
OBSOLETE SUBDIVISIONS AND WHAT TO DO ABOUT THEM

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The Rocky Mountain Land Use Institute**



**College of Law
University of Denver**

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OBSOLETE SUBDIVISIONS AND WHAT TO DO ABOUT THEM

A. Introduction

Much of the Rocky Mountain West suffers from problems created by "premature land subdivision" – or what one commentator has called "the perplexing problem of paper plats".¹ 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 intends to enhance the value of the land and then sell the lots to individual buyers. The subdivision plat is sometimes referred to as a "paper plat" because there is little or no evidence of the subdivision on the ground and very few (or none) of the lots have yet been purchased for building purposes. The lots exist only on paper. Throughout the West, premature subdivisions were often filed before the local government had any quality standards in place to govern land subdivision. Because of the lack of any adopted standards or procedures, some land divisions were created merely by drawing a proposed lot layout on a piece of paper and delivering it to the local government for insertion in a plat book. These filings often ignored topography, did not clearly identify the land in question, and showed no means of access and no places for utilities.

The premature subdivision of land is not just a historical problem, however, because it continues to take place today. Land is being subdivided into future neighborhoods – sometimes entire new communities – far in advance of any market for the lots and far away from the services needed to support them. More seriously, many premature subdivisions are still being created before the local government has enacted modern land use controls to guide the layout and quality of the lots and communities being created.²

Over time, premature subdivisions tend to become "obsolete subdivisions" because the local government adopts or improves its quality standards for new lots. As more people move into a county or town, population densities tend to increase, the need to coordinate adjoining developments increases, and the community often

¹ See, Kelly "The Perplexing Problem of Paper Plats" in The Platted Lands Press (March 1986).

² For an excellent discussion of the wide range of problems caused by obsolete subdivisions, see Shultz & Groy, "The Failure of Subdivision Control in the Western United States: A Blueprint for Local Government Action." 3 Utah Law Review 571 (November 1988).

realizes that its current subdivision standards are not adequate to address the problems that come with a growing community. It therefore adopts higher standards for site design, utilities, public improvements, buffering, and aesthetics that apply to all future divisions of land. Since those standards do not apply to already-subdivided lots, however, there is still a stockpile of obsolete lots that do not meet current quality standards and which the city or county would prefer not to see developed as they were originally created.

Obsolete subdivisions are sometimes said to share four characteristics:

1. They were created long before the demand for building activity;
2. They were created before the adoption of substantive land use controls;
3. They were often sold into multiple ownerships (not in bulk to a single purchaser); and
4. By the time buildings are built on the lots, they do not meet current quality standards.³

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 a 1986 survey of Colorado counties, and that study may serve as a general indicator of the problem in other Rocky Mountain states. The 1986 survey was conducted by the Lincoln Land Institute, which obtained information from 50 Colorado counties and 35 municipalities. Responses indicated that 86 percent of the responding counties and 83 percent of responding cities had obsolete subdivisions within their boundaries. Of those jurisdictions that contained obsolete subdivisions, 59% of the counties and 76% of the cities had more than 10 of them. The survey asked each responding jurisdiction to indicate the size range (not the exact size) of the obsolete subdivisions within its boundaries. The total number of lots in obsolete county subdivisions was somewhere between 15,900 and 80,200, and the total number of lots in obsolete city subdivisions was somewhere between 4,300 and 18,600, for a combined total of somewhere between 20,000 and 100,000 obsolete lots. Both the counties and cities responded that there was an average of less than 100 lots in each obsolete subdivision, which indicates that there were probably over 1,000 obsolete subdivisions scattered throughout the state. If this pattern is repeated throughout the Rocky Mountain West, then the stockpile of obsolete lots waiting to be developed is very large indeed.

Obsolete subdivisions are troubling to city and county planners because they create at least five negative consequences:

³ Groy & Shultz, *ibid.*

- **Land Use.** Obsolete subdivisions tend to commit land to residential development patterns long before those decisions can or should be made.
- **Public Safety.** Many lots are far away from fire protection and emergency medical services, and others are laid out on steep slopes and unstable soil types – which can make them unsafe for building and unreachable by emergency equipment.
- **Financial Liability.** Many lots are far away from roads, water, and sewer lines, and local governments cannot afford to extend streets, utilities, or services to the obsolete lots if they were ever sold to people who wanted to build houses. Because of the small size and close proximity of the lots, many of these subdivisions are required to be served by such utilities and services as development occurs.
- **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 lots, construction on the lots can cause erosion, subsidence, and water pollution.

For all of these reasons, local governments in the Rocky Mountain West often struggle with their policies for obsolete subdivisions. The intent of this monograph is to summarize the legal framework in which obsolete subdivisions must be managed, to understand issues of property rights that surround obsolete subdivisions, and to suggest a variety of tools that local communities can use to prevent the negative impacts of such subdivisions.⁴

⁴ See also, Schnidman & Baker, "Planning for Platted Lands: Land Use Remedies for Lot Sale Subdivisions", 11 Florida State University Law Review 505 (1983).

lots complicates the process of correcting layout problems because new street layouts must be designed to preserve access to those lots.

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. Such claims generally do not succeed, because local governments have statutory powers to amend their land use ordinances, and property owners generally do not have a right to develop under prior rules unless they truly have vested rights as discussed below. However, 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 find the landowners' complaint to be analogous to a claim of "spot zoning", and may question its legality on that ground.

In light of these differences in actual property rights or property expectations, it is useful to define two different types of obsolete subdivisions.

Paper Subdivisions are obsolete subdivisions in which individual lots have not been sold or built on – regardless of whether the land has been sold one or more times in bulk sales to other owners who intend to sell individual lots. Thus, 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 subdivision".

Partially-Sold Subdivisions are obsolete subdivisions in which at least one lot has been sold to an owner who has built a house on it or intends to do so. As might be expected, the most complicated property rights issues arise when a substantial number of lots have been sold in a scattered pattern, so that there is no efficient way to carve the "developed" portion of the obsolete subdivision off from the "undeveloped" portion.

Keeping in mind the additional issues that arise in partially-sold subdivisions, and the fact that the complexity of those issues rises with the number and/or percentage of the lots sold for development, local governments should protect the rights of private property owners by ensuring that its actions on obsolete subdivisions meet the constitutional requirements set forth below. Each of these constitutional principles is discussed in general terms below, and should be discussed with the community's city or county attorney to determine its applicability to the proposal under discussion before any action is taken.

Enabling Authority

As with all land use regulations, statutory local governments can only act in areas where they have received specific or implied authority from the state government, and home rule governments can only act in areas authorized in their home rule charters and not inconsistent with state restrictions on their actions. Local governments should therefore be able to cite the enabling authority for any action they take, and should recite that authority in any ordinance enacted to address obsolete subdivisions.

The most obvious places to look for authority are in the state zoning enabling act and subdivision enabling act. In addition, however, there are other independent grants of power such as Colorado's Local Government Land Use Control Enabling Act.⁶ If there is not explicit state grant of authority for the type of control that the local government wants to use, the government should see whether such authority is an implied power that accompanies any of its specific powers. In doing so, it should evaluate whether any state acts have "preempted" the field of or regulation to the extent that independent grants of land use power cannot be used. For example, in *Pennobscot v. Board of County Commissioners*⁷, the Colorado Supreme Court ruled that Colorado's Local Government Land Use Control Enabling Act could not be used as authority to regulate types of subdivisions that were exempted from regulation under the state's subdivision act. On the other hand, the Colorado Court of Appeals ruled in *Wilkinson v. Board of County Commissioners*⁸ that the same Act did grant local authority to adopt a growth management ordinance when state statutes were silent on that subject.

Procedural Due Process

In enacting land use regulations, local governments must follow state and federal requirements to use a process that is fair to both the 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 in the area of land use is between "legislative" and "quasi-judicial" actions. Due process requires different protections depending on which type of action is being considered.⁹

⁶ C.R.S. §§ 29-20-101 et seq.

⁷ 642 P.2d 915 (1982).

⁸ 872 P.2d 1269 (Colo.App. 1993).

⁹ For a good discussion of this complex field of law, see, White & Edmonson, Procedural Due Process in Plain English, American Resources Information Network (1994).

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 – and is not thinking of a particular landowner or particular development. In many cases, state law, home rule charters, or local practices require that the local government post or publish some general notice that a specific type of regulation is being considered and then hold a public hearing on a proposed regulation before they adopt it. In general, there is no duty to mail individual notices to some or all of the property owners or residents in the community. In addition, there is no general requirement that speakers supporting or opposing the measure have an opportunity to respond or rebut to each other's testimony. Finally, there are generally no restrictions on the freedom of the elected officials to discuss the merits of the proposed regulation with anyone before the public hearing.

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 somewhat as judges and to apply specific criteria and 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 – so that a judge will be able to review the fairness of the decision if it is challenged. By definition, when it acts quasi-judicially, the governing body has a particular landowner or group of landowners in mind. Due process generally requires that those affected property owners be notified individually and that they be given an opportunity to address the governing body in a public hearing. Other members of the public are usually also given an opportunity to speak. Since they need to make their decision based on evidence from the public hearing, the governing body should not discuss the case with affected landowners or members of the public prior to the hearing. Frequently, public hearings on quasi-judicial decisions include opportunities to rebut or respond to statements made by other speakers.

These constitutional requirements for due process are legal minimums, however. Local governments should also consider whether they want to require additional forms of notice and/or more extensive public hearings in order to meet their community's standards for fairness in a given situation.

Vested Rights

Before acting to address the problems of obsolete subdivisions, local governments should also evaluate whether the current pattern of lot lines, public spaces, access roads, or utilities has been "vested" and should take great care not to

vacate plats that are truly vested. There is no simple answer to the question of vesting – the answer depends on reviewing the history of each obsolete subdivision against the text of any applicable state or local vesting statute and the degree of investment for infrastructure or other construction on the property.¹⁰ In addition, in evaluating claims for vested rights, the local government needs to be clarify which rights it is talking about. There may be different answers to whether the property owner has vested rights to a) the subdivision approval, b) the current zoning, and c) any other land use regulations affecting the property.

Under traditional subdivision enabling acts, there was an unstated assumption that approved subdivisions would last a long time. The assumption was that once land has been divided into lots those lots will soon be filled up with buildings, and that there would be little need to reconsider the pattern of lots in the future. As a result, most state enabling acts and local ordinances do not contain statements about how long an approved subdivision will be valid if it is not developed.

By the same token, however, most subdivision statutes and local ordinances do not contain statements that the approved subdivision can never be changed. Instead, they often contain provisions for minor boundary line adjustments and for replatting all or a portion of the subdivision – and that frequently occurs. Some statutes explicitly provide that the landowner is the only party that may initiate amendments or replats, while others are silent on that subject.

Under common law principles, a property owner who has obtained a final approval of a subdivision plat generally did not have a “vested right” to the pattern of lots and utilities shown on the plat. Vesting only occurred when a landowner had obtained a final land use approval and had expended substantial funds for construction based on that approval. As a result, a land subdivider who obtained a final plat approval and then proceeded to build the roads and utilities shown on that plat could show a vested right to the layout. In contrast, a subdivider who obtained final plat approval and then did nothing would generally not have a vested right.¹¹

As a practical matter, however, this question seldom came up, since standards for the approval of land subdivisions change slowly, and there was generally no reason to question the owner's “rights” to build out a land subdivision which met the community's standards. The question of vested rights only arises when a subdivision has been in place for so long that the community's development

¹⁰ 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).

¹¹ As a practical matter, few cases discuss whether a subdivision is “vested”. Many cases focus on whether the landowner spent money in reliance on a government approval. Since construction usually cannot occur without a building permit, many cases frame the issue as whether the owner spent money in reliance on the building permit.

standards have diverged significantly from those embodied in the old subdivision.

At common law, it is generally very difficult for a property owner to obtain vested rights to any particular zoning. Local governments have wide latitude to amend zoning ordinances provided that they do not violate constitutional provisions regarding enabling authority, procedural due process, or takings. There are two general exceptions to this rule. First, zoning can be vested for a period of time through the use of a negotiated PUD or development agreement. Second, zoning can be vested if it falls within the scope of a state or local vested rights law. Most obsolete subdivisions were approved so long ago, however, that these exceptions rarely apply.

The same is generally true for other land use controls beyond traditional subdivision and zoning, such as environmental and growth management regulations. It is technically possible to vest rights under such ordinances, or to be grandfathered or exempted from their application, but such vesting or exemption must generally be stated specifically.

Takings

The 5th and 14th Amendments to the U.S. Constitutions and parallel clauses of many state constitutions prohibit the "taking" of private land for public purposes without the payment of just compensation. In recent years, many landowners have challenged local land use regulations on the grounds that they violate these "takings" clauses.¹²

In its analysis of the leading cases in this field, the U.S. Supreme Court and other courts appear to 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 something on the owner's building.¹³ The category of physical takings may also extend to requirements that the public be allowed to enter the land.¹⁴ 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

¹² For a good discussion of this complex field of law, see Duerksen & Roddewig, Takings Law in Plain English, American Resources Information Network (1994).

¹³ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 114 S.Ct 2309 (1994).

¹⁴ *Dolan v. City of Tigard*, op. cit.

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 of caused by that development (i.e., they have "proportionality").¹⁵ Local governments should be particularly careful to meet these constitutional standards of nexus and proportionality in evaluating any approach to obsolete subdivisions that would involve a physical taking of any portion of the property.

In contrast, "regulatory" takings are those which 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, 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.¹⁶

Since most local regulations addressing obsolete subdivisions are attempting to prevent the same problems that modern subdivision ordinances are attempting to prevent, such regulations will generally be found to promote legitimate public purposes. 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 a pure paper plat that has never had a lot sale or investment in infrastructure, 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. In the case of a partially-sold 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. 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.¹⁷

¹⁵ *Nollan v. California Coastal Commission*, *op. cit.*

¹⁶ Some court decisions also include an analysis of whether the proposed regulation interferes with the owner's "legitimate investment-backed expectations". A review of these decisions reveals, however, that the courts are often evaluating "investment backed expectations" by the same tests used for determining a vested right. In other words, a landowner who would not have vested rights to development is determined not to have legitimate investment backed expectations, and vice versa. For a good discussion of this topic, see Mandelker, Investment-Backed Expectations: Is there a Taking?, 31 Wash U.J. Urb. & Contemp. L. 3 (1987).

¹⁷ *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1982); *Colorado State Department*

Local governments should be particularly careful to analyze this issue if faced with a partially-sold 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 combinations 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 such claims will turn on whether the subdivision was created in a way that requires someone to dedicate or build those facilities and gives lots owners rights to enforce those obligations, or whether such amenities are only expectations of the lot owner ungrounded in legal rights or obligations.

D. Tools to Address Obsolete Subdivisions

Local governments that wish to address obsolete subdivisions within their jurisdiction have many different land use and zoning tools at their disposal. These tools are discussed below. In evaluating which tools are appropriate, local governments should carefully consider their goals for the obsolete subdivision. Different tools may be appropriate depending on whether the local government's aim is:

- a. **"Improve 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;
- b. **"Lower Density"** – To leave the existing street and infrastructure patterns in place, but to cause fewer houses to be built within the

of Health v. The Mill, 887 P.2d 997 (1995).

boundaries of the subdivision.

- c. **“Remove Lots”** – To remove the platted lots from the area, either because of environmental concerns, cost-of-service concerns, or as part of an overall growth management program.

These four goals will be referred to throughout the discussion below, and will be indicated by using the goal headings in quotes above. Many local governments may aim at more than one of these goals. For example, the aim might be to Remove Lots from environmentally sensitive areas altogether, Lower Densities in areas where original lot sizes were tiny, and allow some platted lots to remain in areas where lot sales have already occurred.

1. Minimum Lot Size Requirements

One simple option is to increase the minimum size of lots for which residential building permits will be granted, so that new buyers must buy more than one lot to obtain the right to build a house. Minimum lot size requirements are usually embodied in the zoning district regulations for the area. This technique is used frequently throughout the eastern United States, where irregular lots and town sites full of tiny lots platted over 200 years ago may be interspersed with modern subdivisions platted last year. In some cases, minimum lot size regulations are applied to an entire area of the jurisdiction regardless of the underlying pattern of lot lines.

In general, the new minimum lot size should not be larger for obsolete subdivisions than for new raw land subdivisions. If the obsolete subdivision is located in an environmentally or agriculturally sensitive area, the minimum lot size should not be larger than that for raw land subdivisions in similar areas. If obsolete lots are served by wells or septic systems or are not served by fire mains or hydrants, the minimum lot size should coincide with those for raw land subdivisions with similar service patterns.

Minimum lot size requirements may be appropriate when the goal is to Lower Density, since the resulting subdivision will not have as many houses developed as were originally platted. They do not help to Improve Quality directly, since they are silent as to development quality, and they do not help Remove areas from development. Minimum lot size requirements may result in "outlots" and undeveloped tracts in between developed parcels, however, since new buyers may be able to meet their minimum lot size requirements without buying all the land within the boundaries of a platted block.

2. Rezoning

In the alternative, local governments may use standard zoning procedures to redesignate the land containing the obsolete subdivision into a zoning category that allows fewer dwelling units per acre or otherwise restricts the types of structures that can be built on the land. In their purest form, density reductions are very similar to changes in minimum lot size – since allowing fewer units on a given amount of land means that the units will on average have larger lots.

In general, rezonings to reduce density are accomplished through case-by-case map amendments following quasi-judicial due process including notices to and hearings for the affected landowners. In other cases, however, downzonings of large areas with multiple landowners can be accomplished through legislative acts of the local government.¹⁸ Thus, if the obsolete subdivision is surrounded by other lands that the local government also wishes to reduce to lower densities, a multi-property, large-scale rezoning could be accomplished as a legislative act. Reductions in density can also be accomplished through an amendment to the text of the zone district covering the obsolete subdivision. If the subdivision is the only property within that zone district, 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 are covered by the zone district language that is to be changed, the local government should ensure that the new, lower density is appropriate for all such areas and will not create undesired problems with non-conforming lots or structures. Rezoning to reduce density is an effective way to help Lower Density but does not directly affect the goal of Improving Quality since it does not contain new quality standards. Likewise, it does not help Remove Lots from development since all of the land in the obsolete subdivision may eventually be developed.

Traditional zoning techniques can also be used to adopt an overlay zone tailored to address special problems of obsolete subdivisions. An overlay zone is a zone district adopted to supplement – not replace – the existing zoning on the property. For example, many local governments have adopted floodplain overlay districts to impose additional setbacks or development requirements for properties in floodplains – regardless of what underlying zone district those properties are in. The boundaries of an overlay zoning map usually do not coincide with the boundaries of any traditional 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.

¹⁸ 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.

If an obsolete subdivision was laid out without respect to steep slopes or erosion-prone areas, for example, an overlay zone could designate those areas and impose additional regulations to mitigate erosion or avoid unstable development. If an obsolete subdivision was laid out in a major wildlife migration corridor or calving area, the overlay district could impose additional development standards to protect those areas.

Overlay zones generally help to Improve Quality, since they include new qualitative standards. They can also be drafted to Lower Density. In general, they do not Remove Lots from 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.

3. Transfers of Development Rights

A third technique to address obsolete subdivisions is transferrable development rights, or "TDR"s. TDR programs allow (or require) the owners of land on which structures may be developed to sell or transfer their right to build that structure to the owners of other sites where development is more appropriate. Areas where development is less appropriate – such as obsolete subdivisions – are designated as "sending areas", and areas where development is more appropriate are designated as "receiving areas". Owners in receiving areas who buy TDRs are allowed to build more 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 selling 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 use 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.

Perhaps the greatest weakness of the TDR approach is that it works best in areas where demand for new residential units exceeds the supply of zoned land for residential units. In such 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.

To use TDRs, a local government could designate the obsolete subdivision as a voluntary or mandatory sending area and could designate a portion of the community with modern, standard lots 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, such a system would help promote the goal of Lower Density, since fewer lots would be built over time. A mandatory system would go further and would help Remove Lots, since no structures would be built on the substandard lots. Neither type of program helps to Improve Quality, since they are only concerned with the location of development.

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 notices and an opportunity to be heard.

4. Incentive Zoning

Incentive zoning involves the creation of inducements to lead property owners to use their properties in some ways permitted by zoning and subdivision law and not in others. Incentives usually take the form of granting landowners additional development density if they develop their land in preferred ways. This makes incentive zoning somewhat difficult to tailor for use in obsolete subdivisions, since it takes creativity to induce owners to build fewer structures on substandard lots through granting them the ability to build more of something.

One possible approach would be to allow owners of substandard lots to build larger houses if they combine one or more adjacent lots into a single, conforming 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 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 1600. 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 Lower Density, because fewer houses would be built in the subdivision. It would not Remove Lots from development.

A second 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, or other accessory structure, this might also lead to voluntary combinations of more than one lot. This incentive would also help Lower Density.

Other incentives would address the goal to Improve Quality. For example, owners of substandard lots could be allowed to build a house of 1,000 square feet rather than 800 square feet in return for locating their home on the least sensitive portion of the lot and providing additional landscaping to buffer their small lot from those around them. For communities that are unwilling to take stronger measures to discourage construction on substandard lots, substantial additional buffering can improve both the image and the future lot buyers' happiness with the subdivision.

As owners respond to incentives and purchase two or more adjacent lots to construct their homes, the local government should require the execution and recording of a plat document reflecting the combination of the two lots into one conforming lot, and the elimination of the dividing line between the two, so that the number of nonconforming lots is permanently reduced and future purchasers of the property are required to buy the entire combined lot.

5. Performance Zoning

Performance zoning sets minimum quality standards to be achieved by new development and then allows the landowner to decide how to meet those standards most efficiently. Traditional performance standards include requirements that vibrations from industrial operations not be perceptible at the property lines, or that glare from one property not exceed certain levels when viewed from another property.

In the case of obsolete subdivisions, performance zoning standards should be designed to address those adverse impacts that modern subdivision standards are designed to avoid.¹⁹ For example, performance standards could address the problems of small lots on sensitive lands with poor access through requirements that:

¹⁹ See Freilich, "Inducing Replatting Through Performance Zoning", in Platted Lands Press (January 1985).

- 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 bufferyard standards, and;
- All access roads to the property be of adequate quality adequate to permit use by emergency fire vehicles in winter conditions.

Obviously, performance standards are aimed primarily at Improving Quality in the development. They may also have indirect benefits in terms of promoting Lower Density, 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. Performance standards generally do not Remove Lots from development.

Performance standards are usually adopted as text amendments to some or all of the zone districts in a zoning code, or as amendments to subdivision improvement standards. As such, they can be adopted as legislative acts without individualized notice and hearing requirements.

6. Lot Merger Techniques

In some jurisdictions, local governments actually merge – or require the merger of – undeveloped, contiguous lots that are held in common ownership in order to eliminate substandard lots and create conforming lots.²⁰ For example, if an obsolete subdivision contains Lots 1 and 2 containing 2500 square feet each, and the current subdivision standards for new subdivisions require lots of at least 5,000 square feet each, then the local government could require the landowner to merge two adjacent, undeveloped lots into one lot by recording an instrument declaring that Lots 1 and 2 as originally shown on the plat map shall be considered as a single Lot A for purposes of sale or development.²¹

²⁰ 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."

²¹ In California, local governments are sometimes statutorily authorized to merge two adjacent substandard lots in common ownership even if one of them has already been developed. See Cal. Govt. Code § 66451.11(a) and *Hill v. City of Manhattan Beach*, 491 P.2d 369, (1971).

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, and has not been replaced by another plat map. In actuality, 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. For example:

"It is arguable that the merger of lots is a valid element of subdivision control because merger permits the local government to avoid, among other things, health or safety problems in a subdivision following platting. In other words, merger recognizes that platting should not establish lot lines in perpetuity."²²

Once the local government is satisfied that authority exists, the adoption of general standards and procedures for lot merger may be accomplished as a legislative act. However, the use of those powers to merge specific lots should be treated as a quasi-judicial act similar to an original subdivision or a rezoning. Such an ordinance should be as specific as possible in defining when lot mergers may be appropriate and in creating specific criteria to be reviewed in proposed lot mergers. It is important that the local government, in addition to the landowner, be given explicit authority to initiate lot mergers.

Supporters of lot merger techniques argue that they do no more than formalize the effect of minimum lot size requirements. They claim that if the local government may refuse to issue a zoning or building permit for a proposed structure on a substandard lot, then they should also be allowed to put potential buyers on notice of the fact that a single substandard lot is not a buildable lot. A lot merger document puts buyers on notice of potential buildability problems before they buy the lot – while a minimum lot size requirement may not come to their attention until after they have bought the 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.

Like minimum lot size requirements, lot merger techniques primarily help to Lower Density, because they affect primarily the density of development in the subdivision. They do not help to Improve Quality, since they do not contain qualitative provisions – or Remove Lots from development – since the area will still be developed.

7. Plat Vacation

Just as subdivision plats are approved by local government action, they can

²²

Shultz & Groy, *op. cit.*, at 636.

be vacated by local government action. 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. Of course, the owner could simply use the land as a single tract while leaving the lot lines in place – but that might result in increased property taxes as development pressures reach the area and the subdivided lots begin to be assessed based on their potential development value. In order to vacate a plat, the owner generally needs to apply for a vacation and follow the same procedures used to approve a new subdivision. If roads within the plat have been dedicated to the local government, the local government may decide to vacate those dedications or to keep them in place (particularly if the roads are needed as part of a transportation network or to reach developed land elsewhere).

In most cases, plat vacations are initiated by the owner of the land, but the owner may not be the only party with authority to initiate a plat vacation. Local governments should read both their state subdivision enabling acts and their local subdivision regulations carefully to see whether they have the power to initiate a plat vacation on their own. In some cases, the state enabling authority may be silent or ambiguous on this point, and the local government should review other local land use statutes and implied powers to understand their authorities in this area.²³

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" and are covered below.

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 specifically address what will happen to any dedicated streets, open spaces, and utility easements. While most obsolete subdivisions were not accompanied by subdivision improvement agreements obligating the owner to construct specific improvements, some may have been. If an improvement agreement is in place, it should be amended to match the different infrastructure needs of the land as shown on the vacation plat.

Plat vacations are a strong way to help Remove Lots from the local community's pool of available buildable sites. They do not help improve Quality in any direct way.

²³ Among those states that have adopted explicit authority for local government replatting or vacation are Oregon (Or. Rev. Stat. § 92.234 (1983)) and Utah (Utah Code Ann. § 57-5-7.1 (Supp. 1987)).

8. Replatting

When it is not appropriate or desirable to vacate an entire plat – either because some of the lots have been developed or because some of the lots meet modern standards – local governments may want to consider replatting the subdivision. Replatting – rather than vacation – should normally be considered when the obsolete subdivision is a partially developed subdivision.

A replat usually 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 new park and school sites meeting current standards. 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 increased land values to the owner.

In some partially developed subdivisions, replats are 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 rather than small lots. 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 with current standards in between the older, already-developed lots.

Just as with plat vacations, replats are usually initiated by the owner of the land, but local governments may have the power to initiate a replat on their own. 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.

Depending on how they are drafted, subdivision replats can help to Improve Quality, Lower Density, or Remove Lots from development.

9. Adequate Public Facilities Requirements

In recent years, many local governments in the Rocky Mountain West have begun to consider Adequate Public Facilities Ordinances, or "APFO"s, as a way to manage growth and avoid substandard development. In general, APFOs define an adequate "level of service" for various types of public facilities (such as roads, water,

sewer, regional drainage, schools, and parks and recreation) and then require that proposed new development demonstrate that each of those standards will be met before development approvals will be granted²⁴. 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.

For example, based on current conditions in the community, a typical APFO might include requirements that a) roads must be able to handle proposed traffic from the development without exceeding 100 cars per lane per hour), b) roads expected to handle more than 500 car trips a day must be paved, c) nearby signalized intersections should be able to handle proposed traffic without falling below level of service B, d) 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 e) there must be local parks in place within 1 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.

APFOs are a technique designed to be applied throughout an entire community or a logical subarea of the community – and not for individual developments or homes. While APFOs can be useful in addressing the problems of obsolete subdivisions, they should not be targeted only to such subdivisions. In many cases, obsolete subdivisions are built out one-home-at-a-time as lot buyers appear, and without the benefit of a master developer or infrastructure provider, so that APFOs may not be well suited to addressing their problems. In other cases, however, a master developer could buy an obsolete subdivision and aggressively market the substandard lots just as if it was a new subdivision – and in that case APFOs might be well suited to minimize impacts to the community.

For example, if the ordinance above was drafted as a condition on subdivision or zoning approval, it would not affect decisions to buy and develop lots in an obsolete subdivision that is already zoned. However, if the ordinance was drafted as an independent development approval requirement – such as a requirement for an APFO permit prior to building permit issuance – then it would affect obsolete subdivisions. Buyers of lots in the subdivision would have to demonstrate how each standard would be met before building their house. If roads, schools, or parks were already operating below the defined standards, compliance

²⁴ Recently, 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*, No. 95SC354, December 9, 1996.

could not be shown, and it would be beyond the means of most lot owners to fund the improvements necessary to bring them into compliance. Some communities may feel it is unfair to tie the development of a single home to the adequacy of major public facilities and would not draft an APFO to apply to single home construction.

Since they aim primarily at infrastructure, APFOs generally help to Improve Quality. They do not directly help Lower Density or Remove Lots since the lots will eventually become developable if money for infrastructure can be found.

10. Condemnation

All of the techniques described above involve exercises of local government "police power" to address obsolete subdivisions. An alternative approach is to use "eminent domain" powers to achieve the same result.

If a local government is able to identify an appropriate public purpose that would be served by buying up the obsolete subdivision, it may be able to do so in return for fair compensation paid to the landowner. If the obsolete 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.

Use of condemnation powers can be an effective way to help Remove Lots from development, since the local government can now decide whether any of the land will be developed. In general, however, condemnation is not well suited to addressing the problems of obsolete subdivisions. Most importantly, it results in the local government owning the subdivision when it doesn't need to. Generally, the local government only wants to own land in order to build a public facility on it (such as a road or a town hall) or to create a public park or open space. If the obsolete subdivision is not well suited for those purposes, there is little need for the government to own it. In fact, since there is no intended use of the land, the government may decide to vacate the obsolete plat and then resell the land as surplus property. If the local government obtains a good price for the land upon resale – either because of change in the economy or because the land is in fact more valuable without the obsolete lots – it may be accused of speculating in land at the former owner's expense. In addition, purchase of the land will remove it from the property tax rolls unnecessarily. In most cases, the community's interest

would be best served by regulating future development of the obsolete subdivision rather than owning it.

E. Conclusion

Each of the ten tools discussed above is better suited to achieving some goals than others. In order to address the problems of obsolete subdivisions effectively, local governments should first clarify what their goals are so that appropriate tools may be chosen. A single local government may want to craft a unified strategy to use on all obsolete subdivisions within its jurisdiction, or it may decide to pursue different goals in different obsolete subdivisions that are causing different types of problems. It may also want to adopt different strategies to deal with true paper subdivisions and partially sold subdivisions.

The potential goals to be addressed by the ten tools described above, and the applicability of those ten tools to paper and partially sold subdivisions, can be summarized as shown in the following table.

TOOL	GOALS			APPLICABLE	
	Improve Quality	Lower Density	Remove Lots	Paper	Partially Sold
Minimum Lot Size Requirements		X		X	X
Rezoning	X	X		X	X
Transfer of Development Rights		X	X	X	X
Incentive Zoning	X	X		X	X
Performance Zoning	X	X		X	X
Lot Merger		X		X	X
Plat Vacation			X	X	
Replatting	X	X	X	X	X
Adequate Public Facility Ordinances	X			X	X
Condemnation			X	X	X

Regardless of which tools are chosen, local governments should be very careful to review the history of the subdivision, lot sales, lot ownership patterns, and

infrastructure investment patterns before implementing any remedial program. Only by understanding the historical context of the obsolete subdivision under discussion can local governments craft a program that will protect legitimate property rights and withstand challenges based on enabling authority, procedural due process, vested rights and takings.

