

NEW MEXICO LAND USE LAW 2008-2009

ROCKY MOUNTAIN LAND USE INSTITUTE

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Proposed bills in the 2009 New Mexico Legislature

I. HB 40: Changing the procedure for annexation and eliminating eminent domain by municipalities of wells, cisterns, reservoirs, etc.

Currently, a single property owner—usually a developer, if it owns a majority of acres which it wishes to annex, may petition a municipality of over 200,000 persons (Albuquerque!!!) for annexation if the property is contiguous to the municipality and the municipality may serve it with utilities/infrastructure in a reasonable period of time. This bill would require that a majority of property owners within the area to be annexed sign the petition for annexation. It addresses the fact that single property owners—usually developers, have gerrymandered acreage proposed for annexation so as to own a majority of the acreage, often against the wishes of other property owners within the proposed annexation area..

The bill also changes the area in which the municipality may exercise jurisdiction over water facilities-- outside its municipal boundaries to its “platting and planning jurisdiction” from an area 5 miles beyond the boundaries.

It also prevents the municipality from exercising the power of eminent domain over wells, cisterns, pipes, ditches, pumps, rights of way outside its municipal borders, although it may “acquire” these facilities. Eminent domain still may be used to acquire property for development of water/sewer facilities, however.

This bill looks like it’s aimed at Albuquerque’s growth management efforts on the West Side, where it has used eminent domain to acquire a private water utility which serves new growth, often when the existing Albuquerque/Bernalillo County Water Authority has not approved immediate extension of its own facilities.

II. HB 416: Relating to the extraterritorial powers of municipalities; restoring powers to municipalities in Class A counties with more than 300,000 persons.

This bill restores to Albuquerque an Extraterritorial Authority, having planning and platting jurisdiction over an area extending 5 miles from its municipal boundaries,

exercising this jurisdiction through an Extraterritorial Zoning Commission. It restores the Extraterritorial Authority's jurisdiction over zoning in this 5 mile area as well, as long as this extraterritorial area is not within the jurisdiction of another municipality.

A former powerful New Mexico Senator, a resident of Bernalillo County, (now in prison for another matter) had removed Albuquerque's extraterritorial platting and planning and zoning jurisdiction.

III. The TIDD's Saga: Are TIDD's a Blessing or A Curse?

HB 451: Increases the State's Role in the development, regulation and oversight of the creation and implementation of tax increment districts.

Not controversial; merely gives the Secretary of Finance and Administration and Director of the Legislative Finance Committee more oversight over the formation and administration of Tax Increment Development Districts and requires greater accountability from these districts.

HB 392: Established procedures for Greenfield tax increment development districts and creates a task force to study implementation of such districts.

Here's where the controversy steps in. New Mexico's tax increment development districts, unlike such "TIF's—tax increment financing districts—in other jurisdictions, may utilize state, county and municipal gross receipts taxes to pay back bonds issued by a tax increment district to finance infrastructure. There is no distinction in New Mexico's TIDD's statute, Section 5-5-1, between districts formed to redevelop an area of the community, or a district formed for "greenfield development"—new development.

More stringent requirements for a greenfield development seeking a TIDD, including an independent review, would be required if the bill passes. This bill limits the amount of tax increment in a redevelopment district to 50% of revenues resulting from the development. Only 20% of the revenues resulting from a Greenfield development may be used for the tax increment. This amount may be increased up to 50% if the developer dedicates land for schools, builds a transit-oriented development, provides workforce housing, affordable housing, and a "park-once" strategy. If the increment collected from development in any TIDD exceeds the amount to pay back bonds issued by the District, the excess must be returned to the taxing authority.

Two other bills refer to state approval of a TIDD for a specific Greenfield development and for a redevelopment district in Las Cruces.

As of February 6, this bill was making its way through legislative committees with little opposition

The economic development community favors greenfield development without additional restrictions. Many members of the planning community would prefer that TIDD's only

be used for redevelopment, especially given the current economy, where projected greenfield development could take years to attract business and industry, as well as to sell new homes, and would prefer not to divert tax revenues from existing community.

Bills strongly favored by “opponents” of TIDD’s for Greenfield Development :

SB 509: Senator Cisco McSorley defines “Greenfield development” to distinguish it from redevelopment, and also adds a definition of “sustainable development” which includes development which reduces vehicle miles traveled. His bill requires a detailed time line for completion of a TIDD financed project, including the timing of public infrastructure expenditures, and a detailed summary of all public and private costs associated with a TIDD financed project. All material submitted by a TIDD’s district would have to be posted on a website.

After hearings before both the local governing body where the TIDD will be located, and the State Board of Finance, both bodies must make findings that the TIDD is not a “greenfield” development, and that it wouldn’t have happened through private investment in the foreseeable future. This is particularly relevant because SunCal, a California developer, is in the process of getting state and local approval for TIDD’s to finance a massive “new community” on Albuquerque’s west side, and is seeking TIDD districts in both Albuquerque and Bernalillo County. Considering that SunCal developments in California are rumored to be bankrupt, there is concern for the financial feasibility of a new community in Albuquerque! Another required finding is that increased revenues resulting from the development would have been less without the formation of a TIDD, (although this finding is not necessary if the TIDD is for redevelopment, rather than Greenfield development.) There also must be a finding that the tax increment won’t inhibit public services elsewhere in the community.

The TIDD must conform to planning, and must follow the Procurement Code of the jurisdiction. This bill also specifies how the increment is to be used, and strengthens accounting provisions, requiring an Independent Audit as to what the TIDD has accomplished in creation of jobs, attraction of businesses, and impacts on the general fund., among other information. This bill, if passed, would apply to all TIDD’s, including those formed before the bill was adopted.

SB 483, also introduced by Senator McSorley, would place a moratorium on tax increment districts for greenfield development from the date of its passage (an “emergency”!) until March 31, 2011. It also creates a task force to solicit input on the implementation of TIDD’s in New Mexico. The task force should evaluate the fiscal impact of TIDD’s on both the State’s general fund and on local gross receipts and property taxes. It should also determine what the economic consequences will be if the TIDD doesn’t meet its projections, an issue particularly relevant in these troubled economic times.

HB 19

Hallelujah! Water discovered in Sandoval County, but....

The discovery of a massive aquifer under Sandoval County, the home of Rio Rancho, one of the fastest growing cities in the United States (which now leads the region in foreclosures!) has received major attention. But...the water is very deep and very “brackish”. The New Mexico State Engineer, whose office regulates water in New Mexico, has no authority over water under a prescribed depth. This water would also require massive expensive desalinization to be potable, and would eventually be depleted if rapidly used for new development. Developers are salivating over this new supply. This bill would give the State Engineer authority over its development.

III. Cases

Albuquerque Commons Partnership v. City Council of the City of Albuquerque, 144 N.M. 99, 184 P. 3d 411 (2008)

See of Zoning and Planning Law Report Article, “How Much Process of Law is Due”, attached.

The Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque, October 3, 2008.

The City of Albuquerque’s Green Ribbon Task Force drafted Volumes I and II of the Albuquerque Energy Conservation Code. Volume I of the Code addresses replacing HVAC equipment in existing buildings to meet federal energy efficiency standards. LEED silver certification as well as a 30% more energy efficient standard than a “baseline building” described in the American Society of Heating, Refrigeration and Air Conditioning Standard 90.1-200. A third option in the Code is to meet prescriptive standards, many of which exceed federal standards.

Volume II of the Code addresses new construction, additions, alterations and renovations, and incorporates the 2006 International Energy Conservation Code. It also has four performance based options as well as a prescriptive option for energy efficiency of HVAC which exceeds federal standards.

The Plaintiffs challenged implantation of those sections of the Code which exceed federal standards set forth in the Energy Policy and Conservation Act, 42 U.S.C. 6201, et seq, as amended by the National Appliance Energy Conservation Act, Pub.L No. 100-102 (1987) and the Energy Policy Act of 1992, 42 U.S. C. Sections 6311-17 on the basis of preemption by these federal statutes.

The U.S. District Court for the District of New Mexico granted a preliminary injunction to the Plaintiffs on the basis that they will suffer irreparable injury if the sections of the Code which exceed federal standards are implemented, pending resolution of the case.

The City will seek to prove that the challenged Code provisions do not exceed federal standards, also commenting that there are several options which plaintiffs can utilize without involving the challenged standards. Albuquerque is particularly incensed that its Code, the first of its kind in the U.S., was challenged after it was adopted.