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Memories and Miracles - Housing the Rural Poor along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Dona Ana County, New Mexico

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The first resident bought land there in 1990. He lived in a cobalt blue adobe house he was building by hand. The developer named the community “Recuerdos,” Spanish for memories. The popular story is that after a year there without running water, the first resident re-named Recuerdos “El Milagro,” meaning miracle. Five years later, over a dozen families lived there, and several more wanted to move to El Milagro, but could not acquire the necessary permits.

Now, primarily due to the efforts of a grass roots organization known as the Colonias Development Council (CDC),1 El Milagro, New Mexico, has running water, the beginnings of a community-wide septic system, and, most importantly, a local organizing board. El Milagro does not qualify for federal assistance, however, because it does not meet the federal legal definition of a colonia.2 Moreover, although El Milagro was the subject of litigation against the developer by the New Mexico Attorney General, the consent decree has yet to be fully implemented.3

I. THE MEANING AND CONTEXT OF THE WORD “COLONIA”

The word “colonia” in the Spanish of Mexico means neighborhood.4 In Texas and New Mexico, colonia has several connotations, all of them referring to the rural housing which dots the border region and is inhabited by Mexican immigrants and their children.5 The United States (U.S.) government has given the word “colonia”
a more specific definition. Under federal law, a colonia is any identifiable community that: (1) is in the state of Arizona, California, New Mexico, or Texas; (2) is within 150 miles of the U.S.-Mexico border, except for any metropolitan area exceeding one million people; (3) on the basis of objective criteria, lacks adequate sewage systems and lacks decent, safe, and sanitary housing; and (4) was in existence as a colonia before November 28, 1990. Communities which meet these criteria are targeted for federal aid by the Cranston-Gonzales National Affordable Housing Act. Local officials and community activists have accepted the federal definition, basing their official decision to label communities as "colonias" on whether or not the communities are eligible for federal aid, rather than on whether the communities, despite their ineligibility for aid, are in fact colonias, with the result that the cart sometimes pulls the horse.

In contrast to this black letter definition, my own work in trying to understand the real nature and implications of the colonias along the border is reminiscent of the story of the blind men who cannot see the elephant who stands before them. Each man guesses at other animals on the basis of what is immediately in front of him: the feel of an ear, the touch of a tusk. So I have learned that each colonia has its own characteristics.

My learning about the colonias in southern New Mexico and west Texas has been a journey, a process of gathering information and knowledge through my employment experiences. From 1990 until 1993, I worked as a staff attorney for the farmworker division of the Texas Rural Legal Aid’s El Paso office. El Paso sits squarely on the U.S.-Mexico border. Although the political border between the two countries is the Rio Grande-Rio Bravo, Ciudad Juarez in fact stretches well into downtown El Paso, until the faces become more and more Anglo faces, the signs are more and more in English, and the cars outnumber the pedestrians.

Anyone who worked with the poor in El Paso County, Texas, in the 1980s and early 1990s heard about the colonias that existed out in the desert—illegal subdivisions without roads or water or sanitation, sold mostly to new immigrants. From an airplane flying above El Paso County, I could sometimes see dirt roads

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7. See id. § 1479(f).
8. Judith M. Price, Director of Community Development for Doña Ana County, notes that the federal designation of colonias as “rural or semi-rural concentrations of people, with little or no water, sanitation, roads, and unsafe or unsanitary housing, and . . . clustered within 60 kilometers or 100 miles [sic] of the border” corresponds with many communities that existed in southern New Mexico long before the current housing crisis. Interview with Judith M. Price, Director of Community Development for Dona Ana County, N.M., in Las Cruces, N.M. 4 (Sept. 25, 1996) (transcript on file with author).

A lot of rural New Mexico villages fit [the colonia] profile, too. And I think the thinking . . . on the part of County officials and [C]ouncil of [G]overnment officials was, if there’s [going to] be federal money for water and sewer assistance, [then] designate them a colonia . . .

Programs and government reactions are like sunflowers, they turn to the sun. So if you turn on a bright light source of money . . . we’re [going to] find a way to spend it.

Id.
criss-crossing the desert, going to isolated subdivisions most city residents never saw. My perception was that the media sensationalized the health issues in weekend editions. I would occasionally meet lawyers or other advocates who could talk about conditions firsthand.

The group about whom I heard most about was the El Paso Interreligious Sponsoring Organization, a grass roots organization with ties to the Catholic Church. The farmworkers with whom I worked generally lived in Juarez or in south El Paso near the workers' recruitment site, in old hotels, cheap and dangerous apartments, public housing, or on the streets. They often lived apart from their families, who remained in the interior of Mexico. I had no firsthand experience with the infamous colonias near El Paso.

My work often took me into southern New Mexico. The El Paso farmworkers picked chile near Hatch, Salem, Deming, Las Cruces, and Anthony, New Mexico. Their southern New Mexico counterparts lived in local communities with their families, and appeared to have more resources: telephones, vehicles, and sometimes even a small house. I do not recall hearing the word “colonia” in southern New Mexico at that time, although I was familiar with the communities of farmworkers who had moved into the area.9

On one of my work trips to Hatch in the fall of 1990, I visited Ismael Zuñiga. His house stood on a small isolated hill, above a hollow near the railroad tracks and the village water tower, just on the outskirts of Hatch. There were no other houses nearby.

In 1995, working in Albuquerque with a group of law students from the Semester-in-Practice Clinical Program of the University of New Mexico School of Law, I contacted the Catholic Diocese of Las Cruces in an effort to continue my work with farmworkers and because I knew many of its employees from my work at Texas Rural Legal Aid. Antonio Lujan, a friend and the director of the office of Catholic Social Ministries for the Diocese, referred me to Bess Metcalf. Bess referred me to the presidents of two local concilios, the governing councils for Salem and El Milagro. Thus began the El Milagro Colonia Project in El Milagro, New Mexico.10

9. My conversations with activists in southern New Mexico during the fall of 1995 and the fall of 1996 confirm that the word “colonia” was not in common usage in southern New Mexico until recently. Specifically, Bess Metcalf, lead organizer for the CDC until November 1996, stated that “the word ‘colonia’ is kind of a weird word, because it’s really an artificial designation.” Interview with Antonio Lujan and Bess Metcalf in Las Cruces, N.M. 3 (Nov. 10, 1995) (transcript on file with author) (quoting Bess Metcalf).

Judith Price believes that the federal General Accounting Office Study of the colonias in the late 1980s, in advance of the Cranston-Gonzales National Affordable Housing Act, actually coined the term. See Interview with Judith M. Price, supra note 8, at 2; see also RESOURCES, COMMUNITY & ECON. DEV. Div., UNITED STATES Gen. ACCOUNTING OFFICE, RURAL DEVELOPMENT: PROBLEMS & PROGRESS OF COLONIA SUBDIVISIONS NEAR MEXICO BORDER RCED-91-37 1 (Nov. 1990) [hereinafter GAO STUDY] (The GAO STUDY is also known as the RURAL DEVELOPMENT STUDY). The term “colonia” in fact existed in Texas at least as early as 1977. See LYNDON BAINES JOHNSON SCH. OF PUB. AFFAIRS, UNIV. OF TEX. (AUSTIN), POLICY RESEARCH PROJECT REPORT No. 18, COLONIAS IN THE LOWER RIO GRANDE VALLEY OF SOUTH TEXAS: A SUMMARY REPORT 5 (1977) [hereinafter COLONIAS IN THE LOWER RIO GRANDE]. As far as I can determine, the word is a Texas creation that moved into New Mexico on the heels of the GAO STUDY.

10. The primary credit for implementing the El Milagro Colonia Project belongs to Hector Samaniego and Steven Sage, clinical law students in the Summer 1995 Semester-in-Practice Clinical Program at the University of New Mexico School of Law who both stayed with the project through Spring 1996.
Much to my surprise, I had been to El Milagro before. Ismael Zuñiga was, in fact, the first resident of El Milagro. By 1995, his isolated unfinished house had become a small, but thriving, community of some fifteen to twenty-five families. Three law students and I met with several residents of El Milagro, and offered whatever legal services they needed with regard to their land and community. Most of the residents indicated their primary concern was that they never had received deeds to their land. An older resident, Bernardino Nuñez, gave a long list of people who had come and gone from El Milagro, and described how the property had been red-tagged for failing to comply with county and state regulations. “And now, Professor, what are you going to do?,” he asked.

And so began my involvement with the colonias. The students and I concentrated our efforts on clearing title to each parcel of land in El Milagro. While the effort to clear title is ongoing, the next projects in El Milagro are to help with easements for a community sanitation system and to remove the community’s flood plain designation. Most enjoyable for me, I spend more and more time on front porches in El Milagro, talking to individual residents.

Additionally, in November, 1995, I represented the CDC in an attempt to intervene in the New Mexico Attorney General’s litigation concerning the illegal subdivision of El Milagro and another New Mexico colonia known as Las Palmeras, near Anthony, New Mexico. The lawsuits addressed roads and drainage. While my attempts to intervene failed, the CDC and I continue to work with the New Mexico Assistant Attorney General to help address the needs and concerns of the residents of El Milagro and Las Palmeras. Also, in conjunction with Centro Legal Campesino at Southern New Mexico Legal Services, I have begun work in a third colonia, known as Fair Acres (or Rio Grande Estates), near Las Cruces, New Mexico.

Many, if not most, of the colonias residents in southern New Mexico are farmworkers, so my earlier experience with farmworker issues at Texas Rural Legal Aid sometimes helps me to understand the views expressed by the residents of the New Mexico colonias. Sometimes, however, my El Paso assumptions are entirely off the mark. The legal solutions used in El Milagro sometimes are a perfect fit for a Las Palmeras problem, and I know better what questions to ask in Fair Acres, because of my experience in both communities. However, each of these communities—El Milagro, Las Palmeras, and Fair Acres—is unique, and the work with each community to help remedy the problems is also generally unique.

11. So far, we have cleared title to five parcels, and obtained surveys of five more.
15. In my own experience, the communities of El Milagro, Fair Acres, and Las Palmeras have very different title problems; similar easement problems; and flood plain issues that are similar legally, but very dissimilar geologically. El Milagro’s title problems with individual lots, for example, are extremely complex. In contrast, the residents of Las Palmeras have clear title, but for the most part possess only a real estate contract interest in their lots—a clear, but quite shaky, interest under New Mexico law. See, e.g., Bank of Santa Fe v. Garcia,
realized that in each colonia, I was encountering the ear of the elephant, not the elephant itself, I tried backing away to find an analytical framework for my efforts. But I found that every time I backed away for a better perspective, the animal's features moved out of focus, to the point that I even began to question the usefulness of the word colonia beyond its power to generate attention and funds. Certainly, I do not dismiss the importance of this function. This limitation on the significance of the word, however, does not bode well for residents, policymakers, or activists who seek to understand and resolve the more general problems of the colonias.

Broad generalizations about the colonias are indeed quite common, but these often degenerate into stereotypes. For example, one Doña Ana County official assured me that Mexican immigrants want to live in colonias. While this statement may be factual enough, it evades the essential truth of the colonias, which is that the choice to reside in a colonia reflects a tremendous complexity of factors, including economic, geographic, political, cultural, social, and familial considerations.

My own firsthand understanding of the colonias is specific to particular communities, and is therefore ongoing. Nonetheless, after extensive, if anecdotal, personal experience, and considerable written and field research, I have come to the conclusion that the existence and improvement of the poor condition of rural housing along the border can only be understood in the context of a dynamic, local process, rather than in the context of a static federal or even state definition.

The key is located in the communities themselves. Understanding the formation of colonias requires listening to and working with the colonias residents.
and the grass roots organizations who assist them, and with the county
governments who attempt directly to regulate the developers and the residents,
with whatever resources the desert geography and state and federal government
choose to grant them. Furthermore, the remediation of the lack of roads,
sanitation, water, good land title, and adequate housing in the colonias must, in
each case, be a local solution. Indeed, I have come to the conclusion that any
analytical framework for addressing these issues, insofar as it might lead to
inflexibility in policies, regulations, or assistance directed towards a specific
colonia, may be counterproductive.

To be sure, the federal government, the states, and private foundations can offer
substantial expertise and resources that the counties and communities do not
possess. Their roles are therefore critical in the process of improving the
condition of rural housing. But implementation of any solution invariably begins
at the county or grass roots level. It is equally critical that decisionmakers and
activists work with and learn the lessons of the colonias at a local level prior to
proposing solutions to the issues of rural housing. Although solutions may be
found ultimately only at a local level in specific communities, effective local
processes in one community may serve as a model for other communities,17 as
well as a guide for state and national policymakers to find a way to support local
efforts through laws and resources.

Moreover, while solutions to the border housing crisis must be flexible enough
to permit communities, working with local governments, to find their own
solutions, flexibility in regulation must not be equated with wide-open regulation.
In both states, there is currently a clear risk that developers of unsafe and
unsanitary colonias will simply move to unregulated parts of New Mexico and
Texas. Both states, therefore, need a more comprehensive approach at a statewide
level.

Finally, I believe that in attempting to regulate and ameliorate the infrastructure
problems in the colonias, policymakers should not overlook the positive aspects
of the colonias. Home ownership in small communities has value both to the
residents and to society as a whole, if home ownership includes planning for basic
infrastructure. The purpose of this Article is to explore and contrast the processes
available at the county and community level in El Paso County, Texas, and Doña
Ana County, New Mexico, possibly to prevent the formation of colonias without
adequate infrastructure and certainly to remedy any deficits once such colonias
are created. This Article also suggests what solutions may exist to the border
housing crisis over the long term.

Part II of this Article discusses the growth of colonias and the population
explosion along the border. Part III explores and contrasts the processes
historically available at the county and community level in El Paso County,
Texas, and Doña Ana County, New Mexico, to prevent the formation of colonias
without adequate infrastructure and to remedy any deficits once such colonias are

17. I am sometimes asked to "do what we did in El Milagro" in a different colonia. I have learned that
although I cannot "do what we did in El Milagro" in any other place, I can ask the same questions and use the
same process to reach the same goal of individual property ownership of a livable plot of land.
created. Part IV offers potential solutions to the issues facing the colonias and the housing crisis along the border and focuses on involvement of the colonia communities themselves, along with government and foundation support, to solve the problems facing these communities.

II. GROWTH OF COLONIAS IN EL PASO COUNTY AND DOÑA ANA COUNTY

[The term colonia] describes what everybody thinks is a new or a recent problem, but [really the term] describes a lot of rural poverty issues.[18]

A. Origin of the Word "Colonia"

The word "colonia" appears in studies of inadequate rural housing along the Texas-Mexico border at least as far back as 1977. In 1977 the Lyndon Baines Johnson School of Public Affairs at the University of Texas at Austin studied rural housing in Hidalgo, Willacy, and Cameron Counties, in the southern tip of Texas.[19]

"As defined by the researchers a colonia [was] a poor, rural, unincorporated community with twenty or more dwelling units, where home ownership is the rule. Colonias residents [were] almost exclusively Mexican-American."[20] The study found that colonias in the lower Rio Grande Valley had no amenities, and were protected by no zoning ordinances or building codes.[21] Isolation from other communities and the residents' economic status, the "poorest of the poor," were causes of the problems of colonias residents.[22] In a prediction of things to come in El Paso County, the 1977 study noted that governmental programs often ignored the colonias, and that "[t]he one branch of government to which colonias might normally turn—the county—[was] often too poor and too powerless itself to be of much assistance."[23]

In Doña Ana County, Rose Garcia, a local housing activist,[24] contrasts recent developments and media attention in the newer colonias with "mature colonias," communities with characteristics similar to more recently created colonias.

[T]he term colonias is kind of subjective . . . . [I]t's kind of a new thing to label the population centers, and they're really just subdivisions along the border [or] within 150 miles [of it] . . . . The experience I've had has been really in [the] twenty years that I've been doing community work, originally volunteer, and then more in the last fifteen years with Tierra del Sol in community development . . . . [T]he familiarity I've had is mainly in Doña Ana County and Luna [County] and the counties adjacent to Doña Ana County . . . . [B]ut, the communities that I know of . . . weren't called

18. Interview with Antonio Lujan and Bess Metcalf, supra note 9, at 3 (quoting Bess Metcalf).
19. See COLONIAS IN THE LOWER RIO GRANDE, supra note 9, at 5.
20. Id.
21. See id.
22. See id.
23. Id.
24. Rose Garcia has been a housing activist, supporting low-income housing in southern New Mexico and west Texas for more than twenty years. For approximately fifteen years, she was the executive director of Tierra del Sol, a non-profit corporation dedicated to providing housing to low-income residents of southern New Mexico, in Las Cruces, New Mexico. She left this position in 1996.
colonias, but... historical villages are... "mature colonias." They just were never labeled that twenty years ago.

This history supports that rural communities of first- or second-generation Mexican immigrants, living in substandard housing apart from the general population of Anglos and earlier generation Hispanics, have existed in both states for several decades.

B. The Population Influx to the Colonias in the 1980s

Overall population along the border began increasing at breathtaking speed in the 1980s and 1990s, accounting at least in part for the unprecedented growth of the

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25. Interview with Rose Garcia, housing activist and former executive director of Tierra del Sol, in Las Cruces, N.M. 1 (Nov. 9, 1995) (transcript on file with author).

Bess Metcalf agrees that "colonia" is a new word ostensibly describing new illegal subdivision growth, but in actuality encompassing old rural poverty issues.

"[Colonias] and "illegal subdivisions," [a]re not even synonymous because there are a lot of colonias conditions, where people don't have water, they don't have electricity, or adequate housing, in perfectly legal transactions, and most of the colonias aren't illegal subdivisions . . .

I mean the practices may be somewhat similar[,] in others just more careful, but . . . for a lot of it it's just [the same] rural poverty issues that have existed for years[.]

Interview with Antonio Lujan and Bess Metcalf, supra note 9, at 3 (quoting Bess Metcalf). For example, Butterfield, New Mexico, a designated Cranston-Gonzales colonia, has existed since approximately 1965. See id. at 1.

Judith Price dates the existence of colonias in both Texas and New Mexico to even earlier than 1965. Many . . . rural communities had been passed over, as far as any kind of infrastructure from the government goes, and now they [are] experiencing spillover growth, both from the City of Las Cruces from Doña Ana County's point of view, and from the border regions, El Paso, Sunland Park, and that area. So growth was happening on the edges or sometimes in these older villages . . . that got designated colonias in the [19]80s, but they may have been established in the [19]30s, [19]40s, or [19]50s.

Interview with Judith M. Price, supra note 8, at 4.

26. Judith Price has a unique perspective on these issues due to her work in planning for both the City of El Paso and Doña Ana County. She notes that there was already concern by the City of El Paso about El Paso County's inability to control "illegal subdivisions" when she began work there in 1970. See Interview with Judith M. Price, supra note 8, at 2. Warnings about uncontrolled growth in rural areas of Doña Ana County were being issued at least as far back as 1969. See id. at 11.

Logic and an intuitive understanding of human nature might arguably date "colonias" from the time of the Treaty of Guadalupe-Hidalgo, which established the current U.S.-Mexico border. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 (commonly known as the Treaty of Guadalupe-Hidalgo). At their essence, colonias may simply reflect the immigration of human beings from a poor country to a wealthy one. In this light, that poor people from rural areas of Mexico group together in poor communities in the rural border areas of the southern states should come as no surprise. As Price notes, "the U.S.-Mexico border has always had tidal waves of growth on both sides [and] affordable housing for low-income people has always been a problem on the U.S.-Mexico border." See Interview with Judith M. Price, supra note 8, at 2.

27. In El Paso County, the population of residents outside the City of El Paso went up by 48.6% between 1980 and 1990. See Jane E. Larson, Free Markets Deep in the Heart of Texas, 84 GEO. LJ. 179, 214 (1995). The increase of Hispanic residents outside the City of El Paso was 82.6%. See id. The City of El Paso experienced a 21.2% growth rate during the same decade, with a 33.8% growth rate for Hispanics. See id. Moreover, "[a]lthough in 1980 the two cities were of roughly equal size, by 1990 Juarez was at least three times as large as El Paso." Id. at 215.

colonias. The nature of the development of colonias, however, dating the beginning of the recent growth spurt in numbers and residents of the colonias is nearly an impossible task. Precise population numbers will probably never be available on the historical growth of colonias in Doña Ana and El Paso Counties. Federal, state, and local agencies have all attempted to characterize and quantify colonias and their residents. Indeed, a review of the historical data makes clear that colonia growth occurred beyond the tracking abilities of the traditional census methods. The data also make clear, however, that the growth of colonias in both states kept pace with the overall growth in state population.

In 1987, Congress, through Texas Congressman Ronald Coleman, commissioned a report on the colonias by the Congressional Research Service (CRS Report). The CRS Report defined colonias as “subdivision communities located in unincorporated areas adjacent to U.S. cities along the U.S.-Mexico international boundary ... [with] inadequate public works services.” The CRS Report admitted that due to the inherent difficulty of tracking colonias, its report “[was] piecemeal and [did] not reflect a complete picture of the situation.”

of that growth occurred in the City of El Paso alone. Compare Larson, supra, at 213, with TEXAS ALMANAC, supra, at 177. In 1996, El Paso was the fourth largest Texas city, and the largest U.S. city on the U.S.-Mexico border. See TEXAS ALMANAC, supra, at 177.

The population of Las Cruces, New Mexico was estimated to be 44,496 in 1980. See JOHN L. ANDRIOT, 1 POPULATION ABSTRACT OF THE UNITED STATES 537 (1983). By 1990, the population was estimated to be 62,126, a 40% increase. See N.M. SECRETARY OF STATE, NEW MEXICO BLUE BOOK 212 (1995-96). Even accounting for a discrepancy due to the fact that two census sources were used to make this comparison, there has been tremendous growth.

From 1990 to 1994, the Las Cruces area grew 14.7%, making it the ninth-fastest growing metropolitan area in the U.S. See Las Cruces Makes Top Ten List for Growth, ALBUQUERQUE J., Oct. 2, 1995, at A1. Texas border cities took three of the ten top spots, with Laredo coming in the highest at number two, with an amazing 22.4% growth rate. See id. at A6.

28. See Interview with Judith Price, supra note 8, at 3-4.
29. In 1987, the Congressional Records Service noted:
   It is difficult to actually count the number of "colonias" for several reasons. First, what was once clearly a "colonia" (a residential subdivision in an unincorporated area lacking potable water, sewage disposal system, or adequate roads) may have been absorbed by the growth of a nearby incorporated town or city. Second, many rural communities have substandard living conditions, but all are not classified as "colonias." Third, "colonia" is a derogatory term and may be dismissed in place of the term "subdivision." Fourth, a comprehensive study of the "colonias" has not been undertaken.

CLAUDIA COPELAND & MIRA COUSPAS, CONGRESSIONAL RECORD SERVICE REPORT FOR CONGRESS, ENVIRONMENTAL AND NATURAL RESOURCES POLICY, BORDER STATE "COLONIAS": BACKGROUND AND OPTIONS FOR FEDERAL ASSISTANCE CRS-2 (Oct. 30, 1987) [hereinafter CRS REPORT].
31. See CRS REPORT, supra note 29, at Abstract.
32. One clear difficulty in measuring the growth of colonias is the absence of a single definition. I therefore provide the definition used by each source.
33. See CRS REPORT, supra note 29, at Abstract.
34. Id. at CRS-2. The CRS REPORT also indicated its heavy reliance on information supplied by Texas. See id. Although this might not ordinarily present a problem, my experience suggests that both Texas and New Mexico have had difficulty tracking the growth of their own colonias. Thus, data obtained from telephone conversations with Texas officials concerning New Mexico colonias may be extremely unreliable.
The **CRS Report** optimistically suggested that the desert conditions in New Mexico would discourage colonia formation. The **CRS Report** estimated that 400 to 500 residents lived in colonias in Luna County, near Columbus, New Mexico, and that Doña Ana County had between twenty and twenty-five settlements with a total of 10,000 residents. The **CRS Report** estimated that in Texas, 15,000 residents lived in eighty colonias in El Paso County, outside the city limits of the City of El Paso.

In 1990, the General Accounting Office undertook a study (**GAO Study**) of the colonias, which is considered the most authoritative study of that time and perhaps to date. The **GAO Study** defined colonia to mean “rural, unincorporated subdivisions along the U.S.-Mexican border” characterized by “substandard housing, inadequate roads and drainage, and substandard or no water and sewer facilities.” The **GAO Study** reported that Doña Ana County had fifteen colonias with a total of 14,600 residents. The **GAO Study** estimated that El Paso County had 250 colonias in unincorporated areas, with a total of 70,000 residents, plus an additional 100 subdivisions in the incorporated city of Socorro, Texas, with a total of 15,000 residents.

The increase in the number of residents and colonias in both Doña Ana and El Paso Counties from 1987 to 1990 is significant. The data from the **CRS Report** and the **GAO Study** suggest at least a doubling in the number of colonias residents and a fourfold increase in the numbers of colonias in El Paso County in three years. Doña Ana County showed a 50% population increase in colonias residents. Current estimates for New Mexico, adopted between 1989 and 1992, are that between 20,000 and 25,000 residents live in designated colonias in Doña Ana County. Doña Ana County has thirty-five federally designated colonias.

In 1995, the Texas Water Development Board found 1,436 colonias statewide,
with an estimated population of 339,041.\textsuperscript{43} Greatly increased growth in the colonias in the 1980s and 1990s was also universally observed by local governmental officials and activists, probably beginning in El Paso County in the early 1980s and later spilling over into Doña Ana County.\textsuperscript{44} Even accounting for reporting problems,\textsuperscript{45} the overall increase in colonias population growth between the 1987 CRS Report and current estimates is significant.

C. Disputed Reasons for the Population Explosion Along the Border

The population growth in El Paso and southern New Mexico coincided with legal and economic forces that encouraged immigration from Mexico to the U.S., or encouraged immigrants without documents to legalize their status. First, the population growth coincided with passage of the Immigration Reform and Control Act\textsuperscript{46} (IRCA) in 1986. IRCA gave legal immigration status to residents illegally living in the U.S. who could prove both entry prior to 1982 and continuous residence since then, and to seasonal agricultural workers who could prove they had worked in the U.S. for at least ninety days during the period from May 1, 1985 to May 1, 1986.\textsuperscript{47}

Second, immigration from Mexico to the U.S. was bolstered by an economic recession in Mexico which led to severe devaluations in the peso in the mid-1980s, and by an industrial boom on both sides of the border caused by the creation of free trade zones in Mexico in the 1980s, and the passage of the North American Free Trade Agreement in 1992.\textsuperscript{48} And always, there is a high demand

\textsuperscript{43} See TEX. WATER DEV. BD., WATER AND WASTEWATER NEEDS OF TEXAS COLONIAS: 1995 UPDATE 8 (Feb. 1995) [hereinafter 1995 UPDATE]. The Texas Water Development Board defined colonias by the lack of basic water and wastewater services. See id. at 7.

\textsuperscript{44} See Interview with Judith M. Price, supra note 8, at 2-3. Price estimates that the growth began in El Paso County in the early 1980s. See id.

According to Bess Metcalf, in Doña Ana County, "in terms of the colonias, if we're talking about the current wave of [what] people think about when they refer to colonias, that's only been . . . in the last ten years." Interview with Antonio Lujan and Bess Metcalf, supra note 9, at 1 (quoting Bess Metcalf).

\textsuperscript{45} The value of statistics in this area is obviously limited by the disparity in tracking methods and by the definitions used. For example, Doña Ana County’s count includes only Cranston-Gonzales colonias. See supra note 7 and accompanying text. This may add some communities that in fact existed prior to the growth spurt in the 1980s, and, by definition, may omit some communities that came into existence after 1990.


\textsuperscript{47} See 8 U.S.C. § 1255a(a)(2)(A) (1994); 8 U.S.C. § 1160 (a)(1)(B) (1994). Residents were also required to prove continuous physical presence in the U.S. since November 6, 1986, the date of passage of IRCA. See id. Conservative estimates are that at least 5,000 residents of the southern counties in New Mexico obtained amnesty. See Interview with Judith M. Price, supra note 8, at 12. An additional 8,000 to 15,000 seasonal agricultural workers come to New Mexico from El Paso and other Texas counties during the harvest season. See id. at 12. These workers would also have obtained legal status with immigration reform.

I must note, however, that immigration reform only gave legal status to persons already living in the U.S. Although legal status might encourage a resident to purchase land, legal status did not initially increase the actual numbers of residents along the U.S. side of the border, since, by definition, IRCA required presence in the U.S. to obtain such legal status. See 8 U.S.C. § 1255a(a)(2)(A) (1994); 8 U.S.C. § 1160 (a)(1)(B) (1994).

\textsuperscript{48} See North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 107 Stat. 2057 (effective Jan. 1, 1994) (NAFTA). NAFTA was implemented when the boom in colonia growth was already well underway in El Paso County. However, NAFTA culminated the free trade movement along the border that began in the 1980s.
for cheap labor on the U.S. side, and a large supply of such labor in need of work on the Mexican side of the border.\textsuperscript{49} Additionally, some experts believe that during the 1980s, economic and legal pressures simultaneously forced New Mexico farmers to stop providing housing to farmworkers.\textsuperscript{50} According to this view, when farmers discontinued their former practice of providing housing to farmworkers, the workers were forced to find their own housing, creating the demand for cheap land.\textsuperscript{51}

One common theory is that these arguably temporary demographic shifts created the need for colonia housing. This view may in turn drive the federal policy that designates poor rural communities along the border as “colonias” only if they existed prior to 1990, as well as state policies that tend to view the elimination of future illegal subdivisions as the elimination of the problem. My experience is that although immigration reform and Mexico’s economic collapse may have caused colonia growth to peak in El Paso County, these factors did not directly cause the spurt in southern New Mexico, and do not account for the long-term existence of rural poverty generally along the U.S.-Mexico border.

Significantly, by 1983, many poor families were already living in their own housing in southern New Mexico. Many colonia residents in southern New Mexico moved to colonias from their own housing elsewhere in southern New Mexico, or from Texas.\textsuperscript{53} In my experience, many residents of southern New

\textsuperscript{49} See Interview with Judith M. Price, supra note 8, at 3. Even one visit to the downtown El Paso labor recruitment site in the early morning hours confirms that labor supply exceeds demand, with the result that minimum wage violations are common in the agricultural industry in Texas and southern New Mexico.

\textsuperscript{50} See id. at 13.

\textsuperscript{51} In my experience, employer-provided housing correlates more with distance travelled by the worker than with the minimum housing standards imposed by the federal government. For example, many workers in southern New Mexico were then and are now single men coming a relatively short distance from El Paso. This has historically been “day-haul” labor. Housing was occasionally provided to single workers, but not to families. This limited practice may have decreased as workers obtained legal status under IRCA.

\textsuperscript{52} See, e.g., Interview with Judith M. Price, supra note 8, at 13.

\textsuperscript{53} See DIOCESE OF LAS CRUCES, A STUDY ON SOCIAL CONCERN: A FRAMEWORK FOR ANALYSIS AND REPORT ON FINDINGS 33-34 (Antonio Lujan et al. ed., 1985) (copy on file with author and available from Diocese of Las Cruces). This study, undertaken by the Diocese to determine the needs of its parishioners, surveyed 1,885 Catholic households in the Diocese. See id. at 11. Twenty-six percent of the Diocese sample “was under the threshold of poverty, and another 19% right on the margin.” Id. at 63. Of those parishioners with less than $5,000 per year in income, “75% of that sub-sample had lived in the area for more than 15 years, ... so there’s been a real underclass ... .” Interview with Antonio Lujan & Bess Metcalf, supra note 9, at 3 (quoting Antonio Lujan). Lujan, who has been working in farmworker communities for over a decade, tends to discount the theory that immigration and labor reform led to the creation of the colonias as farmers ceased providing housing.

[It] sounds good in theory—but I really don’t know how valid it is that ... with amnesty and as people legalizes their status, that before some of them were staying in farms where the farmers would just put them up in their own property, and once they became legal, then the farmers started to push them off.

\textit{id.} at 2 (quoting Antonio Lujan).

\textsuperscript{54} Bess Metcalf notes that colonias residents come from different geographic areas. Thus, although some of the growth may be attributed to immigration reform, and some may be attributed to eviction from local farms, some of it may have been other kinds of factors, because not everybody comes from Mexico. Some people who live in the colonias came from, well, they came from El Paso, or they came from ... further down in the valley or something, so it’s probably a [combination] of economic and political forces ....
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Mexico are the children of Mexicans who came here many years earlier, or they are themselves longtime residents who emigrated to the U.S. from Mexico. These observations tend to discount the theory, in southern New Mexico at least, that immigration reform caused the demand for colonias, or that a shutdown of farmworker housing was the cause.53

At the same time, however, based both on experience and logic, I believe the flow of people has been and will continue to be northward, from Mexico to the Texas border, and from the Texas border to southern New Mexico. My sense is that during the 1980s immigration from Mexico, whether due to immigration reform or economic forces or both, increased demand for cheap land along the Texas border, and that population growth from Texas spilled over into New Mexico, where those immigrants combined with long-term first-generation Mexican residents, and with what was already a growing population of second-generation Mexican-Americans. Thus, although the growth rate may have already peaked, the growth in population, and the concomitant need for affordable rural housing will be ongoing for the foreseeable future.

III. TEXAS’ AND NEW MEXICO’S REGULATION OF SUBDIVISION DEVELOPMENT

Short of somebody, right now, today . . . moving a trailer out there or starting to build, and a Roads and Bridges’ person driving around and . . . just happen[ing] to see it, that’s about how you’re [going to] find it.56

The processes available at the county and community level in Texas and New Mexico to prevent the creation of unlivable colonia conditions or to ameliorate existing conditions have depended historically, in large part, on the authority of state laws and the availability of state resources. The legal history of the colonias in both states must be viewed from at least two perspectives: (1) whether the statutory framework provided by the laws in Texas and New Mexico gives local agencies, activists, and residents the necessary authority to act locally to improve the condition of rural housing; and (2) whether there are local or state barriers to local enforcement or implementation of Texas’ or New Mexico’s laws.

Id. at 2 (quoting Bess Metcalf).
To my knowledge, a comprehensive study of the demographics of colonias residents has never been undertaken either in Texas or New Mexico.

55. Antonio Lujan objects to any theory that attempts to generalize on a large scale about colonias residents. He analogizes the current trend to treat colonias residents as a “monolithic group” to generalizations about farmworkers in the past.

[T]alk about colonias, and now that it has become . . . a sexy issue, it’s kind of like [how] people talk about farmworkers as a monolithic group . . . where you have the ones who work the lettuce, the ones who work the onions, you have the ones that are on the migrant stream, the ones that work seasonal in just certain regions, like the chile pickers, or the ones that work for one grower all the time, so it’s a real mixed bag, and I think colonias are that way also.

Id. at 3 (quoting Antonio Lujan).

56. Interview with Viviana Patiño, former Texas Assistant Attorney General, and former First Assistant El Paso County Attorney, in El Paso, Tex. 16 (Nov. 14, 1995) (transcript on file with author) (commenting on the monitoring of colonia growth in El Paso County).
The lack of infrastructure in rural communities in the border counties, including El Paso and Doña Ana, is not a new problem; neither is it solely, or even primarily, a legal problem. The laws and lawsuits in Texas and New Mexico concerning the colonias, however, appear to treat the issue of inadequate rural housing as a recent problem arising from inadequate government regulation and the violation of consumer protection laws by disreputable developers.

At one level, this approach is functional, because legislators and lawyers address what they know best, while residents, activists, and local county agencies work on what they know best. The difficulty arises, however, when the lawmakers’ or litigators’ work ignores or is even at odds with the history of housing along the U.S.-Mexico border or with current efforts to improve conditions. This is not to imply that state laws and state-level litigation are not an important aspect of stemming the growth of unplanned residential subdivisions or even of improving the condition of existing communities. Rather, I suggest only that, in doing their work, lawmakers and litigators should be cognizant that they are actors in a dynamic local process, with a history and a future that may transcend outside regulation.

In legal terms, the beginning of the colonia growth spurt in the 1980s and early 1990s reflected a failure of both Texas and New Mexico to regulate subdivision growth. As a result of demand and lax subdivision laws, large scale developers in El Paso County, Texas, began selling parcels of land without any, or with only limited, infrastructure. In Doña Ana County, New Mexico, developers took advantage of perceived loopholes in the subdivision laws and inadequate enforcement resources.

In both Texas and New Mexico, subdivision regulation laws have historically addressed two areas: platting (roads and boundaries) and infrastructure (water, sewer, and topography). Platting is important to help guarantee clear title for residents, to help counties monitor growth, to the provision of good roads, and to guarantee legal access to property. Both states historically have had stricter laws on roads and boundaries than on infrastructure.57

A. Texas’ Approach to Subdivision Regulation

1. Platting

   a. Initial Approaches

   At least on its surface, the recent history of legislation concerning the colonias in Texas appears chaotic and, at times, desperate. The failure of Texas lawmakers to control the unprecedented growth of colonias along the border with Mexico in the 1980s began with a failure to grant any power to local authorities to regulate, or at times even monitor, the growth of unplanned subdivisions. The Texas legislature failed to recognize that the growth of colonias was a critical problem in the border counties, and that the border counties needed to play a primary role in monitoring and preventing the growth of colonias, and in ameliorating conditions there.

57. See infra discussion Parts III.A and III.B.
The Texas tradition, as reflected in the history of subdivision regulation, favored unfettered freedom in rural land development. As one author noted in 1975:

The statutes comprising Texas subdivision control are confusing and lack sufficient continuity for effective application by governmental officials. This lack of continuity in the regulatory provisions has resulted in a system that, as a practical matter, appears to command little compliance.  

Prior to 1951, no local governmental authority in Texas could regulate rural subdivisions. After 1951, cities were granted authority to approve plats as a prerequisite to recordation. Large counties received similar authority. The requirements for plat approval by either entity, however, were limited to road standards, drainage standards, and to lots that were sufficiently described so that they could be located for tax purposes. In 1963, cities were given limited injunctive powers to enjoin violations of their subdivision ordinances within a five-mile radius of the city limits. The requirements for plat approval, however, remained minimal. Further, there were no guidelines for approval, and a county could not impose additional requirements. To make matters worse, prior to 1991, even the necessity of filing a subdivision plat in Texas was nebulous, depending on the size of the county, the intended use of the plat, and the whim of the developer.

In addition, developers found loopholes in the plat regulations. A subdivision plat had to be filed, in order to be used as a description in a deed of conveyance or contract for sale. Before it could be filed, however, a subdivision plat had to have prior city or county approval. A subdivider could get around the requirement for filing, and thus of approval, by using a “metes and bounds

59. See id. at 640. Prior to 1931, Texas cities could regulate subdivisions within a five-mile radius of their limits. See id. A legislative amendment in 1931 inadvertently created a twenty-year gap in regulatory authority, even within this five-mile radius. See id. (citing Trawalter v. Schaefer, 179 S.W.2d 765 (1944)).
60. See id. at 641 (citing 1951 Tex. Sess. Law Serv. ch. 403 (West)).
61. See id. at 640-41 (citing TEX. REV. CIV. STAT. art. 2372k (West 1951)).
62. See id.
63. See id. at 641.
64. See id.
Rather than using the plat as the description in a deed of conveyance or contract for sale. Moreover, an installment land contract was not considered a "contract of sale." By allowing the developers to avoid the statutory requirements for an approved plat, at least in some counties, or in only using a metes and bound description, the sale of land under installment land contracts was clearly favored.

The Texas subdivision laws, thus, laid out the welcome mat for colonia developers in the 1970s and early 1980s. In the beginning, local officials arguably were not even aware of the burgeoning growth. Because El Paso County officials did not have any regulatory authority over subdivisions, there was no one in county government with the specific responsibility to track the growth.

Viviana Patiño worked on colonias issues during the early 1990s in El Paso County. According to her, tracking eventually took two limited forms. First, a county Roads and Bridges' employee might be "driving around and . . . happen[ ] to see" a new colonia. Second, the El Paso County Attorney's Office began to track the growth by noting where residents applied for septic tank and electricity permits. Neither method was entirely effective. Even when

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69. In Major Investments, Inc. v. De Castillo, 673 S.W.2d 276, 281 (Tex. Ct. App. 1984), the Texas Court of Appeals held that a contract for sale was valid, even if a subdivision plat was never filed, if it used a "metes and bounds description." Metes and bounds "are the boundary lines of land, with their terminal points and angles [and is a] way of describing land by listing the compass directions and distances of the boundaries." BLACK'S LAW DICTIONARY 991 (6th ed. 1990).

70. See Pohl, supra note 58, at 640 n.3 (citing Tashnek v. Hefner, 282 S.W.2d 298 (Tex. App. 1955)).

71. The Texas Attorney General did not address the issue whether a subdivider could avoid the platting statutes by recording deeds containing metes and bounds descriptions which merely referred to streets and alleys which had been dedicated to the public until 1986. See Tex. Op. Att'y Gen. No. JM-508, at 2330 (1986). The Attorney General was asked: "What procedures can the city and county utilize to get the subdividers to comply with the platting statutes and the city's subdivision development ordinance?" Id. at 2331. The Attorney General affirmed that the county clerk was required to file the subdivider's deed, even though the subdivider had failed to comply with the statutory platting requirements. See id. at 2332.

The Texas Attorney General noted, however, that a city could, within its extraterritorial jurisdiction, require a subdivider to prepare and file a plat, on the basis of TEX. REV. CIV. STAT. ANN. art. 6702-1, § 2.401(b) (West Cum. Supp. 1997) (repealed 1995). See Tex. Op. Att'y Gen. No. JM-508, at 2336 (1986). To reach this result, the Attorney General broadly interpreted Major Investments, Inc. v. De Castillo, 673 S.W.2d 276, 281 (Tex. Ct. App. 1984), to "prohibit delivery of a deed that contains any kind of description of an illegal subdivision." Id. My view is that this interpretation was overly broad. If the Attorney General was correct, however, a county with a population of less than 100,000 presumably could similarly require a subdivider to file a plat establishing roads and drainage.

72. See Interview with Judith M. Price, supra note 8, at 10, 12. Price believes the problem in El Paso County was "very, very" far advanced by the time county officials were cognizant, because the El Paso County Roads and Bridges Department was the first to realize the problem. See id. at 10; see also supra note 56 and accompanying text.

73. Interview with Viviana Patiño, supra note 56, at 16.

74. See id. Joe Ojeda, subdivision coordinator for the County of El Paso, agrees that the El Paso County Roads and Bridges Department first spotted the growth issue when residents came in to apply for septic tank permits. See Interview with Joe Ojeda, in El Paso, Tex. (Sept. 27, 1996) (tape on file with author).

75. In 1995, Viviana Patiño voiced the opinion that tracking would be impossible until developers and buyers were forced to record contracts of sale. "By never having to record that contract, the government never knows that there's property being sold left and right out there . . . ." Interview with Viviana Patiño, supra note 56, at 16.
county officials became aware of the possible extent of the problem, regulation was made nearly impossible by the lack of county authority.\textsuperscript{76}

The City of El Paso, faced with a population crisis in the 1980s, annexed extensively.\textsuperscript{77} This action increased the value of unregulated land outside the city's jurisdiction, giving added economic incentives to farmers to subdivide their county land.\textsuperscript{78} In the meantime, the city also refused to extend water and sewer services outside of city limits,\textsuperscript{79} and made a decision that attempting to regulate extensively within its five-mile extraterritorial zone required too many resources.\textsuperscript{80}

b. Platting and the 1983 County Road and Bridge Act

In 1983, the Texas legislature passed the County Road and Bridge Act,\textsuperscript{81} giving meaningful control over subdivision development to counties for the first time. This Act divided counties into large and small. Counties with a population of greater than 190,000 were granted the authority to require a subdivider to follow regulations regarding roads and drainage, and to provide a bond to guarantee compliance with such regulations.\textsuperscript{82} In counties with a population of less than 190,000, the owner was required to "cause a plat to be made" of the subdivision, and the county could impose requirements similar to those in larger counties.\textsuperscript{83} However, the Act only applied to subdividers who laid out portions of the subdivision for "public use,"\textsuperscript{84} apparently the result of bad draftsmanship rather than real intent.

In a shift from the lax regulation of the past, the County Road and Bridge Act also gave authority to local county attorney's offices to force compliance with platting requirements.\textsuperscript{85} As a result, counties have had the authority to regulate some subdivisions on their own initiative since 1983.\textsuperscript{86} However, counties were not required to regulate subdivisions.\textsuperscript{87}

El Paso County took the initiative, under the authority given it by the County Road and Bridge Act, to regulate subdivisions. In July, 1988, El Paso County adopted subdivision regulations in a commissioners court order.\textsuperscript{88} Unfortunately,

\begin{itemize}
  \item \textsuperscript{76} See supra notes 59-66 and accompanying text.
  \item \textsuperscript{77} See Interview with Judith M. Price, supra note 8, at 2.
  \item \textsuperscript{78} See id.; see also Larson, supra note 27, at 220-21.
  \item \textsuperscript{79} See Interview with Judith M. Price, supra note 8, at 2.
  \item \textsuperscript{80} See id. at 2-3. At one point in the 1980s, the City of El Paso estimated that it had ninety illegal subdivisions within its five-mile extraterritorial zone. See id. at 3.
  \item \textsuperscript{81} 1983 Tex. Sess. Law Serv. ch. 288 (West).
  \item \textsuperscript{82} See id. § 2.401.
  \item \textsuperscript{83} See id. § 2.402.
  \item \textsuperscript{84} Id. § 2.402(a).
  \item \textsuperscript{85} See id. §§ 2.001(b)(1), 2.401; see also Interview with Viviana Patiño, supra note 56, at 14; Interview with Brian Quintero, in El Paso, Tex. (Sept. 27, 1996) (tape on file with author). My reading of these laws is that they did not give clear authority to El Paso County to enact Model Subdivision Rules.
  \item \textsuperscript{86} See Tex. Sess. Law Serv. ch. 288, §§ 2.001(b)(1), 2.401 (West). The counties' regulatory power also included the authority to regulate basic infrastructure. See id.
  \item \textsuperscript{87} See id.
  \item \textsuperscript{88} See Subdivision Regulations of El Paso County, Tex., (July 11, 1988), amended by Subdivision Regulations of El Paso County, Tex. (May 2, 1990).
\end{itemize}
these regulations failed to provide for enforcement, and, more seriously, allowed for the possible grandfathering of large numbers of otherwise illegal lots.

Lands subdivided prior to 1983 were not affected by the 1988 legislation. On the eve of passage of the new regulations, developers in El Paso County legalized their subdivided land under the old laws, with minimal road and drainage standards. These lands were thus legally platted, but not substantially developed, prior to the county’s adoption of subdivision regulations pursuant to the County Road and Bridge Act. As late as 1995, the Texas Water Board voiced the opinion that the “continued growth of existing ‘grandfathered’ colonia subdivisions [was] a serious concern and pose[d] the greatest single potential for increased numbers of colonia residents without adequate water and wastewater service.”

El Paso County especially experienced substantial growth in grandfathered colonia subdivisions.

c. Legislative Attempts to Strengthen Subdivision Regulation

Beginning in 1987, Texas required subdivision owners to prepare, file, and record plats—regardless of county size. The county was required to approve the plat. But, the only mandatory state requirement was that subdivisions be adequately described. Infrastructure issues (such as roads, drainage, the

89. Compare Subdivision Regulations of El Paso County, Tex. (July 11, 1988), with Subdivision Regulations of El Paso County, Tex. § 12 (May 2, 1990). When the 1988 regulations were passed, it was unclear whether counties had authority to pass such regulations with enforcement provisions, thus the 1988 regulations did not contain enforcement provisions. See Interview with Brian Quintero, supra note 85. In 1989 the Texas legislature gave authority to the counties to enforce subdivision regulations. See id. El Paso County added an enforcement provision to its subdivision regulations in 1990. See id.

90. See infra notes 92-94 and accompanying text.

91. The commissioners court may impose regulations in subdivisions on any developer “who may hereafter divide the same in two or more parts . . . .” 1983 Tex. Sess. Law Serv. ch. 288, §§ 2.401, 2.402 (West).

92. Viviana Patiño indicates that grandfathering was a serious problem in El Paso County. [I]t was in 1983 that counties were given the right to prosecute, get injunctions, damages, and bring criminal actions. So, just prior to the [C]ounty of El Paso passing its own subdivision order, a lot of the developers came in and legalized their colonias. [B]efore the county had the subdivision order, you could legalize a subdivision without water, sewer, and all you had to do was have certain right of ways and pavement issues[,] [S]o[,] the developers came in and said, fine, look, we have that and on the eve of passing the subdivision order, a whole bunch of them were legalized.

Interview with Viviana Patiño, supra note 56, at 7. Patiño suspects that developers knew of the change in the law before it occurred. See id.


94. See id.


96. See id. § 232.002.

97. See id. § 232.001(b) (West 1988).
availability of water, and a sufficient bond) were left to the county. Moreover, grandfathered subdivisions continued to be acceptable, although county attorney’s offices were given authority to enjoin violations of former and current platting laws.

In 1989, Texas amended its mandatory subdivision platting statute to require subdividers to prepare a plat of a division of a tract “regardless of whether it is made by using a metes and bounds description in a deed of conveyance or in a contract for a deed, by using a contract of sale or other executory contract to convey, or by using any other method.” This language closed the most serious loophole in the platting laws, which at least arguably, had permitted avoidance altogether for installment land contract transfers.

Finally, in 1991, the Texas legislature added subsection (f) to Texas Local Government Code section 232.001, requiring platting for all subdivisions in border counties, regardless of the size of the county or the intended use of the plat. In 1995, the Texas legislature repealed subsection (f), replacing it with a comprehensive set of laws addressing platting and infrastructure in the colonias. Thus, in the face of the tremendous growth of colonias in the 1980s, the Texas legislature began to require basic platting of subdivisions in the border counties.

2. Infrastructure

a. Generally

In the 1980s, the Texas legislature also began to permit local regulation of some infrastructure issues. Not until 1989, however, did Texas first begin taking an active approach to the regulation of basic infrastructure, including water,

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100. See id. Under Tex. Prop. Code Ann. § 12.001(e), the plat was also subject to the filing and recording provisions of section 12.002. A subdivision was subject to the platting requirements however, only if it “involve[d] the laying out of ‘streets, alleys, squares, parks, or other parts,’ as described in the statute.” Tex. Att’y Gen. Op. No. JM-1100, at 5764 (1989).

Executory contracts are contracts “where some future act is to be done, . . . or to do an act on or before some future day, or to lend money upon a certain interest, payable at a future time.” Black’s Law Dictionary 323 (6th ed. 1990).

101. See Tex. Loc. Gov’t Code Ann. § 232.001(f) Historical and Statutory Notes (West Cum. Supp. 1997), repealed by 1995 Tex. Sess. Law Serv. ch. 979, § 29 (West) (effective June 16, 1995). Thus, a developer was required to file a plat even if his subdivision was adjacent to an existing street. Section 232.001(f) applied to any “affected county as defined by section 16.341(1), Water Code . . . .” Id. An “affected county” is a county with severe economic problems, or one that is adjacent to the Texas-Mexico border. See Tex. Water Code Ann. § 16.341(1) (West Cum. Supp. 1997); see also discussion of Economically Distressed Areas Program, infra Part III.A.2.b.


103. See supra notes 81-87, 98 and accompanying text.
sewer, and topography, in subdivisions in border counties. In 1989, the Texas legislature recognized that there were many counties in Texas where per capita incomes were low, unemployment rates were high, and residents lived in "areas without any or with seriously inadequate water supply and sewer services." The legislature found that the lack of adequate water supply and sewer services created "serious and unacceptable health hazards," and that current resources were insufficient to meet the needs of these counties. The legislature also found, somewhat ironically, that "the solutions will become far more expensive, become far more dangerous to the public health and safety generally, and move further beyond the abilities of residents to solve without greater public assistance than current solutions will require [the longer the state waits to begin remediation in these communities]."

104. In the face of weak subdivision regulations or grandfathered subdivisions, activists and local officials were forced to turn to other legal theories to force compliance with minimal infrastructure standards. In the mid-1980s, Texas Rural Legal Aid, representing area farmworkers, filed perhaps the first colonias case in the County of El Paso, pursuant to the Texas Deceptive Trade Practices Act (DTPA), TEX. BUS. & COM. CODE ANN. §§ 17.41-17.63 (West 1987 & Cum. Supp. 1997). See Interview with Viviana Patiño, supra note 56, at 1.

The State of Texas, through the local office of the Texas Attorney General's Consumer Division, also attempted to address the unregulated growth as a consumer issue by filing several DTPA lawsuits against developers during the same time frame. "Pretty much those early lawsuits were just [DTPA] lawsuits. Promises of services that never came." Id.

Remarkably, in the early 1990s, developers began escaping the DTPA hook by informing buyers that their lots had no infrastructure. See id. at 3. The El Paso County Attorney's Office then developed the theory that the developers had violated Texas' DTPA by failing to disclose that the colonias were not fit for human habitation. The theory developed as a result of Viviana Patiño's work in East Clint, "which is probably the worst colonia in all of El Paso." Id.

"In about . . . [1994], we started going out there trying to figure out how to solve the problem in East Clint, and by that time I was already at the County Attorney's Office. In that case, the theory was developed that the colonia was so horrible, it had been sold to these purchasers knowing they were going to go out there and live[.] [If] they were going to go out there and live, it must [have] been property that was fit for residential purposes, but it wasn't! . . . .

Everything [was wrong with it]. It was dry, desert land, with [no thought] about roads at all. People were just driving across the desert . . . [There] was no water, no sewer, nothing[.]

. . . .

[I]t's hilly, desert land out there—one gentleman had dug a hole into one of the hills, and propped some pillars to keep it from collapsing, and that's where he was living[.]. . . . And then someone else had tarp sides with literally a thatched roof. You thought you were in some strange, foreign country. It just had leaves on top, kind of like palm leaves on top as a roof! [So] . . . the theory was, look, the developer knew that when he sold this property, he knew that those people were going out there to live. They weren't going out there to build a warehouse. They weren't going out there to build an airstrip. They were going out there to live! And so, when it was not fit for residential purposes, it wasn't habitable, and that's something that the developer should've disclosed to the consumer before the consumer went out there and purchased it, and when the developer didn't disclose that, then knowing it was for residential purposes, he violated the DTPA.

Id. at 3-4.

105. 1989 Tex. Sess. Law Serv. ch. 624, § 1.01(a) (West).

106. See id.

107. Id. § 1.01(a)(4).
b. Economically Distressed Areas Program

In response to these findings, Texas adopted the Economically Distressed Areas Program (EDAP) in 1993. In response to these findings, Texas adopted the Economically Distressed Areas Program (EDAP) in 1993. EDAP provides some funding for water and sewer services to border counties or economically distressed northern counties which adopt the state's Model Subdivision Rules. In addition to "affected counties," municipalities, water or sewer districts, nonprofit water corporations, and economically distressed areas located within an "affected county" also may apply for assistance under EDAP—but only if the "affected county" adopts and enforces the Model Subdivision Rules. Significantly, EDAP provides that "affected counties" are "the only kind of county that may adopt the Model Subdivision Rules." The Attorney General and the counties are authorized to bring suit to enforce EDAP.

Grandfathering has been a problem under EDAP, but there have been attempts to give control over undeveloped lands to counties. Specifically, the county commissioners could cancel, after notice and a hearing, "a subdivision for which the plat was filed and approved before September 1, 1989, if: (1) the development of or the making of improvements in the subdivision was not begun before September 1, 1989; and (2) the commissioners court by resolution has made a finding that the land in question is likely to be developed as a colonia." The above regulation attempted to address one of the most critical issues in El Paso at the time—the problem of not knowing how many grandfathered colonias might spring up, governed only by the older and much weaker platting laws.


109. An "economically distressed area" is defined as "an area in which: (A) water supply or sewer services are inadequate to meet minimal needs of residential users . . .; (B) financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and (C) 80% of the dwellings covered by an application for funds or financial assistance were occupied on June 1, 1989." Id. § 16.341(2).

110. The law required that the Texas Natural Resource Commission "prepare model rules to assure . . . minimum standards for safe and sanitary water supply and sewer services in residential areas of political subdivisions." Id. § 16.343(a). "Political subdivision" was defined as an affected county, a municipality or water or sewer district in an affected county, or an economically distressed area in an affected county. See id. § 16.341(3). The Model Subdivision Rules were enacted to assure adequate drinking water; assure adequate sewer facilities; provide criteria applicable to subdivisions created prior to 1989; "prohibit the establishment of residential developments with lots of five acres or less in the . . . [targeted areas] without adequate water supply and sewer services[. . .].) . . . prohibit more than one single-family, detached dwelling to be located on each lot[;]" and provide criteria for adequate setbacks. Id. §§ 16.343(b)-(e).

111. The idea for the Model Subdivision Rules was copied, notably, from the El Paso Subdivision Regulations. See Interview with Viviana Patiño, supra note 56, at 14; Interview with Brian Quintero, supra note 85.

112. See id. §§ 16.341(3); 17.921(2), (3); 17.922.

113. See id. § 16.350(a); see also §§ 16.341 (defining "political subdivision"), 16.343(g) (requiring political subdivisions to be located in a county that adopts and enforces the Model Subdivision Rules).

114. Id. § 16.343(f).

115. See id. § 16.354. Suit may be brought in the county where the violation occurred, in the defendant's home county, or in Travis County. See id. § 16.356.

3. 1995 Colonias Laws—Platting and Infrastructure

In 1995, the Texas legislature concluded that the 1989 laws were not sufficient to stem the growth of colonias in the border region. The legislature enacted new colonia laws specifically targeting the border; for example, it redefined the phrase "[a]ffected counties" to mean severely economically distressed counties, "any part of which is within [fifty] miles of an international border." 117

Unfortunately, the new definition fails to include poor northern counties. Indeed, the legislative findings make explicit that the concern is the growth of colonias in the border counties. 118 The legislature found specifically that colonias existed throughout the border counties, that the colonia population had increased in recent years and could be expected to increase further, 119 and that colonias residents were unusually mobile. 120 Further, the legislature concluded, "these conditions allow unscrupulous individuals, through the use of executory contracts, to take advantage of the residents of economically distressed subdivisions by charging usurious rates of interest, as well as allowing unbridled discretion to evict." 121 The legislature warned of the "clear and substantial threat to the environment of the border region, as well as to all Texas" resulting from inadequate potable water, waste water, or sewer services, combined with frequent flooding of the colonias, which are often located on flood plains. 122 The legislature concluded that the "Third World illnesses" arising in border colonias could severely affect the border economy, and that a resulting epidemic could spread to the rest of Texas and beyond. 123

The 1995 Texas colonia laws 124 promised comprehensive regulation of subdivision growth in the Texas border counties. All subdividers 125 must comply with detailed and potentially onerous platting requirements prior to sale. 126 The law applies to all sales, including sales pursuant to an oral contract. 127 Further, "[a] subdivider or agent of a subdivider may not transfer

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119. The legislature attributed this population growth to the "robust economic development along the Texas-Mexico border" under NAFTA, apparently ignoring the dire economic conditions in Mexico and NAFTA's possible negative influence on economically disadvantaged Mexicans. See generally id. In any event, NAFTA arguably did increase northern immigration.

120. See id. Historical and Statutory Notes, 1995 legislation, § 1(4).

121. Id. Historical and Statutory Notes, 1995 legislation, § 1.

122. Id. Historical and Statutory Notes, 1995 Legislation, §§ 1(6)-(9).

123. See id. Historical and Statutory Notes, 1995 Legislation, §§ 1(10)-(14).

124. Id. §§ 232.021-232.042.

125. "Subdivider" is defined as anyone who "owns any interest in land and that directly or indirectly subdivides land into lots as part of a common promotional plan in the ordinary course of business." Id. § 232.021(13). "Subdivide" is defined as "to divide the surface area of land into lots intended primarily for residential use." Id. § 232.021(12).

126. A subdivision plat must be approved prior to sale, if the land is "first platted or replatted after July 1, 1995." Id. § 232.031(a).

127. See id. § 232.023(a).
a lot through an executory contract or other similar conveyance to evade the requirements of this subchapter. Real estate contracts must be recorded. If negotiations are conducted in Spanish, then documents also must be in Spanish. However, the law only applies to “land that is subdivided into four or more lots that are intended primarily for residential use.” In my New Mexico experience, colonias can result from the subdivision of land into fewer than four lots.

Plats are approved by the county commissioners court, with oversight by the Texas Water Development Board. The plat must include a detailed survey and a description in English and Spanish of the water and sewer systems, roadways, and easements for the subdivision; provide for drainage; and identify the topography of the area. Prior to approval of the plat, the subdivider is required to certify that water is available, and will be made available to all lots in the subdivision; furnish sewage treatment facilities or furnish certification that septic tanks will be sufficient; furnish roads and adequate drainage; and make a reasonable effort to have electric utility service and gas utility service installed. Plats must be certified, and utilities may not be connected prior to plat certification. The county must adopt the Model Subdivision Rules, including regulations regarding infrastructure requirements. A plat for a subdivision on a flood plain may not be approved by the county commissioners court.

Enforcement provisions in the 1995 colonia laws are equally as strong as the 1995 laws' substantive requirements. There are civil penalties and criminal penalties for violations, including possible felony charges. Either the Texas Attorney General or the county attorney may bring an action for injunctive relief, or prosecute criminal violations, and the county may halt utilities on a noncomplying subdivision, unless such action presents a threat to the residents. There are also private remedies. Variances are extremely limited.

128. Id. § 232.040(b).
129. See id. § 232.031(b).
130. See id. § 232.033(b).
131. Id. § 232.022(a).
132. See id. § 232.024.
133. See id. § 232.023.
134. See id. § 232.032.
135. See id. § 232.028(a).
136. See id. § 232.029(a).
137. See id. §§ 232.030(a), (c)(3).
138. See id. § 232.024(b).
139. See id. § 232.035.
140. See id. § 232.036.
141. See id. § 232.037.
142. See id. § 232.038.
143. See id. § 232.042.
Since the Texas colonia laws took effect in July, 1995, they have had their intended effect, at least in El Paso County, of shutting down colonia developers.\textsuperscript{144} Grandfathering, however, remains a serious concern.\textsuperscript{145} The 1995 colonia laws have had the unforeseen consequence of dramatically decreasing the value of land in El Paso County, thereby lowering the tax base.\textsuperscript{146} There is also now a housing crisis, which county officials hope to solve through an infusion of state or federal funds for public housing.\textsuperscript{147}

The clearest lesson from the Texas legislative history is that Texas delayed too long in giving real power to counties to regulate their own backyards, and then delayed mandating that counties take necessary action. Furthermore, due to grandfathering, subdivision regulation remains a mine field for local officials, who cannot be sure whether or how many unregulated subdivisions are legal under older, weaker Texas laws.

B. New Mexico's Approach to Subdivision Regulation

In contrast to Texas, New Mexico historically granted extensive local authority to counties, and began taking a comprehensive approach to subdivision regulation in 1973.\textsuperscript{148} Indeed, since 1973, New Mexico has recognized the authority of counties to regulate infrastructure, as well as platting in subdivisions—albeit with loopholes in the definition of “subdivision.”\textsuperscript{149} New Mexico has suffered more from a lack of enforcement resources than from a lack of regulations or enforcement authority.

1. 1963 Land Subdivision Act

New Mexico granted authority to its counties to approve subdivision plats, beginning in 1963, with the Land Subdivision Act.\textsuperscript{150} In contrast to Texas during the same time period, New Mexico prohibited the sale of subdivided land

\textsuperscript{144} See Jose Rodriguez, El Paso County Attorney, Lecture at the Escuela de Derecho, Universidad Autonoma de Ciudad Juarez (Sept. 19, 1996); see also Interview with Brian Quintero, supra note 85.

\textsuperscript{145} See generally TEX. LOC. GOV'T CODE ANN. § 232.031(a) (West Cum. Supp. 1997); Interview with Brian Quintero, supra note 85. Quintero also notes there is some dispute regarding the extent of the extra-territorial jurisdiction of small municipalities in El Paso County (namely Socorro, Clint, and Horizon) over subdivisions. See Interview with Brian Quintero, supra note 85. Compare TEX. LOC. GOV'T CODE ANN. § 232.022(b) (West Cum. Supp. 1997), with TEX. LOC. GOV'T CODE ANN. § 212.001(1) (West Cum. Supp. 1997). The 1995 Texas colonias laws adopt the population extra-territorial jurisdiction of two-miles for smaller cities. See id. § 232.022(b). The 1989 laws applied a five-mile extra-territorial jurisdiction to border municipalities. See id. § 212.001(1); see also Interview with Brian Quintero, supra note 85. Because the 1995 laws were enacted later in time, they should apply. See Interview with Brian Quintero, supra note 85. However, there is arguably a three-mile “no man’s land” outside the two-mile extra-territorial jurisdiction of smaller cities, where the 1995 laws caught developers and municipalities by surprise. This is yet another example of the confusion and contradiction in the laws resulting from the failure of the Texas legislature to adopt a comprehensive approach towards the regulation of subdivisions statewide.

\textsuperscript{146} See Interview with Brian Quintero, supra note 85.

\textsuperscript{147} See Lecture by Jose Rodriguez, supra note 144.

\textsuperscript{148} See N.M. STAT. ANN. §§ 70-3-1 to 70-3-9 & Historical Notes (Cum. Supp. 1975) (New Mexico adopted an initial Land Subdivision Act in 1963, but it was not comprehensive.); see also infra Part III.B.1.

\textsuperscript{149} See N.M. STAT. ANN. §§ 70-3-1 to 70-3-9 and Historical Notes (Cum. Supp. 1975).

\textsuperscript{150} See id.; see also 1963 N.M. Laws ch. 217, §§ 1-8.
"until a plat of such subdivided land being sold ha[d] been approved by the county commission wherein such land is situated; and [u]ntil legal access from an existing public way and to each lot offered for sale or lease ha[d] been dedicated and accepted by the appropriate county commission."\(^{151}\)

Notably, a subdivision was defined as "land divided, or proposed to be divided, into twenty-five or more lots or parcels for the purpose for sale or lease,"\(^{152}\) which foreshadowed future concern by the legislature to avoid regulation of small divisions of land. Nonetheless, early New Mexico subdivision laws are notable in their limitations on the freedom of developers, a sharp contrast to Texas’ near legal vacuum during the same decades.

In 1965, New Mexico broadened the scope of county and extraterritorial municipal authority over subdivisions.\(^{153}\) Counties were given authority under the Municipal Code of "all territor[ies] not within the boundary of a municipality."\(^{154}\) The definition of a subdivision was broadened to "mean[ ] the division of land into two or more parts by platting or by metes and bounds description into tracts of less than five acres in any one calendar year . . . ."\(^{155}\)

2. 1973 Subdivision Act

The 1973 New Mexico Subdivision Act\(^{156}\) (1973 Act) granted extensive authority to the counties and the State to regulate subdivisions, but changed the definition of subdivision once more. The new definition of subdivision became "an area of land within New Mexico, the surface of which has been divided by a subdivider into five or more parcels within three years for the purpose of sale or lease."\(^{157}\) A "subdivider" included a person creating a subdivision "as part of a common promotional plan."\(^{158}\)

In addition, the 1973 Act required subdividers to "have a final plat of the proposed subdivision certified by a [registered] surveyor," which included a survey of each parcel.\(^{159}\) The plat was required to be "approved by the board

\(^{151}\) N.M. STAT. ANN. § 70-3-3 (Cum. Supp. 1975). Whether an acceptable plat included designation of individual lots, however, was not clear. See id. Moreover, subdividers were not required to provide any infrastructure beyond an acceptable plat and dedicated legal access; consumer protection on infrastructure beyond legal access was limited to disclosure requirements. See id. § 70-3-4.

The remainder of the 1963 Land Subdivision Act was dedicated to requirements that a subdivider disclose "unusual conditions affecting [the land’s] use or occupancy," id. § 70-3-4(a), and the lack of roads, public utilities, water, identifiable lots, and access to local amenities, facilities, or points of interest. See id. §§ 70-3-4(B)-(D), 70-3-5. Violations of the 1963 Land Subdivision Act could be punishable as felonies, and the Attorney General or local district attorney was directed to sue for an injunction regardless. See id. §§ 70-3-6 to 70-3-7.

\(^{152}\) Id. § 70-3-2(A).


\(^{154}\) Id. § 14-19-5(1).

\(^{155}\) Id. § 14-19-1. The concern remained the location of streets, and the boundaries of the subdivision, not the individual lots. See id. § 14-19-6.

\(^{156}\) Id. §§ 47-6-1 to 47-6-29 (Repl. Pamp. 1995). The 1973 Subdivision Act has been superseded by the 1995 Subdivision Act, but remains in effect until mid-1997 for some counties. See id. For a discussion of the 1995 Subdivision Act, see infra Part III.B.3.

\(^{157}\) N.M. STAT. ANN. § 47-6-2(1) (Repl. Pamp. 1995).

\(^{158}\) Id. § 47-6-2(H).

\(^{159}\) Id. § 47-6-3.
of county commissioners and on file with the clerk of the county" prior to sale or lease of subdivision lands.\textsuperscript{160}

Furthermore, counties were required to address infrastructure in subdivisions through regulations. For example, counties were required to "adopt regulations setting forth the county’s requirements for" water, waste disposal, roads, terrain management, and phased development.\textsuperscript{161}

State imposed requirements for disclosure and subdivision approval depended on the number and size of parcels in the subdivision.\textsuperscript{162} Subdividers of large or multi-parcel subdivisions were required to disclose information regarding water, waste disposal, roads, and terrain management.\textsuperscript{163} Subdividers of large subdivisions were required to furnish water, waste disposal, roads, and terrain management in accordance with their disclosure statements.\textsuperscript{164} The 1973 Act provided for mandatory communication between the county and state agencies regarding a subdivider’s proposal,\textsuperscript{165} and possible denial of approval in the event of an adverse state agency opinion.\textsuperscript{166} Summary procedures were permitted for smaller subdivisions.\textsuperscript{167} The New Mexico Attorney General and county district attorneys were given investigative powers under the 1973 Act.\textsuperscript{168} The board of county commissioners, the Attorney General, and the district attorney could bring an action for injunctive relief or mandamus to enforce the Act.\textsuperscript{169} The 1973 Act provided for civil and criminal penalties.\textsuperscript{170} A purchaser could bring an action for damages within three years of the purchase or lease agreement.\textsuperscript{171}

Thus, in contrast to Texas counties, counties in New Mexico have long had the authority to regulate subdivisions. Indeed, counties in New Mexico can impose stricter requirements than those mandated by state law.\textsuperscript{172} Further, counties were not given discretion to regulate under the 1973 Act.\textsuperscript{173} Finally, the New Mexico Attorney General always had the authority to participate in the enforcement process.\textsuperscript{174}

The state and county link made the difference in addressing the growth of new colonias in Doña Ana County. New Mexico’s comprehensive approach to subdivision regulation in the 1973 Act enabled state and county officials to promptly begin working together after Doña Ana County began to realize the existence of the

\textsuperscript{160} Id. § 47-6-8.
\textsuperscript{161} Id. § 47-6-9(A).
\textsuperscript{162} See id.
\textsuperscript{163} See id. §§ 47-6-2(L)-(P), 47-6-11.
\textsuperscript{164} See id. §§ 47-6-17.
\textsuperscript{165} See id. § 47-6-11(A).
\textsuperscript{166} See id. §§ 47-6-11(D)-(F), 47-6-20.
\textsuperscript{167} See id. §§ 47-6-12, 47-6-13.
\textsuperscript{168} See id. § 47-6-25.1.
\textsuperscript{169} See id. § 47-6-26.
\textsuperscript{170} See id. § 47-6-27.
\textsuperscript{171} See id. §§ 47-6-27.1(A)-(C).
\textsuperscript{172} See, e.g., Board of County Commissioners of Bernalillo County v. Alpine Land Co., No. CV-94-05996 (N.M. Dist. Ct. filed July 15, 1994).
\textsuperscript{173} See N.M. STAT. ANN. § 4-7-4 (Repl. Pamp. 1995).
\textsuperscript{174} See id. § 47-6-26.
colonia crisis. The growth spurt in the colonias in Doña Ana County began in the mid-1980s and continued into the early 1990s. By 1990, the County of Doña Ana and the New Mexico Attorney General had begun working together to file lawsuits against some of the major developers. The Attorney General’s enforcement authority and resources were critical to this process.

The most critical gap in the 1973 Act allowed for a subdivider to avoid the effect of the law if he “divided [his land] . . . into five or more parcels within three years for the purpose of sale or lease.” In El Milagro, for example, the developer tried to avoid the 1973 Act by selling large lots to pairs of individuals as joint tenants. Each joint tenant then sold individual parcels of land, and received partial releases on deeds of trust. Although ultimately unsuccessful, this perceived loophole not only led the developer to believe he was not subject to the 1973 Act, it created a very messy chain of title for the final purchasers. In Las Palmeras, the Attorney General alleged that the developer sold land to a middleman on a real estate contract. The middleman then illegally subdivided the land. The developer successfully argued that he had not participated in a common promotional plan, and were accordingly not subject to the 1973 Act.

A second serious obstacle to enforcement of the 1973 Act was the statute of limitations of three years from the date of the transaction. My experience

176. Thus, in contrast to the Texas experience, in New Mexico, “counties . . . have a role to play in land use and building, and so you had staff who was looking for those things” in advance of the time residents were ready to put in a septic tank. See Interview with Judith M. Price, supra note 8, at 10-11. At the same time, however, Lisa Warren believes that sometimes an unreported colonia was discovered by Doña Ana County road crews in much the same way as officials in El Paso County discovered colonia growth. See Interview with Lisa Warren in Las Cruces, N.M. (Nov. 9, 1995) (tape on file with author).

177. See supra Part II.B.


179. See id.


182. See id.


suggests that colonia residents may not have any reason to know there is a problem until many months after they sign their agreements, due to ongoing promises by developers to improve the infrastructure. Moreover, even if such promises might toll the running of the statute of limitations period, residents might not know their rights under the 1973 Act or be able to find legal assistance until after the running of the limitations period.

3. 1995 Subdivision Act

In response to some of the problems in the 1973 Act, New Mexico passed the 1995 New Mexico Subdivision Act187 (1995 Act) directing the counties of Santa Fe, Bernalillo, and Doña Ana to enact stricter regulations of subdivisions by July 1, 1996.188 All other New Mexico counties must conform to the 1995 Act by July 1, 1997.189

The 1995 Act defines “subdivision” as “the division of a surface area of land, including land within a previously approved subdivision, into two or more parcels for the purpose of sale, lease, or other conveyance, or for building development, whether immediate or future[.].”190 A “subdivider” still includes a person creating a subdivision as part of a “common promotional plan.”191

The requirement for a final surveyor’s plat remains substantially identical as the 1973 Act, with the exception that a subdivider must now describe legal access, roads, and utility easements for each parcel, and “delineate those portions of the subdivision that are located in a flood plain.”192 The 1995 Act also provides for a two-step process for plat approval.193

A county still has the obligation to regulate subdivisions, but the requirements are more specific, and include legal access and adequate roads for each parcel, utility easements, recording all conveyances with the county clerk, and boundary fencing.194 The 1995 Act specifies that counties may adopt more stringent requirements, in accordance with a comprehensive plan.195 State imposed requirements for disclosure and subdivision approval still depend on the number and size of parcels in the subdivision.196 The disclosure statement, however, is more

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187. Id. §§ 47-6-1 to 47-6-29 (effective July 1, 1996).
188. See id. § 47-6-9(C).
189. See id. § 47-6-9(D).
190. Id. § 47-6-2(J). The 1995 Act’s definition of subdivision has several exceptions, including the division of land to create parcels for family members. See id. § 47-6-2(J)(9). Judith Price wonders whether this exception will again result in the creation of subdivisions without adequate infrastructure. See Interview with Judith M. Price, supra note 8, at 19.
192. Id. § 47-6-3.
193. See id. §§ 47-6-2(E)-(F) (defining preliminary and final plat), 47-6-3 (describing surveying requirements for final plat), 47-6-4 (describing affidavit requirements for final plat), 47-6-5 (describing dedication of roads for public use in final plat), 47-6-9 (describing mandatory county regulations for preliminary and final plats), 47-6-11 (describing preliminary plat approval), 47-6-11.1 (providing for expiration of preliminary plat), 47-6-11.3 (approval of final plats).
194. See id. § 47-6-9(A).
195. See id. § 47-6-9. Counties probably also had this authority under the New Mexico 1973 Subdivision Act. See id. §§ 47-6-1 to 47-6-29.
196. See id. §§ 47-6-2(N)-(R), 47-6-11, 47-6-17.
detailed, and includes additional requirements on disclosure of conditions.\textsuperscript{197} Preliminary plat approval for large or multi-parcel subdivisions depends on absolute determinations of compliance with infrastructure requirements, in addition to compliance with the subdivider’s disclosure statement.\textsuperscript{198}

Infrastructure requirements also are more specific, including terrain management specifically to prevent flooding,\textsuperscript{199} protection of water from contamination, and requiring roads to each parcel.\textsuperscript{200} Final plat approval depends on compliance with the previously approved preliminary plat.\textsuperscript{201}

The investigative powers of the Attorney General and district attorney remain substantially the same.\textsuperscript{202} In addition to injunctive relief and damages, however, the board of county commissioners, the Attorney General, and the county attorney may seek rescission and restitution for purchasers and civil penalties.\textsuperscript{203} Criminal penalties for a second offense may include a felony conviction.\textsuperscript{204} Private remedies have a six-year, rather than a three-year, statute of limitations.\textsuperscript{205} The 1995 Act also imposes a fine on any water, sewer, or gas utility that connects service to individual parcels before a final plat has been approved, and the utility may be disconnected.\textsuperscript{206}

Although the 1995 Act targets Doña Ana County (a southern county), it also currently applies to two large New Mexico counties (Bernalillo and Santa Fe) and will apply statewide as of July, 1997.\textsuperscript{207} Thus, unlike the 1995 Texas colonias laws, the 1995 Act does not address the regulation of subdivisions solely in the context of the state’s border with Mexico. The New Mexico legislature omitted any mention of the word “colonia” from the 1995 Act, although the problems in the colonias certainly were a major factor in the Act’s passage.\textsuperscript{208}

C. Critical Comparison of Texas’ and New Mexico’s Approach to Subdivision Regulation

1. Piecemeal v. Comprehensive Approach

While the New Mexico approach continues to be comprehensive,\textsuperscript{209} Texas has

\textsuperscript{197} See id. § 47-6-17. A county may also require that a disclosure statement be in English and Spanish.
\textsuperscript{198} See id. § 47-6-11.
\textsuperscript{199} See id. § 47-6-11(B)(6).
\textsuperscript{200} See id. §§ 47-6-11(B)(2), (B)(5).
\textsuperscript{201} See id. § 47-6-11.3.
\textsuperscript{202} See id. § 47-6-25.1.
\textsuperscript{203} See id. §§ 47-6-26(A)(3), (4).
\textsuperscript{204} See id. § 47-6-27(B).
\textsuperscript{205} See id. § 47-6-27.1.
\textsuperscript{206} See id. § 47-6-27.2. Unlike the Texas colonia laws, New Mexico does not provide an exception for hardship to residents.
\textsuperscript{207} See id. § 47-6-9(C)-(D).
\textsuperscript{208} See id. §§ 47-6-1 to 47-6-29.
\textsuperscript{209} Ironically, in light of the example of the effectiveness of comprehensive subdivision regulation that New Mexico has provided in contrast with its neighbor’s piecemeal approach, New Mexico will not apply the 1995 Act to Luna or Otero Counties, situated near Doña Ana, until mid-1997. The current prediction is that Luna and Otero counties will soon experience increased colonia growth, if they are not already doing so. See Interview with Judith
historically taken a targeted approach to the regulation of rural subdivisions. In the beginning, Texas laws were concerned entirely with the narrow issue of the approval and filing of subdivision plats prior to their use as part of a legal description in a title transfer.\textsuperscript{210} Changes to the Texas subdivision platting laws were extremely slow in coming. Texas did not close the largest loophole for colonia developers (permitting land transfers by installment land contracts without a recorded plat) until 1989.\textsuperscript{211} Further, Texas did not begin to address the problems of road construction, water supply, sewage systems, and topography in rural subdivisions in any comprehensive way until 1989.\textsuperscript{212}

Even then, Texas targeted only very poor or border counties.\textsuperscript{213} Thus, just as Texas assumed away the unprecedented growth of colonias in the 1980s, recent Texas colonia laws assume that colonias are and will remain a border phenomenon. While poor Texas communities within wealthy northern counties may have recourse under EDAP,\textsuperscript{214} they do not under the 1995 colonias laws.\textsuperscript{215}

If defined by their very proximity to the border, the Texas and New Mexico colonias will obviously remain a border phenomenon. In my opinion, however, colonias are bound to move north, just as the nonpolitical border with Mexico moves north. For example, I recently have begun working with a land use planning student and a local attorney in a “colonia” in Bernalillo County, in the south valley of the Albuquerque metropolitan area. Mexican immigrants bought subdivided lots on a real estate contract with no infrastructure.\textsuperscript{216} If such examples also prove true for Texas, that state should not go confidently to sleep once more, assuming that land developers cannot move north.

2. Financial Assistance v. No Assistance

While Texas, on one hand, can be criticized for its targeted approach to colonia regulation, on the other hand, it can be praised for acting wisely in targeting the border for financial assistance for colonia infrastructure. The down side of New Mexico’s decision not to target border counties may be insufficient resources to address a problem which, while existing in northern counties, is more severe in the south. For example, although the perception is that New Mexico’s 1995 Act has had the intended effect in Doña Ana County of slowing colonia growth,\textsuperscript{217} the problem Doña Ana has historically suffered, again, is not so much a lack of laws, but a lack of enforcement resources.\textsuperscript{218} Thus, although subdivision regulation should be

\textsuperscript{211} See \textit{id.} § 232.0015(b) (West Cum. Supp. 1997).
\textsuperscript{213} See \textit{id.} § 16.341(2)(B).
\textsuperscript{214} See \textit{id.} §§ 16.341(1)-(3); see also \textit{supra} Part III.A.2.b.
\textsuperscript{215} See \textit{Tex. Loc. Gov’t Code} Ann. § 232.021(1) (West Cum. Supp. 1997). The 1995 colonia laws changed the definition of an “affected county” to mean one that is poor and that must be within 50 miles of an international border. \textit{See id.; see also supra} notes 117-123 and accompanying text.
\textsuperscript{216} See Board of County Commissioners of Bernalillo County v. Alpine Land Co., No. CV-94-05996 (N.M. Dist. Ct. filed July 15, 1994).
\textsuperscript{217} See \textit{Interview} with Judith M. Price, \textit{supra} note 8, at 19-20.
\textsuperscript{218} See \textit{Interview} with Lisa Warren, \textit{supra} note 176; \textit{Interview} with Judith M. Price, \textit{supra} note 8, at 7-9.
statewide and comprehensive, there is clearly a greater need for financial assistance in both states along the border.

3. Exceptions v. No Exceptions

Finally, Texas has two significant exceptions to the applicability of its 1995 colonia laws, exceptions which New Mexico did not enact in its 1995 Act. Texas made an exception for a “four-lot split.” New Mexico rejected an exception for a “four-lot split,” presumably to close the loophole previously available for developers. According to estimates by local Texas officials, however, there are no new colonias being developed in El Paso County, in spite of Texas’ “four-lot split” exception. One reason for this may be that the Texas colonias laws have relatively severe criminal penalties, which may deter developers searching for loopholes.

Texas also has exceptions protecting residents and purchasers. Colonias residents are not prohibited from selling their lots. They have rights if the subdivider attempts to cancel the subdivision. In addition, counties may not refuse to connect utilities if that causes hardship to a resident. New Mexico has no such exceptions for colonias residents, which may cause severe hardship for residents who have no choice but to live on illegally subdivided land once they have invested their purchase money into it.

D. Policy Implications of Strict Subdivision Regulation

At a larger policy level, comparisons between Texas and New Mexico, and between El Paso, Texas and Doña Ana County, New Mexico, become difficult. Although both counties have witnessed skyrocketing growth since 1980, El Paso County remains substantially larger in population size than Doña Ana County. Moreover, the City of El Paso has a dense urban population, and shares air and water, culture, language, and history with Ciudad Juarez—a city with a current population of close to two million. Las Cruces has a much smaller population and lies nearly one hour away from the border.

My own sense, gained over six years of working in both counties, is that the poor in El Paso County are more desperately poor and often less sophisticated than their Doña Ana County counterparts. I have yet to see or hear of a Doña Ana County


222. See Lecture by Jose Rodriguez, supra note 144; Interview with Brian Quintero, supra note 85.


224. See id. § 232.031(a). The statute prohibits sale only by subdividers. See id.

225. See id. § 232.039.

226. See id. §§ 232.029, 232.037(C).

227. For example, one resident of El Milagro, almost nine months pregnant, was denied a permit for electricity because El Milagro was an illegal subdivision, even though she was already living in a trailer on her lot. In the end, local discretion solved this specific problem.
colonia resident living in a cave in the side of his newly purchased arroyo, as I heard
described by Viviana Patiño in El Paso. 228 Although there may be some families
with similar problems in southern New Mexico, I do not hear these stories as a
matter of course in Las Cruces or surrounding villages. Further, there are no public
cholera warnings in Doña Ana County, as I used to hear routinely when I lived in
El Paso.

Texas' response to the colonia issue has effectively shut down all future colonia
development. Texas' approach, however, solves the symptom of the miserable
conditions in the Texas colonias, without addressing the disease of lack of adequate
housing along the border. In light of the urgency of El Paso's housing crisis,
emergency public housing may be the only current solution. In the long-term,
however, I wonder whether the outlawing of all colonia construction on the Texas-
Mexico border is somewhat like the laws prohibiting the poor from sleeping under
bridges. Instead, I urge a long-term solution to the housing crisis along the border
of both states that would encourage planned rural community development,
beginning with the communities themselves.

IV. WE DRINK FROM OUR OWN WELLS: 229 A PLEA
FOR COMMUNITY BUILDING FROM WITHIN

The people have their problems. Each time all of you come they tell you
and tell you, they think it can be resolved easily, but it can't be done like that,
can it? Everything is step by step . . . [b]ut I think, if we have lived here for
three years, and we were once without hope of having anything, no more than
to keep living as we were, well now there are many gains we have obtained.
Because at least they know we exist. Because Milagro used to not even be
registered in the county. They didn't believe that people lived out here. They
thought it was all just cows, . . . coyotes, and deer. But there are many children
here. We have now achieved that the school bus comes here. Also, there are
many [other] gains that we have obtained . . . 230

The amazing growth in the number and population of the colonias intensified a
severe housing shortage along the border—a shortage that continues today. 231 The
lengthy history of the colonias in Texas and New Mexico is significant because it

228. See supra note 104.
229. This is the title of a book written by liberation theologian Gustavo Gutierrez. See GUSTAVO GUTIERREZ,
WE DRINK FROM OUR OWN WELLS (Matthew O'Connell trans., 1984). His reference is to Saint Bernard of
Clairvaux, meaning that experience that comes from the Spirit is the basis of liberation.
230. Interview with Marta Jimenez, resident and former president of El Milagro Concilio, in El Milagro,
N.M. 9-10 (Nov. 5, 1995) (transcript on file with author).
231. There are currently no data suggesting that the current population boom in El Paso County and Doña
Ana County will not continue for at least the near future. The growth in population along the border cannot be
attributed solely, or perhaps even primarily, to immigration trends from Mexico. Rather, the increase in the
population, especially in southern New Mexico, has been substantially the result of internal growth. Thus, this
country cannot avoid addressing the low-income housing crisis by scapegoating new immigrants from Mexico,
and proposing new or greater immigration controls as an alternative to the construction of new housing.
Moreover, even if immigration directly from Mexico caused the huge growth in population along the border,
there is no data to support that current efforts to control immigration on the border will succeed. In any event,
stopping immigration will not stop the growth in the population already living along the U.S. side of the border.
demonstrates that colonias are not merely an aberrant example of the results of the lack of land use planning and consumer protection. Rather, the formation of colonia-type communities historically has filled a need for low-income housing that was not being addressed in any other way. All of the officials and activists I questioned on the issue believed that the population growth will continue in both counties, that the increase will primarily be among the rural poor, and that there are currently no realistic alternatives to colonias on the horizon.

There is clearly a crisis in affordable housing for the rural poor in both Doña Ana County and El Paso County. I would never suggest, in light of the history of colonia development along the border, that colonias as they exist now are a good solution to the crisis. Nonetheless, I begin my discussion of possible solutions to the border housing crisis with the assumption that there is nothing inherently wrong with rural subdivisions developed for sale to low-income residents. Let me hasten, however, to emphasize the word “inherently.” In both New Mexico and Texas, there are numerous examples of colonias that are so poorly located that they are unsafe and unsanitary, and cannot be remedied. The Texas experience teaches beyond any doubt that development without regulation, in a region accustomed to exploitation of a desperately poor underclass, inevitably leads to widespread abuse in the form of development without necessary infrastructure.

232. Judith Price sees colonias in part as the commercial markets’ response to the need for affordable housing. “Americans are great entrepreneurs. You put a demand out there, we’ll find a supply for you if we can make money at it. And so that happened all up and down the Rio Grande Valley from New Mexico to Texas.” Interview with Judith M. Price, supra note 8, at 5.

233. In this regard, the 1990 GAO STUDY is significant for what the researchers did not find in California. See GAO STUDY, supra note 9. Although California also is experiencing an increase in population along its border with Mexico, San Diego County reported “no developments in the county meet[ing the GAO] definition of colonia.” See id. at 34. This may be due to the fact that land in San Diego County is too valuable to turn into colonia lots. Whatever the reason, the unavailability of colonia lots did not resolve the problem of border housing.

[An official from San Diego County] pointed out other serious problems with legal and illegal aliens who lack access to affordable housing. These people have resorted to building makeshift dwellings on the hillsides or any place that may give them temporary shelter. These shelters are located in close proximity to where the aliens work as farm labor or in the wholesale nursery business.

...[T]he situation is getting worse because the number of aliens is increasing and the county does not have the resources to provide affordable housing. Thus, the aliens are left to exist in make-shift dwellings (or none at all) without potable water or sanitation facilities, and they are often chased from place to place by landowners under orders from the County Health Department.

Id.

Rose Garcia predicts that over-regulation in New Mexico could produce the same result as lack of affordable land has had in San Diego if there are no alternatives to colonias available to the rural poor.

According to Garcia, if colonia land is not available, or rises sharply in price, “you’re probably [going to] start seeing more homesteading, illegal homesteading, out in areas that are not developed.” Interview with Rose Garcia, supra note 25, at 16.

234. See Interview with Viviana Patiño, supra note 56, at 3-4. In at least one colonia in El Paso County, for example, the land was so inhospitable to humans that the only remedy available to the residents was moving. See Eduardo Montes, Developer to Relocate Colonia Residents, ALBUQUERQUE J., Feb. 7, 1997, at C3 (describing the East Clint colonia in El Paso County, Texas). In New Mexico, residents could not live on the land at Anapara because of its location on a flood plain and its “severe flooding problems.” See Interview with Rose Garcia, supra note 25, at 2.
Thus, my point is not that the colonias, as they developed along the border in the 1980s and 1990s, provided a good solution to the lack of border housing. Instead, the colonias were an inadequate solution, but we can learn much from these efforts if we do not dismiss the colonias as a temporary problem that can be solved entirely by stricter subdivision laws. An objective and thorough review of the history of colonia formation and development along the border reveals that there are some very positive aspects of small rural communities, where home ownership is possible for persons who could not otherwise afford such a luxury.

I applaud the efforts to curb abuse. However, I fear that the current efforts in the legal community obscure the value of rural settlements. Efforts at the county and state level have been directed towards consumer protection against abuses in the colonias rather than at developing a housing strategy for low-income residents. My hope is that in planning for future growth, policymakers will take note of the positive aspects of colonia formation to determine whether regulated colonia development leading to home ownership in stable communities might be part of the solution to the current housing crisis.

The views of activists and officials along the U.S.-Mexico border are that colonias are not a wholly negative phenomena. Judith Price calls colonias residents "homesteaders."

[The colonias residents] have never been able to buy land before . . . and they have a growing family, and apartment rents and mobile home spaces in the City of El Paso or the City of Las Cruces are priced out of their reach. I mean it's natural for them to look around for land they can buy to start a homestead. These are homesteaders, basically . . . . They've come to the border. Many of them have come from rural surroundings that are very much the same as what they're coming into. They have no credit, they have no way to buy land. They have no expectation of anything but hard work and passing something on to their kids.

Marta Jimenez, a resident of El Milagro, confirms this view. She observes that living in El Milagro is less expensive than renting in Hatch; that she can build her home slowly as her family grows; that landlords do not like children; and that

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235. In a detailed and thorough article on the subject of land use regulation in the colonias in El Paso County, Jane Larson advocates a balance between regulation and flexibility.

In regulating [colonias] . . . border counties must set appropriate standards for construction and land use, and for the provision of public services and infrastructure. There is a direct tradeoff between higher standards and affordability for lower-income households, and regulators must be sensitive to this tradeoff. Unrealistically high standards will exclude low-income families from colonia housing, encourage the development of illegal settlements, and attract competition for land and housing from higher-income families. But if standards are too low, not only will health and safety be threatened, but any housing constructed quickly will deteriorate and be abandoned, once again constricting the supply of affordable housing in the region. To build decent, affordable, and long-lasting housing in informal settlements, housing and land use regulation must be stripped to its core, but that core remains essential to sustaining these settlements as a viable housing resource for the poor.

Larson, supra note 27, at 249.

236. Interview with Judith M. Price, supra note 8, at 3.
children are safer playing in El Milagro. She believes she and her husband are building for the future and for their children.

Rose Garcia contrasts the positive aspects of “mature colonias” in southern New Mexico with the problems in current colonias. Sunland Park and Anthony, for example, have resolved or have organized to resolve many infrastructure problems in their communities. Anthony organized a sanitation board. Sunland Park ultimately incorporated as a city to address sanitation issues. Perhaps more importantly, both communities, among several in southern New Mexico, continue to address similar issues as a community. Garcia believes that the newer colonias like El Milagro can follow the same pattern and improve their infrastructure primarily through self-help.

My more limited experience confirms this view. The colonias residents I have met expect to work hard to improve their subdivision lots. For example, Marta Jimenez speaks with pride of digging a trench by hand with her mother to lay pipe for water. Residents often exhibit great pride of ownership to the extent their financial resources permit. There also are unexplored talents for practical problem solving to improve colonia conditions. El Milagro started as a single unfinished adobe home in 1990, but now is a lively community of over a dozen families, with water, some decent housing and some substandard housing, and specific and realistic plans for future improvements. There is a relatively strong sense of community because residents are members of the same family, or knew each other before moving to the colonia, or as a result of the confidence residents gained working on each self-help project. In less than two years, some trailers

237. See Interview with Marta Jimenez, supra note 230, at 2, 10.
238. See id. at 6.
239. See Interview with Rose Garcia, supra note 25, at 1-3, 6, 9, 11.
240. See id. at 1.
241. See id. at 4.
242. See id. at 1-3, 6, 9, 11.
243. See id. at 9.
244. See Interview with Marta Jimenez, supra note 230, at 2.
245. For example, in one colonia in El Paso County, residents initially preferred to stay on less than optimal land, rather than abandon their improvements in exchange for better and more valuable land as part of a settlement agreement. Viviana Patiño describes the strength of this attachment.

The hold-up to the settlement right now is that the residents want the costs of improvements on the property. The case was filed in [1994]; we’re now almost in [1996]. Some of the houses that were just tar paper and thatched roofs, are now cinder block[,] [P]eople, when the water started getting trucked in and the toilets put out there, . . . thought ‘you know this is great, I’ve got a permanent place to live’ and started building some very permanent homes. Interview with Viviana Patiño, supra note 56, at 5.

246. In El Paso County, for example, the colonia residents, through the El Paso Interreligious Sponsoring Organization (EPISO), commented to county officials that residents had the practical skills to install septic tanks, but were not licensed. See id. at 18-19. EPISO voiced the opinion that more residents would have legal septic tanks on their property if the county facilitated reduced fees and on site, bilingual classes for licensing of those wishing to install septic tanks. See id. Those obtaining licenses could then supervise other colonia residents. See id.
247. See Interview with Antonio Lujan and Bess Metcalf, supra note 9, at 8 (quoting Antonio Lujan).

Although El Milagro has been the subject of extensive media attention on the colonia problem and of litigation by the New Mexico Attorney General under the New Mexico 1973 Subdivision Act, most
have become permanent homes with porches, landscaping, and other improvements, and many residents have started thriving vegetable gardens. There is a sense of building something for the future in these communities.

These efforts and the sense of community are largely attributable to home ownership, in tandem with community organizing and self-help improvements in infrastructure, which cannot be separated. Although home ownership often provides the impetus for organizing, mere ownership is not sufficient if conditions in the colonias do not improve. Antonio Lujan observes a sense of alienation among colonias residents, that diminishes as the residents take control of their communities.

Then, . . . on the social-political side is [the fact that] these people are really pretty much alienated from the broader community or society, and I think that plays out a lot of times in the community itself, in terms of trying to get people to work together, where some individuals just don’t want to . . . .

According to Bess Metcalf, “one of the things that we face is just a sense of despair.”

Working on community projects in the colonias is an effective organizing tool to overcome the alienation of colonias residents.

I think by taking on short-term achievable projects that are visible. Like in Milagro, when we started there, it was, “naah, nothing’s [going to] happen,” and they’re talking well, a year ago, we were talking about the roads, the water, and the school bus, and they’ve accomplished those things.[.] So now they’re

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improvements thus far have been through grants or loans obtained by the Village of Hatch or El Milagro itself, self-help, or pro bono efforts by the University of New Mexico Law School, the New Mexico State University Surveying Department, and the Las Cruces Surveyors Association.

248. In keeping with this sense of its intrinsic value, home ownership is clearly highly valued by U.S. society, both for its inherent worth and for its stabilizing social effects. “The rich, the middle class, and the poor place a high value on home ownership.” John Mixon, Installment Land Contracts: A Study of Low Income Transactions, with Proposals for Reform and a New Program to Provide Home Ownership in the Inner City, 7 Hous. L. Rev. 523, 523 (1970).

The federal government also values home ownership. Congress created the Federal Housing Administration in 1964 to open up home ownership to the middle class. See National Housing Act, 12 U.S.C. § 1702 (1964), cited in Mixon, supra, at 523. Even today the federal government continues to promote private home ownership as a first step in a family's economic health. For example, former Secretary of Housing and Urban Development, Henry Cisneros recently indicated that home ownership is "the beginning of investment and wealth" in the U.S. family. See Channel 9 News, El Paso, Tex. (NBC television broadcast, Oct. 3, 1996). He proposed a new "bridal registry" for wedding guests wishing to contribute to home ownership for a new couple. See id.

249. Antonio Lujan believes ownership changes a resident’s perception of his home. In the 1985 Las Cruces Diocese study, for example, about 85% of the people . . . surveyed owned or were buying their home. And you’d ask them, is your home adequate for your family’s needs, and over 60% would say, “yeah, it’s adequate.” In Sunland Park, the numbers were mixed in with El Paso, so we had to [go] door to door there, and you could tell that the house was substandard, but it was adequate, because they owned it, and that’s how they defined adequacy. But if you look at, like in Milagro, for example, there may be a couple of houses that aren’t substandard houses. Everything else is substandard, and I think that’s a real need [for adequate housing.]

Interview with Antonio Lujan and Bess Metcalf, supra note 9, at 8 (quoting Antonio Lujan).

250. Id. at 7 (quoting Antonio Lujan).

251. Id. (quoting Bess Metcalf).
starting to believe that they can make a difference, and then . . . they're going to be the model to really transform that community.  

Thus, in light of the inherent and practical value of home ownership, the plan to develop a subdivision outside city limits and sell affordable lots on a real estate contract is not an inherently bad plan, because such a plan may be the only way to put home ownership within reach of low-income people. Generally, land in rural areas is less expensive than land in urban areas, and real estate contracts permit low-income persons to pay off the price of land over time, without the need for a large down payment.

The current problem, however, is that unregulated subdivision development is inadequate or even uninhabitable. On the other hand, regulated subdivision development may be too expensive for this population to afford. Thus, the best choice presented by policymakers to poor persons living on the border is too often between government-financed, multi-family housing in urban areas or privately-financed, inadequate housing in rural areas. Having made a policy choice that privately-financed colonias are ultimately too costly to the entire border community, the legal solution thus far has been to mandate up front construction of necessary infrastructure in future colonias prior to sale. This decision raises the price of lots, perhaps financially foreclosing poor residents from choosing privately-owned rural housing, which they may favor above multi-family housing, whether publicly or privately financed.

This approach, while resolving the immediate crisis, ignores the history of housing along the border, in which colonias were a necessary part of addressing the housing shortage. The mature colonias in southern New Mexico often became habitable communities in which to live, in which poor persons could own their own homes and share in the sense of belonging to a community. The difference between mature colonias and new colonias, however, is that time and slow growth permitted

252. Id. at 8 (quoting Antonio Lujan).

Jane Larson takes a longer view of community building in the colonias, suggesting that "a]ny project undertaken to build sewers and bring water to the colonias must be accompanied by an equally energetic project to rebuild political community . . . ." Larson, supra note 27, at 257-58. By "political community," Larson means the question of "who will be a 'citizen' in the new world order." Id. at 257. She appears to suggest that community building cannot begin without full citizenship in the larger political community. See id. at 254-57.

I would also readily adopt the view that full citizenship for colonias residents is critical to their future. However, my personal experience, as well as from interviews with community activists, suggests that this dialogue begins in practice with the question of who is a "citizen," meaning who is a participant in the decisionmaking process, in a particular community or a particular county, and may then expand outward. Thus, I do not disagree with the destination, but I believe Larson may be oversimplifying the map.

However, Larson's practical recommendation is to extend voting in local elections to noncitizen permanent residents. See id. at 254-55. The political likelihood of such an extension aside, the community activists with whom I have observed and worked with were universal in their belief that voting rights were crucial for the long-term future of affordable rural housing. See Interview with Rose Garcia, supra note 25, at 5, 11. Both Antonio Lujan and Rose Garcia make voter registration an automatic part of community organizing. See id. at 5, 11.

253. See, e.g., Larson, supra note 27, at 211.

254. See generally Mixon, supra note 248, at 531.

255. I do not ignore my experience that many families on the border and elsewhere in the U.S. have no housing choices, or have only the choice between bad public housing or bad private apartments.
residents to buy inexpensive land and improve their housing and the supporting infrastructure over time.

A. The Pitfalls of Current Private Financing of Rural Subdivisions

There are two critical flaws in the colonias as they are currently developed in Texas and New Mexico. First, they are insufficiently capitalized initially, and currently there is no alternative to developers providing the initial capital for infrastructure. Thus, the financial incentives favor the developers skimping on the construction of infrastructure to save up-front costs for the land purchase or for profit.

The above arrangement not only results in an unlivable colonia, but may ultimately increase the cost of low-income housing to society. Much of the time and resources of non-profit groups, governmental entities, and the communities themselves are devoted to unraveling the problems caused by the failure to create necessary infrastructure from the beginning, rather than by the lack of infrastructure itself. For example, much more effort has been required to clear titles and easements in El Milagro and Las Palmeras than would have been needed if the land had been properly subdivided initially, before residents moved there and began building.

On the other hand, the regulation of subdivision development does not change the nature of colonia financing. To finance high up-front costs that come with regulation, developers inevitably require higher payments by purchasers, which may put home ownership out of reach.

Second, the purchase of land in colonias is often financed entirely by real estate contracts, which poses a substantial risk of forfeiture to the ultimate purchasers if the purchaser or middleman defaults on land payments to the legal title holder. Thus, even where a developer makes only a minimal investment in infrastructure, he may finance his own purchase through a real estate contract, creating the real possibility that a resident paying regularly on his individual lot may nonetheless lose his land and improvements when the seller defaults. Individual lots are frequently sold on contract as well, with the same result that improvements to the land by the community or the individual owner may accrue to the developer after default. If a developer were to default after local, state, or federal government money helped to bring a colonia up to code, the value of these improvements could be lost to the residents.


258. See generally Bank of Santa Fe, 102 N.M. at 591, 698 P.2d at 461. This result is especially harsh where a purchaser takes property subject to a prior lien. This occurs in many colonias, where purchasers buy from a middleman who also purchased the land on a real estate contract. Should the middleman default, the property, with improvements, reverts to the original seller, regardless of whether the residents share any blame for the default. See generally id.
B. Proposed Solutions

Are these problems inherent in the nature of low-income housing? Many of the persons I interviewed for this Article suggested that the result of regulation of the colonias would be the loss altogether of colonias as a low-income housing alternative, because improved conditions necessarily carried with them an increase in price. I do not believe the choice is so black and white. While regulation of rural subdivisions is necessary, regulation does not necessarily require construction of all infrastructure prior to sale, and certainly does not require private up front financing of infrastructure. Further, policymakers should recognize that the real estate contract in its current form exists only because it is the only form of major credit available to poor persons that is acceptable to lenders.259 If, however, the federal or state governments were to guarantee loans in exchange for improvement by residents of their colonia lots, other forms of credit would become available.

1. Involvement of Colonia Residents

What are the alternatives to substandard colonia development?260 The most positive aspect of colonia creation and amelioration is the effect that residents have on their own communities, and the effect that ownership has on community building. Any laws seeking to take advantage of the positive aspects of colonias as an affordable housing alternative along the border should take the resource of the residents themselves into account.

First, any plan to rely on rural subdivisions to alleviate the housing shortage along the border must address the current problems of residents now living in colonias in Texas and New Mexico. Texas has attempted to address this issue to some extent by allowing limited grandfathering of the application of more lenient standards to colonias residents.261 State laws in both Texas and New Mexico should be extended along these lines. Such an extension of state laws should provide clear exceptions for either non-profit grass roots organizations representing colonias residents, or colonias residents themselves,262 to invest as individuals or as a group in colonia property, without the threat of being subject to penalty under the 1995 Texas colonia laws or the 1995 New Mexico Subdivision Act.

For New Mexico colonias existing prior to the 1995 New Mexico Subdivision Act (regardless how they were created on paper, or even if created by oral contract), the

259. See generally Mixon, supra note 248, at 531.

260. Jane Larson, in her article detailing the growth of unregulated subdivisions in El Paso County, has suggested seven areas of focus for change: 1) regularize land title; 2) make credit available at market rates for land purchase, home construction, and home improvement; 3) support self-help housing and reject "no-growth" policies; 4) delegate ordinance-making power to the counties; 5) enact minimal, but comprehensive, land use regulations for all colonia housing; 6) mandate extension of municipal water and sewer to county residents; and 7) extend the franchise in local government elections to noncitizen residents. See Larson, supra note 27, at 238-39. While I do not reject any of these suggestions, I would place more than equal emphasis on resident control of colonia formation and remediation, which Larson touches upon in recommending self-help housing.

261. See supra notes 90-94, 116 and 145 and accompanying text.

262. Both the CDC in New Mexico and EPISO in Texas are closely aligned with colonia residents. Thus, I will refer to colonia residents for the remainder of my discussion, with the understanding that residents may choose to organize under a larger umbrella, such as the CDC and EPISO provide.
New Mexico legislature should provide an exception to permit residents to regularize their titles, without the threat of sanction. At the same time, any such exception should carry with it a requirement that the community, as a whole, have a long-term plan for reaching the 1973 or 1995 New Mexico standards in infrastructure in the colonia. Provisions could be made to permit residents or purchasers with a certain percentage investment in the purchase price to apply for exceptions to current laws to allow a longer time frame for remedying the infrastructure problems in particular communities. Unless officials can point to resources available to a community to meet these deadlines, they should be extended for residents on a case-by-case basis. This same model could be used under the 1995 Texas colonias laws.

Examples of how this might work in New Mexico may be found in El Milagro and Fair Acres. In both communities, some residents bought individual parcels of land, but were listed on the sale documents as joint tenants. In some cases, only one purchaser is listed, leaving the other purchaser with an extremely insecure ownership interest. Nonetheless, both residents are living on, paying on, and improving individual parcels. Currently, to re-survey and officially divide their parcels, residents must overcome the obstacle of the 1973 or 1995 New Mexico Subdivision Acts, which forbid the subdividing of land without adequate infrastructure. Regardless of the merit of these laws as applied to large scale developers, they can be crippling to residents, who are faced with violating the subdivision laws or walking away from a transaction in which they were victims, often to the benefit of sellers who still hold legal title to the land.

To compound the problem, residents may have purchased on a real estate contract from a developer who also purchased on a real estate contract, leading to the real possibility that if the middleman defaults on his payment, the individual parcels will be lost. One solution to this quandary might be for a non-profit group to buy out the middleman, using the profits from payments by individual lot holders to build infrastructure. The difficulty with this approach, however, is again that the nonprofit group may thereby become an illegal subdivider.

Second, to help with this process, and with future self-help housing projects, Texas and New Mexico laws should encourage the legal recognition of small groups of residents to receive grant monies for infrastructure construction from state and federal governments and from private foundations. New Mexico already has laws, for example, permitting residents to organize sanitation districts. Rose Garcia credits these laws with helping support grass roots organizing in the now mature


264. Residents could argue, to better or worse effect, that the subdivision of the parcels has already occurred, and thus any effort to regularize title is not a new violation. However, county officials have given this theory a lukewarm response and it has not yet been tested in court.

colonias of southern New Mexico.\footnote{266} Ironically, while Texas has learned the lesson that local control over developers is an essential part of planned rural community development, it continues to deny local control to community groups to seek assistance for water, sewer, and other infrastructure on their own.\footnote{267}

Third, to support the creation of rural subdivisions with adequate infrastructure in the future, Texas and New Mexico, along with the federal government, should set up financing programs\footnote{268} that would both distribute the cost of infrastructure over a longer period of time,\footnote{269} and give oversight over subdivision planning to government, third-party financial institutions, or the residents as a group.

As I have stated, New Mexico’s laws currently recognize self-help organizations, permitting such groups to apply for assistance with infrastructure.\footnote{270} Such groups are recognized by New Mexico only after a community is already in existence. I would expand this policy to include recognition of groups who are seeking to settle a rural subdivision. For example, Marta Jimenez notes that her family could not afford the ten-acre lots sold by the developer of El Milagro, and were thus forced to buy on an extremely dubious real estate contract from a middleman, who provided neither surveys nor deeds, even after all the residents’ payments had been made.\footnote{271}

To avoid this problem, a small group of potential residents could finance or apply for financing for the purchase of a large lot, thereby eliminating the costly middleman. Another option to residents could be small-government or privately-

\footnote{266} Rose Garcia gives a vivid description of a grass roots organization’s use of New Mexico laws to implement self-help projects.

\footnote{267} In New Mexico, we have the Sanitary Projects Act, under which we can incorporate overnight. Right now, I’ve got a cookie cutter model, that in a one-hour meeting, I can incorporate a mutual domestic water system. I mean from scratch. The Agenda is cookie cutter. All it is five board actions, five resolutions, . . . standard boilerplate articles and by-laws, everything ties back to the statutes . . . . We have done probably a dozen of these systems.

Interview with Rose Garcia, supra note 25, at 4.

\footnote{268} In the 1987 CRS REPORT, the reporters emphasized that colonias were unable to apply for substantial federal aid because they were not recognized legal entities. See CRS REPORT, supra note 29, at CRS-15. “Among all of the [federal programs discussed in this report, only those authorized under the Housing Act of (1949[, 42 U.S.C. § 1441,)] provide assistance to individuals, rather than municipalities, authorities, districts, or other public entities.” Id. at CRS-10, CRS-15, CRS-17. The CRS noted that legal entity status was entirely dependent on state laws. See id. at CRS-17-CRS-18.

\footnote{269} For an excellent description of possible self-help or small scale financing mechanisms to bring inexpensive credit within reach of the poor, see Larson, supra note 27, at 242-44.

\footnote{269} In 1987, the Congressional Research Service (CRS) noted that the high cost of credit for colonia development made cheap rural land more expensive in the long run.

In general, rural communities face special problems in financing needed capital improvements. Compare with urbanized areas, rural communities frequently face higher per capita costs due to lower population density, less ability to benefit from economies of scale, and limited ability to spread capital costs among residential and industrial taxpayers.

CRS REPORT, supra note 29, at CRS-18.

The CRS cited state infrastructure banks, which lend or issue debt on behalf of participating local governments, as a hopeful trend. My experience is that improvements will commence sooner if communities can raise their own financing. This is occurring in Las Palmeras, where residents have obtained financing and expert advice for a sewer system from a private foundation.


\footnote{271} See Interview with Marta Jimenez, supra note 230, at 2.
financed loans which take group dynamics and peer pressure into account have a proven track record for repayment.\textsuperscript{272}

The application process for recognition as a resident group would have to be tightly regulated, to guarantee that the group is not used merely as a "straw man" to hide the same old development schemes of years past. This recognition could be part of a federal or state loan application process, modeled perhaps on New Mexico's statute setting up water and sanitation districts.\textsuperscript{273}

2. Formalization of Land Purchases

Finally, the colonia laws in both Texas and New Mexico should recognize that the current informal system, in place in both states, of purchasing land that is not up to regulatory standards now, with the understanding that improvements will be made over time, could be a workable system if it were formalized. The advantage of such a system is that it distributes the costs of building infrastructure, both for the developer and the individual lot owner, over time.

The current problem with "pay now, improve later" is twofold. First, residents may purchase land that is uninhabitable without immediate and extensive infrastructure improvement. Second, developers may never deliver on promises to improve the land. Both problems could be resolved by amendments to the 1995 New Mexico Subdivision Act and the 1995 Texas colonias laws, requiring minimal standards in infrastructure, but permitting an exception to some of the stricter regulations if colonias residents or the developer submit an acceptable plan for improvement over time. Developers could provide a bond to guarantee future improvements. Residents could, either as a legally recognized group or in tandem with a developer, provide a plan that includes "sweat equity" as one method for improving infrastructure, which should in turn reduce their payments on individual lots.

Marta Jiménez noted that one of her neighbors was not permitted to move onto her property because El Milagro had been declared an illegal subdivision. In the meantime, the neighbor was living in a substandard trailer on an expensive rented lot. Jimenez' proposed compromise was for the County to permit the neighbor to move, and Jimenez would give her water by use of a garden hose, having already laid pipe herself for water.\textsuperscript{274} Although I could predict a less than enthusiastic response by county officials, I was hard pressed to argue with the logic.

Obviously, those with more knowledge than I about what infrastructure is immediately essential and what can safely be constructed over time should participate in drafting regulations for long-term "sweat equity" plans. And the goal would be absolute and comprehensive compliance with all subdivision regulations by a certain date.

I am recommending greater control by residents in their own communities, and greater regulatory flexibility by state and local governments in order to encourage self-help efforts. To begin a study of the feasibility of this approach, policymakers

\textsuperscript{272} See Larson, supra note 27, at 242.


\textsuperscript{274} See Interview with Marta Jimenez, supra note 230, at 2, 10.
could select one of the many colonias in either state to serve as a self-help model to determine whether the approach results in actuality to better and more affordable rural housing.

V. CONCLUSION

As I began my work in El Milagro, my learning in the community and my memories of hearing about the colonias in El Paso County during my residence there brought two seemingly opposed thoughts to mind: the colonias grew up recently and quickly, without much forewarning and under the radar screens of local regulators, and yet apparently they have existed since the border line between the U.S. and Mexico was drawn. I learned in working on this Article, first, that, because the border line is pivotal to the growth of the colonias, colonias have always existed along the border, but, second, that colonia growth has accelerated and moved north in recent years, frequently catching regulators unaware.

I started my research with the idea that the colonias began in Texas, and that New Mexico could benefit from Texas' experience in coping with the accelerated growth. I learned that the colonias have also long existed in New Mexico, but have benefitted over time from their treatment as unique communities, rather than as part of a more general colonia problem, and that the two states have much to teach each other.