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Zombie Slaying: Tools for Addressing Distressed Subdivisions and Excess Entitlements

By James Holway, FAICP

Excess development entitlements and distressed subdivisions are compromising the quality of life, distorting development patterns and real estate markets, and diminishing fiscal health in communities throughout the United States.

Since the post-2007 real estate bust, eroding subdivision roads now slice through farmland and open space, and “spec” houses stand alone amid many rural and suburban landscapes. Some are empty, but others are partially inhabited, requiring the delivery of public services to remote neighborhoods that generate very little tax revenue. As the economy continues to recover, will the market correct excess entitlements, incentivizing developers to build out distressed subdivisions or to redesign those that do not reflect current market demand? In some locations, yes; in others, it is unlikely. This article summarizes the lessons learned by communities addressing excess entitlements and presents both policy recommendations and best practices developed from a five-year project. Additional information as well as the full report is available at www.ReshapingDevelopment.org.

WHY ARE EXCESS DEVELOPMENT ENTITLEMENTS A PROBLEM?

Local jurisdictions shape the future of their communities through the entitlement of land, the approval of subdivisions, and the award of subsequent development rights. These actions result in land-use commitments that prove difficult to change in the future, establish development standards, and often commit the community to significant, long-term service costs. In the eight Intermountain West states alone (the focus area for this project), millions of vacant lots are “entitled.” Across a large number of the region’s counties, the rate of vacant subdivision parcels ranges from around 15 percent to two-thirds of all lots. When land is entitled

and subdivided prematurely, before the market demands new housing, the following problems can result:

Threats to health and safety. Lots that sit undeveloped for many years can foster wild-fires, flooding, erosion, water contamination, and poor emergency access.

Blight. Vacant lots generate nuisances such as weeds and pests, and deteriorating infrastructure.

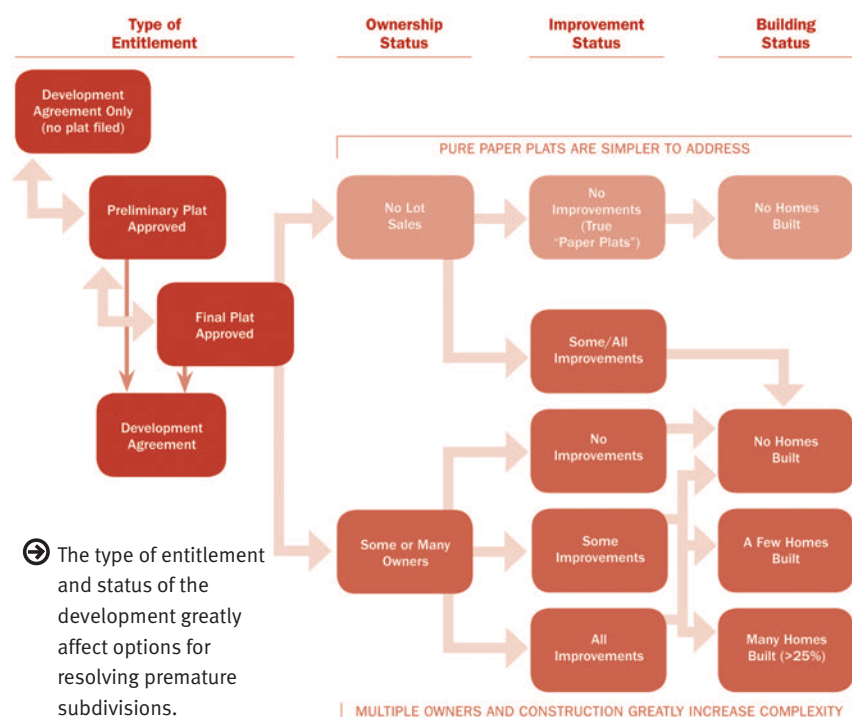
Impacts on existing lot owners. Residents of unfinished subdivisions are impacted by a lack of services as well as unfulfilled subdivi-

sion amenities that impact their quality of life and property values.

Fiscal threats. The local government may bear service costs for scattered and unfinished developments without the benefit of adequate property taxes.

Fragmented development patterns. Partially built developments, at times scattered throughout an area, increase environmental impacts and infrastructure costs.

Overcommitted natural resources. Resources, in particular water allocations, are often committed to new developments before



Sonoran Institute, adapted from Don Elliott's 2010 working paper, "Premature Subdivisions and What to Do About Them."

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NOTE

We invite you to both use and help us maintain the companion website (www.ReshapingDevelopment.org) as a resource for communities throughout the country. This website contains links to detailed working papers on legal and planning frameworks, market conditions, and lessons learned as well as much more extensive documentation of best practices, including contacts for additional details. Please also look to the Successful Communities Online Toolkit information exchange (www.SCOTie.org) for an ongoing repository of best practices and contribute your best practices as well.

About the Author

James Holway, FAICP, is currently running for the Arizona Corporation Commission (Arizona's elected public utility commission). He completed the work in this article while directing the Western Lands and Communities program for the Sonoran Institute and the Lincoln Institute of Land Policy. He has also worked for a regional council of governments, a state regulatory agency, several universities, and nonprofit organizations in Arizona, Maryland, North Carolina, California, and New York. In 2010 Holway was elected to represent Maricopa County on the Central Arizona Water Conservation District. He earned his PhD and master's degree in planning from the University of North Carolina.

approval, and if scarce resources are tied up in distressed and stagnant subdivisions, they may be unavailable to serve new developments that are ready to move forward.

Market flooding and distortions. Empty lots and vacant houses, particularly if present in large numbers, can impair the functioning of real estate markets and hinder market adjustments.

PLANNING AND LEGAL FRAMEWORK

Economic forces shape the regional markets for land development and drive the boom-and-bust cycles. However, local planning and development controls greatly influence how these market forces will play out in any particular community. State and local laws set the context within which local governments manage and regulate land development. Legal authorities and planning tools for addressing development entitlements include zoning, subdivision approval, development agreements, planned unit developments, and other unique land-use authorities that particular states may grant to local governments.

The figure on page 2 illustrates the subdivision approval process and highlights the changes in ownership, improvement, and building status as land progresses from large vacant tracts to built homes. Excess entitlements are easiest to address when they're purely paper subdivisions—with no improvements, no lots sold, and no houses built. The revision or revocation of a paper plat requires the agreement of only a single property owner, allowing for the simplest resolutions. Furthermore, the owner

hasn't made any major investments that might constrain the ability to alter design plans. As the status of a subdivision progresses from a paper plat to a partially built development with many owners, the challenges grow more complex, and the options for resolving them more constrained. Larger subdivisions split into several phases at various stages of completion pose the most intricate and extensive challenges. The first phases of construction may be mostly sold lots with most infrastructure in place, but later phases may be mere paper plats. Thus, a single distressed subdivision may pose several types of legal entitlement issues, with varying levels of risk and potential liability, in different portions of the development.

Local governments seeking to remedy the potential negative impacts of excess development entitlements and distressed subdivisions

have many different land-use and zoning tools at their disposal. These instruments generally fall into four categories: economic incentives, purchase of land or development rights, development regulations, and growth management programs. The role of land-use regulations may be even greater in the area of distressed subdivisions than in other areas of land-use planning and management because of the number of stakeholders involved.

Economic incentives may be more politically acceptable than regulations, but such incentives need to be both affordable and effective to be appropriate. Purchasing land or development rights, although expensive, could cost less than providing public services to some areas. Finally, growth management tools can be a particularly effective way to keep local government service costs in line with revenues.



➡ Vacant, platted lots under development in Pinal County, Arizona.



Anna Trentadue

➡ A street and sidewalk on the way to nowhere in Driggs, Idaho.

Note that the existence of appropriate state enabling authority is a prerequisite for local adoption of most of these tools.

POLICY RECOMMENDATIONS

Although the recovery from the most recent boom-and-bust cycle is nearly complete in some areas of the country, many communities continue struggling with vacant and distressed subdivisions that impact economies, urban form, and quality of life. In order to treat current issues and avoid problems stemming from development entitlements in the future, communities should build a solid foundation of policies, plans, laws, and programs to address these challenges.

Based on expert workshops, a 2012 planner and developer survey, and hands-on work in several communities, we identified a series of policy recommendations to address the following key challenges:

- Lack of enabling authority
- Lack of planning and foresight
- Lack of regulatory tools and inconsistent application
- Inability to adapt to change
- Inadequate development assurances
- Unsustainable fiscal impacts
- Unwillingness to serve as facilitator
- Insufficient information
- Low community capacity

The recommendations below encompass policy and administrative actions that can be taken at both the state and local levels. Although the primary focus is on public-sector actions, other stakeholders in real estate markets should participate to help structure and implement effective solutions.

Adopt New State Enabling Authority

Local tools for managing land development derive from state enabling authority, which varies across states. (See Anna Trentadue and Chris Lundberg's *Subdivision in the Intermountain West* (2011), a Lincoln Institute of Land Policy Working Paper, available at www.lincolninstitute.edu/pubs/dl/2031_1353_Trentadue%20WP11AT1.pdf). Local and state officials could work with their associations and state legislators where amendments of state enabling statutes are needed to provide additional tools. Particularly important are state requirements for local comprehensive plans and periodic updates of those plans. Another important authority is for local governments to be able to execute development agreements and to have minimum requirements for such agreements. Of similar import is a clear process for revising or vacating unbuilt portions of an approved subdivision after either a set period of time or proven noncompliance with the development agreement. Beyond these, Arizona's requirement for filing public disclosure reports on the condition of the property and associated infrastructure prior to any lot sale was also viewed as beneficial. Finally, another valuable tool would be the authority to use impact fees and property tax structures that provide a disincentive for premature subdividing and holding of vacant lots for an extended period.

Prepare and Revise Community Comprehensive Plans and Entitlement Strategies

An up-to-date local comprehensive plan is a crucial foundation for efforts to regulate or otherwise guide local land-use markets and decisions. This tool will be particularly useful for communities seeking to regulate unfinished subdivisions or to support rezoning lands to

limit the number of potential residential development entitlements. The plan should include policies that require consistency among zoning and subdivision ordinances and the adopted plan; target infrastructure investment to guide location and timing of development; require concurrent provision of infrastructure improvements along with residential home development to maintain desired service levels; identify population levels that can be supported with available resources and assess whether zoning or subdivision changes may be necessary to ensure this capacity is not exceeded; identify health and safety issues that justify development requirements and limitations; and analyze the fiscal impacts of development.

Adopt Enhanced Procedures for Development Approvals, and Ensure That Policies Are Up to Date and Consistently Applied

Local governments should keep ordinances and plans consistent with health and safety standards and establish a development agreement template that includes time lines, approved sunset clauses, development assurance procedures, and clear consequences for failure to meet conditions. And, when developers seek to alter the original conditions of their subdivision approval, local governments need to require use of the new templates, time lines, and procedures.

Adapt and Adjust Policy Approaches with Market Conditions

Communities should adopt policies and procedures that allow the development approval process to be responsive to market conditions and emerging issues related to development. For example, local governments could require a market feasibility study that reflects exist-

ing subdivision approvals and inventories of vacant platted lots to demonstrate that an area is able to absorb additional development in the near future. Other initiatives to mitigate the impacts of distressed subdivisions could include a process to revise or vacate unbuilt portions of an approved subdivision with little or no development activity after a stated period of time; updates to obsolete subdivision and building code requirements based on health and safety; streamlined approval processes for plat redesigns that meet market conditions and health standards; enhanced enforcement of requirements to fix blight and nuisance conditions; and programs for transferring or extinguishing development entitlements.

Rationalize Development Assurances

Adequate development assurances are important, but the traditional process has become unduly burdensome for the developer and rarely affords local governments the intended assurance of funded and properly built infrastructure. Local governments should work with their development community to establish workable alternative assurance mechanisms. These could include requiring installation of infrastructure before building permits can be issued; requiring completion of infrastructure for one phase before allowing final subdivision approval of the next phase; temporarily releasing development assurances for projects that are not moving forward in exchange for guarantees that lots will not be sold or building permits issued until preestablished conditions are met; or, if the alternatives above are impracticable, requiring a traditional surety bond or a letter of credit equal to the cost of developer-funded improvements.

Establish Mechanisms to Ensure That a Development Pays Its Share of Costs

Distressed subdivisions and excess development entitlements may result in the need to raise taxes and cut public services community-wide. Potential mechanisms to avoid negative fiscal impacts on the general populace include establishing a fiscal impacts planning system capable of quantifying the full costs, benefits, and fiscal consequences of development proposals; creating concurrency requirements that prohibit development that would reduce current or planned-for levels of service; and adopting development impact fees that accurately reflect the relative costs of providing public services in different parts of the community.

Serve as Facilitator, and Pursue Public-Private Partnerships

Stakeholders from the public and private sectors will need to cooperate in order to solve problems that surface in individual distressed subdivisions, secure alternative uses for the properties, or move them back on the market as viable projects. Local governments can facilitate or even catalyze this process. At a minimum, governments should ensure that existing requirements are not constraining beneficial resolutions.

Establish Systems for Monitoring, Tracking, and Analyzing Development Data

Governments must have accurate, complete, and timely data in order to make good development decisions. Specific recommendations include identifying the nature and extent of specific problematic entitlements; identifying where the investment of local government resources can be most effective; and tracking infrastructure commitments and investments made by the local government and others to ensure the currency and validity of letters of credit, development assurances, and other infrastructure completion commitments.

Build Community Capacity

Two distinct components determine a community's capacity to address problems related to excess entitlements: (1) adequate financial and staff resources and (2) the political will to take action. Public education is critical to building the support necessary for building and maintaining this community capacity, so that community leaders and residents understand the potential impacts of a failure to address distressed subdivisions and excess entitlements.

BEST PRACTICES

The most effective tools for addressing excess development entitlements and distressed subdivisions fall into two groups: those designed for communities that seek to *prevent* future problems related to excess entitlements and those for communities that need to *treat* immediate issues. Approximately 50 tools were identified throughout this project; based on the lessons learned, we selected 29 suitable planning and regulatory tools and the dozen best practices highlighted below. Your community's planning and administrative capacity, level of political will, and the severity of local development entitlement issues will determine the policies most appropriate to pursue.

Preventive Measures

This first set of best practices suits communities that do not have significant excess development entitlements or distressed subdivisions but seek to establish policies and tools to prevent related problems in the future. The first three are good standard planning practices that all communities should enact to lay a solid foundation to prevent or mitigate problems. The second set of two additional best practices, for communities likely to face significant development pressures in the future, will likely require significant political will to implement.

Community Comprehensive Plan.

The general or comprehensive plan is an essential foundation for healthy development, providing a policy basis for more specific regulations and an important defense against legal challenges. This plan should anticipate potential subdivision issues and include language that addresses the need to avoid entitling development very far in advance of market demand. Key components should address maintaining sustainable levels of growth with reference to health and safety, fiscal, and public welfare concerns; establishing a case for zoning or subdivision changes if they are necessary to prevent excess lots; laying a foundation for transferable development rights and for potential donor and receiver sites; establishing a strategy for targeted infrastructure investments and linkage to capital improvement plans; and requiring plan consistency and infrastructure concurrency, as well as requirements for updates.

Ordinances Consistent With Comprehensive Plan. Local jurisdictions should make zoning and subdivision ordinances consistent with the comprehensive plan and provide periodic amendments to maintain congruity.

Development Agreement Template. The lack of a good template is the single biggest governmental failure leading to problems with excess entitlements. Communities should execute an agreement for every new subdivision that binds developers to install infrastructure and construct amenities on a predictable timetable. This template should include time frames and time lines with sunset criteria on all approvals; phasing requirements that prohibit platting of later phases until a specified percentage of earlier phases are sold or built and the necessary infrastructure is installed; sunset criteria that enable the city or county to vacate plats or portions of plats that remain unsold and undeveloped for a specified number of years beyond the designated time frame; bonding, security, or

cost reimbursement for construction of unbuilt on-site infrastructure and for long-term property management of that infrastructure; and transfer provisions for subsequent owners.

Market Feasibility, Demand Analysis, and Lot Inventory. Linking development approvals to market feasibility and lot inventories was viewed by participants in the experts' workshops as a potentially important tool, although we are not aware of any community successfully using it. A number of communities do reject requested general plan or zoning amendments for residential development when they feel the areas are not yet ripe for development. Potential best practices include requiring an objective market feasibility study to inform the phasing of larger subdivisions and rezoning land at the time of annexation to a "holding" category that allows only agriculture or very large lot rural zoning. Feasibility studies should be based on documented historical rates and patterns of home construction (not lot sales) and should require consideration of the existing inventory of platted vacant lots within a certain number of miles of a new development, the distance between the proposed subdivision and existing roads and utilities, and the ability of responsible parties to provide necessary services.

Development Assurances. After adopting a good development assurance template, communities should apply it consistently. The city or county should consistently enforce the development assurance provisions in the development agreement. The assurance process is far more likely to meet its objectives when jurisdictions collaborate with the real estate

community to establish a system for tracking the completion of required infrastructure as well as the status of assurances to guarantee that key deadlines are met.

Treatment Measures

The following best practices are for communities looking to remedy *existing* problems stemming from excess development entitlements and distressed subdivisions. The first two are targeted to communitywide efforts. The last four are designed to target specific entitlement issues or, in some cases, a particular subdivision. These best bets are generally ordered from the easiest to the hardest to implement. However, if your community's comprehensive plan, implementing ordinances, and development agreement templates are not in place or are outdated and inconsistent, then a quick revision, targeted to address current issues, must be a top priority.

Conduct an Assessment and Develop a Strategy to Address Entitlements. Assess the number and nature of excess entitlements. Assess the development entitlement impacts and target approaches. Identify your community capacity. Establish a strategy to address your distressed subdivisions and excess entitlements. See the full report and the companion website for a guide to follow in addressing distressed subdivisions and excess entitlements (www.ReshapingDevelopment.org).

Facilitate Subdivision Redesign, Repurposing, and Replatting. Adopt a jurisdiction-wide approach to increase flexibility and encourage replatting throughout the community. Increase flexibility for minor, commonsense plat modifica-

tions by expanding administrative authority to approve minor amendments to concept plans, final plans, plats, and development agreements. Provide market information, and convene interested stakeholders to assist private sector opportunities for addressing distressed subdivisions.

Plat Lapsing or Vacating Procedures. If the number or location of entitled lots is a critical issue, the affected community should establish an ordinance enabling vacation of purely paper subdivisions in breach of their development agreements, including a mechanism to abandon later paper phases while allowing active phases to continue. Then it should file actions to vacate portions of plats that meet the plat vacation criteria.

Revise Zoning or Subdivision Regulations. If outdated zoning or subdivision regulations are contributing to public health or safety hazards in distressed subdivisions, communities can review and, if necessary, modify those regulations. Communities with significant problems should also adopt ordinances that allow the modification or partial abandonment of existing plats or delay the issuance of permits for developments on lots that pose clear public health and safety risks. Once the ordinances are adopted, the city or county could, for example, decide to withhold residential building permits until the developer fixes health and safety hazards or meets current building code requirements, even if those mandates were established after the subdivision was originally approved. Although some states have vested rights legislation that makes it difficult to apply standards adopted after a subdivision is approved, most make exceptions to accommodate new standards related to public health and safety.

Identify and Address Problematic Infrastructure. If infrastructure has failed, is failing, or is incomplete, the community should create an inventory of missing or inadequate infrastructure, identify related health or safety problems, and establish a procedure to make (or require the developer to make) essential fixes.

Improving Development Assurances. If the problem is failure to install required infrastructure, but immediate health and safety threats are not a key concern, the community may consider adopting a "permit hold" or "subphasing approach" as a feasible option. Under these approaches, individual developers may not need to post construction bonds (or they can post smaller construction bonds), but all infrastructure is required prior to final platting. As an alternative, final plats will not be approved or building permits will not be issued for subsequent phases until earlier phases are complete.



➡ Despite its completed roads, residents never arrived in this arrested development in Mesa County, Colorado.



Maricopa County Planning and Development Department

➡ A revitalized zombie: Construction resumed in this once-distressed subdivision in Maricopa, in Arizona's booming Sun Corridor, where the market is absorbing excess lots as the economy recovers.

Such mechanisms impose smaller financial burdens on the developer than those created by traditional performance bonding requirements and reduce the risk that the developer will have sold lots far in advance of infrastructure or services. These assurances should also include clear consequences for failures to satisfy conditions and complete necessary improvements, as well as mechanisms to maintain and track data to ensure effective implementation.

Transfer of Development Rights. Where a market for new development exists, mechanisms can be established to facilitate development entitlement offsets or transfer of development rights from premature or obsolete subdivisions to projects driven by current market pressure for residential construction.

CONCLUSION

The Lincoln Institute of Land Policy and the Sonoran Institute initiated work on dis-

tressed subdivisions to help communities currently facing development entitlement issues as well as those that may face them in the future. Preparing your community, either to treat current problems or prevent future ones, begins with doing a good job on the fundamental planning tools that are well known to *Zoning Practice* readers. For communities that lack state enabling authority to pursue particularly useful tools, a good starting point could be working with your state APA chapter and associations of local governments to propose changes in state enabling authority to allow adoption of the best practices outlined in this report. Communities and others involved in real estate development will also be well served by ensuring they have mechanisms in place to adapt and adjust to evolving market conditions. Communities likely to face growth would benefit from growth management poli-

cies that facilitate keeping approval of new development entitlements and investments in infrastructure in line with evolving market demands. For communities already facing distressed subdivision problems, a willingness to reconsider past approvals and projects and acknowledge problems is an essential ingredient to success. Communities that are able to be not just an effective regulator but also a facilitator will be best prepared to both prevent and then respond and treat distressed subdivisions and any problems that may arise from excess development entitlements. One message we consistently heard was the importance of building and maintaining political will. Building popular support for dealing with excess development entitlements and creating partnerships with the local building and lending community will sustain the ability to respond to existing issues and avoid future ones.

Cover image: The developers of Castlebrooke Manor in Kannapolis, North Carolina, succumbed to foreclosure after completing entrance pillars and some streets on a 108-acre parcel. In 2012, however, the city approved plans by a new developer to resuscitate the project.

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ENTITLEMENTS?

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