Premature Subdivisions and What to Do About Them

Donald Elliott, FAICP

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Abstract

As the recent economic recession has slowed the breakneck pace of growth in the western United States, many communities—from the Great Plains west to the Sierra Nevada Mountains—are struggling with the problems created by "premature land subdivisions." Premature land subdivisions occur when a landowner divides a parcel of land into lots for sale far in advance of the market for those lots. The estimated number of these entitled lots, most of which will not be absorbed by the market for some time, ranges in the hundreds of thousands for some jurisdictions in the West.

This working paper explores the legal approaches and tools available to local governments to manage and resolve the adverse impacts created by premature and obsolete subdivisions. These tools range from regulatory approaches, economic incentives, growth management strategies and land acquisitions that can enable local governments to improve the quality of those subdivisions, in some cases by reducing the number of excess lot entitlements within a subdivision, as well as rationalize the overall growth pattern of the community to keep cost of services down and promote more efficient infrastructure systems.

About the Author

Don Elliott is a Senior Consultant in Clarion Associates' Denver office. He is a land use lawyer and city planner with 21 years of related experience. Don has drafted award-winning land use regulations for Denver and Aurora, Colorado, and has spoken and written extensively on a wide variety of land use and legal topics. Prior to joining Clarion Associates, he served as Project Director for the Denver Planning and Community Development Office and was responsible for the Gateway and Downtown Zoning Projects. Don holds a master's degree in city and regional planning from the John F. Kennedy School of Government at Harvard University, a law degree from Harvard Law School, and a Bachelor of Science degree in urban and regional planning from Yale University.

Contact Information

Donald Elliott, FAICP
Clarion Associates
621 17th Street, #2250
Denver, CO 80218

About Western Lands and Communities

Now in its seventh year, Western Lands and Communities is a partnership of the Lincoln Institute of Land Policy and Sonoran Institute focused on shaping growth, sustaining cities, protecting resources, and empowering communities in the Intermountain West. We address these challenges through research, tool development, demonstration projects, engaging policy makers, and education.

The joint venture currently emphasizes these major initiatives: state trust land management, smart growth tools, reshaping development patterns, western megaregions, climate change mitigation and adaptation, and Superstition Vistas – a sustainable development pilot project.

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This working paper draws on information and analysis contained in the Rocky Mountain Land Use Institute's Technical Service Report No. 12 titled "Obsolete Subdivisions and What to do About Them," which I authored in 1997. A lot has happened since 1997, however, and the problems described in that report have only become more serious. This report updates the information in the RMLUI report related to obsolete subdivisions by updating legal citations and the discussion of possible legal approaches in light of legal and practice changes over the past decade. Perhaps more importantly, it shifts the focus of the analysis from obsolete to premature subdivisions, because during the past decade the frenetic pace of subdivision activity has forced local governments to focus on the policy and growth implications of more recent subdivision approvals. The RMLUI has approved the use of its Technical Service Report 12 as the basis for this new report. In addition, this report incorporates research performed by Anna Trentadue and Chris Lundberg of Valley Advocates for Responsible Development in Teton County, Idaho, and by Seth Miller and Fernanda Falbo of the Sonoran Institute in Phoenix, Arizona.

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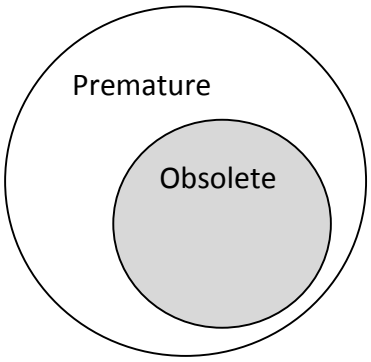
Introduction and Background

Much of the western United States—from the Great Plains west to the Sierra Nevada Mountains—struggles with problems created by "premature land subdivisions." Premature land subdivisions occur when a landowner divides a parcel of land into lots for sale far in advance of the market for those lots. In many cases, the landowner does not intend to actually build anything on the subdivided lots, but merely to enhance the value of the land and then sell the lots to a land developer or to individual lot buyers. This paper discusses the challenges created by premature subdivisions and how local governments can manage their adverse impacts after they have been approved. While the paper does not focus on how to approve better subdivisions in the future or avoid future commitments to premature subdivisions, our discussion of the adverse impacts of premature or poorly designed subdivisions provides a rich mine of examples of mistakes that should not be repeated. We focus on existing premature subdivisions simply because far less has been written on the topic, and because this is the more difficult challenge for local governments.

Description of the Challenge

Premature subdivisions come in two flavors: Those that generally meet modern subdivision standards and those that do not. Those that do not are called ***obsolete subdivisions***, which is a subset of premature subdivisions. Each type is discussed in more detail below.



Premature Subdivisions

Between 1980 and 2008, many parts of the western U.S. experienced a boom in land subdivision activity that far outstrips expected demand for platted lots in both the short- and mid-term (and sometimes the long-term). This trend affected both large urban and small rural counties. For example, rural Teton County, Idaho, with an estimated year-round population of 8,833, has a total of 9,194 platted lots, of which 6,946 are vacant. Even if the county were to see a return to its 6-percent annual growth rate between 2000 and 2008, this reflects a stockpile of lots adequate to accommodate growth for the next 69 years. And there is currently a queue of 3,583 additional subdivision lots awaiting approval by the county government.

A second example is urbanizing central Arizona, which encompasses the evolving megaregion of Phoenix, Tucson, and the communities in between within three counties. One of those counties, Pinal County, in between Phoenix and Tucson grew from approximately 180,000 to 300,000 residents between 2000 and 2007. Even at this amazing 9.4-percent annual growth rate, Pinal County's estimated 600,000 entitled but unbuilt lots could accommodate future growth for the next 18 years. At a more typical growth rate of 6 percent it could accommodate the next 28 years of growth. Neither Teton County, Idaho, nor Central Arizona are being noted because their practices were

particularly good or bad, but simply because they are indicative of the scale of the premature subdivision phenomenon and its applicability to a wide variety of local governments across the western United States.

Premature subdivisions are of concern to local governments for three related reasons.

- **Land Use Commitments.** Premature subdivisions tend to commit land to residential development patterns long before those decisions can or should be made. They assume that elected officials today can predict where residential growth will or should occur decades in the future, which has proven to be a bad assumption in many cases. It is almost certain that elected officials 20 years from now will need to respond to water constraints, environmental challenges, and transportation constraints that we are unaware of today, but the location of premature subdivisions may limit their ability to do so. As a corollary, premature subdivisions limit the ability of elected officials to promote and engage in land conservation efforts. Even if everyone agrees that certain hillsides or arroyos should be protected from development, the fact that the lots have been platted and sometimes sold makes it significantly more difficult to do so.

- **Changing Standards.** As population grows, elected officials often realize that their current subdivision standards are not adequate to address the problems that come when many more people live in the same area. They therefore adopt higher standards for site design, utilities, public improvements, buffering, and aesthetics that apply to all future divisions of land. There is still a stockpile of obsolete lots, however, that do not meet current quality standards. For local elected officials, premature subdivisions raise the specter of being constrained to issue building permits for good, safe, well designed homes on lots that the elected officials feel are neither good nor well designed due to the passage of time and improvements in the art of land development.[1]

- **Servicing Costs.** Local governments are often slow in understanding the cumulative effects of individual subdivision decisions or the costs of providing services to distant areas. Even when subdividers commit to building all of the on-site infrastructure, it is the cost of off-site infrastructure, the cost of maintaining that infrastructure, and the cost of providing police, fire, emergency medical, and social services to distant areas that often fall on the local government. Unfortunately, the added taxes collected on new development often do not cover those costs.

[1] In some cases, however, premature subdivisions exceed the local governments' minimum approval standards, either because the subdivider wanted to target a more expensive segment of the market or because he or she wanted to induce the local government to approve a subdivision that it might otherwise deny. When premature subdivisions include expensive designs or amenities, and the market weakens, the fact that the conditions of approval exceed minimum development standards sometimes act as a brake on development because the subdivider cannot obtain financing to pay for the extra features and amenities.

A large stockpile of prematurely subdivided lots limits the ability of elected officials to respond to future financial and environmental challenges. Since some premature subdivisions will not experience substantial building activity for decades to come, and subdivision standards will surely change in the interim, premature subdivisions tend to become obsolete subdivisions over time.

Obsolete Subdivisions

Obsolete subdivisions are a more difficult subset of premature subdivisions, because they were created long ago, or at least before the local government had modern subdivision standards in place. While premature subdivisions meet current development standards, obsolete subdivisions do not.[2] Obsolete subdivisions are troubling to city and county planners because they create at least three additional negative consequences:

- **Public Safety.** Lots that were approved before subdivision standards were in place are more likely to be far away from fire protection and emergency medical services, or to be laid out on steep slopes and unstable soil types that can make them unsafe for building and unreachable by emergency equipment.

- **Community Quality.** Building new houses on lots that are smaller, more irregular, poorly buffered, or inappropriately located tends to decrease the perceived quality of the community and upset residents of neighboring subdivisions that meet current quality standards.

- **Environmental Damage.** Because soils and grades were often not considered in the layout and design of the older lots, construction on the lots can cause erosion, subsidence, and water pollution that the local government may then be obligated to mitigate or that raise the possibility of lawsuits.[3]

A key difference between premature and obsolete subdivisions is that the latter raise important issues of public safety and potential legal liability that elected officials feel compelled to address, regardless of the actions of their predecessors in approving the subdivision.

For all of these reasons, local governments in the western U.S. often struggle with their policies for premature and obsolete subdivisions. This report summarizes the legal

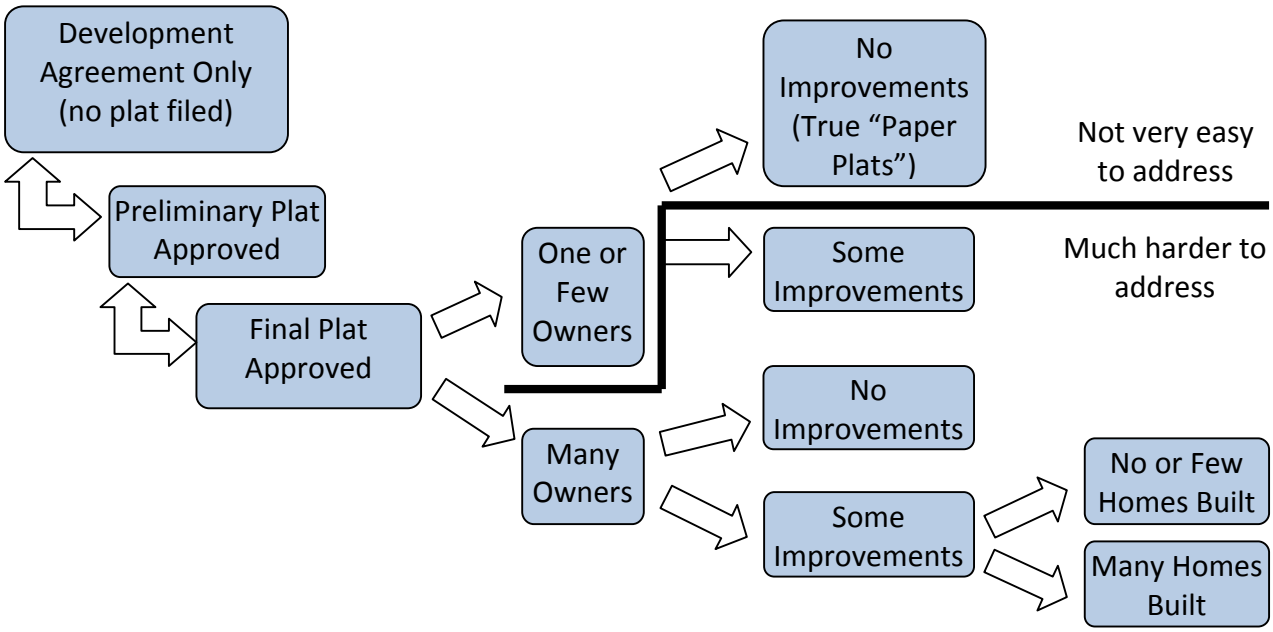
[2] Although obsolete subdivisions occur throughout the United States, they are especially common in the West. The volume of obsolete subdivisions in Colorado was documented by the Lincoln Institute of Land Policy in a 1986 survey of Colorado counties, and that study may serve as a general indicator of the problem in other western states. Responses from 50 counties and 35 municipalities indicated that 86 percent of the responding counties and 83 percent of responding cities had obsolete subdivisions within their boundaries. If this pattern is repeated throughout the Rocky Mountain West, then the stockpile of obsolete lots waiting to be developed is very large indeed, and has almost certainly grown dramatically since the 1986 study. See Shultz and Groy, "The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action", 3 Utah Law Review 571 (November 1988).

[3] See also, Schnidman & Baker, "Planning for Platted Lands: Land Use Remedies for Lot Sale Subdivisions", 11 Florida State University Law Review 505 (1983).

framework in which premature subdivisions must be addressed: to understand issues of due process and property rights that surround them, and to suggest a variety of tools that local communities can use to prevent their negative impacts within our framework of federal and state constitutional rights. Teton County, Idaho will be discussed as an example of rural premature subdivision, and central Arizona as an example of more urban premature subdivision, in order to provide more concrete examples of the challenges that western local governments face. However, our intent is to provide an analysis that will be broadly applicable throughout the western U.S. – not just in those two regions.

Varieties of Premature and Obsolete Subdivisions

Regardless of whether subdivisions are obsolete or simply premature, one of the reasons they are so hard to address is that there are so many variations of the problem. The chart below graphically illustrates some of the permutations involved:



Unfortunately, this chart does not show the full range of complexity involved in classifying premature subdivisions. It suggests that lot sales only happen after final plat approval (a few states allow sales before that), that lot sales occur before improvements (that is not true in all cases), and that home construction only occurs after improvements are in place (sometimes lot owners jump the gun). In addition, the chart suggests that each premature subdivision falls into one of the discrete boxes in the chart, but in many cases different parts, or phases, of a single subdivision fall into different boxes. Phase 1 may be mostly sold with most infrastructure in place, while Phase 2 may still be a pure paper plat with no lots sold and no improvements in place. The dark line shows that once more than a few landowners are involved (regardless of whether they are individual lot owners or bulk lot owners), or the subdivider has begun to install improvements, or more than a few owners have built homes, the situation gets more difficult in a hurry—both in

legal terms and in the number of parties who have to agree on a solution. So although one commentator famously termed this the "perplexing problem of paper plats,"[4] the truth is that the problems get much more perplexing when it is not just a paper plat.

The sale of even one lot to an individual landowner complicates the job of addressing the problems of the subdivision for three major reasons:

- **Lot Owner Rights.** First, the owners of the lots may have obtained specific additional legal rights. The subdivider may have made representations to the buyers of lots that certain roads, parks, or other public amenities would be built in certain locations. If these representations were made in writing and were drafted so as to survive the closing of the lot sale, then the lot owners may have rights to require that the subdivider live up to its promises. Even if no commitments or dedications were made in writing on the plat itself, they may have been made in a set of Covenants, Conditions and Restrictions (CC & R's) to which the lot buyer is a beneficiary, in the deed conveying the lot to the buyer. Local governments, although not bound by private party CC&Rs, are very reluctant to intervene to correct problems with obsolete subdivisions if their actions will prevent the subdivider from living up to its promises and/or draw the local government into the resulting lawsuits. Even if the subdivider's promises are not legally enforceable by the lot buyers, local governments may be reluctant to violate the expectations of the lot owners regarding those future facilities.[5]

- **Lot Access.** Second, access to occupied lots must be preserved. State subdivision enabling acts or local subdivision regulations often require that no lot be created without adequate access to a public street or road. The existence of a few occupied lots complicates the process of correcting layout problems because a new street network must be designed to preserve access to those lots, or the owners of occupied lots must be convinced to exchange their lots for ones with easier access.

- **Equal Treatment.** Third, if a large majority of substandard lots have been sold to and developed by individual buyers, individual owners who have not yet developed their lots may claim that they are entitled to a variance from any new rules to allow them to develop under the same rules that their neighbors recently used. If so many lots have been developed that it appears that the few remaining lot owners are being "singled out" for higher standards, courts may

[4] Kelly, Eric Damian, "The Perplexing Problem of Paper Plats", The Platted Lands Press (March 1986).
[5] Of course, the individual owners of subdivided lots may not wish to have the subdivision built out as originally platted. Many old subdivisions have very small lot sizes, poor access, and poor drainage, so that buildout according to the original plan would create a very dense, low-quality development. Owners may have bought their lots with little knowledge of the original scheme, or in the hopes that the original scheme would not be realized and that they would continue to have few neighbors. They may be very willing to discuss amendments to the original plat that would improve the quality of their living environment. Either way, however, the individual lot owners must be consulted and their potential rights taken into account.

find the landowners' complaint to be analogous to a claim of "spot zoning," and may question its legality on that ground.

To clarify our later discussions, we will distinguish between "paper plats" (those categories above the dark line) and "partial performance plats" (those below the line).[6] Because it is very likely that premature subdivisions contain some phases that are paper plats and some that are partial performance plats, we will organize the remainder of the paper around legal issues and potential tools that apply to individual phases of a subdivision rather than the entirety.

In addition, since most of the larger and most premature subdivisions occur outside of incorporated cities, this report will focus on legal powers and challenges likely to occur in statutory counties (i.e., those without home rule powers). While there are a few instances of incorporated cities having approved hundreds of thousands of lots in advance of development, those cases are rare, and states have generally delegated to cities broader authority to regulate development. By focusing the discussion on county subdivisions and powers, we can address those governments with the most serious potential impacts from premature subdivision and with the weakest powers to address those impacts. However, readers should keep in mind that many solutions that may be beyond the reach of statutory county governments might be feasible for city (or even county) governments – if they have home rule powers[7].

Basic Legal Powers Involved

Subdivision Powers

Before reviewing specific legal issues raised by premature subdivisions, it is useful to review the basic legal framework that surrounds this issue. Premature subdivisions are generally created through local governments' use of the police powers delegated to them by the state through a subdivision enabling act. State enabling acts authorize local governments to control the subdivision of land within their jurisdiction within defined limits, and efforts to surpass those limits are often subject to invalidation as "ultra vires"

[6] Note that the status of a paper subdivision turns on sales to individual lot owners and not bulk sale of large sections of the plat to a single buyer. If a landowner subdivides a tract into 100 lots, and then sells all 100 lots to another owner, who sells the 100 lots to another owner, but no individual lot has been sold to an owner who intends to build a house on it - the land is still a paper plat.

[7] In general, "statutory" counties and cities have only those specific powers granted to them by the state government – and if the state enabling acts do not mention powers to amend or vacate plats then they probably do not have those powers. In rare cases, courts have decided that even statutory governments may have some "implied" powers if they are closely related to explicitly granted powers (for example, if it would be impossible to exercise an explicitly granted power without also using an unmentioned but closely related power), but those situations are fairly rare. In contrast, "home rule" governments generally have broad powers to regulate "local" matters unless the state has limited that authority in specific cases. The issue then becomes whether subdivision is a "local" matter or not, and state courts may reach different conclusions based on the specifics of state law. In short, for statutory counties the question is "where does the state law say I can do this", while the question for home rule governments is "where does the state law say I cannot do this." If resources permit, a future paper may address the use of specialized municipal powers and home rule county authorities to address premature subdivisions.

actions, meaning actions that the local government was not authorized to take. By way of example, the subdivision enabling act for Idaho appears in I.C. 50-1301 to 50-1329 and that for Arizona Counties in A.R.S. §11-806.01(A) et. seq. both are summarized at the end of this paper.

Unfortunately, most subdivision enabling acts in the western United States are old and many have been amended repeatedly over time in ways that create internal inconsistencies and questions about what the legislature intended. One of the fundamental problems is that subdivision ordinances were originally designed to ensure that (1) platted lots had adequate legal descriptions to reduce mistakes, misunderstandings, and fraud in the buying and selling of land, (2) that each lot had adequate access to public roads, and (3) that each lot had adequate easements for utilities. However, the subdivision of land also raises issues of potential traffic congestion, soil erosion and subsidence, emergency vehicle access, habitat protection, adequacy of water supply, groundwater protection, and wildfire hazards. As local governments have enacted regulations to address these issues, they have been grafting them onto a foundation that was not originally designed with those types of regulations in mind, and the results have not always been good.

But subdivision enabling acts are not the only source of law surrounding premature subdivisions and constraining efforts to address their negative impacts. At least five other types of statutes, and related state enabling authorities, may come into play.

Zoning Powers

While subdivision law controls how land can be divided, zoning addresses how it can be developed. In theory, the two should work hand-in-hand: zoning would describe what could be done on the land, and then the owner would divide the land appropriately. Each lot would meet the minimum requirements in zoning. In practice, however, it is much messier than that. Some land is subdivided before zoning is in place, and zoning is often amended after lots are subdivided in ways that are inconsistent with those lots.

In most states there is no legal requirement that zoning and subdivision be consistent with each other. They are often held to be separate grants of authority to local government, and courts often do not imply a duty to use them consistently where the legislature has not made that a requirement. While the constitutional protections against takings of property require that every property owner have a reasonable economic use of his or her land, there is generally no requirement that property owners retain the rights to use the land in the way it was originally zoned or subdivided.

Planned Unit Development (PUD) Authority

Planned unit developments are legalized contract zoning that may include elements of zoning, subdivision, and contract. In essence, PUD enabling acts authorize local governments to negotiate with landowners and draft individualized land use regulations that will then be applied to each landowner's property. PUD powers are used in a wide variety of ways, and courts have been very generous in allowing flexibility in this area.

Some local governments treat PUDs as a separate base district and rezone land into that district. Some treat it as an overlay district that varies some but not all of the requirements of the base zone district. Some treat it as a permit that varies zoning or subdivision standards. Some treat it as a form of subdivision approval that varies only subdivision standards. Some PUDs vary zoning but not subdivision standards, others do the opposite, and many vary both zoning and subdivision standards.

Importantly, however, PUDs also include an element of contract. PUDs are arrived at through negotiation and agreement, rather than through a "pure" use of the police power (adopting a regulation that governs an entire class of properties without tailoring it or negotiating with landowners). While local governments retain wide latitude to change their police power regulations over time, it is not exactly clear when a local government can alter a negotiated contract to which it is a party. As with all contracts, the assumption is that both parties knew what they were signing and intended to perform the contract, but sometimes changes in circumstances or the passage of time will allow a contract to be amended or rescinded.

In addition, local elected officials are different than private parties because their ability to bind their successors is weaker. Each elected official needs to have the ability to represent his or her constituents and to use the police power as he or she sees fit within the bounds of constitutional and statutory law. When local elected officials purport to bind their local government for a long time, those acts are sometimes invalidated as unconstitutionally "contracting away the police power." So PUDs as contracts must be binding for some period of time, but they cannot be binding forever. Very few courts have considered this question. Some courts have upheld contracts related to development rights that are binding for five or 10 years, and one has upheld a PUD restricting local government zoning authority for 35 years, but it appears that no courts have gone further.[8] Unfortunately, very few PUDs address the issue of when, if ever, one party's failure to perform will allow the other party to terminate the contract. Additionally, in many jurisdictions the question of when, if ever, a local government can unilaterally amend or rescind a PUD has not been answered by either the courts or the legislature.

Development Agreement Authority[9]

Regardless of whether a PUD is used, many subdivisions are approved in conjunction with a contract specifying how the property will be developed. While some states have enabling acts authorizing development agreements, many do not, because making contracts is one of the general powers of local government, and generally nothing in state

[8] See *Geralnes B.V. v. City of Greenwood Village*, 630 F.Supp. 644 (D. Colo. 1986).

[9] In addition to having development agreements, some portions of larger master planned subdivisions are organized as condominiums. When that occurs, state condominium law (often a version of the model Common Interest Ownership Act) may insert an additional complication. While property owners can be held to comply with the extra legal requirements applicable to subdivisions (and their failure to do so may be grounds for determining that the property owner is itself not performing its obligations with regard to the subdivision), it also raises the specter of claims that the local government has interfered with property owners' rights under the condominium act and is liable for damages resulting from that interference.

law says that local government cannot make contracts in the context of land use approvals.

The simplest form of development agreement is a "subdivision improvements agreement" in which a property owner agrees to build certain roads, pipes, wires, or drainage structures to support a subdivision. Some of those details could be placed on the face of the plat document itself, but then if the owner failed to perform his or her obligations the only recourse might be for the county to vacate the plat. That would inconvenience and/or cloud the property titles of anyone who had bought lots in the interim, but the county's real dispute is with the subdivider. For that reason many county attorneys prefer to have these obligations spelled out in a contact, so that in the case of failure to perform the county can draw on the developer's performance guarantees to get the job done or can sue the developer to compel performance or to obtain money damages without drawing individual lot owners into the dispute. In most cases it is very clear that the approval of the development agreement was part and parcel of the approval of the subdivision (the subdivision wouldn't have been approved without the agreement, and the owner would never have signed the agreement unless the county approved the subdivision).[10] This raises the question of whether local governments' police powers to amend zoning or subdivision regulations applicable to a subdivision are reduced when there is also a related development agreement that has been partially performed (or at least has not been violated).

Other Sources of Land Use Authority

In addition to statutes on subdivision, zoning, PUD, and development agreements, some states have additional statutes granting local government powers to regulate land use or environmental matters. For example, Colorado has adopted the Local Government Land Use Enabling Act (LGLUEA). This gives local governments broad authority to regulate in areas related to land use, development, and the environment, provided that the state has not adopted legislation that limits their authority in those areas. The LGLUEA is almost universally cited as authority for local government land use actions—in addition to subdivision, zoning, or PUD acts—and in some cases has been held to authorize local regulations not specifically addressed in other state laws. Similarly, Idaho has adopted section 67-6511A of the Local Land Use Planning Act, which gives local government clear authority for revoking final land use permits or approvals where the developer breaches the conditions of a development agreement. The text of subsection 6511A seems to apply only to re-zones, however, and not to subdivisions or PUDs unless they also qualify as re-zones.

Because traditional state enabling acts and court decisions address many key questions on premature subdivisions poorly (or not at all) it is important to search for other possible sources of legal authority that may be used to support innovative local government approaches to these issues.

[10] In some cases, development agreements committing local government to approve a specified number of lots may be entered into in advance of platting the lots.

Specific Legal Issues

This section addresses specific legal issues that arise when local governments try to use the powers outlined above to address different types of premature subdivisions. Traditionally, landowners who are dissatisfied with local land use regulations have alleged that the regulation is illegal for one of the following four reasons:

- The local government had no authority to take the action it took
- The way in which the regulation was adopted violated procedural due process
- The owners had a vested right to develop their property under the prior rules
- The regulation is a "taking" of their property without just compensation

Each of these types of challenges is addressed below.

Claims of Lack of Authority to Modify Plats or PUDs

One of the most common ways to attack a local government action is to claim that the city or county did not have authority to take the actions it took. In the context of premature subdivisions, this is most likely a claim that the state has not explicitly authorized counties to modify or limit the duration of approved plats or related development agreements.

<u>In General</u>

Most state subdivision enabling acts *assume* that platting is a one-time event that will last forever, but they do not explicitly *say* that plats are forever or that they are time-limited. More specifically, most enabling acts do not address whether a county government may impose limits on the duration of a final plat or conditions under which the plat would be vacated or amended. In some cases, state enabling acts provide a procedure for revising or vacating a plat, but these same provisions are often silent as to whether the property owner is the only one who can apply to revise or vacate a plat, or whether the local government has that authority as well.

In some areas or land use law, zoning, for instance, local governments have authority to revise or retract their earlier approvals provided that property owners have not relied to their detriment on those approvals. Property owners who have purchased land with a certain zoning designation generally cannot prevent the local government from rezoning that land unless they have "relied to their detriment" – which usually means they have obtained approval to build something based on that zoning and have taken some steps towards actually building the structure. In general, merely having purchased the land and completed preliminary planning for a new building is not enough to restrict the local government's power to rezone.

We can apply the same general logic to premature subdivisions, but the outcome proves more complex. In the case of paper plats, local governments may be able to argue that there has been no legally sufficient reliance on the subdivision approval and that it is free to vacate the plat. Clearly, however, when lots have been sold and improvements or homes have been constructed, landowners have invested in reliance on the plat, and the local government may be estopped from changing it over landowner objections. Even a few lots sales, improvements, or homes built could be sufficient to move the subdivision from a "no reliance" to a "reliance" conclusion.

The same situation applies when the premature subdivision is created through a PUD or with an accompanying development agreement. There is generally legislative silence on how long these last or how they can be modified.[11] However, since these actions involve elements of contract, general principles of contract law will probably be applied. Property owners could raise claims that even *assuming* a local government could modify or vacate a premature subdivision through the use of its police powers, it cannot do the same if it is a party to a contract (or contract-like) approval for the development unless the contract itself provides for those actions. Courts considering these claims will need to balance the general contract law bias in favor of upholding the original agreement between the parties with a long line of cases prohibiting local elected officials from binding their successors beyond a reasonable length of time. This is particularly true if it is clear that the development has not proceeded as anticipated by either party to the contract.

Because the basic legal claim in this case is that the local government does not have authority to modify plats, this claim applies to both paper plats and partial performance subdivisions. Just as the local government can sometimes prevail when it is clear that the property owner has failed to perform its obligations, a property owner who has performed at least part of its infrastructure obligations may be more able to raise the defense that vacation or modification is unfair.

Arizona, Idaho, and Other States

Neither Arizona nor Idaho has adopted subdivision enabling acts that would change the above analysis. Both states' acts are silent on this issue, and there have been no reported appellate level cases where the courts have interpreted that legislative silence one way or another. In contrast, both Oregon and Utah have adopted legislation explicitly authorizing local governments to file applications for replatting.[12] At least three cases

[11] Most state enabling acts do not address how a local government might be able to modify or vacate a plat or PUD without the approval of the landowner(s). In states where local governments have only those powers explicitly granted to them, silence probably means local governments do not have these powers. In other states, the courts may well fill this silence by referring to general principles of local government law, which would allow local governments to modify their own past decisions if property owners had not legally relied on those decisions to their detriment. In the case of partial performance plats it may be easy for landowners to show reliance, which will constrain local government options in addressing the impacts of the subdivision.

[12] Or. Rev. Stat. § 92.234 (1983) and Utah Code Ann. § 57-5-7.1 (Supp. 1987).

from other states have upheld the authority of a local government to modify an approved subdivision even in the absence of specific statutory authority.[13]

Claims of Vested Property Rights in the Plat

In General

Vested rights is one of the most misunderstood areas of land use law, but one that is crucial to local government actions on premature subdivisions. There are two types of vested rights—common law and statutory. At common law, a property owner obtains a vested right when he or she has reasonably relied on a local government action by relying on that action to their detriment. Reliance usually means relying on a statement of someone with apparent authority to make that statement, or obtaining a permit or approval, and then taking steps to actually build something permitted by that statement, permit, or approval. Merely buying the land and completing general planning for a building based on the permit or approval is generally not sufficient to support a claim to vested rights. In most cases, construction must be underway.[14]

Many states have also adopted laws creating "statutory" vested rights. In general, those statutes define which types of local government approvals create vested rights, regardless of whether construction is underway, and which do not. Or they authorize local governments to define their own list of permits that create vested rights within general boundaries established by the legislature. Generally, these statutes require that once the listed permits or approvals have been obtained, the local government may not change its rules or standards in ways that interfere with the completion of the project for a certain number of years. Many statutes do not prohibit the local government from adding conditions or changing its approval, they simply require that the government compensate the property owner for any loss incurred because of those changes.

Note that vested property rights analysis could be very different for different phases of premature subdivisions. Some phases may have clear statutory or common law vested rights, while others do not.

Local governments considering actions involving premature subdivisions should analyze whether the property owners have common law or statutory vested rights related to their lots or to the overall development. In addition, it is important to analyze whether the state's vested rights scheme prohibits actions that would interfere with those rights or simply requires compensation for the loss incurred. In some cases, the potential financial liability of allowing premature subdivisions to be completed may be larger than the cost of compensating property owners to amend the plat.

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[13] See *Miller v. Santa Fe County Board of Commissioners,* 192 P.3d 1218 (N.M.App. 2008), *Parker v. Bd. of County Comm'rs,* 603 P.2d 1098 (1979), and *Centex Homes, LLC v. Township Committee of Tp. of Mansfield*, 857 A.2d 649 (N.J. Super. Law, 2004).

[14] See, for example, *Underhill v. Board of County Commissioners*, 562 P.2d 1125 (Colo. App. 1977) and *Webster Properties v. Board of County Commissioners*, 682 P.2d 506 (Colo.App. 1984).

Arizona, Idaho, and Other States

Arizona is one state where traditional vested rights doctrine does not match the discussion above. In 2006 Arizona voters approved Proposition 207, which was codified at Arizona Revised Statutes (ARS) 12-1134. This important statute provides that "[i]f the existing rights to use, divide, sell or possess private real property are reduced by . . . any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property the owner is entitled to just compensation[.]" The government has 90 days after receiving a landowner claim for compensation to grant waivers or repeal the regulation in order to avoid liability. Instead of requiring local governments to pay compensation only when they modify those types of approvals listed in a vested rights statute, this language potentially covers a very broad range of government actions even if they have a minimal negative effect on property value. Despite predictions that Proposition 207 would create a flood of litigation, relatively few suits or claims have been filed. Instead, Proposition 207 appears to have had a chilling effect on local governments (who are hesitant to take actions that produce claims) while the economic downturn has meant that few landowners have filed claims to date.[15]

Idaho's vested rights statutes are contained in I.C. 67-6511(d) (four year vesting following a change in zoning). It appears that there is no parallel statute explicitly granting vested rights in a subdivision plat. Most reported Idaho case decisions on vested rights in the context of subdivision plats concerned rights to common areas when subsequent plats were filed purporting to take away these common areas.[16]

Claims that Plat Modifications "Take" Property Rights

In General

The Fifth and 14th Amendments to the U.S. Constitution and parallel clauses of many state constitutions prohibit the "taking" of private property for public purposes without payment of just compensation. In recent years, many landowners have challenged local land use regulations on the grounds that they violate these "takings" clauses.[17]

The U.S. Supreme Court and other courts distinguish between "physical" and "regulatory" takings. "Physical" takings are those that "take" a physical piece of the owner's property, for example, through a mandatory land dedication requirement, a required easement, or a requirement that the owner allow a utility company to place

[15] Prior key Arizona takings cases included *Phoenix City Council v. Canyon Ford, Inc.* 473 P.2d 797 (Ariz.App. 1970) and *Town of Paradise Valley v. Gulf Leisure Cor*p. 557 P.2d 532 (Ariz.App. 1976), but it is not clear whether these holdings remain valid after the passage of Proposition 207.

[16] Cases concluding that the property owners (generally nearby lot owners) had vested rights in these areas include *Armand v. Opportunity,* 141P.3d 123 (Idaho 2005) and *Middlekauff v. Lake Cascade Inc.*, 719 P.2d 1169 (Idaho 1986). Cases where the Idaho courts determined that the property owners did not have a vested right in common areas include *Sun Valley Land and Minerals Inc. v. Hawkes,* 66 P.3d 798 (Idaho 2003) and *Saddlehorn Ranch v. Dyer,* 85 P.3d 675 (Idaho 2004).

[17] For a good discussion of this complex field of law, see Duerksen & Roddewig, *Takings Law in Plain English, American Resources Information Network* (1994).

something on the owner's building.[18] The category of physical takings probably also extends to requirements that the public be allowed to enter the land.[19] The Supreme Court has subjected physical takings to higher levels of scrutiny, in part because they are hard to distinguish from those situations in which local governments are required to buy property through condemnation. As a result, the Court has suggested that physical takings for the benefit of the general public will almost always require compensation unless they are required to mitigate the impacts of the proposed development (i.e., they have "nexus") and are roughly proportional to the impacts caused by that development (i.e., they have "proportionality").[20] Local governments should be particularly careful to meet these constitutional standards of nexus and proportionality in evaluating any approach to premature subdivisions that would involve a physical taking of any portion of the property, for example, for a new road.

In contrast, "regulatory" takings are those that do not require the dedication of land, easements, or public access. Instead, they leave the property owner with as much land and as much right to exclude the public as the landowner had before, but impose conditions on the size, shape, or nature of development on the land. In evaluating whether a regulatory taking creates a "taking" of property rights, the local government must consider: (a) whether the regulation is intended to promote a legitimate governmental purpose,[21] (b) whether the regulation is rationally related to the development impact that it is intended to address, and (c) whether the regulation leaves the landowner with any reasonable economic use of the property, taken as a whole.[22]

Since most local regulations addressing *obsolete* subdivisions are attempting to prevent the same problems that modern subdivision ordinances are trying to prevent, and often include considerations of public health and safety, they will generally be found to promote legitimate public purposes. In the case of actions addressing *premature,* but not obsolete, subdivisions the local government should be careful to clearly identify the public purposes to be served.

Whether local regulations leave the landowner with a reasonable economic use of the land is a question of fact to be determined on a case-by-case basis. In the case of paper plats, the land has probably been used for agriculture or ranching, and there is a strong argument that the current use represents an economically viable use of the property. While it may be true that the property owner is losing money operating the farm or ranch, most courts presume that the current use of the property is economically viable or the owner would have already put it to another use – i.e. it is rare that courts examine the economics of the current use of the land.

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[18] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 114 S.Ct 2309 (1994).
[19] *Dolan v. City of Tigard*, op. cit.
[20] *Nollan v. California Coastal Commission*, op. cit.
[21] While some commentaries and decisions have held that challenges based on the character of the governmental action should be treated as substantive due process claims rather than takings claims, we have included this element of the takings test because many courts continue to include it in their review.
[22] *Penn Central Transp Co. v. New York City*, 438 U.S. 104 (1978).

In the case of a partial performance subdivision, the analysis is more difficult. The mere fact that the proposed regulation requires the landowner to spend money for infrastructure, or increase the cost of finished lots, or results in fewer buildable lots for sale is not, by itself, enough to show a lack of reasonable economic use. However, a property owner challenging the development will have an opportunity to demonstrate that the additional costs or reduced revenues in fact deprive him or her of all reasonable economic use. Courts are generally willing to receive detailed evidence on the issue of property economics. On the other hand, regulations that effectively prevent the property owner from building *any* permanent structure or using the land for any productive purpose will normally be held to be a taking unless there are clearly other economic uses of the property or the restrictions are based in common law principles of nuisance.[23]

Local governments should be particularly careful to analyze this issue if faced with a partial performance subdivision with a scattered pattern of developed lots. They should be particularly sensitive to those owners who bought undeveloped substandard lots for development, and whose lots are not adjacent to at least one other undeveloped lot. In that situation, the lot owner may not be able to sell the lot to a surrounding lot owner who wants to create a larger lot, since the surrounding lots have already been developed with houses and no one has an incentive to combine substandard lots in order to get a larger building parcel. Since the combination of the last undeveloped lot with already developed lots is unlikely, the local government should be careful to leave the lot owner with an economic use of the land, which will probably mean allowing some type of structure and occupancy. In contrast, when individually owned, undeveloped lots are adjacent to one another, there are more opportunities to encourage combination of lots through private market transactions

As mentioned earlier, local governments must also be sensitive to possible takings claims from the owners of individual lots with houses alleging that any interference with anticipated open spaces, parks, school sites, or access easements "take" some of their property rights in the subdivision, even though such facilities have never been built or dedicated. The success of those claims will turn on whether the subdivision was created in a way that requires someone to dedicate or build those facilities and gives lot owners rights to enforce those obligations, or whether such amenities are only expectations of the lot owner ungrounded in legal rights or obligations.

While claims that land use regulations “take” property rights in violation of the federal or state constitutions are common, most of those claims fail because the property owners have been left with some reasonable economic use of the property. When considering a modification to a premature subdivision plat or related documents, local governments should be careful to confirm that each affected property owner is left with a reasonable economic use of his or her property ownership as a whole. When a property owner owns several contiguous lots or parcels, the analysis can take place for all of those contiguous parcels together, and generally need not consider each lot individually.

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[23] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1982); *Colorado State Department of Health v. The Mill*, 887 P.2d 997 (1995).

Arizona, Idaho, and Other States

The key "takings" statute in Arizona is A.R.S .12-1134, the Arizona Property Rights Protection Act, which codifies Proposition 207 and goes far beyond the traditional takings analysis outlined in the pages above. A.R.S. 12-1134 requires government reimbursement for all diminution of value due to regulation and prohibits the government from exercising eminent domain on behalf of a private party. The statute exempts regulations addressing public health and safety, public nuisance, federally required regulation, adult businesses, establishment of public utilities, and laws preexisting Proposition 207 from the scope of the reimbursement requirement. Very few lawsuits seeking compensation have been brought under Proposition 207, which may be due in part to the slowing of development pressures in Arizona in the current economic climate. Or it may be attributed to hesitancy on all sides to take actions that might set unpredictable precedents in the courts.

In contrast, the Idaho voters decisively defeated Proposition 2, which would have imposed a duty to compensate for diminution in value due to land use regulations. Idaho courts have generally followed the takings analysis outlined above, with leading recent cases including *City of Coeur d'Alene v. Simpson*, 136 P.3d 210 (2006), *Moon v. North Idaho Farmers Association*, 96 P.3d 637 (2004), *Grubb & Associates v. Hailey*, 903 P.2d 741 (1995), *Covington v. Jefferson County* 52 P.3d 828 (2002), and *KMST, LLC v. Ada County*, 67 P.3d 56 (2003). In 2004, Idaho amended its 1994 Regulatory Takings Act to give property owners affected by a regulatory action the right to request a regulatory takings analysis from the state agency or political subdivision. This right is referenced in the Idaho Local Land Use Planning Act with regards to rezoning requests, special use permits, subdivisions, PUDs, variances, and permit applications.[24]

Claims That Plat Modifications Violate Procedural Due Process

Other local governments throughout the west have adopted similar "administrative takings relief" provisions. In essence these ordinances allow or require a landowner who believes that an unconstitutional taking has occurred to proceed through an administrative review process before going to court on a state or federal constitutional claim. By requiring the landowner to "lay their cards on the table" – including evidence of how much the owner paid for the land, the revenues and expenses of the current use, any efforts to sell or market the land etc. -- local governments can often spot cases in which regulation has inadvertently taken or may have taken property rights and can waive or amend the regulation to allow a reasonable economic use of the property without incurring the time and expense of a lawsuit.

In General

Perhaps the most common claim against local government land use regulations is that the city or county failed to allow property owners due process as required by state or federal

[24] For an excellent summary of Idaho takings law, see Givens, Pursley, LLC, *The Idaho Land Use Handbook: The Law of Planning, Zoning, and Property Rights in Idaho* (2009).

law. Ironically, this is both one of the most frequent ways in which local regulations are invalidated and one that is easy to avoid. Compliance with statutory and constitutional due process requirements are fully within the control of local governments. They just need to be scrupulous about taking one step at a time and, when in doubt, allow more opportunity for property owners to participate in meaningful ways.

Local governments must follow state and federal requirements to use a process that is fair both to specific property owners that will be affected by the action and to the rest of the public. Fairness means different things in different contexts, and one major distinction is between "legislative" and "quasi-judicial" actions.[25]

Legislative actions are those that the governing body takes under its authority to set general rules to protect the public health, safety, and welfare of its residents. When it acts legislatively, the local government is thinking of those rules that will work well for all property within a certain category; it is not thinking of a particular landowner or development.

In contrast, quasi-judicial acts are those in which the governing body is applying a general law to a specific situation—often a particular landowner or parcel of land. Quasi-judicial acts require the governing body to act like judges as they apply adopted standards to a specific case before rendering a decision. The decision itself must be made on the basis of evidence presented or statements made at the public hearing, and not as a result of preconceived assumptions or prior conversations. Due process generally requires that affected property owners be notified individually and that they be given an opportunity to address the governing body in a public hearing.

Even though a modification of a paper plat covering a large area of land and hundreds or thousands of landowners might be characterized as a "legislative" action, local governments may want to treat it as quasi-judicial if only to avoid any claim that property owners were given inadequate notice or rights to participate in the decisions.

Arizona and Idaho

Neither Arizona nor Idaho appears to have unique legislation related to procedural due process related to subdivision plats.

In Idaho, the procedure for vacating plats in the state's counties is set forth in I.C. 50-1317.[26] If the plat contains any public roads or rights-of-way, then the original plat must be vacated before the land can be replatted. Replatting will require the authorization and consent of each landowner whose property boundaries will be altered. Where there is opposition to a petition to vacate, the Board of County Commissioners (BOCC) shall set a public hearing where the petitioner must produce a petition signed by the owners of two-thirds of the tracts on the plat in order to proceed. If the petitioner can meet that

[25] For a good discussion of this complex field of law, see, White & Edmonson, *Procedural Due Process in Plain English*, American Resources Information Network (2004).
[26] See in particular I.C. 50-1317 through 1320.

threshold, the BOCC may hear the petition, and if in their opinion justice requires it, they may grant the prayer of the petitioner in whole or in part.

Tools to Address Obsolete Subdivisions

Local governments that want to address the potential negative impacts of premature subdivisions have many different land use and zoning tools at their disposal. In evaluating which tools are appropriate, local governments should carefully consider their goals for the subdivision. Different tools may be appropriate depending on the specific goals of the local government. Three common goals include the following:

- **Improving Quality.** To leave the existing lot lines in place, but impose new quality, environmental, or infrastructure standards to govern construction of houses on those lots.

- **Reducing Lots.** To leave the existing street and infrastructure patterns in place, but to cause fewer houses to be built within the boundaries of the subdivision.

- **Rationalizing Growth Patterns.** To guide the overall pattern of development to promote efficient transportation networks, reduce government service costs, and avoid wasting or over-committing scarce resources like water. This issue also raises concerns of equity among private property owners, since the commitment of scarce resources to far-flung subdivisions that will develop later can sometimes make those resources unavailable to closer-in areas that would develop faster and also be easier to serve.

Many local governments may aim at more than one of these goals. In addition, pursuing these goals may also maintain or enhance property values in the community.

The tools to be reviewed are summarized in the table below, and have been organized generally into those that would address the negative impacts of premature subdivisions through: (1) economic incentives, (2) purchases of land or development rights, (3) development regulations, and (4) growth management programs. Note that state enabling authority, as discussed in section II above, would be necessary for local adoption of most of these tools.

Economic Incentives
Replatting Fee Waivers
Streamlined Voluntary Replatting Process
Voluntary Development Delay Agreements
Targeted Infrastructure Funding
Development Impact Fees
Transfer of Development Rights (TDR) Programs
Facilitation of Redesign or Consolidation
Purchasing Land or Property Rights
Voluntary Sales

Conservation Easements and Deed Restrictions
Land Swaps
Eminent Domain
Regulating the Land
Plan Consistency Requirements
Plat Lapsing
Plat Vacation
Replatting
Changing Subdivision Standards
Changing Zoning Standards
Changing the Zoning Map(s)
Growth Management
Urban Service Areas
Adequate Public Facility Ordinances

Economic Incentives[27]

Most local governments in the western U.S. would prefer to address land use issues through incentives rather than regulations whenever possible. The question that always arises is whether incentives will in fact bring about the outcomes that local governments want or whether they will prove ineffective and the problems will simply get worse in the interim.

Replatting Fee/Cost Waivers

Perhaps the most obvious tools that local governments can offer to encourage replatting or redesign of premature subdivisions are waivers of application fees, processing fees, and surveying costs for property owners who want to replat. While most local governments are not used to covering these "private" costs for landowners, it is generally unrealistic to expect private owners to cover these costs themselves unless some other significant incentives or regulations are involved. For example, in a subdivision with hundreds of small lots, it might be reasonable for local government to offer to waive application and platting fees for individual property owners who want to combine two or more adjacent parcels into a single lot, or for bulk property owners who would like to replat an entire phase of the subdivision to avoid environmentally sensitive areas. Fee waivers generally do not raise any legal issues except for potential claims that the county is in fact subsidizing private development. However, if the waiver ordinances are drafted carefully to identify the public purposes to be served by different patterns of development, it should be enough to survive a legal challenge.

[27] In addition to the economic incentives listed in this section, some impacts of premature subdivisions could be addressed through changes to the property tax system. For example, the property tax structure could be revised to create incentives for developing vacant property or for keeping vacant land in agricultural use until the governmental costs of extending services to the area are lower. However, changes to the property tax structure usually require changes to state legislation (or the state constitution) and are usually controversial. They are therefore beyond the powers of most local governments, and they are not covered in this report.

Streamlined Voluntary Replatting Process

Where a property owner(s) wants to voluntarily replat a phase or portion of a premature subdivision in ways that will reduce its negative impacts, the local government can offer a streamlined replatting process. For example, some states require a two-stage platting procedure – approval of a preliminary plat or plan followed by approval of a final plat document. In order to encourage replatting in closer conformance to adopted plans and modern standards, a local government could adopt a one-stage replatting process or commit to moving these types of replats to the "front of the queue" ahead of other subdivision approval reviews. Streamlined voluntary subdivision procedures do not raise any legal issues other than compliance with state enabling acts, many of which are largely silent on the voluntary replatting issue.

Voluntary Development Delay Agreements

Many local governments require subdividers to post financial security, in the form of letters or credit or performance bonds, to guarantee that they will in fact build the required infrastructure or to ensure that the local government will have the funds to complete the work if the subdivider fails to do so. Financial guarantees cost the subdivider money every month that they are outstanding. If a slow market suggests that lots may not be sold for many years, or if the subdivider is in financial difficulty, the subdivider may want to ask the local government to release that financial security. The local government could enter into an agreement to release that security in exchange for an agreement that the applicant may not sell lots, and that the local government will not issue building permits for home construction, until the subdivider or a successor in interest re-submits acceptable financial security. In the case of a very poorly designed or located subdivision, this leaves the local government at risk that perhaps no one will ever re-submit the financial guarantees, but it could also significantly reduce the rate of lot sales and construction in those developments. In addition, voluntary delay agreements could be combined with streamlined replatting and targeted to landowners who would agree to revise all or a portion of their plat to comply with new standards prior to removing the voluntary delay agreement. Again, the only legal constraint is the need to comply with state subdivision acts, some of which may require the local government to obtain security in the course of the approval process.

Targeted Infrastructure Investments

Local governments can also address the growth patterns of premature subdivisions through the use of basic spending powers. For example, the local government could encourage development of more efficiently located and designed subdivisions by spending public funds to extend roads, water, sewer, or other services to those areas. Or it could decline to spend public funds on the extension of water, sewer, and roads to areas that it would like to see develop more slowly. In these cases, public funds would be used to steer growth through indirect subsidies in circumstances where the local government is not obligated to spend money. Targeted infrastructure investments do not raise legal issues, since local governments are authorized to spend public funds to achieve their

planning objectives, provided that they do not violate the terms of any development agreements obligating them to spend funds on specific infrastructure projects.

Development Impact Fees

Development impact fees are per-dwelling-unit or per-commercial-square-foot charges imposed on new development to offset the additional infrastructure and facility costs incurred by local government to serve that development. When development impact fees are charged, the local government must calculate them carefully to ensure that they no-more-than-offset actual governmental costs for a specific type of facility—for example, roads, and that they net out any taxes collected for the same purpose. Additionally, they must be spent only for that type of facility in a location that will benefit the fee payer and within a reasonable period of time after payment. Fees that are collected but not spent on the right type of facility in an appropriate location within a reasonable length of time must generally be refunded with interest.

Development impact fees are relevant to premature subdivisions because badly planned or located subdivisions impose much higher costs on the local government. For example, in many states large premature subdivisions have been platted far from public roads and without clarifying who has responsibility to build or improve adequate roads for all those lot owners to get from their subdivision to the public highways. As lots are sold and homes are developed, traffic on the intervening (often gravel) roads increases to a point where it must be widened or paved or both, and in the absence of a good development agreement saying otherwise that obligation may fall on the county. Once those cars reach the public road they may dramatically increase traffic levels on those roads, which may in turn require widening, turn lanes, or improvement to those already-public roads. A good development impact fee study can divide the county into different areas that reflect the relative costs of additional roads needed to serve new development in each area and impose those pro-rata costs on development in each area. Those located in remote or hard-to-reach areas will have higher fees, which will tend to direct buyers to easier-to-serve lots and reduce government service costs over time.

Since development impact fees are generally assessed at the time a building permit is issued, it may be possible to impose such fees after platting has taken place and to have them apply to existing lots that have not obtained building permits. Stated another way, some states would treat development impact fees as general building and financing regulations not targeted towards a particular parcel of land or development and therefore not covered by vested rights statutes. Care should be taken, however, to ensure that the state's vested rights statutes do not prevent the application of development fees in this case. Because they apply at the time of building permit, development impact fees can be used for both paper plats and for unbuilt portions of partially performed plats, as long as the local government is careful not to charge any fees to cover the costs of on-site or off-site improvements that the developer is already obligated to pay for.

Transfer of Development Rights (TDR) Programs

Another tool to address premature subdivisions is transferrable development rights, or "TDRs." TDR programs allow or require the owners of land in some areas to sell or transfer their right to build structures to the owners of other sites where development is more appropriate. Areas where development is less appropriate, like hard-to-serve premature subdivisions, are designated as "sending areas," while areas where development is more appropriate are designated as "receiving areas." Owners in receiving areas who buy TDRs are allowed to build more dwelling units than they could without TDRs.

TDR programs can be voluntary for both the buyer and seller, mandatory on both buyer and seller, or voluntary on one party and mandatory on the other. Voluntary systems simply encourage owners in sending areas to sell TDRs, urge landowners in receiving areas to buy them in order to earn extra density, and then let the buyers and sellers negotiate the price of the TDRs. Some local governments assist the functioning of voluntary systems by acting as a "TDR bank" and being willing to buy TDRs from sellers in sending areas and then hold them until a willing buyer in a receiving area is found.

Systems that are mandatory for landowners in the sending area prohibit them from using their zoned density to build units on their own land but offer them the ability to sell the development rights as a form of compensation for the restriction on their land. Landowners can choose whether or not to try to sell the TDRs, but they cannot build structures on their own land even if they decide not to sell the TDRs. Systems that are mandatory for landowners in receiving areas prohibit those landowners from building units equal to their full zoned density (or from applying for increases in density) until they have purchased TDRs from someone in a sending area.

In the context of premature subdivisions, a local government could designate all or part of a premature subdivision as a voluntary or mandatory sending area and could designate a portion of the community where the location is better and infrastructure is available as a receiving area. Under a voluntary system, owners of lots in the obsolete subdivision would be encouraged to sell their TDRs rather than building on the substandard lots. If successful, this would help promote the goal of rationalizing growth patterns, since fewer lots would be developed in hard-to-serve areas over time.

The greatest weakness of TDRs for premature subdivisions is that they work best where demand for new residential units exceeds the supply of zoned land for residential units. In those situations, even voluntary systems can work well, since owners in receiving areas have a strong reason to buy TDRs in order to build more units for which they know there is a market. In contrast, if a community's supply of zoned and subdivided residential lots exceeds demand, then most builders will be able to build enough homes to meet demand without buying TDRs. Unfortunately, local governments with a large supply of premature subdivisions almost by definition have supply exceeding the demand for platted lots. Still, it may be possible to design a TDR program that targets a few very poorly located premature subdivisions as sending areas and a high-demand location (such

as a transit-oriented development node) as a receiving area. Even areas with a large oversupply of vacant lots sometimes have some sites where housing demand exceeds supply.

TDR systems are usually adopted as ordinances adding new text to a zoning or subdivision ordinance, and as such can be adopted as legislative acts of the local government. If the designated sending and receiving areas are large areas with multiple owners and properties, then those too might be adopted as legislative acts. However, if a mandatory system is adopted, then the location of property within a sending or receiving areas will significantly affect the options available to its owner, and in this case the designation might better be treated as a quasi-judicial action similar to a rezoning, and landowners should probably be given individual notices and an opportunity to be heard. Since a TDR program can apply to any lot on which a structure has not been built, it can be used to address both paper plats and unbuilt portions of partial performance plats.

Facilitation of Redesign or Consolidation

As development markets evolve, certain premature subdivisions may be able to obtain a higher value if they are redesigned. Local government could work with landowners to make them aware of such opportunities. In some cases, subdividers may know that their plats are premature or obsolete and may want to redesign and/or consolidate lots, but lack the resources to do so. To address this need, a local government could offer staff time to help develop or maintain databases of property owners and facilitate interactions between them to consolidate substandard lots or to revise lot patterns within their phase of the subdivision. For example, local government could cooperate with the subdivider to contact lot owners to determine whether some of them would be willing to sell their property to adjacent owners who want a larger property. While individual lot owners could take the initiative to make these contacts themselves, few have the time or interest to do so, and local government assistance could result in reduced numbers of lots and lower public service costs through private market transactions. If the local government has funds available, it could even create a "bank," similar to a TDR bank, to buy lots from willing sellers and then contact adjacent property owners to see if they want to buy those lots.

Arizona and Idaho

Neither Arizona nor Idaho has statutory restrictions that would prevent a local government from waiving application/processing/or surveying fees for property owners in premature subdivisions who want to replat. Both states have development impact fee statutes (A.R.S. 9-463.05 et. seq. for cities and towns and A.R.S. 11-1101 et. seq. for counties; I.C. 67-8201 et. seq.) Both states also have explicit enabling legislation for local governments to adopt TDR programs (A.R.S. 9-462.01(A)(12) and I.C. 67-6515A).

Purchasing the Land or Property Rights

Often overlooked in the search for tools to address premature subdivisions is the purchase of land or development rights. While local governments are often short on revenues, and

the need to address premature subdivisions may have been motivated by a realization that local revenues could not support scattered low density development in the future, this is still a viable tool in many instances. For some local governments the relevant question is not "how much will it cost to purchase the land or development rights in badly located premature subdivisions today" but "how much more will it cost to provide services to those badly located premature subdivisions in the future."

Voluntary Sales

The ideal situation is where a local government wants to purchase land from some or all of the property owners in a premature subdivision and those owners are willing to sell. Since the purchase and sale of public lands for a public purpose is generally one of the inherent powers of local governments, the voluntary purchase of land from willing sellers should not raise legal issues. The result can include both reduced lots and more rational growth areas, since the potential number of homeowners in hard-to-serve locations is reduced.

Voluntary sales and purchases could also cover development rights, rather than the land itself. Where a lot owner would like to own surrounding parcels to increase his or her own lot size and not to build additional homes, he or she might well be willing to buy adjacent lots and then sell the development rights on the acquired lots. The local government might be willing to purchase them to avoid the prospect of future re-subdivision and the need to serve additional lots.

Conservation Easements and Deed Restrictions

Similarly, some property owners might be willing to donate a conservation easement on all or a portion of a premature subdivision in order to receive a tax deduction under federal, and sometimes state, income tax laws. A private conservation easement could prove to be a viable alternative for obsolete subdivisions where an agreement to vacate and replat cannot be achieved among all of the various lot owners. Conservation easements could also play a role in any subdivision vacation and redesign project. For example, rather than resurveying some portions of the property to replat those lots as open space, the county could accept a conservation easement ensuring that those lots would not be developed.

Deed restrictions are simply conditions placed by a property owner on his or her property and recorded in real property records, and are generally enforceable only by the grantor. In the context of premature subdivisions, deed restrictions could be used when some or all of the property owners in a subdivision phase agree not to develop certain lots—but those lots do not have the open space, habitat, or conservation values that would induce a conservation organization to accept and manage an easement. Although the restriction could prohibit development of the lots, the only persons who could enforce the restriction would be the grantors. No government or non-profit entity would be able to assert standing to enforce a deed restriction in the future, or if the grantors changed their minds and decided not to enforce their own restriction.

Land Swaps

In theory, a local government could broker a land swap between the owners of land in premature subdivisions and owners of land located in easier-to-serve locations consistent with their growth plans. A county or conservation organization could, for example, purchase land closer to existing developed areas, or where water and sewer services are available at lower prices and then "swap" lots in that area to owners in farther out premature subdivisions who may be tired of waiting for infrastructure to be installed or unable to afford higher priced water and sewer service assessments. As discussed above, since the purchase and sale of land for a public purpose is generally an inherent power of local government, it is unlikely that such a program would face a significant legal challenge as long as the public purpose behind the program was clearly spelled out in the enacting ordinance.

Eminent Domain

In addition to its police powers, local governments have the power of eminent domain—the power to force private parties to sell their land to the government for a public purpose in return for payment of fair market value. While most local governments are loathe to use this power against unwilling sellers, it remains a valid tool for compensating property owners where the government needs the land for another purpose or when the costs of allowing development on the land to proceed would be too high.

The key, again, is to document an appropriate and defensible public purpose. For example, if the premature subdivision is located on environmentally sensitive land such as steep soils, wildlife habitat, prime and unique agricultural land, wildfire hazard areas, or stream corridors, the local government may be able to buy all or part of the subdivision land in order to prevent damage to those areas. Similarly, if access, utility lines, or water or sewer treatment facilities cannot be constructed in the area without causing environmental damage, the community may be able to buy the land to prevent that damage. If the subdivision is located in an area that is designated for different type of growth, or more limited growth, in the community's master plan, then the community may be able to buy the land in order to prevent incompatible growth.

During recent years, the U.S. Supreme Court's ruling in *Kelo v. New London*[28] has re-invigorated debate about whether local government should be able to condemn private land and then turn it over to a second private landowner for redevelopment. While the *Kelo* Court upheld the legality of that practice in the absence of state legislation prohibiting it, the holding was unpopular and many states quickly moved to limit or prohibit that practice. In the case of premature subdivisions, it is very unlikely that the local government would force a sale by one subdivider in order to then have a second private owner redevelop the subdivision, so most of the *Kelo* ruling and state legislative acts responding to the decision may not apply. Instead of redevelopment, it is more likely that the local government would purchase particularly hard-to-serve phases of premature subdivisions to prevent their development, for example, for open space. There

[28] 454 U.S. 469 (2005).

seems to be no question that a local government's condemnation of land in its own jurisdiction for open space is a valid public purpose. While there has been some controversy in the western U.S. as to whether the condemnation of land in another jurisdiction for open space is a valid public purpose, at least one recent case held that it is, and that legislative attempts to eliminate that power are unconstitutional.[29]

In addition to its political unpopularity, however, eminent domain has a significant drawback for use in premature subdivisions -- it results in the local government owning the subdivision when it doesn't need to. That removes property from the tax rolls unnecessarily and will result in some local governments trying to sell the condemned land back into private ownership. The market for large tracts of land without development potential is limited, however, so the local government may want to resell the land for more limited residential development that avoids environmentally sensitive areas, reduces governmental service costs, and is more consistent with the comprehensive plan – but the resale and new development plan may raise some of the *Kelo* issues and require close reading of state restrictions on resale of condemned land. More seriously, where the premature subdivision is not obsolete (i.e., it meets modern platting standards) courts may question whether there is a public purpose in having the government buy back lots that it had approved only a few years before. In many cases, the local government's best interest would be served by regulating future development of the premature subdivision rather than owning it.[30]

Arizona and Idaho

Neither Arizona nor Idaho has adopted legislation that would prohibit local governments from voluntarily purchasing land in premature subdivisions, or from engaging in or facilitating voluntary land swaps. Both Arizona and Idaho have adopted the Uniform Conservation Easement Act (ARS 33-271 et. seq. and IC 55-2100), which may be of use when some of the prematurely subdivided land where development is to be prohibited has conservation value. The *Kelo* decision produced much debate and calls for reform in both states. Also, a desire for reform and restraint in the use of eminent domain powers was a major rallying point behind the passage of Proposition 207 in Arizona. The need to calculate compensation based on the strict rules in Proposition 207, rather than general rules of eminent domain, may make local government in Arizona even more reluctant to use this tool in the context of premature subdivisions.

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[29] *Town of Telluride v. San Miguel Valley Corp*., 185 P.3d 161 (Colo. 2008).

[30] One variation on eminent domain that is used in Europe may be worth considering as a future tool for addressing obsolete subdivisions. Under "land tenure readjustment" programs, Germany (and perhaps other countries) use eminent-domain-like powers to obtain title to land from private parties, replan the land to incorporate modern infrastructure and roads and to protect environmentally sensitive areas, and then convey specific parcels of the land back to the original owners. Each owner receives a roughly proportionate share of the new developable land, although the removal of environmentally sensitive lands may mean that his or her acreage is smaller than it was before. While complex, this approach addresses one of the key complaints that arose following the Supreme Court's decision in *Kelo v. New London* – that it was unfair for the government to take land from one private owner and give it to another. Under land tenure adjustment the original landowners get shares of the land back – hopefully with any decrease in acreage offset by increases in value through a more rational layout and better roads and infrastructure.

Regulatory Tools

While most elected officials and property owners prefer incentives to regulations, and some property owners would prefer to have the local government buy their land rather than restrict its development, sometimes there is no substitute for good land use regulations. The role of land use regulations may be greater in the area of premature subdivisions than in other areas because of the number of stakeholders involved. On the day a final new subdivision plat is approved only two parties need to agree—the local government and the subdividing property owner. Once lot sales have taken place, however, the number of stakeholders multiplies, and it may become impractical to try to broker voluntary solutions between scores or hundreds of landowners.

Plan Consistency Requirements

One simple step toward better subdivisions is to require consistency between the subdivision and the comprehensive plan for the community. Obvious as that may seem, many communities have not taken that step. Some state courts have explicitly upheld denials of subdivisions on the basis that the application did not comply with the comprehensive plan even where it complied with technical subdivision standards, as long as the local government was clear that consistency would be required and the comprehensive plan was detailed enough to serve as a regulatory document.[31] Once a subdivision is approved, however, it is difficult to use plan approval requirements to govern development within the subdivisions. The public – and the courts – generally consider that approval of a final plat means that the development is consistent with the comprehensive plan.

There are no reported cases of building permits being denied within an approved subdivision because of a plan consistency requirement unless the site in question was a clear common law nuisance (i.e. the site was an unstable slope or a floodplain where the local government can deny the permit on public health and safety grounds and then try to deal with the reasonable economic use requirement). In addition, there are no reported cases of a platted subdivision being unilaterally vacated or denied building permits because a later amendment to the comprehensive plan redesignated the area for conservation or some other non-development use. Courts generally hold that re-designation of a plan is advisory, and that it needs to be embodied in some form of development regulation in order to support a denial of development permits. Even then, the need to comply with the law of vesting, takings, and procedural due process will apply.

Plat Lapsing

Many local government permits and approvals "lapse" if the applicant does not take steps to use the land in accordance with the approval within a specific time. In many communities, an approved preliminary subdivision plat lapses if the applicant does not obtain a final plat approval for at least part of the subdivision within a few years.

[31] See, *Larimer County v. Conder,* 927 P.2d 1339 (Colo. 1996).

Similarly, some communities require that the final plat be recorded in the property records within 30 to 90 days after approval or the approval will lapse. These and similar lapsing periods are included to reduce the likelihood of "stale approvals" – i.e. local governments being confronted with approvals granted many years ago based on standards that no longer apply. Lapsing periods encourage applicants to only apply for a permit or approval when they are ready to use the property in a specific way – which is when the local government can best evaluate its impacts on the surrounding area. By analogy, local governments could in theory adopt a regulation providing that if improvements are not installed or a defined number of houses are not constructed with a defined period of time, approvals of unimproved and unbuilt subdivision phases will lapse. In most states, however, a legislative action of the governing body cannot be "automatically" reversed. Instead, the governing body must act to reverse the decision and must grant required due process as it does so. In this case, a lapsing provision might state that a resolution vacating the unbuilt and unimproved portions of the plat will automatically be introduced as an action item before the board of county commissioners, and that if approved, the county will record a plat vacation instrument in the real property records. As discussed above, however, if individual lots have been sold, the rights of those property owners will need to be protected in any vacation.

Plat Vacation

Plats are approved by local government action and they can generally be vacated by local government action, subject to the discussion in Section III above. Usually, plat vacation occurs when an owner of subdivided land concludes that the land would be more valuable as an undivided tract—for example, when a wealthy buyer wants to create a custom estate tract for a large new home or for agricultural or ranching purposes.

Vacating plats usually requires the same procedures needed for platting. However, if lots have been sold in the interim then any requirement to have all the current landowners submit the application can be very difficult to meet. Some states like Idaho address this by requiring a majority, but not all, property owners to file the application. If roads within the plat have been dedicated to the local government, the local government may decide to vacate those dedications, or at least the parts of them that are not required to reach occupied parcels or public destinations (for example, forest access on the far side of the subdivision) [32]

Since plat vacations are quasi-judicial actions affecting specific parcels of land, all owners of affected land should be given notice and an opportunity to be heard before the vacation is approved. In order to minimize confusion in the future, local plat vacation ordinances should address what will happen to any dedicated streets, open spaces, and utility easements. If a subdivision improvement or development agreement is in place, it

[32] Generally, true plat vacations remove all of the lot lines shown on the current plat. This technique should therefore not be used if one or more of the lots has been sold and developed with a house - it should be limited to true "paper subdivisions". Local actions to remove some of the obsolete lot lines while leaving others in place are technically "replats".

should be amended to match the different infrastructure needs of the land following the vacation or partial vacation.

Replatting

When it is not appropriate or desirable to vacate the plat for an entire phase of a subdivision, generally because several lots have been improved and homes developed, local governments and landowners may want to consider replatting the subdivision. A replat involves preparing a new plat document that may reflect new lot lines conforming to modern size and shape requirements, new streets and utilities meeting current public improvement standards, and lot and street patterns that avoid environmentally sensitive areas. Where the original subdivision plat contained undersized lots, lots on environmentally sensitive land, or inadequate roads and utilities, the replat may show fewer developable lots. In other cases, a more logical and environmentally sensitive arrangement or the use of careful lot clustering may enable the replat to contain the same number or even more developable lots. Even where a replat decreases the number of lots, the increased size and quality of the remaining lots may result in similar or increased land values to the owner.

When partial performance subdivisions are replatted, they are sometimes designed to leave the sold or developed lots and their access and infrastructure in place, while replatting unsold and undeveloped lots into much larger tracts. Where there is a scattered pattern of lots that have already been developed with houses, the replat may try to maintain a logical pattern of infill lots that can make use of existing streets and infrastructure. This sometimes means creating relatively small infill lots that conform to current standards in between the older, already developed lots.

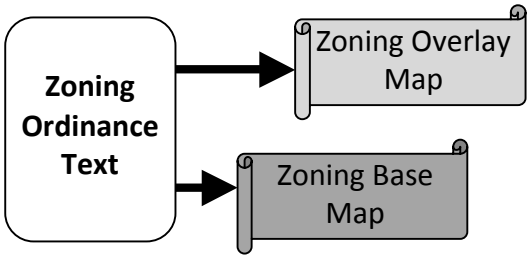
Like plat vacations, replats are a form of quasi-judicial government action where all affected owners of land should be given notice and an opportunity to be heard. Again, the local government ordinance should clearly address what is being done with platted streets, easements, and open spaces shown on the original plat and should protect the legal rights of existing lot owners in and to those places or substitutes for them. Replatting can be used with both paper subdivisions and partially performed subdivisions, and can be effective to reduce lots, or reduce service costs.

Changing Subdivision Standards

Where the primary concern is not the number of platted lots in all or part of a premature subdivision but the quality of development permitted on those lots, the local government may decide to adopt new standards guiding future subdivisions. For example, the local government may decide to require that future plats in some areas “cluster” smaller development lots around larger areas of shared open space or common areas. As an alternative, the local government might adopt a conservation subdivision ordinance requiring that subdivisions in rural areas keep a high percentage, say 60-80 percent, of land in open space but allow the same or greater number of lots to be developed on the remaining land. Not only will the resulting pattern preserve more of the open visual character of those areas, but the more compact pattern of lots may be more efficient for

the local government to provide with sheriff or emergency medical services. Finally, the local government might adopt new subdivision regulations requiring study and delineation of a larger range of environmentally sensitive lands and larger development setbacks from those areas. Revised subdivision standards generally only apply to future subdivisions, however, unless they are used in conjunction with the replatting process discussed above.

Changing Zoning Standards



As noted in Section II.B, the power of local governments to regulate zoning is generally independent of the power to regulate the subdivision of land. So, as an alternative to adopting new subdivision standards, some local governments address premature subdivisions by changing the zoning district or standards applicable to the subdivision. Zoning is sometimes a confusing topic because the same result can often be achieved in several different ways. More specifically, the same result can often be achieved by: (1) changing the text of the zoning ordinance, (2) revising the map of zoning base districts, or (3) adopting or revising a map of zoning overlay districts. This section discusses zoning text changes, while map changes are discussed in Section 7 below.

1) Increase Minimum Lot Sizes

The most common zoning amendment to address obsolete subdivisions is to apply a zone district with a larger minimum lot size in order to preserve more open character and reduce the potential number of development parcels. While often legal, this can create the need to create exceptions for already purchased or already built lots. For example, if a subdivision platted with two acre lots is rezoned to require a minimum of four acres per dwelling unit, lot owners will have to purchase two lots in order to build a home. Where an individual has already bought a lot and the surrounding lots have also been purchased and built on, the local government probably needs to allow the owner of the "hemmed in" two acre lot to build a home on that lot through a variance process. But where a bulk owner or individual owners already own two or more contiguous lots, they may be able to meet the new minimum lot size for a house. Where the minimum lot size is raised significantly, usually to protect open agricultural character or an environmental resource, this is sometimes referred to as "large lot" zoning, but the principle is the same. Obviously, the usefulness of this tool depends on how many lots have been sold to individual owners and the pattern of those ownerships.

2) Require Substandard Lot Merger

Local governments that raise minimum lot size through zoning often also adopt a "lot merger" regulation stating that when an individual owns more than one contiguous substandard, or too small, lot, those lots will be considered together in determining how

many homes can be constructed.[33] In principle, adoption of a lot merger ordinance does not result in the vacation or replatting of lots, since the original plat remains of record. In reality, however, some of the purposes behind the original subdivision have been lost, since the boundary line between Lots 1 and 2 becomes meaningless. Because of this, it is particularly important for local governments to research their express or implied powers to use lot merger techniques. Some commentators feel that lot merger powers might be an implied power under state subdivision acts.

Supporters of lot merger ordinances argue that they just formalize the effect of higher minimum lot size requirements. They claim that if the local government may refuse to issue a building permit for a proposed structure on a now-substandard lot, then they should also be allowed to put potential buyers on notice of the fact that a single now-substandard lot is not a buildable lot. Opponents feel that since minimum lot size standards protect the local government against construction on substandard lots, there is no need to complicate title to individual lots through merger ordinances.

Local governments considering this approach to premature subdivisions should read state enabling acts carefully because some states, such as Colorado, now prohibit use of the lot merger tool without the consent of property owners.[34] On the other hand, California's local governments are sometimes statutorily authorized to merge two adjacent substandard lots in common ownership even if one of them has already been developed.[35] In some cases, increases in minimum lot sizes are combined with a TDR system (discussed in Section IV.A.6), and owners of multiple contiguous lots who can now build fewer homes are allowed to sell unused development potential to buyers in receiving areas.

3) Performance Standards

Instead of adopting new minimum lot size standards, the local government could adopt additional performance standards applicable to certain types of lots in premature subdivisions. Performance standards establish minimum quality standards to be achieved by new development and then allow the landowner to decide how to meet those standards most efficiently. [36] These types of standards are particularly useful when the local government wants to improve the quality of development, rather than reducing lots or rationalizing growth patterns, because they still allow for development of any premature lot as long as it can find a way to meet the standards. They may also have an indirect

[33] For example, § 5-1908 of the San Miguel County, Colorado, land use code provides, in part that: "A legally created, substandard-sized parcel may qualify for a building permit for a single-family residence if it meets all other applicable Land Use Code requirements, including the definition of lot and standards for driveways, Such a parcel shall be merged with all other substandard-sized parcels under contiguous ownership into one parcel, and no sale, transfer, or other conveyance of less than 35 acres therefrom shall be allowed without County subdivision approval. A deed and a plat delineating the merged parcel must be recorded in the Office of the County Clerk and Recorder prior to the issuance of a building permit thereon."
[34] C.R.S. 30-28-139 (2003).
[35] See Cal Govt. Code § 66451.11 (a) and Hill v. City of Manhattan Beach, 491 P.2d 369, (1971).
[36] See Freilich, Robert H. "Inducing Replatting Through Performance Zoning", in Platted Lands Press (January 1985).

effect of removing lots, however, since some landowners will conclude that the best way to meet the performance standards and still build the house they desire is to acquire two or more lots.

For example, performance standards could address the problems of small lots on sensitive lands with poor access through requirements that:

- At least 50% of the lot be kept in open space;
- No structures or access drives be placed on steep slopes, erosion-prone soils; prime wildlife habitat, or wildfire hazard areas;
- Any lot line within 10 feet of a structure be landscaped to modern buffer-yard standards, and;
- All access roads to the property be of adequate quality adequate to permit use by emergency fire vehicles in winter conditions.

While performance standards are a popular topic, they are not particularly well-suited to the adverse impacts raised by premature subdivisions. The tool was originally developed to address situations where development regulations are so strict that acceptable development might not occur but the use of performance standards would allow that development to go forward without adverse impacts. That is generally not the case with premature subdivisions, where it is lack of market demand rather than strict regulations that is causing development to lag.

In addition, since performance standards often address the same issues that the local government addresses during the platting process, there is some risk that a court might conclude that the local government had reviewed and approved the plat after taking those factors into account. For instance, a court could conclude that a county platting ordinance already lists avoidance of sensitive environmental areas and adequate lot access as topics for review, so the approval of the plat indicates the county's conclusion that those issues are adequately addressed and that a further regulation to address the same issue is unfair to property owners. Of course, if new conditions are brought to light after the plat was approved, and consideration of those conditions might have lead to a different decision on the plat, then there may be a rationale for additional performance standards. That happens more often than one might think – especially as the cumulative effects of approved subdivisions on roads, access, and water supplies become clearer over time.

4) Downzoning

Local governments considering adopting higher minimum lot size standards or performance standards that will reduce the number of buildable lots should be aware that the action will be portrayed as a "downzoning" regardless of whether zoning standards or the zoning map is changed. In most cases, downzonings are not illegal as long as valid vested rights are protected, due process is followed, and the property owners are left with a reasonable economic use of the property. But they are often politically controversial. In general, changes to the zoning map that reduce the number of permitted homes are

accomplished through case by case map amendments following quasi-judicial due process including notices to and hearings for the affected landowners. In some cases, however, downzonings of large areas with multiple landowners can be accomplished as legislative acts, particularly if there is a strong public purpose behind the action.[37]

5) Zoning Incentives

Instead of adopting new minimum lot size standards or performance zoning *requirements,* the local government can adopt *incentives* to encourage fewer lots, lower service costs, or better development quality. This approach is very similar to the incentive discussion in Section IV.A above. Incentives usually take the form of granting landowners additional development density if they develop their land in preferred ways, an approach that is often hard to apply to premature subdivisions for two reasons:

- It is often difficult to induce property owners who cannot find a market for normal-sized lots to instead replat in ways that create even more residential lots. If no one is buying the original lots, having more lots to sell is seldom attractive.

- It is difficult to induce owners to build fewer structures on premature lots by granting them the ability to build more of something else. Often there is little market for commercial land until the buying power of homes is in place– if the home lots are not occupied because there is no market for homes, then there is often no market for the other land uses that follow homes.

Nevertheless, zoning incentives sometimes work if the incentives allow numbers, sizes, or layouts of lots that match market demands better than the current plat. The most common approach is to allow subdivision owners to replat in a cluster layout involving smaller lots that will reduce infrastructure costs by allowing water and sewer lines to be shorter and less expensive. Clustering incentives work when there is a market for smaller lots designed so that the owners retain their views and use of larger open spaces – and that market appears to be expanding in many areas.

A second approach is to limit house sizes on "normal" lots and then allow owners to build larger houses if they combine one or more adjacent lots into a bigger lot. For example, if owners of substandard 2,500 square foot lots are only allowed to build houses of up to 800 square feet, but owners of two or more adjacent lots can build a house equal to 800 square feet per lot plus a 25% bonus, the owner of two lots could build a house of 2,000 square feet rather than just 1,600. Careful calibration of such incentives to match market demands can be very effective in reducing construction on substandard lots. The incentive in this example would help reduce lots, because fewer houses would be built in the subdivision. It would not rationalize growth patterns.

[37] For example, in 1985 Boulder County, Colorado successfully initiated a rezoning of 25,000 acres of land including 4,000 different properties and 5,000 different owners through a one-time legislative process.

A third approach would be to allow owners of substandard lots to build accessory structures only if two or more lots are combined. Since many homeowners want the right to build a storage shed, detached garage, hot tub enclosure, barn, or other accessory structure, this might also lead to voluntary combinations of more than one lot.

Other incentives could address development quality rather than the number of lots or the costs of servicing them. A fourth example would allow lot owners to build larger houses if they locate the home on the least environmentally sensitive or visible part of the land (for example, not on the ridgelines) or if they design or buffer the homes to be less visible from roads or adjacent properties. While restrictions on house sizes are generally politically unpopular (after all, doesn't a larger house generate more property taxes), they can be very effective. Many lot buyers want a house of a certain size, and if they are not permitted to build a house of that size because of problems with the premature platting they will either purchase adjacent lots or wait to build the house after those problems are addressed. In partially performed subdivisions, a single lot owner who is hemmed in by surrounding homes (i.e., one who cannot purchase any adjacent lots) needs to be allowed a reasonable economic use of the parcel – which often means a house. However, there is little doubt that a smaller house would pass that constitutional test – the requirement of reasonable economic use does not require that the home be of any particular size.

While these zoning changes can be accomplished through amendments to the text of the zone district covering the premature subdivision, the general rules applicable to legislative and quasi-judicial actions apply. If the subdivision is the only property (or one of only a few properties) within that zone district where the change applies, then the effect is the same as an individualized map amendment, and quasi-judicial notices and hearings should be given. On the other hand, if multiple properties will be affected by the changed zone district language, the local government should ensure that the new, lower density is appropriate for all those areas and will not create problems with non-conforming lots or structures.

Changing the Zoning Map(s)

1) Rezone Property to a New Base Zone District

Virtually all of the zoning changes discussed in section C.6 above could instead be achieved by rezoning all or part of a premature subdivision into a new base zone district where those controls already exist. Or they could be achieved by writing a new base zone district containing those provisions and then rezoning the property into that new zoning district. All previous discussions of legislative and quasi-judicial due process still apply, however. If the nature of the action is to adopt new rules governing a broad class of properties or property owners, it is probably a legislative action. But if the effect of the regulation is to single out one or a few properties or property owners for additional restrictions, then quasi-judicial due process protections should apply.

2) Adopt Overlay Zones

Instead of revising the map of base zoning districts (i.e., rezoning) applicable to a premature subdivision or changing the text of zone districts to allow fewer units in that district, the local government could decide to adopt an overlay zone tailored to address special problems of premature subdivisions. An overlay zone is a zone district adopted to supplement, not replace, the existing zoning on the property. The boundaries of an overlay zoning map usually do not coincide with the boundaries of any underlying base zoning districts. A property owner located in an overlay district must read both the text of the basic zone district and the text of the overlay district to know what can be developed on the land. For example, an overlay zone might provide that since it is currently impossible for the local government to provide fire protection services to some defined areas (shown on a map), lots in that area will be required to have larger minimum lot sizes or more separation from forested areas until fire protection services can be provided. Owners then have the option to develop now with larger lot sizes and separation distances in order to help reduce the risk of damage from fire or wait until fire protection services are offered and then develop the lots as originally platted.

Depending on their specific provisions, overlay zones can be used to reduce lots, rationalize growth patterns, or improve the quality of development. Although the text of an overlay district can be adopted as a legislative act of the local government, the adoption of an overlay map applying the text to any small or medium sized area should generally be treated as a quasi-judicial act, and affected landowners should be given notice and an opportunity to be heard. Large scale overlay districts covering very large numbers of landowners may still be addressed through legislative procedures.

Arizona and Idaho

Both Arizona and Idaho have general zoning and subdivision powers that would support most of the tools listed above, although the provisions of Proposition 207 in Arizona may make some of them more expensive to implement, and therefore less attractive. The restrictions of Proposition 207 may lead local governments in Arizona to look more carefully at incentive-based controls rather than mandatory restrictions.

Growth Management

While discussion of growth management systems has declined in recent years, these tools still represent potentially very effective ways to address the issues of premature subdivisions—and particularly the need to keep local government service costs in line with available local government revenues.

Growth management measures have been upheld when it appears clear to the courts that the local government is trying to meet its service obligations. It is less clear that they

would have been upheld if the government restricted the rate of development and then took no steps to meet the service gap.[38]

Two types of growth management controls are potentially applicable to premature subdivisions: those that set boundaries for the delivery of certain public services, and those that allow development based on the availability of public services and facilities.

Urban Service Areas[39]

Where it is clear that local government or other agencies cannot provide, or afford to provide key public services to a premature subdivision area, the government can sometimes define the geographical area in which it can provide adequate services and adopt a schedule for how it intends to expand that boundary to include new areas over time. This is particularly true in the case of public health and safety services—such as fire, police, sheriff, and emergency medical services—or road conditions that threaten public safety. The rationale is fairly simple, because the government is not obligated to approve subdivision or development of land where it would endanger public health or safety. Since the government could have denied or limited the approval if its inability to provide services was known at the time the subdivision was approved, it can also respond to those types of concerns if they come up after the plat has been approved. While the title suggests that this tool may only apply to urban areas, the logic applies just as well to the provision of rural services related to public health and safety.

An urban service area is simply a legislative act that identifies where the local government is able to provide key public services and how that area will change over time. It generally includes text identifying what services are covered and maps identifying the service areas. Where premature subdivision lots require community sewer or water service, or connections from those services to larger public lines, the urban service area can define where those services can now be delivered and when those services will be extended to different areas of the county. The effect of the urban service area may be to delay development of the lots, but they will be developable when services

[38] The two leading growth management cases both involved a local government that had approved annexations, subdivisions, or zoning for new development areas and then realized that the rapid or scattered development of those areas could create service needs that the local government could not meet. Both local governments adopted phasing requirements that limited the amount of actual construction that could take place on approved lots so that they would not outstrip local government services. Importantly, though, both local governments took measures to extend local government services to those areas, and the court decisions upholding early growth management measures relied on that fact. *Golden v. Planning Bd. of Town of Ramapo*, 285 N.E.2d 291 (N.Y. 1972); *Construction industry of Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975).

[39] One variation of the urban service area is an urban growth boundary – or a legislatively approved line beyond which urban growth (i.e. more dense development generally dependent on central water or sewer services) will not be approved. Because premature subdivisions occur primarily in rural areas, that tool is not discussed in this report. However cities containing large areas of undeveloped land might consider this tool. Urban growth boundaries can be either larger or smaller than the municipal boundaries. Where large new areas have been annexed and the city government cannot afford to extend services throughout the area, the phasing of service delivery can be negotiated as part of a development agreement. If that was not done and cannot be done due to the fragmented ownership of the premature subdivision, a second option is a legislatively approved growth boundary that can phase the infrastructure to promote orderly development.

are extended. Obviously, if the local government has entered into a development agreement obligating it to provide services on a given schedule, then contract rights are involved and the government will have to renegotiate the contract to match its fiscal resources. Several court decisions in recent years have concluded that delays in the granting of approvals or permits to allow the government time to address an important problem do not qualify as either takings or temporary takings of property.[40]

Adequate Public Facilities Ordinances (APFOs)

While urban service area ordinances focus on *when* the local government can provide key public health and safety services, Adequate Public Facilities Ordinances (APFOs) focus on *whether* they exist at the time an application is made. To impose an APFO requirement, the local government studies what levels of key services—including roads, sewer, regional drainage, or schools—are "adequate" to support new development and then requires that proposed new development demonstrate that each of those standards will be met before development approvals will be granted.[41] Sometimes, APFOs are drafted as a separate step in the development approval process that must be met even if traditional zoning and subdivision approvals have been granted. Often, the required "levels of service" are defined by quantifying the level currently enjoyed by the community or the level required to meet modern public health and safety standards, whichever is higher. Some APFO ordinances require that the defined types of infrastructure and facilities be present before certificates of occupancy can be issued for individual homes. Others give the property owner a period of time, generally one to five years, to install the facilities after occupancy begins.

For example, based on current conditions in the community, a typical APFO might include requirements that (1) roads must be able to handle proposed traffic from the development without exceeding 100 cars per lane per hour, (2) roads expected to handle more than 500 car trips a day must be paved, (3) nearby signalized intersections should be able to handle proposed traffic without falling below level of service (LOS) B, (4) elementary schools must be adequate to accept anticipated students from the proposed development without exceeding 30 students per classroom or 600 students per school, and (5) there must be local parks in place within one mile of the development with enough land to accept use by residents of the proposed development without falling below a standard of 1.5 acres of park land per 1,000 nearby residents. Where those standards are met, building permits can be granted; where they are not met, building permits must be delayed until the standards are achieved.

APFOs are perhaps best used as a development review tool before subdivisions are approved, because subdivisions without adequate facilities can then be delayed or denied

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[40] See, for example, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S.302 (2002); *Santa Fe Village Venture v. Albuquerque,* 914 F. Supp. 478, 483 (D.N.M. 1995); *Williams v. Central,* 907 P.2d 701, 703-706 (Colo. App. 1995); *Woodbury Place Partners v. Woodbury,* 492 N.W.2d 258 (Minn. App. 1992).

[41] The Colorado Supreme Court endorsed the power of county governments to condition development approvals on the availability of adequate schools in the case of *Board of County Commissioners v. Bainbridge*, 929 P.2d 691 (Colo. 1996)

without even creating a paper plat or running the risk that it would swiftly change into a partial performance subdivision. As noted above, though, APFOs can also be applied after subdivision approval – particularly if public health or safety issues are involved. In the case of a paper plat, an APFO may spur the property owner to provide additional infrastructure so that lots can be sold and developed. In the case of partial performance subdivisions, however, APFOs may in fact delay development indefinitely because the ownership is so fragmented that there is no "deep pocket" owner capable of making those investments. While temporary delays in building permitting are often upheld, lengthy delays where there is no apparent governmental or developer effort to make the property buildable could be held to be either a temporary or permanent taking requiring compensation to the landowner.

Arizona and Idaho

Neither Arizona nor Idaho, or most other western states, have adopted explicit legislation authorizing the use or urban growth boundaries or adequate public facilities ordinances[42]. However, the same is true in states where key growth management measures have been upheld, such as California, New York, and Florida. Some of the ground-breaking programs were adopted and defended despite the lack of specific enabling authority.

Conclusion

Each of the 20 tools discussed above is better suited to achieving some goals than others. In order to address the problems of premature subdivisions effectively, communities should first clarify their goals so that they can then choose appropriate tools to reach those goals. A local government may want to craft a unified strategy to use on all premature subdivisions within its jurisdiction, or it may decide to pursue different goals in different premature subdivisions or phases of premature subdivisions that are causing different types of problems. It may also want to adopt different strategies to deal with paper subdivisions and partial performance subdivisions. The most effective strategies will involve collaboration and mutually beneficial agreements between landowners[43], local government, and the development community. Some of these tools may also require explicit enabling authority through state legislative action. The table below summarizes the applicability of each of these tools:

[42] In fact, in 2000 Arizona voters defeated Proposition 202, the Citizens Growth Management Initiative, which would have required Arizona cities and counties to adopt growth management plans to limit urban sprawl.

[43] In many cases the landowner may be a subsequent owner who purchased the property as a "distressed subdivision" or through foreclosure at a reduced price. Such landowners may not be committed to previous development plans, but are looking for some way forward to market their investment and are willing to cooperate with local communities to find solutions.

POTENTIAL TOOLS ● Well Suited ⊖ May be Usable ○ Probably Not Usable	Goal			Phase Type	
	Improve Quality	Reduce Lots	Rationalize Growth Patterns	Paper Plat	Partial Performance
Economic Incentives					
Replatting Fee Waivers	●	●	●	●	●
Streamlined Voluntary Replatting	●	●	●	●	●
Voluntary Development Delays	○	○	●	●	⊖
Targeted Infrastructure Investments	⊖	○	●	●	●
Development Impact Fees	○	○	●	●	⊖
Transfer of Development Rights	○	⊖	●	●	●
Facilitating Redesign or Consolidation	⊖	●	⊖	●	●
Purchasing Land or Property Rights					
Voluntary Sales	●	●	●	●	●
Conservation Easements and Deed Restrictions	⊖	●	●	●	●
Land Swaps	○	○	●	●	●
Eminent Domain	○	⊖	⊖	●	●
Regulating the Land					
Plan Consistency Requirements	○	○	○	○	○
Plat Lapsing	○	●	●	⊖	○
Plat Vacation	○	●	●	●	⊖
Replatting	●	●	●	●	●
Changing Subdivision Standards	●	⊖	⊖	⊖	⊖
Changing Zoning Standards	●	●	●	●	●
Changing the Zoning Map(s)	●	●	●	●	●
Growth Management					
Urban Service Areas	○	⊖	●	●	⊖
Adequate Public Facility Ordinances	○	⊖	●	●	⊖

Regardless of which tools are chosen, local governments should take steps to treat individual lot owners as fairly as possible and to avoid the four types of legal challenges listed in Section III of this report. That starts with a very careful review of the history of the subdivision, lot sales, lot ownership patterns, infrastructure investment patterns, market conditions and growth patterns before designing or implementing any remedial program. Only by understanding the historical context of the premature subdivision

under discussion can local governments craft a program that will protect legitimate property rights and withstand challenges based on enabling authority, vested rights, takings, and procedural due process.[44] Legal liability can be reduced by following these four simple principles:

- Cite as many sources of land use authority as possible, and avoid those types of actions where courts or statutes deny local government authority.

- Avoid actions that are prohibited by state vested rights statutes, or where individual lot owners probably hold common law vested rights based on detrimental reliance on a government approval.

- Leave each property owner with a reasonable economic use of his or her property taken as a whole, unless state law requires that each lot be considered individually.

- Scrupulously follow and document each step required by state law and the local government's own regulations for the action being taken, erring on the side of providing additional notice and opportunities for participation in case a judge later determines that an action intended to be legislative in nature was in fact quasi-judicial.

Because of the absence of both statutory and case law on many of the issues covered in this paper, it is important that local governments be willing to take some risks to address premature subdivisions. Put another way, it is important that local governments see the lack of explicit law in these areas as an opportunity rather than a barrier to action. Even in the western U.S., courts have been fairly willing to interpret local governmental powers broadly when it is clear that the government is addressing a significant problem in a way that is both procedurally and substantively fair. [45] That is what it is going to take to manage the impacts of premature subdivisions over time.

[44] *F.B.R. Investors v. County of Charleston*, 402 S.E.2d 189 (S.C. App. 1991); *Hale v. Board of Zoning Appeals for Town of Blacksburg,* 673 S.E.2d 170 (Va. 2009); *Aragon & McCoy v. Albuquerque Nat. Bank,* 659 P.2d 306 (N.M. 1983).

[45] See, for example, *Homebuilders of Central Arizona v. City of Scottsdale,* 930 P.2d 993 (Ariz. 1997).

Appendix I

Idaho Subdivision Law Summary

The procedures for vacating and recording plats in Idaho are set forth in Title 50, Chapter 13 of the Idaho Code. (I.C. §§ 50-1301 to 50-1329). The authority for local governments to engage in planning and zoning actions is further articulated in the Idaho Local Land Use Planning Act (LLUPA) of 1975. (I.C. §§ 67-6501 to 67-6537)

1. **Types.** Subdivisions are defined as "[a] tract of land divided into five (5) or more lots, parcels, or sites for the purpose of sale or building development." Cities and counties to adopt their own definition in lieu of this one and many have done so. Local ordinances sometimes distinguish between "major" and "minor" subdivisions usually based on the number of lots, and often include a short plat procedure for "minor" subdivisions.
2. **Exemptions.** There are no statutory exemptions to subdivisions, but several cities and counties have adopted procedures for one-time only lot splits, large parcel exemptions, and family subdivisions.
3. **Procedural requirements.** At least one hearing before the city council or board of county commissioners before forming a commission, adopting zoning ordinances, adopting subdivision or PUD ordinances, approving development permits, or approving a PUD application. While the adoption of subdivision ordinances is mandatory, the adoption of a process for permitting PUDs is entirely discretionary.
4. **Authority to vacate, amend, or replace plats.** Before a subdivision or PUD can be re-platted, the plat must first be vacated by the governing body if it contains any public roads or public rights-of-way. Re-platting requires the authorization and consent of each landowner whose property boundaries will be altered. LLUPA also gives clear authority to revoke entitlements when the conditions of his development agreement are breached, but this appears to only apply to written commitments concerning conditional re-zones. It is unclear whether a PUD is considered a re-zone for purposes of the revocation statute.
5. **Specific vested rights provisions applying to subdivisions.** The Idaho Code is silent on vested rights except for stating that if a plat is vacated, title to the part vacated shall vest in the rightful owner. Some counties and cities have adopted their own vesting ordinances -- some of them vest the developer with the right to begin construction after preliminary plat approval, but do not allow lots sales until all infrastructure obligations are completed and the final plat is then recorded, while others vest the right to begin construction and sell lots immediately upon recordation after final plat approval.

Development agreements. LLUPA expressly authorizes development agreements. LLUPA only discusses development agreements in the context of formalizing a conditional re-zoning. Many Idaho cities and counties have adopted ordinances

elaborating on specific requirements for development agreements in their jurisdiction. These agreements have become commonplace for almost all development permits and entitlements in Idaho.

Appendix II

Arizona Subdivision Law Summary

Arizona counties, through the County Boards of Supervisors, "regulate the subdivision of *all lands* within its corporate limits, *except* subdivisions which are regulated by municipalities." (A.R.S. §11-806.01(A), emphasis added).

A. Definition

A county subdivision is the division of property into six (6) or more lots. The division of the property is not considered a county subdivision if (1) each lot or parcel is 36 acres or more in area, (2) the lease is for one year or less, (3) the leasing of space within specified commercial or residential developments, or (4) the subdivision of lots is within a cemetery. (A.R.S. §32-2102(55), emphasis added).

B. Procedural Requirements

The County Board of Supervisors must approve the plat of all subdivisions within the county's jurisdiction before the plat may be recorded. The Board may but is not required to refer the plat to the Planning Commission for review. The Commission and the Board must base their recommendation and approval or rejection, respectively, on the plats compliance with regulations which govern the engineering standards and the arrangement of streets or highways and the dedication of public infrastructure. The Commission may also look at the dedication of open spaces. (A.R.S. §11-806.01(B), A.R.S. §11-806.01(D) & A.R.S. §11-806.01(E))

C. Water Requirements

All subdivisions within Arizona's Active Management Areas (which include central Arizona's urban areas) must demonstrate that the subdivision has obtained a 100 year assured water supply. The demonstration must occur before the final plat is recorded. While the majority of the subdivision enabling act outlines a general scope of regulation and empowers counties and municipalities to implement the regulations via local ordinances, the subdivision act is very specific in the requirement that subdivisions within an Active Management Area have an assured supply of water. The five active management areas are Tucson, Santa Cruz, Phoenix, Prescott, and Pinal. For subdivisions outside of an Active Management Area, subdivisions are required to demonstrate whether or not an "adequate" water supply exists, but with notice on the public report, the subdivision can go forward with an inadequate supply. (A.R.S. §9-463.01(I) through A.R.S. §9-463.01(Q))