into four lots; and a parcel of 5.0 to 9.9 acres may only be divided into five lots.

Subdivisions in irrigated agricultural land that are larger than ten acres may only be located in a “buildable area” identified on the submitted subdivision plat. This area may only comprise 30 percent of the area to be subdivided. The remaining 70 percent of the land must remain “agricultural open space.” The agricultural open space shall be protected from future development by means of a deed restriction, filed with the final approved subdivision plat.

Only agricultural uses and liquid waste disposal systems required for development in the buildable area, parks and recreational uses, and structures accessory to agricultural uses are allowed in the agricultural open space. There are design criteria for the buildable area, which include a 7500 net square-foot minimum lot size, if a liquid waste disposal system approved by the New Mexico Environment Depart-

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32. *Id.* § 6.
33. *Id.*
34. *Id.*
35. *Id.* §§ 6-7.
ment is to be utilized. This ordinance thus protects irrigated agricultural land while allowing some cluster development so as not to deny owners of this property the opportunity for some alternative land use that will provide additional income.

Rio Arriba County also enacted the Rio Arriba County Timber Harvest Ordinance in order to implement a policy to “protect, maintain and restore fully functional forests and streams, rivers, watersheds and acequias, while permitting the harvest of forest goods,” as well as for other purposes such as erosion control. This ordinance applies only to timber harvests on private land within the county and requires a permitting process for such harvests. The process includes submittal of a Timber Harvest Plan (THP) and may also include submittal of an Environmental Assessment if the Planning and Zoning Department determines that the harvest may have a significant environmental impact. There are performance standards for harvests.

The Timber Harvest Ordinance was unsuccessfully challenged in Rancho Lobo, Ltd. v. DeVargas by a property owner who wished to establish a hunting preserve and had obtained a permit from the State of New Mexico to harvest trees on the property. The suit alleged that the state’s Forest Conservation Act preempted county regulation of timber harvesting. The Tenth Circuit held that although the state’s Forestry Division had broad powers to administer all laws related to timber harvesting, it did not give it exclusive authority, nor did it prohibit local governments from enacting and enforcing such laws. The Timber Harvest Ordinance particularly addressed the impact of timber harvesting on watersheds, watercourses, and acequias. This case has been appealed to the U.S. Supreme Court.

In the Rancho Lobo case, the Tenth Circuit relied upon San Pedro Mining Corp. v. Board of County Commissioners, in which the New Mexico Court of Appeals upheld a mining ordinance enacted by Santa Fe County that went far beyond the state’s mining laws. The court addressed such issues as the impact of mining development on the county’s water quality and quantity as well as on county roads and health services. It should be noted, in this regard, that Rio Arriba County

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36. Id. §§ 8-9.
38. Id. at 9-10.
39. Rancho Lobo, Ltd. v. DeVargas, 303 F. 3d 1195 (10th Cir. 2002).
41. Rancho Lobo, 303 F.2d at 1195.
42. RIO ARIBBA COUNTY TIMBER HARVEST ORDINANCE, supra note 37, at 16-18.
has also enacted a Sand and Gravel Mining Ordinance,\textsuperscript{44} which requires a permit for sand and gravel mining and includes performance standards for this activity. The performance standards are particularly concerned with terrain management, flood control, mining in arroyos and watercourses, and protection of cultural resources.\textsuperscript{45}

Thus, Rio Arriba County has developed a land regulatory scheme that intends to preserve its traditional acequia based agriculture and its timber resources and mitigates the impact of sand and gravel mining while allowing the county to continue to grow. Other rural municipalities and counties should follow the examples of Rio Arriba and Santa Fe counties in tailoring ordinances to address specific threats to their interests, as set forth in their comprehensive plans.

VI. OTHER APPROPRIATE RURAL LAND USE REGULATORY STRATEGIES

A. How Can LESA Help?

The Land Evaluation and Site Assessment (LESA) rating system is an agricultural land protection tool that can be utilized in New Mexico to protect agricultural lands and thus also preserve water in traditional agricultural uses. LESA was developed by the Natural Resources Conservation Service (NRCS) of the U.S. Department of Agriculture (formerly the Soil Conservation Service) as a result of information collected in the \textit{National Agricultural Lands Study}, a 1981 study that recommended methods of protecting farmland from conversion to urban sprawl,\textsuperscript{46} and also in \textit{Compact Cities}, a study published in 1980 that reported on the ravages of sprawl and recommended actions the government should take to prevent it.\textsuperscript{47} The NRCS used recommendations from both reports to develop site assessment criteria that could be used, along with land evaluation criteria, to determine which properties, if converted to other land uses, would be least destructive to the agricultural economy of an area, assuming that some farm sites would be needed for development.\textsuperscript{48} The protection of farmland as federal policy was incorporated into the Farmland Protection act of

\textsuperscript{44} RIO ARRIBA COUNTY, N.M., SAND AND GRAVEL ORDINANCE, RIO ARRIBA ORDINANCE NO. 2000-02 §§ 1-4, at 9-28 (2002).
\textsuperscript{45} Id. at 9-13.
\textsuperscript{46} U.S. DEPT. OF AGRICULTURE, NATIONAL AGRICULTURAL LANDS STUDY (NALS) (1981).
\textsuperscript{47} U.S. SENATE SUBCOMMITTEE ON THE CITY, COMPACT CITIES (1980).
1981\textsuperscript{49} and implemented through inclusion of LESA in federal regulations.\textsuperscript{50}

LESA can be used by state and local governments as well as private organizations to make sound decisions about land use in agricultural areas threatened by conversion of agricultural land to other uses. The governmental or private entity retains the NRCS to perform a land evaluation, rating soils within the area sought to be protected and placing them into groups ranging from the best to the least suited for a specific agricultural use, such as cropland, forestland, or rangeland. For example, the best group may be assigned a value of 100, while all other groups are assigned lower values. The land evaluation is based on data from the National Cooperative Soil Survey, a national database.\textsuperscript{51}

It should be noted that forestland and rangeland were added to the parameters of LESA in 1994.\textsuperscript{52} Considering that the only soils in New Mexico that receive the highest rating are those which are irrigated, either by acequias or ditch systems or by irrigation systems utilizing groundwater, the addition of forestland and rangeland to LESA makes it more relevant to the rest of New Mexico's agricultural activities.\textsuperscript{53}

The site assessment aspect of LESA shifts the process to the state or local government or private organization interested in farmland protection. It involves three major areas:

- Non-soil factors related to agricultural use of the site.

This could include the location of a specific site within an area traditionally used for agriculture, which, if converted to a non-agricultural use, such as a high-density subdivision, could negatively impact future agricultural use of nearby land.

- Factors related to development pressure.

As the bulldozers move closer to agricultural land, a jurisdiction or organization may wish to preserve remaining farm, forest or range land for its open space value, even if its soils are not of the highest grade.

\textsuperscript{50} See 7 C.F.R. § 658 (1994).
\textsuperscript{52} 7 C.F.R. § 658 (1994).
\textsuperscript{53} Interview with Gerald Stratton, Soil Scientist, Natural Resources Conservation Service, Albuquerque, New Mexico, District Office (Apr. 9, 2003).
In New Mexico, especially in rural northern areas, the traditional acequia irrigation system is highly valued as a reflection of culture, history, and political organization. Continued use of water to serve traditional local agriculture would thus have high public value, even if agriculture is no longer profitable.

Each factor selected by the state or local jurisdiction or private organization is assigned a range of possible values according to local needs and objectives. Both the land evaluation and site assessment can then be used as a sound basis for making land use decisions.

Protection of agriculture is a major policy in virtually all jurisdictions in New Mexico that have conducted comprehensive and/or regional water planning processes. LESA can provide the first step towards solid implementation of the policy, providing the basis for selecting those areas that could be protected by an agricultural district under conventional zoning or an overlay district, such as the district created in Rio Arriba County, and/or performance standards that will prevent total destruction of agricultural land while permitting some development.

There have been at least two LESA processes conducted in New Mexico. The village of Corrales worked with the NRCS, completing both a land evaluation and a site assessment in the 1980s. The village never adopted a regulatory system reflecting the LESA study, however, since at the last minute farmers opposed it, thinking that their options for selling their property in a booming market might be limited. A private group that sought to protect agriculture in Bernalillo County’s South Valley, which is threatened by sprawl creeping out from Albuquerque, also conducted a LESA process but nothing further was done by the county to implement it.

Rio Arriba County did not utilize LESA, although it could have done so. There was strong consensus in the county that the remaining acequia-irrigated agricultural land along the Rio Grande and Rio Chama had to be protected, considering that subdivisions were proliferating in these areas, ground water was being contaminated by septic tanks, and

55. Id.
56. Observations gained from the author’s professional experience as land use lawyer and consultant in New Mexico counties, including Rio Arriba County, Valencia County, Mora County, San Miguel County, Hidalgo County, and Doña Ana County.
57. Interview with Gerald Stratton, supra note 53, at 20.
58. Id.
water rights were being sold to non-agricultural users elsewhere. Nothing more was needed.

The case might not be as clear in other counties, where, although there is no irrigated agriculture, ranching has been the predominant way of life. LESA could thus provide the basis for a protective strategy. It could also provide the basis for protecting private forestland from being totally cleared for subdivisions.

B. Transfer and Purchase of Development Rights

One of the rights in the "bundle" of property rights associated with land ownership is the right to develop property. Property rights can be limited by a government under its police powers—the powers to protect the health, safety, and general welfare of the community.59

Transfer of development rights (TDRs) and/or purchase of development rights (PDRs) are techniques used to protect a desired land use from further incompatible development in furtherance of a comprehensive plan policy. These techniques provide the property owner with a means of compensation for keeping land in a use, such as agriculture, that might be less valuable than the highest and best use of the property, which may be converting the land to other uses.

The transfer of development rights imposed by a government agency as a means of preserving an historic structure, New York's Grand Central Station, was upheld by the U.S. Supreme Court against a takings challenge.60 In the context of a rural growth management strategy, which includes preservation of agricultural land, it can be used when an agricultural district or overlay district has been established that limits further development of the property except for agriculturally related uses. Preservation of agricultural land will also continue the use of water in agriculture and preserve watersheds.

The New Mexico Legislature in 2003 enacted legislation enabling the transfer of development rights. "Development rights" are defined as

the rights permitted to a lot, parcel or area of land under a zoning ordinance or local law respecting permissible use, area, density or height of improvements executed thereon, and development rights may be calculated and allocated in accordance with density or height limitations or a criteria

that will effectively quantify a development right in a reasonable and uniform manner.\textsuperscript{61}

Once development rights are quantified, property owners in the restricted area, the donor area, may transfer their development rights to another parcel of land called the receiving area, which has been zoned at a density that will enable the owner of the development rights to realize the same financial benefit as if the donor area were developed at its highest and best use.

Purchase of development rights may involve the purchase of the quantified development rights by another party who will then utilize them in a present or future receiving area. The development rights may also be purchased by a local government and then banked, as was done by the city of Chicago when it wished to preserve an historic area of the city and then provide incentives for intense development of a new lakefront area. Developers who purchased the development rights from the bank could develop at higher densities than normally allowed in the new receiving area.

TDRs work best where there are zoning districts that have different densities of development, such as one dwelling unit per acre, two dwelling units per acre, etc. The usual density allowed in these districts can be increased, using development rights. The problems with a TDR program are valuing of development rights, administering the program, and finding areas that are receptive to being receiving areas for development at increased densities than those normally allowed in that area. The success of TDR programs relies on private market transactions, where there are willing sellers of the development rights and willing buyers.\textsuperscript{62} A TDR system could work if a rural county designated a specific developable area as a receiving area and established density or other incentives that would encourage the purchase and transfer of development rights. Considering that most rural areas do not have specific zoning districts, some other type of market might have to be established.

Chapter 229 states,

A. The legislature finds that: (1) growth and urban development are encroaching on and eliminating open and distinctive ecological, agricultural and historical areas; (2) the ability to transfer development rights is useful to

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\textsuperscript{61} Laws of New Mexico, 2003 Advanced Legislative Service, ch. 229, at 2157 (Michie 2003).

achieve community objectives if used consistent with comprehensive plans; and (3) transference of development rights using normal markets may provide just compensation to property owners for public benefits.\textsuperscript{63}

Thus, TDRs are considered by the legislature to be a technique for planned rural growth management.

C. Conservation or Land Use Easements

Conservation or land use easements are becoming one of the most popular privately initiated land use tools for preservation of open space and agricultural land. In New Mexico, a variation on the conservation easement is water banking, which will help to sustain acequia-based agriculture. A “conservation” or “land use easement” is defined in the New Mexico Land Use Easement Act\textsuperscript{64} as

a holder’s non-possessory interest in real property imposing any limitation or affirmative obligation the purpose of which includes retaining or protecting natural or open space values of real property, assuring the availability of real property for agricultural, forest, recreational or open space use or protecting natural resources.\textsuperscript{65}

An owner of property who wishes to protect all or part of his/her land from development for the purposes set forth above voluntarily donates a nonpossessory interest in the property to a “holder,” which, in New Mexico, is defined as a non-profit entity that has as its purpose or powers the protection of the interests described above.\textsuperscript{66} A holder is usually a trust established specifically to purchase land to protect open space or agricultural values, or to hold conservation easements.

The American Farmland Trust holds conservation easements in agricultural land all over the United States. The Nature Conservancy either purchases land or holds conservation easements in unique open space. The conservancy purchased the Gray Ranch in southern New Mexico and then sold it to a private owner after establishing conservation easements that it now holds to protect the natural features of that magnificent property while allowing ranching on the land to continue. In northern New Mexico, conservation easements in agricultural land are

\textsuperscript{63.} Laws of New Mexico, \textit{supra} note 61, at 23.  
\textsuperscript{64.} N.M. STAT. ANN. § 47-12-1, et seq. (Michie Supp. 1999).  
\textsuperscript{65.} \textit{Id.} § 42-12-2(B).  
\textsuperscript{66.} \textit{Id.} § 42-12-2(A).
held by the Taos Land Trust and the Santa Fe Conservation Trust. The Rio Grande Agricultural Land Trust is seeking to acquire conservation easements in the Rio Grande Valley to preserve the remaining farmland in the village of Corrales and Bernalillo, Valencia, Sandoval, and Socorro counties.67

The terms of the easement, the uses of the land that the easement restricts, as well as the uses that are allowed are clearly defined in an easement deed. The holder of the easement has the right to inspect the property and monitor land uses. The easement is usually perpetual and runs with the land, binding future land owners as well as the easement donor. There usually is an escape clause in the deed, which terminates the deed if the interest to be protected is destroyed and cannot be restored.

Donors of conservation easements qualify for tax deductions under the Internal Revenue Code,68 including reductions in inheritance taxes. Tax reductions discourage sale of the land by heirs of the original owner because they need to raise funds to pay taxes. In parts of New Mexico, however, many owners of agricultural land do not have sufficient income to make the tax incentives worthwhile. A potential holder can then purchase the easement if the land is considered too valuable to lose and if he/she has the funds to do so.

There is a difference of opinion as to whether a local government can be the holder of a conservation easement in New Mexico. Although the definition above limits holders to non-profit entities, a recent New Mexico Attorney General’s Opinion stated that the Land Use Conservation Easement Act neither “affirmatively includes nor excludes counties or other public entities as potential owners of such easements.”69 The opinion cites the “usual” powers of municipalities and counties to “acquire and hold real property”70 as authority for this conclusion.71 If, indeed, municipalities and counties can be holders of conservation easements, they could utilize them as a growth management and agricultural or open space protection tool, without having to utilize eminent domain to acquire and preserve the subject property. Of course, eminent domain is always available as the last resort, if the jurisdiction has the financial resources to purchase the property.

70. N.M. STAT. ANN. § 3-18-1 (Michie 1978).
71. Opinion of Attorney General, supra note 69, at 1.
D. A Variation on These Themes

An interesting technique for preservation of ranchland has been developed by Albuquerque architect Anthony Anella. A design process called "sieve mapping" is used to identify the conservation value of a ranch and provides a basis for capitalizing on this value by allowing for limited, carefully designed development to be located in appropriate places on the ranch. The best ranch land continues to be devoted to grazing. Any ecologically sensitive areas are preserved as open space by a conservation easement held by the ranch owner or donated to a non-profit holder. Land that is considered appropriate can be developed for residential uses. Lots may border the rangeland but cannot interfere with it. A rancher can thus sell part of his non-productive land, using the proceeds to support continued ranch use.72

This technique offers a variation on the themes of conservation easements and transfer of development rights, although the rights transferred are on the same piece of property. Anella's technique should be popularized all over New Mexico as a means of preserving ranch land.

E. Water Trusts: Preserving Acequias

The acequias that irrigate traditional agriculture in rural New Mexico have both physical and cultural significance. The acequia is actually a unit of rural government. Each acequia or ditch is maintained and managed by its members, who are those served by the ditch. When farm families no longer wish to continue a traditional family farm irrigated by an acequia, they often sell their water rights to outsiders for use elsewhere and for other purposes. The loss of the water represented by the water rights sold has a negative effect on the operation of the acequia, as well as on the integrity of the acequia as a whole.

The 2003 New Mexico Legislature passed a bill that will enable acequia associations to establish water banks in which to temporarily reallocate water without a change of purpose of use or point of diversion. This will preserve the water supply available for the farms served by an acequia or community ditch. The acequia or community ditch bank governing body will be able to make this transfer to a water bank without having to go before the state engineer for approval. The

water rights placed in the water bank would not be subject to loss for non-use for the period during which they are in the bank.  

CONCLUSION: PLANNING ON THE NEW MEXICO HORIZON

As growth continues in a context of drought and acknowledged potential water shortages, the need for planning is increasingly being recognized in New Mexico. The 2003 New Mexico Legislature authorized creation of a Horizons Task Force to “examine strategic planning process[es] in other states” and seek their applicability to New Mexico in establishing a statewide comprehensive planning process. Perhaps this task force will learn from the experiences of other states and recommend mandated statewide planning as well as regional and local comprehensive planning. The task force might also recommend the consistency of this planning with regional water planning and with land use regulatory strategies that should implement these plans.

It is the comprehensive plan that will enable rural New Mexicans to define the future of their communities. Comprehensive plans should include elements addressing the relationship of land use to water availability, economic development, affordable housing, environmental preservation, and other identified issues and needs. Once the plan is adopted, the tools of rural growth management discussed above can be utilized to assure that growth and development, which should and must occur, will not destroy what makes New Mexico the “Land of Enchantment.”