Subdivision in the Intermountain West: A Review and Analysis of State Enabling Authority, Case Law, and Potential Tools for Dealing with Zombie Subdivisions and Obsolete Development Entitlements in Arizona, Colorado, Idaho, Montana, New Mexico, Nevada, Utah, and Wyoming

Anna Trentadue and Chris Lundberg
Valley Advocates for Responsible Development

Lincoln Institute of Land Policy
Working Paper

Lincoln Institute Product Code: WP11AT1

Abstract

Over the past decade, the Intermountain West has experienced an unprecedented boom in speculative real estate development followed by a precipitous bust in housing and land values. "Zombie Subdivisions" now dot the landscape and continue to hamstring the fiscal health of cities and towns, ecosystem stability, property values, and quality of life throughout the West. As struggling developers lose title to their properties or seek to quickly unload their incomplete projects, many people now find themselves owning a parcel or lot in what was supposed to be a high-amenity development that does not exist. Cities and counties, struggling to service these far-flung subdivisions, are looking for ways to create more affordable growth scenarios.

In light of these challenges, is it possible to “undo” what has already been developed but is no longer supported in today’s markets? What are the rights and remedies for lot owners in defunct developments? Can local governments vacate development entitlements in these zombie subdivisions?

This paper assesses the potential tools available to tackle this problem by reviewing the state-by-state legal framework for development entitlements, subdivision platting, and the potential to vacate or amend these land entitlement instruments at various stages in the process. The scope of research includes the eight Intermountain West states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. The enabling legislation varies greatly in each one of these states, creating unique laws, practices, and case law in these representative areas. The overall objective of this paper is to provide the legal context in each of these states while also highlighting a few illustrations of transferable best practices as well as unique opportunities and constraints that exist in a few states or local governments.

About the Authors

Anna Trentadue is the staff attorney and program director for Valley Advocates for Responsible Development (VARD) in Teton County, Idaho. Anna earned a B.A. in Biology, with a French minor, from Colorado College in 2000 and her *Juris Doctor* from the University of San Francisco in 2006. During law school, she specialized in land use and water law, interned with the California Attorney General's Energy Task Force, and clerked at a private water law practice. Upon graduation, she returned to Idaho to work for another private water law practice in Boise before joining the VARD staff in 2007.

Chris Lundberg is the staff attorney and communications and education associate for Valley Advocates for Responsible Development (VARD) in Teton County, Idaho. Chris graduated from Carleton College in Northfield, MN, with a B.A. in political science in 2005 and went on to earn a *Juris Doctor* from the University of Minnesota Law School in 2008. Chris was admitted to the Idaho Bar in September of 2008. Chris joined the VARD staff in 2008.

Contact Information
Anna Trentadue or Chris Lundberg
Valley Advocates for Responsible Development
PO Box 1443
Driggs, ID 83422

About Western Lands and Communities

Now in its eighth 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.

Western Lands and Communities' current initiatives include: state trust land management, advancing open source planning and visioning tools, addressing the impacts of excessive development entitlements, and land use planning for climate change mitigation and adaptation. For further information see www.westernlandsandcommunities.org

About Valley Advocates for Responsible Development

Now in its 10th year, Valley Advocates for Responsible Development (VARD) is a small nonprofit organization that works with citizens, other nonprofit organizations, developers, and local governments to promote responsible development and sustainable use of the natural resources of Teton Valley, Idaho. VARD's mission is to advocate for private, public, and civil actions that will result in responsible development and sustainable use of the natural resources (water, land, wildlife, and air) in Teton Valley. For further information see http://www.tetonvalleyadvocates.org

About the Reshaping Development Patterns Project

The goal of the Reshaping Development Patterns initiative is to assist communities of the Intermountain West addressing previous entitlements as well as communities who may face future growth challenges. This multi-year project started with background research on issues and challenges around development entitlements in the West, including the legal, economic, planning, and design issues associated with the entitlements. Ultimately, this effort will produce a series of working papers, a major policy report, a series of best practices, and case study results, and eventually perhaps a book compiling all the information and lessons learned. This project includes applied case studies in several types of Intermountain West communities, including rural amenity communities like Teton County, Idaho, and rapidly growing mega-regions such as Pinal County, Arizona, which will ultimately inform a West-wide policy report. For further information see http://www.sonoraninstitute.org/reshaping-development-patterns.html

Acknowledgements

Special thanks to Don Elliott for "paving the way" with his 2010 paper, *Premature Subdivisions and What To Do About Them,* and also providing us with advice and commentary on *Subdivision in the Intermountain West.* Also thanks to the following individuals who provided peer review of this paper: Craig M. Call, J.D., Utah Land Use Institute, Salt Lake City, Utah; Don Elliott, M.A., J.D., Clarion Associates, Denver, Colorado; Grady Gammage Jr., J.D., Gammage & Burnham, Phoenix, Arizona; Jerry Grebenc, M.A., Community Technical Assistance Program, Helena, Montana; Lee Nellis, F.A.I.C.P., Round River Planning, Cody, Wyoming; Richard Holmes, M.A., Southern Nevada Water Authority, Las Vegas, Nevada; and Robert M. White, J.D., Robles, Rael & Anaya P.C., Albuquerque, New Mexico.

Table of Contents

Subdivision in the Intermountain West

Introduction and Background

Over the past decade, the Intermountain West has experienced an unprecedented boom in population growth and speculative real estate development followed by a precipitous bust in housing and land values. When markets were active, both local governments and developers spent little time considering the long-term carrying costs, lasting community impacts, and day-to-day servicing costs associated with these developments. In the rush to capitalize on what seemed like an infallible market, careful scrutiny of road configurations, open space management plans, and even basic utilities went by the wayside. As long as real estate inventory moved quickly, the system worked. Then, as demand and financing dried up, some local governments called on the financial guarantees for these developments, usually in the form of a letter of credit. However, many of these financial institutions backing these letters of credit had failed. One by one, projects stalled out in varying stages of completion, where they remain today. Empty subdivision roads now carve up agricultural fields, and lonely spec houses dot many rural landscapes. Some are vacant, but some are occupied, necessitating the provision of public services to a remote neighborhood generating very little tax revenue. In jurisdictions where lots could be pre-sold prior to infrastructure being completed, many people now find themselves owning a parcel or lot in what was supposed to be a high-amenity development that simply does not exist as anything more than a paper plat.[1]

These "Zombie Subdivisions" are the living dead of the real estate market. They can take on many forms and iterations, each with its own background story on how a once-promising project became derailed. In some instances, the developer pre-sold or transferred lots to individuals and investors, but now lacks the funds to complete basic infrastructure improvements. Some truly speculative zombie developments do not physically exist at all, but are merely paper plats recorded at the county clerk's office. Others are simply not marketable, meaning, they are "complete" in the sense that the roads and utilities are in, but no lots have sold, and no houses are built.

Speculative buyers also helped fuel this zombie phenomenon by investing in subdivisions with no intention to build a home and reside in it, but rather, "flip" the lot as a short or long-term investment. The lifespan of these speculative purchases varies greatly. Some speculators' investment plans depended on a short timeline with a quick resale while the market was still active. As market demand crashed and sales dried up, some short-term flippers lost these investments to foreclosure. On the other end of the spectrum, there

[1] A "paper plat" is created when a landowner prematurely divides a parcel of land into lots far in advance of the market for those lots. This often results in what is called 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. *See also,* Kelly, Eric Damian, *The Perplexing Problem of Paper Plats,* The Platted Lands Press (March 1986).

were deep-pocket speculators with the financial longevity to hang on to their investments for the long haul in the hopes of flipping the property in the next boom. Many of these buyers still own their investment lots, and they plan to "hibernate" and ride out the current recession. The end result of this speculative boom is a lingering glut of low-quality, often hastily-designed real estate inventory in varying stages of completion where there is little to no end-user demand.

Will these zombies go away on their own? Probably not. Subdivisions by their very nature are designed to be permanent divisions of land, typically changing landscapes from agricultural to residential uses. These zombies sit somewhere halfway in between this transition. Thus, the impacts of this boom-bust tidal wave endure, and will continue to hamstring the fiscal health of cities and towns, ecosystem stability, property values, and quality of life throughout the West. Cities and counties struggle to service these far-flung subdivisions and are looking for ways to create more affordable growth scenarios. Without a long-term land management plan for many of these stalled-out subdivisions, noxious weeds and blight are a growing problem for neighbors and communities at large. Some developers seek to reconfigure their projects in order to lower carrying costs to fit the new reality of the housing market. Others struggle to stave off foreclosure by quickly unloading lots or even bargain-selling their entire projects. This action begins the race to the bottom, driving land values down, and encouraging low-quality development.

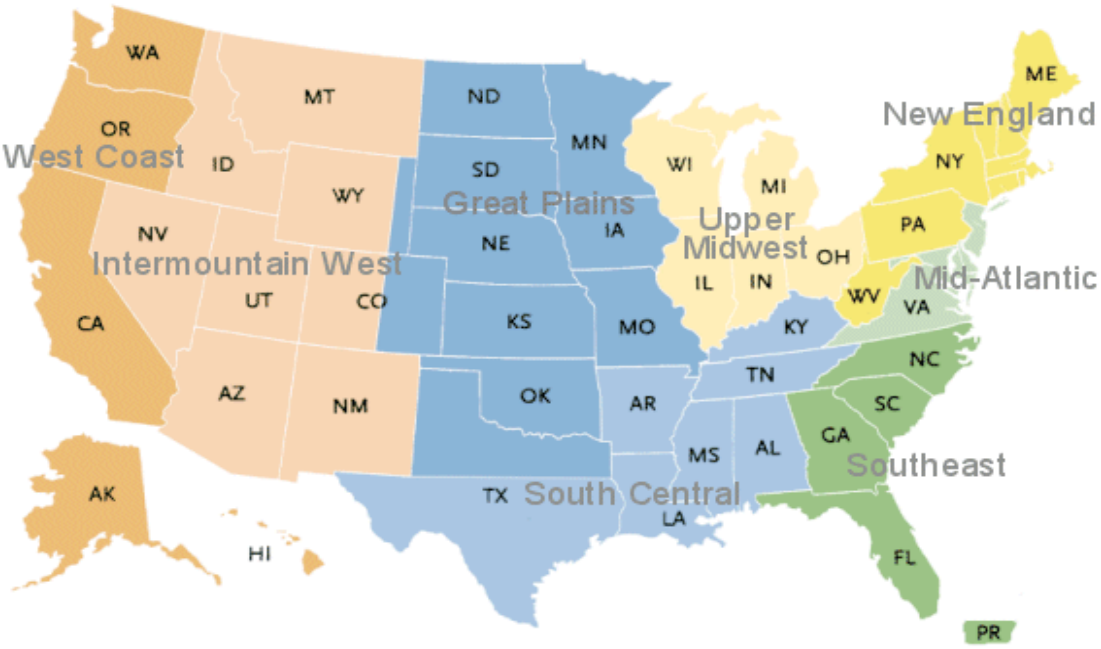
All of this begs the following questions: *What can be done to mitigate the impacts of zombie subdivisions? Is it possible to "undo" what has already been developed but is no longer supported in today's markets? What tools exist to address these challenges?*

This paper will begin to answer these complicated questions by reviewing the state-by-state legal framework for development entitlements, subdivision platting and recording, and the potential to vacate or amend these land entitlement instruments at various stages in the development process. The scope of research includes the eight Intermountain West states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming as depicted on the map below (figure 1).

Each one of these eight states, and in some cases even local governments, have unique laws, practices, and case law in these representative areas. The objective of this paper is to provide the legal context in each of these states while also highlighting a few illustrations of transferable best practices as well as unique opportunities and constraints that exist in a few states or local governments.

This paper serves as a follow-up to Don Elliott's 2009 Lincoln Institute Working Paper, entitled *Premature Subdivisions and What to Do About Them.* The focus of the *Premature Subdivisions* is the general exploration of legal approaches and planning tools available to local governments to manage and resolve the adverse impacts created by premature and obsolete subdivisions. This paper takes it one step further, exploring the statutory tools available in each of these states and how the case law has developed (or not developed) around these tools.

Figure 1. Intermountain West



Summary of State Enabling Statutes

While certain planning and regulatory duties remain constant, (i.e. the generalized duty to plan for public infrastructure and services, process plats in an orderly fashion, process development applications, record plats, etc.) each state has its own approach to the allocation of planning, zoning, and subdivision responsibilities between state, county, and municipal governments. Each state's enabling legislation is structured differently, which illustrates that there is no one, singular approach to local land use regulation.

The Significance of Home Rule and Dillon's Rule

The degree to which each state is both a "Home Rule" and a "Dillon's Rule" jurisdiction determines how much flexibility local government has to enact unique regulatory structures which could be used to address problems created by zombie subdivisions.[2] Because the U.S. Constitution is silent on local governments, each individual state creates and regulates its own forms of political subdivisions. Home Rule states have either provisions in their constitutions or acts of their state legislature granting local governments the power to govern themselves as they see fit (so long as the abide by the state and federal

[2] *See,* Appendix I for a chart comparing the degree to which states are "Home Rule" jurisdictions and/or "Dillon's Rule" jurisdictions.

constitutions.)[3] The powers and limits of this Home Rule authority are not black and white and vary in each state. Thus, each state differs in the degree to which it is truly a Home Rule jurisdiction. Dillon's Rule (named after a written decision by Judge John F. Dillon of Iowa in 1868) is often a foil to Home Rule authority. Dillon's Rule stands for the premise that local governments are creatures of the state and that political subdivisions only have the powers that are (1) expressly granted to them by the state legislature; (2) those that are necessarily implied from that grant of power; and (3) those that are essential and indispensable to the municipality's existence and functioning. Any ambiguities in the legislative grant of power are resolved against the municipality so that its powers are narrowly construed.[4]

As a general rule, cities and counties in pure Home Rule states have greater autonomy, while local governments in states relying heavily on Dillon's Rule to interpret state authority are more restricted in their powers. That said, Home Rule and Dillon's Rule jurisdictions are not polar opposites. No state reserves all powers to itself and likewise, no state devolves all of its authority to local governments either. Instead, there are many shades of grey as to how these two rules interact, resulting in great state-by-state diversity in basic approaches to local regulation of land use. Where Home Rule may prevail in theory, it may not prevail in actual practice. For example, as a non-Home Rule state, Nevada's legislature has passed laws emphasizing regional planning over municipal planning. As another non-Home Rule state, the Idaho legislature has made almost no distinction between the planning and zoning duties of cities and counties; all Idaho land use regulations apply to both. As a somewhat more limited Home Rule state, the Utah legislature passed legislation permitting cities and counties the choice of adopting alternative forms of local government. New Mexico's Constitution allows for cities to adopt Home Rule charters, and 10 cities have done so. The remainder of New Mexico's cities continue on as Dillon's Rule jurisdictions, leaving the state to function as a sort of regional hybrid between Home Rule and Dillon's Rule.

Even more so than New Mexico, Colorado exists as an extremely multifaceted jurisdictional hybrid between consolidated cities and counties, statutory cities and towns, territorial municipalities, and Home Rule. The state has taken a particularly broad approach to Home Rule by expressly reserving the "full right of self government in local and municipal matters" for its citizens.[5] The first Home Rule charter was a creation of the

---

[3] Utah is a notable exception where local Home Rule authority does not stem from statute or legislative acts, but rather, has been articulated through developed case law. *See*, *State v. Hutchinson,* 624 P.2d 1116 (Utah 1980).

[4] "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control. *Clinton v Cedar Rapids and the Missouri River Railroad*, 24 Iowa 455, (Iowa 1868).

[5] Bueche, Kenneth, A History of Home Rule, Colorado Municipal League, November 2009. *See also,* Mamet, Sam, Overview of Colorado Municipal Home Rule, Colorado Municipal League, April 2009.

1901 Colorado legislature, which established the consolidated City and County of Denver.[6] Today, both cities and counties are expressly authorized by statute as well as Constitutional mandate to adopt Home Rule charters, and many have done so. This has created a strong and diverse Home Rule presence throughout the state.[7] Two counties (Pitkin and Weld) have adopted Home Rule charters.[8] Cities and towns with populations over 2,000 may also vote for Home Rule, which has proven to be an increasingly popular election issue regardless of the size, wealth, or political leanings of the community.[9] As of 2009, 100 Colorado cities have successfully adopted their own individual and unique charters, ranging from liberal (Boulder) to conservative (Canon City), affluent (Aspen) to lower income (Lamar), small (Black Hawk) to sprawling (Colorado Springs). The end result is that more than 90% of Colorado's population resides in Home Rule cities and counties.[10] The remaining 10% of the state's population can be found residing within the 170+ statutory cities and towns (which all tend to have smaller populations than most Home Rule jurisdictions), as well as Georgetown, the last town in Colorado still operating under its original territorial charter.[11] Thus, while 90% of the population is concentrated within 100+ different Home Rule charters, almost twice as many smaller jurisdictions are operating under traditional statutory charters.

The degree to which a state is a Home Rule or Dillon's Rule jurisdiction can significantly impact how cities and counties grow. For example, Home Rule has had the effect of directly shaping land use patterns in Arizona. Article VIII of the Arizona Constitution provides for Home Rule of cities of 3,500 or more (known as "charter cities). In general, these charter cities have broader power to legislate on matters not prohibited by statute. Counties and non-charter cities can only regulate pursuant to statute, leaving counties with very limited authority over subdivisions. This has spurred a growing problem with

---

[6] This was accomplished by the amendment of Article XX, section 4 into the Colorado Constitution.

[7] Voters of a county can elect to adopt a Home Rule charter establishing the functional organization and structure of county government. *See,* Article XIV, section 16, of the Colorado Constitution and C.R.S. § 30-11-501. The Colorado County Home Rule Powers Act (C.R.S. § 30-35-101 *et seq.*) further implements these constitutional provisions.

[8] Bueche, Kenneth, A History of Home Rule, Colorado Municipal League, November 2009. *See also,* Mamet, Sam, Overview of Colorado Municipal Home Rule, Colorado Municipal League, April 2009.

[9] Article XX, section 6 authorizes that cities and towns with populations of more than 2,000 may also vote to elect home rule charters.

[10] Bueche, Kenneth, A History of Home Rule, Colorado Municipal League, November 2009. *See also,* Mamet, Sam, Overview of Colorado Municipal Home Rule, Colorado Municipal League, April 2009.

[11] Colorado has 12 statutory cities and towns organized under C.R.S. §§ 31 -1-203, 31-4-100, 31-4-200. There are 160 statutory towns organized under C.R.S §§ 31-1-203 and 31-4-3. There also still remains one town in Colorado (Georgetown) that still operates under its original territorial municipal charter.

rogue or "wildcat" subdivisions created by lot splits in unincorporated areas. The end result is a boom in unregulated subdivision activity outside of incorporated cities.

The predilections of each state's legislature towards local government autonomy versus centralized state control will also impact the scope of each local government's authority. Some non-Home Rule legislatures have granted broader authority to local governments than other non-Home Rule states. For example, some non-Home Rule states (like Wyoming) allow for cities to exercise extraterritorial jurisdiction while others (like Nevada and Idaho) specifically limit the authority of cities to their jurisdictional boundaries.[12] Each state's legislature has dictated with varying degrees of specificity how they want local governments to grow via cluster development, planned unit developments (PUDs), and the management of open space. In Wyoming for example, cluster development is statutorily authorized to counties, but the directive is clear that cluster development is strongly encouraged as the model for county growth. Contrast this with Colorado (Home Rule) and Idaho (non-Home Rule), both of which have adopted state-level legislation granting powers to both cities and counties the authority to approve PUDs. Although Colorado is clearly a Home Rule state, the legislature introduced a Dillon's Rule approach to their Planned Unit Development Act[13] by establishing statutory criteria and procedures that local governments must follow when approving PUDs. Contrast this with Idaho, a non-Home Rule state that has instituted a Home Rule philosophy in its PUD legislation by leaving the adoption of PUD regulations, criteria, and approval processes entirely to the discretion of local governments.

The variety in enabling legislation has also created diversity in the most fundamental land use terminology. For example, the basic term "subdivision" is defined quite differently in each state, with some states defining every division of land as a subdivision, while others do not recognize a formal subdivision unless is has more than 25 lots.[14] In these particular states with high thresholds for what constitutes a "subdivision," a typical response has been for local governments to adopt more stringent standards, resulting in regional diversity as to what constitutes a "subdivision" of land.

Emerging Trends: Will Regulation Soon Replace Caveat Emptor as the New Norm?

The recent boom and bust cycle in real estate speculation throughout the Intermountain West has left countless paper plats and partially built zombie subdivisions in various states of completion.[15] Many developers need to sell lots or interests in their properties to

---

[12] *See,* Appendix II for a chart comparing state statutes authorizing extraterritorial jurisdiction of cities to extend their planning powers beyond the city limits.

[13] Colorado Revised Statutes §§ 24-67-101 to 24-67-108.

[14] *See,* Appendix III for a chart comparing the statutory definition of a "subdivision" in each of the eight Intermountain West states.

[15] For a detailed discussion of the post-crisis emerging trends in rural real estate markets, *see* Burger, Bruce M. and Carpenter, Randy, *Rural Real Estate Markets and Conservation Development In the Intermountain Wes: Perspectives, Challenges, and Opportunities Emerging*

raise the capital to either finish their projects or remain current on their mortgages to retain their property. It seems as if there are "deals" on short sales or bulk purchases of subdivision lots in almost every community. Each of these eight states and the local governments within them vary greatly in how or to what degree they regulate these lot sales and/or require the prospective buyer to do their own due diligence prior to purchasing the land.

Some states like Arizona and New Mexico have inserted themselves into the sales transaction by requiring written disclosures from anyone interested in selling subdivision lots or parcels. The disclosure requirements are often exhaustive and include all encumbrances on the land, any restrictions affecting the use of the property, a timeline for completion of offsite improvements, the debt attached to the property, etc. Arizona does not even allow lot sales until the office of the State Real Estate Commissioner has physically inspected the condition of the development, confirmed the veracity of these disclosures in a public report, and issued a permit allowing the sale of the lots. It is as if the State Commissioner does a portion of the due-diligence that would normally be completed by the buyer. Both Arizona and New Mexico also heavily regulate the content of real estate advertisements in their states, including ads for properties located outside of the state's jurisdiction. These regulations were spurred into being by a wave of real estate scams in both states, which prompted a legislative response.

By comparison, Idaho has taken more of the *caveat emptor* ("buyer beware") approach. The state does not require any detailed disclosures[16] prior to sale, and does not regulate real estate advertisements. Besides the basic anti-fraud provisions in the Idaho Real Estate Appraisers Act[17] and Title 55 (Property), Idaho does not regulate the representations of sellers. Instead of protecting would-be purchasers, Idaho's jurisprudence instead focuses on the landowners right to have their property title protected from being clouded by illegitimate encumbrances.[18]

While Arizona and New Mexico's protective stance on real estate advertisements currently makes them regulatory outliers when compared to the other six states, it remains to be seen if in the aftermath of this real estate glut, more states will adopt

---

from the Great Recession, Lincoln Institute of Land Policy Working Paper 2010. This working paper was also commissioned by the Western Lands and Communities Joint Venture.

[16] Idaho Code § 55-2506 does require a few basic disclosures such as the source of water supply to the property, the nature of the sewer system, the condition of the structure on the property, and the known presence of hazardous materials or substances.

[17] Idaho Code §§ 54-4101 to 54-4119. *See also,* Idaho Code § 55-901 (fraudulent conveyances of land).

[18] *See,* slander of title case law: *Weitz v. Green,* 148 Idaho 851, 230 P.3d 742 (Idaho 2010); *Porter v. Bassett,* 146 Idaho 399, 405, 195 P.3d 1212, 1218 (Idaho 2008), *McPheters v. Maile,* 138 Idaho 391, 395, 64 P.3d 317, 321 (Idaho 2003).

regulations on fraudulent advertising and mandatory pre-sale disclosures. Litigation is costly for everyone; the use of mandatory disclosures could preempt many lawsuits initiated by misled or disgruntled purchasers of subdivision lots.

Here are more detailed descriptions of how each state's land use regulations are structured:

Arizona: Concurrent Regulation of Both Developers and Local Government

In Arizona, the statutory duties of cities and counties are divided into different sections of the Arizona code, Title 9 (Cities and Towns) and Title 12 (Counties). Planning, zoning, and subdivision regulations are each specifically called out as mandatory duties that are a part of a city's general powers. Much emphasis is put on this statutory duty to adopt and enforce municipal subdivision regulations, but the Arizona code goes further by contemplating that municipalities may even determine that certain lands may not be subdivided at all due to resource constraints (i.e. water) and topography of the property.[19] That said, this is seldom done in practice for fear of property owner claims under the Private Property Rights Protection Act (See discussion of state takings legislation, *infra)*. Extraterritorial jurisdiction is also specifically granted to cities in any county not having county subdivision regulations applicable to the unincorporated territory. There, the cities may exercise their subdivision regulations within three miles in all directions of the corporate limits of the city.

Like cities, counties are mandated to plan and provide for the future areas of growth and development within their jurisdiction; thus, they are charged with forming a planning and zoning commission to carry out these responsibilities. One of the chief tasks of this commission is to formulate, recommend, and update the comprehensive plan for the jurisdiction. Counties are charged with regulating the subdivision of all lands within their corporate limits (except for lands regulated by the cities) including adoption of procedures and regulations for the processing of subdivisions applications. It is a misdemeanor to record a plat that has not received final plat approval from the board of county supervisors. Water availability is a chief concern; counties may choose to not approve the final plat for a subdivision composed of lands located outside of an active groundwater management area unless there are adequate assurances of water supply and availability, which are spelled out in detail in the Arizona code.[20] Because counties are charged with regulation and enforcement of all zoning, subdivision, platting, and building regulations, they may elect to form an enforcement office, adopt civil penalties, and even create a hearing and appeals system.

---

[19] Arizona Statutes. § 9-463.01(4). Local municipalities may "[e]ither determine that certain lands may not be subdivided, by reason of adverse topography, periodic inundation, adverse soils, subsidence of the earth's surface, high water table, lack of water or other natural or man-made hazard to life or property, or control the lot size, establish special grading and drainage requirements and impose other regulations deemed reasonable and necessary for the public health, safety or general welfare on any lands to be subdivided affected by such characteristics."

[20] Arizona Statutes. §§ 11-806.01, 32-2101, and 45-402.

At the municipal level, a "subdivision" is defined as "improved or unimproved land or lands divided for the purpose of financing, sale or lease, whether immediate or future into four or more lots, tracts or parcels of land, or, if a new street is involved, any such property which is divided into two or more lots, tracts or parcels of land, or any such property, the boundaries of which have been fixed by a recorded plat, which is divided into two or more parts."[21] The state subdivision regulations of Arizona do not include an explicit definition of what constitutes a "subdivision" within an unincorporated county. However, the state statute regulating the sale of subdivided lands in Arizona only requires that notice of the intention to offer subdivided lands for sale be provided where the subdivision in question has created six or more lots of which each of those lots is less than 36 acres in size.[22]

Arizona allows for some unusual exemptions from what would be the typical notice, hearing, and local government approval requirements for subdivision applications meeting specific size requirements. Arizona's case law has developed to hold that a subdivision plat approval is generally a ministerial action. If the zoning standards are met, and the subdivisions criteria is satisfied, then plat approvals must be granted. Counties are further permitted to adopt regulations for the administrative approval of subdivisions creating five or fewer lots, any of which is 10 acres in size or smaller. This administrative approval is mandated as counties are expressly prohibited from denying subdivisions that meet these requirements.[23]

Separate from city and county planning and subdivision regulations, is Title 32 (Occupations and Professions), which regulates the sale of land, and real estate disclosures in Arizona. These statutes were the result of widespread real estate fraud in the 1950s and 60s, when paper plats were sold to out-of-state buyers without any possibility of infrastructure. Some subdivisions did not even have access. This prompted a legislative response: the formation of the Office of the State Real Estate Commissioner and mandatory pre-sale property disclosures in the form of a public report. These disclosure laws have continued to expand over the years.

Before subdivided lands are offered for sale, the subdivider (who is presumably also the seller) is required to notify the State Real Estate Commissioner in writing of this intent and provide several written disclosures including a statement on the true condition of the property, any encumbrances, the amount and timeline of indebtedness on the property, any requirements for off-site improvements, etc.[24] The Office of the Commissioner then inspects the subdivision and issues a public report confirming these disclosures and authorizing the sale or lease of the lots. Exempt from this requirement are divisions of land creating six or more lots that are 36 acres or more. The sale of unimproved lots or parcels is also governed by these regulations. Purchasers have a six-month period to

[21] Arizona Statutes. § 9-463.02 (definition of subdivision).

[22] Arizona Statutes § 32-2181(E).

[23] Arizona Statutes § 11-831.

[24] Arizona Statutes § 32-2181.

inspect the lots and they have the right to unilaterally rescind the purchase. Title 32 also heavily regulates the content of all real estate advertising materials associated with the subdivision.[25] Counties can enforce these provisions by clouding the title to the property thus enjoining the sale, and the seller is exposed to statutorily civil liabilities. Any material changes to the plan require the seller to apply for a new public report from the Real Estate Commissioner.

While Arizona heavily regulates land sales on one hand, the state has also passed extensive legislation to protect private property rights. Chapter 11 authorizes property owners to appeal land dedications, zoning regulations, and exactions as an unconstitutional taking in violation of recent U.S. Supreme Court jurisprudence.[26]

Chapter 12 includes the recently-adopted Private Property Rights Protection Act (commonly referred to as "Prop 207") which entitles private property owners to just compensation when the state or a political subdivision of the state reduces "the existing rights to use, divide, sell or possess private real property" through the enactment or application of "any land use plan enacted after the date the property is transferred to the owner."[27] As the nation's strongest compensation scheme for land use regulation, Arizona planners and land use lawyers feared Prop 207 would create a massive wave of litigation and landowner claims. That has not proved to be the case, primarily for two reasons: the statute only applies prospectively, and since the passage of Prop 207, cities have been reluctant to pass highly regulatory new land use ordinances. For example, historic preservation designations have virtually ground to a halt since Prop 207. (See section discussing the adoption of property rights legislation, *infra*).

Chapter 32 authorizes Counties to adopt requirements for phased developments, or at any time, a developer can submit a protected development rights plan for his project. There are statutory time limits for these development rights; however, three years for non-phased development, five years for phased development, and 10 years for gross acreages

---

[25] Arizona Statutes § 32-2183.01. See Appendix IX for the complete text of this Arizona statute regulating the contents of real estate advertising materials and prohibiting untrue statements of material facts or omissions of material facts in connection with the sale of subdivided lands. Counties are authorized to hold hearings and take action to enjoin false or misleading advertising.

[26] *See,* Arizona Statutes §§ 11-810 and 11-811. Strangely, the Arizona legislature took it one step further and passed § 11-811 which expressly requires compliance with U.S. Supreme Court decisions: "A county or an agency or instrumentality of a county shall comply with the United States Supreme Court cases of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, _____U.S._____(2002) and Arizona and federal appellate court decisions that are binding on Arizona counties interpreting or applying those cases."

[27] Arizona Statutes § 12-1134.

of over 640 acres.[28] These are not personal rights, but attached to the land. A development right established under Chapter 32 is protected against subsequent local ordinance changes except in limited situations where federal or state regulations necessitate a change to the plan, or upon a finding by the county that if left uncorrected, the plan poses a serious threat to the public health, safety, or general welfare.[29] In practice, cities and counties generally do not use protected development rights plans. Development agreements are more the norm as they may be tailored to each jurisdiction's needs and can grant vested rights of a much longer duration than a vested rights plan.

Colorado: Four Levels of Government

Colorado divides its land use and development regulations between state government regulations (Title 24), local government regulations that apply to cities and counties (Title 29), county government (Title 30), municipal government (Title 31), and special districts (Title 32).

The major pieces of state-level land use legislation in Title 24 are the Planned Unit Development Act,[30] Vested Property Rights Act,[31] and Colorado Land Use Act[32] all of which are authorized at the state government level. A notch below that is Local Government Land Use Control Enabling Act[33] in Title 29. This Act applies to cities and counties both, granting broad authority to local governments to plan for orderly growth and regulation of land within their respective jurisdictions (city, town, and counties). Major components of this Act are the express encouragement of intergovernmental coordination for purposes of planning and regulation as well as the uniform authority to impose impact fees among local governments. Also found in Title 29 under the heading "Regulatory Impairment of Property Rights" is the statutory protection of private property. However, the title leaves one to wonder whether the Chapter focuses on the protection of private property, or the government police powers to regulate the uses of property. Part 2 of this property rights section underscores and reinvigorates the federal constitutional prohibition against taking private property for public use without just compensation and the state constitutional prohibitions against taking or damaging private property for public or private use. The language that is protective of property rights mirrors the standard takings criteria (direct nexus to a legitimate government interest, rough proportionality to the government impact, etc.). This is juxtaposed with provisions

[28] *See* Arizona Statutes § 11-1203 for a more detailed discussion of the limited rules and regulations on extensions of time for protected development rights and limited extensions of time for building permits issued under a protected development rights plan.

[29] Arizona Statutes § 11-1204.

[30] Colorado Revised Statutes § 24-67-101 et seq.

[31] Colorado Revised Statutes § 24-68-101 et seq.

[32] Colorado Revised Statutes § 24-65-101 et seq. Note: The Colorado Land Use Act was repealed in 2005.

[33] Colorado Revised Statutes § 29-20-101 et seq.

affirming the expressly granted land use authority of local government police powers. Although it seems out of place for the property rights chapter, specific provisions are included which prohibit a local government from granting any kind of development permit unless it first determined that the applicant has satisfactorily demonstrated an adequate water supply for the proposed project. Protection of property rights seems to not trump government's duty to carefully protect Colorado's precious water supplies.

At the county government level (Title 30) are county planning regulations, including the formation of planning commissions, optional regional planning commissions by cooperative agreements, adoption of comprehensive plans, and open space management. Counties "should" make available processes for cluster developments via incentives such as clustering, water augmentation, and density bonuses not to exceed two units for each 35-acre increment and the transfer of development rights. Cluster development is statutorily defined as "any division of land that creates parcels containing less than 35 acres each, or single-family residential purposes only, where one or more tracts are being divided pursuant to a rural land use process and where at least two-thirds of the total area of the tract or tracts is reserved for the preservation of open space."[34] These cluster provisions are driven by state water regulations stating that landowners must be given a well permit for a 35-acre or larger parcel.

One key difference between Colorado's County Government (Title 30) and Municipal Government (Title 31) regulations is that planning and zoning is not enumerated under a county government's general powers and functions; however, it is expressly included as a power and function of cities and towns. That said, counties do have explicit powers to zone and provide for the physical development of the unincorporated territories as a part of the county planning regulations. Subdivisions within a county's jurisdiction are statutorily defined as any division of land, which results in parcels smaller than 35 acres.

Municipalities are more expressly given the grant of power to zone and are mandated to form a zoning commission.[35] They are also granted the power to form a planning commission charged with the duty to formulate and adopt a master plan for the municipality. The adoption of subdivision regulations is mandatory, but the adoption of PUD regulations is discretionary. The statutory definition of a "subdivision" within the boundaries of a municipality is more strictly defined as any division of a single parcel of land into two or more parcels for the immediate or future purpose of sale or development.

Idaho: The Top Down Approach

Idaho is decidedly not a Home Rule state; all legislative powers are derived from authority granted in the Idaho Constitution or by statute. Except for the cities of Bellevue, Boise, and Lewiston, which adopted Home Rule charters prior to statehood, Idaho cities

[34] Colorado Revised Statutes § 30-28-403. *See also,* Colorado Revised Statutes § 30-28-401 which directs counties that they "should" adopt processes for cluster development of parcels.

[35] Colorado Revised Statutes § 31-23-301.

and counties have no inherent authority to pass laws.[36] "Dillon's Rule" prevails in Idaho; political subdivisions may only exercise the power granted to it by the Idaho constitution or the state legislature.[37] Thus, the power to zone is directly granted to cities and counties in Article XII, Section 2 of the Idaho Constitution.

The authority for local governments to engage in planning and zoning actions is further articulated in Title 67 (State Government and State Affairs) under what is known as the Idaho Local Land Use Planning Act (LLUPA) of 1975.[38] Most aspects of Idaho land use regulations are encompassed under LLUPA, including comprehensive planning, the structure and function of planning commissions, development agreements, variances, the adoption of zoning regulations, the adoption of subdivision regulations, special use permits, impact fees, etc. Counties and cities are addressed separately in Title 31 (Counties and County Law) and Title 50 (Municipal Corporations); however, these Titles are mostly silent on planning and zoning. The only outlier seems to be the procedures for the vacation of plats, which is located within Title 50, but applies to both cities and counties.[39] A city council or Board of County Commissioners may elect to exercise all of the powers authorized in LLUPA, but they also have the discretion to distribute some of this authority by forming a planning and zoning commission, or even separate planning and zoning commissions.

A "subdivision" is statutorily defined as "[a] tract of land divided into five (5) or more lots, parcels, or sites for the purpose of sale or building development."[40] This definition is not found within LLUPA, but within the procedures for the vacation of plats. The code does allow cities and counties to adopt their own definition in lieu of this one, and many have done so. These local ordinances sometimes distinguish between "major" and "minor" subdivisions usually based on the number of lots, and there is often a short plat procedure for those subdivisions that constitute as "minor" subdivisions. Under LLUPA, cities and counties also have the discretionary authority to adopt procedures for the processing of PUDs. 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.

Some argue that a strict reading of LLUPA indicates that a hearing is not required to approve a subdivision. However, it is clear that LLUPA does require at least one hearing

---

[36] That said, Article II of the Idaho Constitution does expressly grant police powers to any incorporated city or county to make and enforce local police, sanitary, and other regulations not in conflict with its charter or the general laws of the state.

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

[38] Idaho Code §§ 67-6501 - 67-6537.

[39] Idaho Code §§ 50-1301 - 50-1329.

[40] Idaho Code § 50-1301(16). This statute further defined an agricultural subdivision as "[a] bona fide division or partition of agricultural land for agricultural purposes shall mean the division of land into lots, all of which are five (5) acres or larger, and maintained as agricultural lands."

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. Most Idaho cities and counties have chosen a bifurcated process, in which all applications are first reviewed in a public hearing before a planning and zoning commission and then go to hearing before the city council or Board of County Commissioners for final approvals.

LLUPA expressly authorizes development agreements, but they are not mandatory.[41] Interestingly, 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. Entering into a development agreement is expressly considered consent to be re-zoned upon failure to complete the conditions of final approval. This revocation statute appears to only apply to written commitments concerning conditional re-zones. LLUPA allows PUD procedures to be adopted as a part of, or separate from, the zoning ordinances, which makes it unclear whether a PUD is considered a re-zone for purposes of the revocation statute. In many cities and counties, PUD ordinances have been adopted independently of zoning ordinances. This begs the question, if a PUD is not a function of zoning, is it then a creature of contract? Certain Idaho cities and counties have also adopted ordinances expressly permitting the revocation of development entitlements for failure to complete the conditions of approval.

Detailed statutory language vesting a city or county with the authority to vacate, amend, or replace a plat can be found in Title 50 Chapter 13.[42] The procedure for vacating a plat requires the request to vacate be processed by the city council or Board of County Commissioners. Before a subdivision or PUD can be re-platted in Idaho, the plat must first be vacated if it contains any public roads or public rights-of-way. The authority to vacate roads or rights of way is vested in the city council or Board of County Commissioners. The re-platting process will necessarily require the authorization and consent of each landowner whose property boundaries will be altered. If the plat to be vacated is inside or within one mile of the boundaries of a city, the application must petition the city council to vacate the plat. To vacate plats beyond one mile from city boundaries, the application is processed and approved/denied by the Board of County Commissioners.[43] If any opposition is made to the application (the code is not clear, but the language suggests that in fact, city plats would be included here), the application for vacation must be heard by the Board of County Commissioners. There is no statutory specificity as to who has standing to raise such an objection; however, if the petitioner obtains the petition of 2/3 of the property holders of lawful age in the town or 2/3 of the tracts in the platted and subdivided acreage, then the board of county commissioners

[41] Idaho Code § 67-6511A.

[42] Idaho Code §§ 50-1301 - 50-1329.

[43] Idaho Code § 50-1306A.

may proceed to hear and determine the application to vacate.[44] If the petition is unable to obtain the objectors consent or obtain the requisite number of signatures from stakeholders, then the application is presumably not able to be determined upon. While the code is silent on this possibility, it tends to reason that a few objectors could potentially stall or derail a vacation application.

In general, 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.[45] Thus, some counties and cities have adopted their own vesting ordinances. Most cities and counties in Idaho 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 to the satisfaction of the local governing body. Only then may the final plat be recorded, and lot sales may proceed. In a few cities and counties, the vesting system is reversed: the final plat is approved by the governing body and recorded soon thereafter. At that time, the developer immediately obtains the right to pre-sell lots and begins the construction of infrastructure. While cities and counties are free to adopt either type of vesting system, there is still the statutory requirement that no lots may be sold until the plat has been duly recorded.

Montana: Zoning Optional

The enabling authority for land use regulation in Montana stands in contrast to Idaho's Dillon's Rule. Article XI, Section 6, of the Montana constitution provides that a local government unit with self-government powers may exercise any power not prohibited by the constitution, law, or charter. Local governments may provide any services or perform any functions not expressly prohibited by the Montana constitution, state law, or its charter.[46]

Almost all land use regulations are covered under Title 76 (Land Resources and Use) of the Montana Code, except for the vacation of plats, which is found under Title 7 (Local Government).[47] There is separate treatment of city and county planning and zoning regulations within Title 76. The formation of county planning boards, zoning districts, or zoning commissions is discretionary except under certain conditions. For example, the creation of a planning board is required for the development of a county, city or town growth policy. While formation of planning boards is mostly discretionary, Montana's statutes clearly contemplate that some form of local government authority, such as a planning board will be formed in each jurisdiction.

One of the chief tasks of a county planning board can be the development of a growth policy. If adopted by a local governing body, a growth policy can provide the rationale

[44] Idaho Code 50-1319.

[45] Idaho Code § 50-1320.

[46] Montana Code Annotated §§ 7-1-101 and 7-1-102.

[47] The procedures for the vacation of plants are mainly city-specific but there is treatment of old townsites and unincorporated areas. Montana Code Annotated §§ 7-5-2501 - 7-5-2504.

and legal basis for a zoning code. By statute, counties may choose between two different approaches to zoning, known simply as "Part 1" and "Part 2" zoning, due to their location in the state code.[48] Part 1 zoning allows the Board of County Commissioners to create a planning and zoning district and appoint a seven-member planning and zoning commission upon petition of 60% of the affected real property owners in the proposed district. The commission's duties include adoption of a "development pattern" for the physical and economic development of the planning and zoning district. Under the Part 1 approach, county zoning regulations may be adopted without a growth policy in place. By contrast, a growth policy is a prerequisite for the Part 2 approach whereby the Board of County Commissioners is authorized to adopt zoning regulations within their jurisdictional boundaries so long as they are developed in "accordance" with the county's growth policy. While "in accordance" is an arguably loose and vague term suggesting there is great leeway for county boards, it is important to note, that Part 2 zoning can be very difficult to adopt due to the protest provisions found in this particular statute.[49]

When compared to counties, cities and towns are given a more specific directive to regulate and zone for the purpose of promoting health, safety, morals, or the general welfare of the community. That said, the adoption of zoning in cities and towns is still discretionary. A growth policy is a prerequisite for a city to adopt zoning, and any adopted zoning must be made in accordance with the city or town's growth policy. Cities and towns are granted extraterritorial jurisdiction. They may extend the application of zoning or subdivision regulations beyond the limits of a city or town at a distance determined by statute, so long as (1) the city or town has adopted a growth policy for the area in question; and (2) the county does not have zoning or subdivision regulations in place for subject area. Since subdivision regulations are required under the statute for every county, city and town, this essentially means that the Board of County Commissioners would need to approve the extension of any municipal zoning and be willing to amend the county subdivision regulations and zoning (if applicable) to exclude the subject area.

Title 76, Chapter 3, of the Montana Subdivision and Platting Act, governs the local regulation of subdivisions.[50] "Subdivisions" for the purpose of this Act are defined as

---

[48] Montana Code Annotated §§ 76-2-101 through 76-2-117 (Part 1 Zoning); §§ 76-2-201 through 76-2-228 (Part 2 Zoning).

[49] Montana Code Annotated § 76-2-205. This includes a statutory 30-day protest period which runs after first publication of notice to propose zoning regulations. This section further provides that if 40% of the real property owners within the district whose names appear on the last-completed assessment roll or if real property owners representing 50% of the titled property ownership whose property is taxed for agricultural purposes have protested the establishment of the district or adoption of the regulations, "the Board of County Commissioners may not adopt the resolution, and a further zoning resolution may not be proposed for the district for a period of one year." (Note that the statute expressly uses the permissive word "may" instead of "shall" which makes it unclear if the Board of County Commissioners retains any leeway to still adopt the zoning regulations despite protests from property owners.)

[50] Montana Code Annotated §§ 76-3-101 - 76-3-625.

divisions of land, which create one or more parcels less than 160 acres in size.[51] Family gifts of land are exempted, but must still comply with all the applicable survey and zoning requirements. The Act requires the governing body of every county, city, and town to adopt and provide for the enforcement and administration of subdivision regulations, and then outlines very detailed minimum provisions for these regulations, including drainage standards, open space management, reservation of water rights, environmental assessments, subdivision review criteria, etc. Local governments are further authorized to adopt more stringent regulations than state law. In certain situations, these statutory subdivision regulations outlined in the Subdivision and Platting Act (public hearing requirements, environmental assessments, subdivision review criteria, etc.) can be exempted for subdivisions located entirely inside or adjacent to an incorporated city or town where the local governing body has adopted a proper growth policy and zoning as described in the paragraph above.[52]

Title 76, Chapter 4, governs the state regulation of subdivisions. At the state level, the focus is mainly sanitation in subdivisions, meaning the state regulation of laws controlling water supply, sewage disposal, and solid waste disposal. For purposes of this particular chapter, a "subdivision" is defined as, "only those parcels of less than 20 acres which have been created by a division of land, and the plat thereof shall show all such parcels, whether contiguous or not."[53] The state is statutorily charged with adopting rules, standards, and enforcement for sanitation disposal and facilities, but that is the extent of the state's charge. Other than state regulation of waste and water facilities, all other statutory regulation of subdivisions is focused at the local level.

New Mexico: Four Overlapping Sets of Regulations

In New Mexico, there is a separate treatment of cities and counties in the state code. The formation of city and county planning authorities is discretionary, but like most other states where the appointment of such a commission is not mandated, clearly the formation of some type of planning authority was anticipated by the legislature because these commissions are vested with the broad authority, jurisdiction, and duty to enforce and carry out the purpose of New Mexico planning, zoning, and platting regulations. Certain sections of Chapter 3 (Municipalities) are written so as to apply to both cities and counties, and thus, the treatment of planning and zoning matters is addressed summarily in Chapter 4 (Counties).

The adoption of processes and regulations for the subdivision of land is mandatory as is the preparation and adoption of a master development plan for the county or city's entire jurisdiction. Cities are also expressly granted planning, platting, and zoning jurisdiction

[51] Montana Code Annotated § 76-3-103.

[52] Montana Code Annotated § 76-3-616.

[53] Montana Code Annotated § 76-4-103. It should be noted, however, that immediately preceding is Chapter 4's definitions section which includes Montana Code Annotated § 76-4-102(16): *"subdivision" means a division of land or land so divided that creates one or more parcels containing less than 20 acres, exclusive of public roadways.*

beyond their boundaries out to a certain distance, depending on the size of the city and the population of the county.[54] Subdivision applications in these areas beyond the city boundaries are subject to concurrent jurisdiction by both the city and the county, or even another city should the areas overlap. Municipal planning authorities are required to adopt detailed rules and regulations regarding the manner in which the subdivision application is to be processed. By contrast, the Board of County Commissioners must first approve all plats within the jurisdiction of the county before recordation, and the code includes minimum metes and bounds requirements. Both cities and counties are required to adopt "summary" or short-plat procedures for the approval of two lot subdivisions, re-subdivisions where the combination or recombination of portions of previously platted lots does not increase the total number of lots, or subdivisions of two or more parcels of land in areas zoned for industrial use.[55]

While both cities and counties are given broad authority to zone within their respective jurisdictions with approval from the appropriate governing bodies, in limited situations cities with populations of less than 1,500 must put any change to their zoning or land uses to a majority vote of the people in an election. In addition, any portion of the extraterritorial zoning area beyond a municipality's boundaries shall be zoned by mutual agreement with the county whose lands abut the city. In the absence of a mutual agreement, a petition requesting the zoning of the extraterritorial zoning area must be signed by 25 percent of the qualified electors residing in the extraterritorial zoning area (and within the same county). Cities and counties are also authorized to form joint planning and zoning authorities upon mutual agreement. Municipalities have broad authority to regulate the construction, repair, conversion, etc. of all buildings and structures so they conform to their zoning. Counties have similar enforcement authority, but it is statutorily limited where inconsistent with statutory or constitutional limitations on counties, such as in the areas where cities have extraterritorial jurisdiction.[56]

Plats within a municipality's jurisdiction may be vacated with written approval from landowners as well as from the municipal planning authority. One of the only criteria for review is that the appropriate authority must consider if the vacation or even partial vacation of a plat will adversely affect the interests or rights of persons in contiguous territory or within the subdivision being vacated. By statute, a $100.00 misdemeanor fine is imposed on anyone who transfers, sells, agrees to sell, or negotiates to sell the land by

---

[54] New Mexico Statutes §§ 3-19-5 and 3-20-9. See also Appendix II for details of extraterritorial jurisdiction.

[55] New Mexico Statutes § 3-20-8.

[56] *See also,* New Mexico Statutes § 4-37-1. All counties are granted the same powers that are granted municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in this grant of powers to the counties are those powers necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort, and convenience of any county or its inhabitants. The Board of County Commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties.

reference to or exhibition of or by other use of a plat or subdivision of the land before the plat has been properly approved and recorded. This fine is levied for every day of the offense, so continuing violations add up quickly.

Separate from both the city and county Chapters in the state code is Chapter 47, which contains both the New Mexico Land Subdivision Act[57] and the New Mexico Subdivision Act.[58] The Land Act briefly outlines the basic procedural requirements for county subdivisions, which are similar to those already contained in the more detailed planning and zoning statutes found in Chapter 3. Similar to Arizona's disclosure requirements, the Land Act also requires full written disclosure of any and all conditions that may affect the use or occupancy of the land prior to the lease or sale of a lot/parcel of subdivided land.[59] There are also extensive advertising standards and prohibitions on wording, phrasing, illustrations, and other references, which may be misleading in real estate promotional materials.[60] These fraud provisions go beyond protecting the sale of land in New Mexico by also applying to all in-state advertisements for out-of-state real estate developments as well.

The Subdivision Act contains the bulk of the statutory procedural requirements for county (not city) subdivisions. The Act contains many of the same provisions already included in the municipal planning and zoning regulations found in Chapter 3, such as the prohibition on lot sales prior to approval/recordation and the basic procedures for vacating a plat. Also included are the same fraud and disclosure requirements found in the Land Act, but the Subdivision Act goes one step further and gives purchasers or lessees a six-month right of inspection and rescission for a full refund.[61] Interestingly, the Subdivision Act also includes an abbreviated process for merging contiguous lots without a public hearing or approval from the Board of County Commissioners. Similar to Chapter 3, the Subdivision Act mandates adoption of county subdivision regulations, but the list of requirements to be included is extensive, including water consumption, protection of cultural properties, fencing, etc. The minimum requirements for preliminary plat "summary review" are even more extensive and include seeking comments from local tribes, school districts, and the state engineer.[62] The state engineer plays a critical role in determining whether the amount of water permitted is sufficient in quantity to fulfill the maximum annual water requirements for the development. The Subdivision Act mandates interagency consultation before a subdivision application is approved.

---

[57] New Mexico Statutes §§ 47-5-1 to 47-5-8.

[58] New Mexico Statutes §§ 47-6-1 to 47-6-29.

[59] New Mexico Statutes § 47-5-4. Establishes written disclosure requirements prior to sale, including water availability, road maintenance obligations, existing blanket encumbrances, etc. *See* Appendix X for the full text of this statute.

[60] New Mexico Statutes § 47-5-5. This statute established advertising standards for real estate sales publications. *See* Appendix X for the full text of this statute.

[61] New Mexico Statutes § 47-6-23.

[62] New Mexico Statutes § 47-6-11.

Preliminary plat approvals will expire within 24 month unless a timely application is submitted for a one-time extension of up to 12 additional months. Because the subdivision process is so front-loaded towards the preliminary plat stage, the Board of County Commissioners cannot deny a final plat if the preliminary plat was previously approved and is in substantial compliance with the previously approved preliminary plat.

What truly sets the Subdivision Act apart from other states of the Intermountain West is the statutory requirement for a schedule of compliance and the concurrent right of the Board of County Commissioners to suspend or revoke approval of the unsold/unconveyed portions of a plat if the subdivider has not met the schedule of compliance for the development.[63] These two statutes have often come into play as New Mexico has the most developed case law on the authority of government entities to revoke or vacate a development entitlement.

Because municipalities are authorized to adopt their own subdivision ordinances, many have done so, and with great variability. Some of the state's most populous cities such as Albuquerque, Santa Fe, and Las Cruces have adopted their own ordinances and development processes. Thus, while there is county-by-county consistency with the New Mexico Subdivision Act, there can be great regional variability between cities that have created their own regulatory systems.

New Mexico's numerous statutory definitions of a "subdivision" must also be mentioned. Subdivisions within the territorial limits of cities are simply defined as the division of land into two or more parcels. From there, the definitions become increasingly complicated. For a municipal planning authority exercising extraterritorial jurisdiction, a "subdivision" refers to the division of land into two or more parcels of less than five acres in any on calendar year. For purposes of the New Mexico Subdivision Act, there are five categories of subdivisions, and there are additional exemptions for divisions of land creating parcels no smaller than 140 acres. See Appendix III for detailed descriptions of New Mexico's various definitions of "subdivided lands" and "subdivisions."

Nevada: The Regional Approach

Titles 20 and 21 of the Nevada code outline the regulations governing the formation and structure of cities, counties, and townships. Noticeably absent in these Titles is the mention of any specific land use mandates or plan duties. The city regulations focus more on economic development, public works, and transportation plans, while the county laws focus primarily on the duties of elected and appointed officials. The only mention of planning at all is a city's discretionary option of forming a city planning commission.[64]

[63] New Mexico Statutes §§ 47-6-24 and 47-6-25. The fact that this power to revoke or suspend entitlements is expressly established by state statute is unique; however, the substance of these provisions is not; many local governments have adopted ordinances establishing similar authority to suspend entitlements for failure to perform.

[64] Also unique to Nevada is the existence of several very large unincorporated towns, such as Enterprise (pop. 150,473) and Sunrise Manor (pop. 179,808). Sections 269.010 – 269-652 of the

This total absence of any planning directives at the county or city level, coupled with the lengthy provisions in Title 22 (Cooperative Agreements and Regional Planning), shows us that Nevada contemplates land use at a regional level and encourages cooperative planning.

The Nevada Interlocal Cooperation Act[65] permits local governments to make the most efficient use of their powers by enabling them to cooperate with other local governments on a basis of mutual advantage. This enables the provision of services and facilities in whatever manner and forms of governmental organization which best accord with geographic, economic, population and other factors influencing the needs and development of local communities. Regional Planning Districts work with, and on behalf of, governmental units to develop plans or implement programs to address the economic, social, physical and governmental concerns of each region of the state. Any combination of counties and cities representing a majority of the population of the region for which a district is proposed may petition the Governor by formal resolution setting forth their reasons for establishing a regional development district. The only geographic limitation is that the proposed district must consist of two or more contiguous counties. The creation of a regional development district does not affect the right of counties or cities to conduct local or sub-regional planning. Interestingly, development agreements are specifically contemplated by statute.[66] While they are not mandatory in the entitlement process, and the requirements and limitations are quite loose, there is a 15-year time limit imposed on all extensions of time in all development agreements.

Within Title 22, planning duties are then divided up between counties where the population is greater than 400,000, populations between 100,000 to 400,000, and populations of less than 100,000 residents. In counties with a population of greater than 400,000 (primarily the counties incorporating Las Vegas and Reno) the establishment of a regional planning coalition by cooperative agreement is mandatory. Certain public entities (governing bodies, regional agencies, state agencies or public utilities that are located in whole or in part within the region) must submit plans to the regional planning agency for review to ensure consistency of land use plans and decisions with the comprehensive regional policy plan. These public entities are prohibited from adopting or amending their plans unless the regional planning coalition has been given the opportunity to make recommendations. This includes detailed procedures to plan for infrastructure in undeveloped areas that are likely to become developed.

In counties with populations between 100,000 and 400,000, the legislature directly established regional planning commissions in each county meeting this size requirement

---

Nevada Code outline the laws governing these unincorporated towns, and they are likewise silent on any planning duties or other forms of land use mandates.

[65] Nevada Revised Statutes §§ 277.080 to 277.180.

[66] Nevada Revised Statutes § 278.0201 Agreement with governing body concerning development of land: Manner and contents; extension of period for commencement of construction under certain circumstances; etc.

in order to ensure that comprehensive planning will be carried out with respect to population, conservation, land use and transportation, public facilities and services, annexation and intergovernmental coordination. These regional planning commissions must develop a 20-year comprehensive regional plan for the development and growth within their jurisdictional region.

In smaller counties of less than 100,000 residents, regional planning commissions may be formed at the discretion of the Board of County Commissioners. In cities and counties with smaller populations, other mandatory planning strictures also kick in at this time. The governing body of each city whose population is 25,000 or more, or of each county whose population is 40,000 or more, must create a planning commission consisting of seven members. This mandate to form a planning commission is independent of the local governments' discretion to also form a regional planning commission. Cities whose population is less than 25,000 and counties whose populations are less than 40,000 have the discretion to create a planning commission of seven members. If they determine that the creation of a planning commission is unnecessary or inadvisable, the governing body may, in lieu of creating a planning commission, perform all the functions and have all of the powers which would otherwise be granted to and be performed by the planning commission.

The specific processes governing divisions of land are also found within the Regional Planning Title of Nevada's code, but they are independent of the regional planning statutes.[67] Steps in the general subdivision process include submission of a "tentative map" to be reviewed by the planning commission, state agencies, district boards of health, general improvement districts, irrigation districts, and also the cities if the proposed development is within one mile of city boundary. The time limit for taking action on a tentative map is described in the development agreement statute, but it may be extended by mutual agreement of the subdivider and governing body. If no timely action is taken, the tentative map is deemed approved. Final maps are the second phase of approvals; they are what eventually get recorded.[68]

Nevada has separate procedures for division of land into large parcels. For these purposes, "large" is defined as one-sixteenth of a section as described by a government land office survey or 40 acres in area, including roads and easements. Governing bodies may elect to define "large" as one sixty-fourth of a section as described by a government land office survey or 10 acres in area, including roads and easements. The process is somewhat abbreviated as the tentative plat requirements are also waived for "large" parcels. Furthermore, parcels over 640 acres are totally exempt from these subdivision requirements.[69]

---

[67] Processes for divisions of land can be found in Nevada Revised Statutes §§ 278.320 -278.4965.

[68] For purposes of divisions of land in Nevada, the terms "map" and "mapping" are used in place of "plat" and "platting."

[69] Nevada Revised Statutes §§ 278.471 - 278.4725.

Just as large parcels may easily be subdivided, they can also easily be reverted via a process that is unique to Nevada, known as reversion to acreage.[70] The process is simple, can be accomplished quickly, and both large and small parcels are eligible. Survey maps of the parcels to be reverted are submitted to the planning commission (or other authorized person), and within 30 days the planning commission makes a decision. The typical notice and hearing requirements do not apply. The new map is then recorded in the office of the county recorder. Contiguous large parcels can also be merged under these procedures.[71] In recent years, reversion to acreage has been used to revert smaller residential subdivisions in the Las Vegas Valley to either be re-subdivided into a product that better meets market demand, or resold as a large parcel.

There are also many detailed statutory procedures for the correction, modification, or vacation of plats that are unique to Nevada. If a city plat is to be corrected or amended, the application to vacate is commenced as an action in the District Court of Nevada with the city listed as the plaintiff. The presiding judge issues findings and conclusions in the vacation decree; there are statutory procedures for objections by affected persons and appeals. There are separate processes for professional surveyors or the planning commission to request a correction or amendment to a recorded subdivision plat, record of survey, parcel map, map of division into large parcels or reversionary map.[72] To vacate a portion of a city's plat, *any owner* of platted land in an incorporated city may make application in writing to the city council to vacate a portion of the plat pursuant to the typical publication, notice, and hearing requirements.[73] However, *any person* claiming material injury from the city council's order of vacation may commence an action in the District Court of Nevada within 60 days to set aside the order. In addition, Nevada's Planning & Zoning Chapter authorizes what is known as the 10% rule of deviation, enabling local governments to adopt an ordinance authorizing the director of planning or another person or agency to grant a deviation of less than 10% from requirements for land use established within a zoning district without conducting a hearing so long as the applicant obtains written consent of the owner of any real property that would be affected by the deviation. This 10% exemption could potentially be used to give a little bit of creative leeway to a landowner seeking to reconfigure or amend a subdivision plat.[74]

Planned Unit Developments are not contemplated within the Cooperative Planning Title, but are included in their own separate Chapter.[75] Typically, PUDs are offered as a

---

[70] While reversion to acreage is more common in the East and Midwest, Nevada is the only Intermountain West state with procedures for the reversion to acreage from subdivisions back into larger parcels.

[71] Nevada Revised Statutes § 278.490. Reversion of maps and reversion of division of land to acreage: Procedure and requirements; exemption from certain requirements

[72] Nevada Revised Statutes §§ 278.473 - 278.477.

[73] Nevada Revised Statutes §§ 270.010 - 270.180 (Procedures for the correction and vacation of plats).

[74] Nevada Revised Statutes § 278.319.

[75] Chapter 278A. Planned Development (Nevada Revised Statutes §§ 278A.010 - 278A.590).

flexible rural or urban planning tool that offers private developers an alternative to the typical zoning requirements. Thus, local governments in Nevada have great flexibility in the form, size, and style of the PUD. That said, certain firm statutory requirements, such as at least one parking space per dwelling unit and drainage standards for common driveways, indicates that the legislature contemplated the use of PUDs in more urban settings rather than to encourage rural cluster design.[76]

The legislature must also have envisioned potential complications and conflicts surrounding PUDs necessitating local governments to step in and regulate a private development, as detailed enforcement provisions are included in the PUD chapter in case a PUD is not built or needs to be modified. Cities and counties are expressly vested with authority to modify PUDs, and the code makes no distinction between public and private developments. There is a public benefit link to enforcement or modification of a PUD; it must be done to further the mutual interest of both the residents/owners of the PUD as well as the public's interest in the preservation of the integrity of the plan as finally approved, whether or not these are recorded by plat, covenant, and easement or otherwise.[77] Before a city or county may modify, remove, or release a plan, they must make an affirmative finding following a public hearing that such changes are consistent with the efficient development and preservation of the entire PUD, that the changes will not adversely affect either the enjoyment of land abutting or across the street from the PUD or the public interest, and that such changes are not granted solely to confer a private benefit upon any person. Thus, Nevada's PUD statutes are unique in that they expressly permit local governments to modify private developments, taking into consideration public versus private interests, whether those interests are conveyed by plat, covenant, or easement.

Utah: Twin Sets of Regulations

In general, the enabling land use authority in Utah is divided between statutes governing county regulations and statutes governing municipal regulations. The Municipal Land Use Development and Management Act empowers cities and towns to divide up the land within their boundaries into districts and to zone/regulate land uses therein. The County Land Use Development and Management Act is substantively identical and empowers counties to zone the territory within their boundaries and to regulate land uses therein. Both of these acts were adopted concurrently in 1991 and then extensively revised and re-codified in 2005. Both Acts give broad, nearly identical enabling authority to cities and counties to regulate, zone, and enact all ordinances, resolutions, rules, and other forms of land use controls and development agreements as considered necessary. The formation of a planning commission is discretionary to both; however, the Utah code clearly contemplates that a commission will be formed because of the numerous necessary statutory functions of the commission, such as the formulation of a "general plan," as well as the crafting of zoning and subdivision ordinance recommendations.

[76] Minimum Standards of Design (Nevada Revised Statutes §§ 278A.230 – 278A370).

[77] Nevada Revised Statutes § 278A.30.

Both cities and counties have the discretion to adopt their own regulations for the subdivision of land. However, if a city or county declines to adopt their own regulations, then they may only regulate subdivisions as provided in these two Acts.[78] The basic subdivision requirements in these two Acts are that plats must be recorded when land is subdivided, and there is a long list of minimum statutory requirements which take effect if no local regulations are adopted by the city or county. Sale or transfer of land in a subdivision before a plat has been recorded pursuant to these Acts is prohibited. The city or county may seek to enjoin the sale or transfer of lands in violation of these Acts.[79] The Acts have identical definitions of a subdivision: any land that is divided, re-subdivided or proposed to be divided into two or more lots or parcels for the immediate or future purpose of sale or development. The county Act also allows for a "minor subdivision lot," which is created when an agricultural property of at least 100 contiguous acres splits off a single lot of at least one acre in size located at least 1,000 feet from any other minor subdivision lot on the property.[80]

Both Acts also outline identical procedures for amending subdivision plats. In general, a hearing is not required to vacate, alter, or amend a subdivision plat unless an owner submits a written objection within 10 days of mailed notification, all lot owners have not signed the revised plat, or a hearing is required by local ordinance.[81] Both Acts include one noteworthy exception to the typical platting requirements: cities and counties may elect to approve mets and bounds of subdivisions of less than 10 lots if certain conditions are satisfied in writing by the local authority such as conformance with all applicable land use ordinances and approval by the culinary and sanitary water authorities. These platting exemptions can also include lands used for agricultural purposes as defined by the state tax code.[82]

One detail in both Acts that is unique to the Intermountain West states is the prohibition of separate ownership of common areas on plats. Instead, the ownership must be equally divided amongst the *parcels* (not owners) on the plat. These common areas may be conveyed so long as the owners of at least 75% of the lots give written consent.[83] This means that although each parcel owner has property interest in the common areas, the lands may still be conveyed away without their consent. If a plat with common area is to be vacated and all parcel owners do not sign the revised plat, a public hearing must be heard before the appropriate governing body.[84] Presumably, this 75% rule would kick in again, meaning, if 75% of the lot owners have signed off on the plat, the revisions or vacations are likely to be approved.

---

[78] Utah Code Annotated §§ 17-27a-601 and 10-9a-601.

[79] Utah Code Annotated §§ 17-27a-611 and 10-9a-611.

[80] Utah Code Annotated § 17-27a-605.

[81] Utah Code Annotated §§ 17-27a-608 and 10-9a-608.

[82] Utah Code Annotated §§ 17-27a-605 and 10-9a-605.

[83] Utah Code Annotated §§ 17-27a-606 and 10-9a-606.

[84] Utah Code Annotated §§ 17-27a-608 and 10-9a-608.

Wyoming: Paper vs. Reality

On paper, the Wyoming legislature gives a clear directive towards coordinated local and state level planning. At first glance through the state's code, the Wyoming Land Use Planning Act is the most prominent legislation, mandating the formation of a state land use commission for the purpose of guiding land use planning throughout Wyoming. [85] The commission's duties are to include statewide land use goals, policies, and guidelines, adopting a state land use plan, identifying critical areas, and assisting local governments in the planning for the development and regulation in the areas determined to be of "critical or more than local concern." The Act further requires all local governments to develop a local land use plan that is consistent with the state's guidelines and be subject to review and approval by the commission. Cities and counties are also required to coordinate plans under this Act.

While on paper the Land Use Planning Act appears to provide a vehicle for creative, coordinated planning solutions, the reality is quite different. In 1979, the Wyoming legislature defunded the commission, rendering its jurisdiction meaningless.[86] Additionally, the legislature has not funded the Land Use Planning Act since 1982. Thus, while the Act has never been repealed, its provisions have been effectively deemed inoperative and unenforceable.[87] In 2009, the Sonoran Institute sponsored a statewide survey of Wyoming professional planners and land use attorneys which revealed the pangs of a lack of joint planning in actual practice. There was virtually unanimous agreement amongst those surveyed that the Wyoming legislature should require cities and counties to plan together, particularly in the fringe areas surrounding the cities.[88] Some planners even commented that they would like to see the land use commission resurrected.

Still in effect are the more specific planning and zoning duties of cities and counties which are broken out into Titles 15 (cities) and 18 (counties) of the Wyoming Code. Title 15 governs cities and towns. At the city level, the planning and zoning requirements are largely procedural, and the formation of a planning commission is discretionary. That

---

[85] Wyoming Statutes Annotated §§ 9-8-1010 to 9-8-302.

[86] Schneebeck, Richard, *The Participation in Federal Policy Making for the Yellowstone Ecosystem: A Meaningful Solution, or Business as Usual?* University of Wyoming Land and Water Law Review, 1986. *See also,* Memorandum from Governor Herschler to Joint Appropriations Committee, 45th Legislature, January 1, 1980, at 1.

[87] Brown, Drew, & Massey LLP, *Wyoming Law Digest Reviser,* 2006.

[88] Final Report, Phase One – A Survey of Wyoming Planners Concerning Wyoming's Planning Statutes, Sonoran Institute (2009). In 2009, the Partnership for Wyoming's Future, a project of the Sonoran Institute, conducted a survey of processional planners and land use attorneys in Wyoming to determine changes they would recommend to Wyoming's planning enabling statutes. The survey was designed in consultation with the Wyoming Association of Municipalities, the Wyoming County Commissioners Association, and the Wyoming Planning Association.

said, master community planning is a mandatory duty, which must include "careful and comprehensive surveys and studies of the existing conditions and probable future growth of the municipality and its environs."[89] Thus, like Utah and Colorado, the Wyoming code clearly contemplates that some type of planning commission will be formed to carry out these mandatory duties. Separate treatment is given to these municipal planning and zoning duties. The planning duties are envisioned as the responsibility of the planning commission, whereas zoning is authorized to local governing bodies. A zoning commission must be appointed to draft recommendations on the boundaries of the various zoning districts that are local government's statutory duty to form. If a city planning commission already exists, it may be appointed to act as this zoning commission. However, Wyoming does allow for limited municipal zoning via direct legislation. If there is ever a protest against zoning district boundaries that is signed by the owners of (20% or more of the area of the lots included in the proposed boundary change, or of those immediately adjacent within a distance of 140 feet, the change is not effective except upon the affirmative vote of three-fourths (3/4) of all the members of the governing body.

Title 18 governs counties and unincorporated territories. By definition, the word "unincorporated" specifically refers to lands that would typically be included in a city's area of impact, thus giving specific jurisdiction to the county where other states would more commonly require cooperative planning with the cities. The Board of County Commissioners has the authority to provide for the physical development of these unincorporated territories and may zone all or any part of the unincorporated lands surrounding the cities. Because counties are vested with authority over these would-be areas of impact, which can extend up to three miles from a city's boundaries, they wield significant influence over a city's ability to plan and centralize commercial uses.[90]

Title 18 also mandates the appointment of a county planning commission, whose lengthy statutory planning duties include recommendations on zoning districts. Similar to the cities, the organization and establishment of any county zoning district is an election question, which shall be subject to majority election by the residents in the proposed district.[91] In general, the Board of County Commissioners is given broad authority to regulate the location of buildings and structures as well as uses and occupancy of land within their jurisdiction. In an unusually heavy-handed approach in what is typically seen as a pro-property rights state, the Wyoming code goes so far as to expressly prohibit the erection, construction, reconstruction, enlargement, change, maintenance, or use of any building or land within any area included in a zoning resolution without first obtaining a

[89] Wyoming Statutes Annotated § 15-1-504.

[90] When Title 18 refers to lands situated outside of cities and towns or any "territories" or "areas," there are three potential definitions: (1) lands which are one mile from the limits of a town or city having a population of 2,000 or less, (2) two miles from the limits of a town or city having a population between 2,000 and 3,000, and (3) three miles from the limits of a town or city having a population of 3,000 or over. Wyoming Statutes Annotated § 18-5-101.

[91] Wyoming Statutes Annotated § 18-5-104.

zoning certificate from the Board of County Commissioners.[92] However, one very large, noteworthy limit to the zoning authority of counties is the explicit statutory limitation that no county zoning resolution or plan may prevent any use reasonably necessary to the extraction or production of mineral resources.[93] Given the size, scale, impacts, and growing diversity of forms and processes of natural resource extraction, this is a significant loophole in a county's zoning authority.

Wyoming's county regulations also include the Wyoming Real Estate Subdivision Act, which addresses the minimum (very lengthy, very detailed) statutory requirements for subdivision permits[94] and large acreage subdivision permits. There are exemptions to the Subdivision Act that are reserved for single gifts or sales to immediate family members. Some argue these family exemptions have been aggressively exploited and should be repealed. In an effort to curtail abuse, some county commissions have adopted requirements regarding the documentation of eligibility, use, and implementation of these family exemptions.[95] Large agricultural parcels (>35 acres) and cluster developments are also exempt, leaving another significant regulatory loophole. The county-level regulations do enable and clearly encourage the adoption of a separate process for the administration of cluster development permits, which could be structured as an incentivized process.

The statutory definition of a "subdivision is no simple matter in Wyoming. With respect to county planning, a "subdivision" means the creation or division of a lot, tract, parcel, or other unit of land for the immediate or future purpose of sale, building, development or redevelopment, for residential, recreational, industrial, commercial or public uses.[96] Counties are permitted to adopt abbreviated procedures for administrative approval of large acreage subdivisions, which are statutorily defined as no more than 10 parcels between 35 and 140 acres.[97] Also, the minimum requirements for the issuance of a

---

[92] Wyoming Statutes Annotated § 18-5-203.

[93] Wyoming Statutes Annotated § 18-5-201, "[N]o zoning resolution or plan shall prevent any use or occupancy reasonably necessary to the extraction or production of the mineral resources in or under any lands subject thereto."

[94] Wyoming Statutes Annotated §§ 18-5-301 to 18-5-318. Provisions include minimum statutory requirements for all subdivision permits, investigatory and enforcement powers, penalties for false statements or misrepresentations, and minimum requirements for large acreage subdivision permits.

[95] Wyoming Statutes Annotated § 18-5-303. *See also,* Teton County Wyoming code §6041, Criteria for Review of Claimed Family Exemption From Provisions of Real Estate Subdivision Act. The intent and purpose of this section of Teton County's code is to provide criteria for eligibility and procedures for implementing the family subdivision exemption to the state Subdivision Act.

[96] Wyoming Statutes Annotated § 18-5-302viii.

[97] Wyoming Statutes Annotated § 18-5-316: "Additionally, any subdivision parcel that is 35 acres in size or greater and is used for agricultural purposes, regardless of whether the parcel is part of a

subdivision permit in the unincorporated portions of the state allows counties to exempt subdivisions creating five or fewer lots from all or part of the mandatory minimum statutory requirements; this is another significant loophole from the regulatory requirements.[98]

With respect to city planning, the definition is simpler. Within the planning jurisdiction of an incorporated city or town, a "subdivision" of land is defined as the division of a tract or parcel of land into three or more parts for immediate or future sale or building development.[99] Thus, simple divisions of land into two parcels are not included in the statutory definition of a city subdivision.

As for the vacation of plats, the Wyoming Constitution Article 3 §27 directs the legislature to pass laws concerning the vacating of road and town plats. Title 34 (Property, Conveyances, and Secured Transactions) includes the very general provisions for the vacation of plats.[100] Little concrete guidance is provided in Title 34 beyond the basics: plats may be vacated provided that such vacating does not abridge or destroy any of the rights and privileges of other proprietors in said plat. However, no plat or portion thereof within the corporate limits of a city or town can be vacated without the approval of the city or town.

General Summary of Each Major Step in the Subdivision Process

While there is state-specific variability in the general subdivision approval and platting process, there are common steps that are followed in most jurisdictions:

1. Adoption of subdivision regulations via the public hearing process. In most states, the adoption of subdivision regulations is mandatory.
    a. Some states merely require that regulations be adopted. (ID)
    b. Other states include such detailed minimum requirements for subdivision regulations, that they almost replace the need to adopt any additional local rules. (AZ, MT, NM, NV, WY)

---

large-acreage subdivision or constitutes a large parcel within a regular subdivision, is not deemed to be part of a platted subdivision for tax purposes." *See also,* Wyoming Statutes Annotated §§ 18-5-18 and 39-13-103.

[98] Wyoming Statutes Annotated § 18-5-306.

[99] Wyoming Statutes Annotated § 15-1-601.

[100] Wyoming Statutes Annotated §§ 34-12-106 – 34-12-111.

    c. The adoption of subdivision regulations in Utah is discretionary. If a city or county declines to adopt their own regulations, then they may only regulate subdivisions as provided in the Utah code.[101]

2. A preliminary or tentative subdivision application, which satisfies the local minimum requirements, is submitted to the city or county for approvals. (ID, MT, NM) Usually these applications are reviewed in a multi-step process wherein firstly, a preliminary plat is approved by the local planning authority.
    a. Some jurisdictions also require a pre-application sketch plan to precede the preliminary plat. More progressive jurisdictions (i.e., City of Boise) have also required a neighborhood charrette prior to preliminary plat.
3. In some states (MT), environmental assessments are required in the preliminary application. Usually, the minimum requirements for water and sanitation are regulated at the state level (MT, NM, AZ, CO) and are required to be a part of the approvals process. Minimum road requirements may also be included in this application process.
    a. In Arizona, areas designated as Active Management Areas (mostly the urban lands around the big cities), developers must show that their subdivision has an assured 100-year water supply before the final plat is recorded and lots are sold.[102]
4. A public hearing is required to consider comment on the application. (NM, CO)
    a. There are limited exemptions to this hearing requirement for certain types of small subdivisions. (MT, AZ)
    b. Some also argue that the Idaho subdivision statute does not require a public hearing for subdivision applications. Thus, many jurisdictions have crafted a hearing requirement into their local ordinances.
    c. In Utah, hearings are not required for new subdivisions.[103]
5. Then a final plat is prepared reflecting the comments and conditions that were attached to the approval of the preliminary plat. States vary on whether the body that approved the preliminary plat needs to approve the final.
    a. Some states require the Board of County Commissioners to review and approve the final plat for applications in the unincorporated areas of the county. (NM)
    b. Other states allow for administrative approval of final plat applications that are exempt from the typical subdivision approvals processes. (AZ)

---

[101] Most cities and counties in Utah have adopted their own subdivision ordinance. In addition to the statutory subdivision regulations, there are also fire, building, sanitation, and other regulations that would concurrently regulate the subdivisions and subdivision improvements.

[102] Arizona Revised Statutes §§ 11-806.01, 32-2101, and 45-402.

[103] This is a recent change from the previous statutes giving local governments the option of approving subdivisions of less than 10 lots without a hearing if certain statutory conditions are satisfied in writing. Likewise, hearings on plat amendments are now only required in limited situations. *See* Utah Code Annotated §§ 10-9-608(1)(b) and 17-27a-608(1)(b).

    c. Some states require city subdivisions also be approved by the Board of County Commissioners or other regional authority. (NV)
6. If approved, subdivision must be formalized in a recorded plat that meets specific statutory requirements for a plat, and it must be recorded in the office of the county recorder. (ID, NM, NV)
7. Any future changes or amendments to the plat must be approved by the appropriate land use authority and recorded in the office of the county recorder. (ID, NM)
8. Some states have specifically prohibited the sale or reservation of lots prior to the recordation of a properly approved plat.[104] (ID, NM, WY)
    a. Arizona prohibits lots sales prior to county certification and state permit authorizing sales.
9. A few states expressly allow entitlements to be revoked upon failure to comply with the schedule of completion for the subdivision (NM)

Statutes Allowing for Vacation or Amendments of Subdivisions and Plats

Most of these eight states have at least some form of a general statute addressing the vacation or modification of plats. Some states like Arizona mandate that cities and counties adopt regulations governing recording, vacating, and amending plats; *however, there is no specific statutory criteria for how these procedures should be implemented*. Other states mandate the specific procedures that must be followed to vacate or amend a plat. For example, Nevada has two sets of statutory procedures for the vacation of either an entire plat or only a portion of the plat. The process for vacating an entire plat must be initiated by the city as an action in the District Court of Nevada with the city listed as a plaintiff. If only a portion of the city's plat is to be vacated, *any owner* of platted land in an incorporated city may make application in writing to the city council to conduct a public hearing on the vacation. So in one procedure it is the district court, which has the authority to vacate the plat an entire plat, but it is the city council's jurisdiction for vacating just a portion of a plat. And yet, Nevada also has a third vacation procedure that is unique among the eight Intermountain West states: a reversion to acreage process for large agricultural parcels. These reversion statutes allow for an owner, or a governing body, to revert any recorded subdivision map into "large" agricultural parcels, although "large" is not defined within the statute.[105] Interestingly, there is no published Nevada case law on this reversion statute; however, this process has been increasingly used to address the vacation of zombie subdivisions in the Las Vegas valley.

[104] *See,* Appendix IV for a comparison of state statutes specifically prohibiting the sale of lots prior to the recordation of a properly approved plat.

[105] Nevada Revised Statutes § 278.490.

Idaho has the most detailed nuts and bolts statutory procedures for the vacation or amendment of plats, including the specific consent requirements from adjoining landowners and an appeals process. While Colorado may be one of the most populous states in the region, and presumably the need for vacating or modifying plats has arisen from time to time, there are no explicit replatting statutes in the Colorado code except for a few provisions on procedures for correcting errors and inconsistencies in plats. That said, Colorado's Planned Unit Development Act (which is applicable to both cities and counties) clearly outlines procedures for subsequent changes to PUDs (which can include plats). Perhaps this distinction for PUDs is due to Colorado's vision of PUDs being more flexible, often-changing, planning tools. Montana statutes seem to only contemplate the vacation of a plat in the context of an abandoned townsite or village. It is hard to imagine effectively applying Montana's statutes to a situation where landowners seek to vacate a plat for a residential development.[106]

Common Steps in the Plat Modification Process

While there is great variety in the form and detail of these statutes, some common procedural themes do emerge. Here are the typical steps in the plat modification process:

1. Sometimes general public notice is required.[107]
2. Most often, specific notice is required to be sent to all landowners within the subdivision plat and also abutters within certain distances of these platted lands. All states provide an opportunity for a hearing.[108]
    a. Nevada outlines detailed procedures for the formalized commencement of city plat vacation proceedings in District Court.[109]
3. Usually, steps are taken to protect all rights of way, unless there is consent to vacate from all adjoining landowners.[110]
4. Some states require written authorization from all landowners within the platted area to be vacated.[111]
    a. In certain states, only property owners who own part of the platted property can petition to vacate a plat.[112]

---

[106] *See,* Appendix V for a comparison of state statutes addressing the amendment or vacation of plats.

[107] Idaho Code § 50-1306A. *See also,* Nevada Revised Statutes §§ 270.160 and 270.040.

[108] Idaho Code § 50-1306A. Idaho requires general notice and then also specific notice to abutters within 300 feet in order to vacate plats in, or within, one mile of the boundaries of any city. *See also,* Utah Code Annotated §§ 10-9a-608 and 17-27a-608.

[109] Nevada Revised Statutes §§ 270.010 to 270.150, *See also,* New Mexico Statutes § 47-6-7.

[110] Idaho Code §§ 50-1315, 50-1321, *See also,* New Mexico Statutes § 3-20-12(A).

[111] Wyoming Statutes Annotated § 34-12-106, *See also,* New Mexico Statutes § 3-20-12(A).

[112] Utah Code Annotated §§ 10-9a-608 and 17-27a-608, *See also,* New Mexico Statutes § 3-20-12(A).

b. The wording of replatting statutes in some states seems to imply that anyone may petition for the vacation of a plat, however, it is unclear as to how successful such an application would be if there was resistance from owners of the platted lands, or from anyone else within the city limits.[113]

5. Usually, some form of land use authority is required to sign off on the vacation or amendment.[114]
6. Some states establish appeals procedures in the event that there is opposition to the application.[115]
7. A new plat, complete with a survey, is required to be recorded in order to clearly establish which parts of the plat were vacated, and which rights of way, easements, and other encumbrances were preserved.[116]

Statutes Requiring that Zoning Be Consistent with Subdivision (or Vice Versa)

While it may seem intuitive that subdivisions must comply with the underlying zoning standards, there is an alternative argument that this may not be the case. In Colorado for example, the zoning and subdivision powers were granted to local government in two separate acts of the legislature, meaning that it is possible to allow for subdivision of land that does not meet the minimum zoning requirements to build a house. This type of "density zoning" was implemented in several Colorado counties (such as Adams, Custer, Pitkin, Morgan, and Rio) as a way to regulate rural sprawl development created by the 35-acre exemption to the state subdivision regulations. In these counties, the subdivision regulations may be exempt, but the zoning regulations require a larger minimum acreage

---

[113] In the absence of any opposition, Idaho Code § 50-1318 requires the Board of County Commissioners to grant within (30 days) any application to vacate a plat. However, in the presence of *any opposition* (the code does not specific opposition by whom), the Board of County Commissioners may proceed to still hear and make a determination on the application only if the petitioner "shall produce to the Board of County Commissioners the petition of two-thirds (2/3) or the property holders of lawful age in said town, or owning two-thirds (2/3) of the tracts in such platted and subdivided acreage." (Idaho Code § 50-1319). Because § 50-1319 allows for a 2/3 petition from all lawful property owners in town, this suggests that anyone in town could potentially submit opposition to a vacation application.

[114] Idaho Code §§ 5-1319 (Board of County Commissioners), 50-1306A (both the Board of County Commissioners and the city council in certain circumstances); New Mexico Statutes § 47-6-7 (Board of County Commissioners); Utah Code Annotated §§ 10-9a-608 and 17-27a-608 (local land use authority); Wyoming Statutes Annotated § 34-12-106 (Board of County Commissioners).

[115] Idaho Code §50-1319; *See also*, Idaho Code §§ 50-1322 and 50-1323. Nevada also has an appeals process; *See,* Nevada Revised Statutes § 270.100 (appeals) and § 270.150 (rights and remedies).

[116] Idaho Code §§ 50-1309 and 50-1312. *See also,* Nevada Revised Statutes §§ 270.020 and 270.160, *See also* New Mexico Statutes § 47-6-7.

than 35 acres in order to build a house. Thus, while a landowner may subdivide their land free from regulation, there is no guarantee that a house can be built on it.[117]

In Montana, zoning conformance is specifically not mentioned in the statutory criteria for subdivision review.[118] That said, in Montana, family land gifts and boundary adjustments are specifically exempt from subdivision regulations but are still subject to the applicable zoning regulations. By contrast, New Mexico specifically requires that a subdivision application must not violate any applicable zoning ordinances. Utah entitles landowners to have their development applications approved if the governing body makes a finding that the proposal complies with the applicable zoning regulations. However, there is no statutory authority in Utah that would restrict the board from approving a subdivision which, in fact, does not comply with the underlying zoning. Conformance with the applicable zoning regulations is most specifically and clearly called out in the Wyoming Code. Both large acreage and standard subdivisions must comply with the zoning requirements. Wyoming goes even further and states that a zoning certificate from the Board of County Commissioners is required before any structures/building shall be erected or constructed on any land within the board's jurisdiction.[119]

Can these consistency requirements be used opportunistically to address zombie subdivisions? For communities saddled with the political and legal challenges of amending undesirable zoning regulations that were put in place by prior administrations, is it possible to incentivize a new form and type of subdivision that is not consistent with the underlying zoning, thus enabling local governments to opt for the carrot over the stick? Can these consistency requirements be used to address obsolete subdivision lots by rendering them un-buildable, as is commonly seen with historic townsite lots that predate zoning regulations? The passage of time may be the real lynchpin here as the implication of a platted lot's viability often fades over time, until *caveat emptor* becomes the norm. Put another way, the unwritten rule may be that lots and parcels which are old enough (like those long and narrow historic townsite lots, or hillside parcels that are common in rural western communities) have simply become too outdated in light of modern zoning to be buildable under current building regulations. Local governments may be able to take steps to speed up this process to obsolescence by amending their building and zoning codes now and even establish service area boundaries depicting the platted lands as beyond the area of service for a particular municipality.

---

[117] Davis, Merry. *County Perspectives: A report of 35-acre subdivision exemption in Colorado.* Colorado Counties, Inc. August, 2006.

[118] Montana Code Annotated § 76-3-608.

[119] *See,* Appendix VI for a summary of state statutes requiring that land subdivision be consistent with the underlying zoning.

Cases Supporting or Invalidating Efforts to Modify Subdivisions

The need to modify or even vacate an obsolete plat is not a new concept; however, the application of this practice may become more common with the volume of so many hastily platted residential developments that now stand incomplete and unfinished. As lending has dried up along with the market demand for many of these speculative projects, there becomes a growing need to "undo" some of these projects that are simply not viable. Certain states, like New Mexico, clearly have the most developed case law on the vacation of plats. In reviewing these cases, it is important to note the distinctions between government action to alter a plat and private action to alter a plat.

Private Action

When subsequent property owners seek to modify a plat or resident owners assert their rights to common areas in the development, these situations give rise to a private right of action. These opinions are a representative summary of private actions to modify platted residential developments.

- *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.,* 77 N.M. 730, 427 P.2d 249 (N.M. 1967)
  Issue: Where a subdivision plat clearly dedicates open space and other public amenities, and such amenities are used to promote property sales within the development, may the developer take unilateral action to subsequently alter the uses of those dedicated areas? **Held:** Where there is a clear dedication on the plat, the lot owners' rights to the dedicated uses on the plat trumps the right of the developer to alter those uses.[120]

- *Knight v. Albuquerque*, 110 N.M. 265, 794 P.2d 739 (N.M. 1990)
  Issue: The developer attempted to circumvent the holding of *Ute Park (supra)* by reserving a right to develop any parcel depicted on the plat in any manner that the developer desired without the need to obtain consent from any subdivision lot owners. However, the plat depicted a golf course and subdivision lots were sold in reference to that plat. The lot owners sued to enjoin the developer from developing anything other than a golf course in the land area depicted on the subdivision plat as a golf course. **Held:** The New Mexico Court of Appeals held that subdivision property owners had private right of action to prevent the golf course denominated on the subdivision plat from being used for other purposes, notwithstanding the developer's specific reservation of right to build hotels, cottages, or other facilities on any tract shown on plat without permission of owners of any subdivision lot. *Ute Park* and other similar cases in New Mexico as well as outside authority from the state of Maine were cited for the proposition that to sell lots on the basis of open space or

[120] *See also*, *Cree Meadows, Inc. v. Palmer,* 68 N.M. 479, 362 P.2d 1007 (N.M. 1961).

other amenities depicted on a plat while reserving the right to alter those uses without the consent of the lot owners is "patently unfair and violative of public policy."

- *Whatley v. Summit County Board of County Commissioners*, 77 P.3d 793 (Colo. App. 2003)
  Issue: The County approved amendments to a PUD (addition of one lot which would allow for a house and several outbuildings) that were applied for by subsequent purchasers of the property without providing notice and hearing to other property owners within the development. At issue was whether the Colorado Planned Unit Development Act required the consent of owners of property within the PUD as to only the initial design of the PUD, but not to any subsequent amendments. **Held:** The Colorado Planned Unit Development Act requires that before county approval of a PUD, all landowners within the proposed PUD must provide written authorization of the initial plat. But, subsequent modification of a PUD only requires that "affected property owners" be given notice and an opportunity to be heard. Their consent is not required. However, in this particular case, the subsequent amendments were declared void based on the fact that proper notice and hearing procedures were not followed.

- *Brumbaugh v. Mikelson Land Co,* 185 P.3d 695 (Wyo. 2008)
  Issue: The original developer recorded a subdivision plat along with covenants and restrictions. Three lots within the development were sold. Then, the remainder of the subdivision was sold to another entity that vacated the portion of the plat they had purchased and annulled the covenants and restrictions except as they pertained to the three lots sold to individual owners. Subsequently, at least part of the vacated section of the former subdivision was incorporated into a new subdivision that also covered adjacent lands. The developer of the new subdivision and the owners of the original three lots requested a declaration of rights with regard to the former lands of the original subdivision and the various rights and easements included in the recording documents. **Held:** The three original lot owners remained subject to the original covenants and restrictions that were in place when they purchased their land. The lot owners also retained the explicit easements for power, sewer, and access that were granted to them on the original plat. However, the remainder of the subdivision was properly vacated, as it was an action taken by the owner of more than two-thirds of the entire development as required by the covenants and restrictions. As a result of that vacation, the former subdivision lands are no longer considered a part of the subdivision and therefore are not entitled to have any representation or say regarding the architectural committee of the original subdivision or any power to amend the covenants and restrictions of the original subdivision.

From these private action suits, we can glean a few rules: State legislation on the modification of plats will determine the rules of procedure. Future restrictions on property uses of common areas are determined by the dedication language on the plat. Easements and rights of way will be preserved where there is clear, unambiguous language on the plat.

Government Action

When government steps in to revoke, terminate, modify, or somehow alter the rights included on the plat, this is a different situation than for private action. New Mexico clearly leads the pack in developing case law on government action to revoke subdivision plats, but this is due to the fact that New Mexico Statutes §§ 47-6-24 and 47-6-25 specifically authorize the vacation of plats by local governments. None of the remaining seven states have adopted such a specific regulation.

- *Parker v. BOCC*, 93 N.M. 641, 603 P.2d 1098 (N.M. 1979)
  Issue: The developer obtained approval for a subdivision plat on the condition that certain road improvements be made within the subdivision within one year. When the developer failed to meet that deadline, the county commissioners suspended approval. The developer posted a performance bond and a new deadline for completion was set forth in a new development agreement. The developer failed to meet that new deadline, at which point the county revoked plat approval pursuant to the county's regulations and the agreements entered into with the developer. The developer challenged the revocation claiming that the commissioners lacked the power to revoke the plat and that doing so violated the developers due process rights. **Held:** In addition to explicit provisions in the state code authorizing county commissioners to suspend or revoke plat approvals where a developer fails to meet specific conditions imposed by the commissioners, the state code also authorizes the Board of County Commissioners in each county to adopt regulations "necessary to ensure that development is well planned." On those grounds, the New Mexico Supreme Court held that the county regulations authorizing the suspension or revocation of plat approval where a developer fails to fulfill the conditions of approval were valid, and thus the developer had no cause of action.

- *Roe v. BOCC of Campbell County,* 997 P.2d 1021 (Wyo., 2000)
  Issue: A land development company proposed to re-subdivide portions of two residential neighborhood plats into seven large acreage lots. Six of those lots would be utilized for livestock grazing operations while the remaining lot would be retained for use as a county park. Additional land swaps were made with the county to meet the park-size requirements for the area and to better accommodate county airport operations. The Board of County Commissioners then approved the re-subdivision. At that point, the plaintiffs in this case sought judicial review of the approval. **Held:** The plaintiffs lacked standing to seek judicial review. It is unclear from the discussion in the decision what exactly the Roes' relation was to property to be re-subdivided, but if they owned a property interest in neighborhood plats, this finding of no standing is probative. However, it is clear from the discussion of the court that the Plaintiffs were unable to articulate any injury that they would incur as a result of the re-subdivision.

- *Ahearn v. Town of Wheatland*, 39 P.3d 409 (Wyo., 2002)
  Issue: A tract of approximately five acres of land was subdivided and incorporated into the Town of Wheatland. Roughly one acre of that original subdivision was subsequently sold. The owner of the other four acres later utilized the Town of

Wheatland's expedited replatting process, adopted by ordinance, to re-subdivide the ground into three new lots. The owner of the one-acre lot complained that state statutes required his consent to the re-subdivision. **Held:** The town's expedited replatting process was valid, and as a result the owner of the one-acre lot whose land was a part of the original subdivision, but merely adjacent to the re-subdivided parcel, was only entitled to notice and hearing. The consent of the adjacent landowner was not required to proceed. *One critical note: This was a town, so the only applicable law regarding the necessary procedures for subdividing property are the brief requirements in W.C. § 15-1-501*

- *Miller v. SF County BOCC*, 144 N.M. 841, 192 P.3d 1218 (N.M. App., 2008)
  Issues: In 1986, property in Sante Fe County, NM received final approval for a subdivision plat, subject to conditions, in 1986. The landowner never recorded the final plat and never fulfilled the conditions, which had provided the basis for the approval of the final plat. No development took place at the time, and the property was sold to two people. Those two people sought and received a lot split from the county in 1988, creating "A" and "B" sections of the unrecorded and unfulfilled 1986 plat. In 1994, the owner of the B section sought and received conditional approval to develop a scaled-down version of the original 1986 plat on just the B section, which had the effect of maintaining a level of density consistent with the 1986 plat. The approval was made on the condition that the original obligations of the 1986 plat approval be met along with additional new conditions. In 1996, the owner of the A section received final approval for and recorded a plat that effectively doubled the density of the 1986 plat. No further action was taken to develop the A section after the plat was recorded. Later in 1996, a water crisis forced a development moratorium in the county and subsequent development regulations were imposed that significantly limited development within the service area of the local water utility. In 2001, the county sent the owner of the A section a letter setting forth three bases for rescinding county recognition of the 1986 plat. That individual then sold the A section in 2003 "as-is" with reference to the county's actions. In 2004, the new owner was denied approval for a scaled-back plat that was consistent with the density of the 1986 plat. The property owner appealed that denial and asked for a judicial determination that the 1986 plat retained validity. The court framed the issues on appeal as follows: 1) Whether the 1986 plat approval was extinguished and abandoned by the subsequent property owners as a result of splitting the property and filing new plats; 2) Whether the 1986 plat was subject to revocation for failure to comply with the conditions of approval; and 3) Whether any rights to the plat ever vested, and if not, whether the property would therefore be subject to all current ordinances rather than the ordinances in place in 1986. **Held:** (1) The court did not reach the question of whether the plat approval had been abandoned or extinguished as it was able to reach a dispositive conclusion on the other two issues; (2) The court did find that the county had the authority to revoke the 1986 plat approval for failure to complete the conditions that were terms of its approval. Even without a completion date in the conditional approval, "substantial time" passed without completion, and therefore the county had a right to revoke the approval; (3) The court's primary analysis was devoted to the question of whether the property owner had any vested

rights in the 1986 plat. In New Mexico, in order to establish a vested right to exempt a property from compliance with otherwise applicable land use regulations, the party asserting the vested right must establish (a) the issuance of written approval for the project; and (b) a substantial change in position by the applicant in reasonable reliance upon such approval. In this case, the court declined to determine whether or not the written approval element was met, as the property owner was unable to show that he had made a substantial and reasonable change in position in reliance on the 1986 approval. Simply buying the land was not enough to establish a vested right. With the finding that there was no vested right, the court was able to easily reach the rest of its conclusions, including the determination that the board had the authority to revoke the plat.

From these cases, two general rules emerge: (1) local governments have the authority to revoke plats when the landowner/developer has failed to timely complete the conditions that were terms of the plat's approvals; and (2) at a minimum, lot owners are entitled to notice and hearing on the plat vacation. Standing to challenge the government's action may require a demonstration of actual injury.

Additionally, it is not clear if government revocation of a plat would be upheld if a landowner were unable to timely complete the improvements due to unforeseen circumstances. Is it necessary for local governments to grant at least one reasonable extension of time? Many jurisdictions have used well-drafted development agreements to answer this question, but this is not the case in some communities where development agreements were never employed or were so hastily drafted as to be totally void of any usefulness or clarity. In the New Mexico cases, there is a clear history of the local government granting reasonable extensions of time to landowner/developers before eventually revoking the plat because the developer simply could not (or would not) perform on his obligations. Would this government action to revoke these entitlements be upheld if a hard line was taken and no "second chances" or extensions of time were given to the landowner/developer?

Amending Covenants Codes and Restrictions

There is a separate body of law dealing with private actions to amend the Covenants, Codes, and Restrictions (CCRs) that often accompany the recording of a subdivision. CCRs are most typically private contracts between lot owners within a subdivision and the developer; however, these contracts often address public utilities and infrastructure such as power, sewer, water, pathways, public ingress/egress, etc. These kinds of court decisions have not been added to this paper because they are typically private actions between those parties in privity of contract, which are usually the developer and the landowners within the subdivision. This can create an unusual situation where a local governing body may seek to amend or vacate a plat, but this does not change the contractual obligations in the CCRs that run with the land. What happens if a plan can be amended but not the CCRs recorded with the plat? This body of law may be relevant for guidance as to amendments to CCRs, which may affect the rights of property owners within the development, such as access to community recreation facilities.

Cases Interpreting Vested Rights in the Context of Subdivisions

The question of if and when a property owner acquires a vested right to develop their property can depend on many variables. What does a "vested right" even mean? Does it include the right to sell off parcels or subdivision lots? Can a developer immediately break ground on construction of infrastructure? Is a developer exempt from future changes in land use regulations?

One critical distinction is whether the development is located in an infrastructure-before-recording jurisdiction, meaning a jurisdiction where infrastructure improvements are required to be completed to the satisfaction of the city or county before the final plat may be approved and lot sales may commence. At the other end of the spectrum are recording-first jurisdictions, which require the plat first to be recorded upon approval by the local government, and then, via a development agreement, the developer is under a contractual obligation to complete his or her infrastructure requirements.

Common Themes in Questions of Vested Rights

While there is always state-specific variability from the universe of vested rights case law, a few common themes and general rules of thumb emerge.

Incomplete Infrastructure

In general, a landowner does not acquire vested development rights where infrastructure was not completed within the required timeframe. Here are some case examples:

- *Parker v. BOCC*, 93 N.M. 641, 603 P.2d 1098 (N.M. 1979)
  As was mentioned in an earlier section, in the *Parker* case, the subdivision plat was approved on the condition that certain road improvements be completed within a given time period. When the developer failed to meet those obligations, the eventual result was the revocation of the plat. That failure to complete the agreed-upon work, in addition to the statutory authority to take such action and the explicit conditions that had been placed on the approval, were sufficient grounds to deny the developer's claim to any sort of vested entitlement to the plat.

- *P-W Investments v. City of Westminster*, 655 P.2d 1365 (Colo., 1982)
  Issue: In 1972, a development company obtained final approval and building permits for a two-phased apartment project. The subdivision agreement called for final completion of both phases of the project within 14 months. Phase 1 was completed on time; however, the original developer defaulted on its financial obligations. The development subsidiary of the original developer's lender stepped in and assumed the rights and obligations of the development agreement. During the early stages of construction of Phase 1, the developer purchased all of the water taps and sewer permits required to serve both Phases 1 & 2. But, on completion of Phase 1, the demand for apartment complexes dropped significantly and the nation was struck

with a real estate recession. As a result, Phase 2 was not completed on the time schedule included in the subdivision agreement. Over the next few years, the city where the development was located began to realize that its water and sewer services were oversubscribed with pending developments. By 1977, 21,000 pending sewer and water hookups had received approval while the city could only serve an additional 2,900 units on the system. Letters were sent to pending developments indicating that the city could not guarantee that previously approved sewer and water hookups would be allowed to gain access to the system. In addition, new ordinances requiring additional park and sewer system fees were implemented to help pay for the explosion in residential growth that the city had experienced over a short period of time. In 1977, the city created a growth management plan that created a system for allocating the scarce number of remaining water and sewer taps. Included in the plan was an expiration period on building permits that remained unused over a specified period of time. Also in 1977, the lender-developer of the project found a buyer for the uncompleted Phase 2, but the sale was contingent upon receiving water and sewer service from the city. The city denied the request for sewer and water service and the lender-developer sued under a theory of vested rights and a claim that the new city ordinances were unconstitutionally retrospective. **Held:** (1) Water and sewer tap permits issued to developer's predecessor by city did not serve as foundation for any vested rights which later enacted an ordinance restricting issuance of building permits due to limited water and sewer capacity unconstitutionally impaired or took away; (2) Mere completion of some preliminary improvements on second phase of project did not create vested right or unconditional priority to water and sewer services free of restrictions imposed by such ordinance; and (3) Because the city ordinances did not impair any previously perfected vested rights, the laws could not be considered retrospective and therefore they raised no constitutional problems.

- *Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353 (Colo. 1986)
  Issue: Where an aggrieved party fails to seek an injunction or restraining order to halt construction during the pendency of an appeal, where does the risk lie?
  Held: In Colorado, the party seeking judicial recourse to halt construction has a duty to seek an injunction or restraining order to prevent further construction during the appeal process. Where the construction is completed during the pendency of the appeal, the failure of the plaintiff to obtain some form of judicial stay renders the plaintiff's claim moot. Where the defendant incurs a substantial change in circumstances while judicial proceedings are pending and the plaintiff has taken no action to restrain the defendant, the plaintiff bears at least a part of the responsibility for the defendant's actions.

- *Gallup Westside v. Gallup*, 135 N.M. 30, 84 P.3d 78 (N.M. App., 2003)
  Issue: In 1975, the development in question was approved subject to an Assessment Procedure Agreement (APA).[121] The APA contained, among other clauses, an expiration date 20 years in the future. Units 1, 2, and 4 of the development were constructed and completed pursuant to the terms of the APA within the required deadlines. Unit 3 had passed into new ownership and no substantial work had been completed on the project as of the expiration date of the APA in 1995. In 1996, the owner of Unit 3 requested permission from the city to commence development of the site pursuant to the terms of the expired APA. In 1997, the city's planning and zoning commission proposed an extension of the APA that would allow for completion of Unit 3, but that extension included amendments impacting the location of the utility infrastructure, additional drainage requirements and the reservation of 3.5 acres for a city park as mandated under the city ordinances and regulations in place in 1997. The developer refused to accept any amendments to the APA and after years of litigation, the New Mexico Supreme Court heard the case in 2003. The developer claimed to have vested rights dating to 1975 when the plat for Unit 3 received final approval. A finding of vested rights is the cornerstone to establishing protection from retrospective legislation. **Held:** (1.) Unit 3 did receive final plat approval in 1975; (2.) But, that final approval was conditioned upon the terms of the APA; (3.) The developer failed to meet the terms of the approval and thus the city retained a right to revoke the plat pursuant to the APA; (4.) Because the plat remained subject to revocation, no vested right to develop could exist; and (5.) The developers had no substantial reliance interest that would support the finding of a vested right.

- *Northfork Citizens for Responsible Development v. BOCC of Park County,* 228 P.3d 838 (Wyo. 2010)
  Issue: Of the many issues raised in the lengthy legal proceedings surrounding the development in question in this case, the relevant issue here goes to the question of when rights vest in the event of appeal proceedings. In this case, the defendant received approval to proceed with the construction of a subdivision. One key detail is that Park County permitted the developer to proceed with construction activities during the appeals process and by the time the case reached the Wyoming Supreme Court, the subdivision was nearly complete. The developer contended that because of the substantial change in circumstances and the failure of the plaintiffs to obtain an injunction or a stay of construction, the appeal should be rendered moot on a theory of vested rights. **Held:** Here, Wyoming law is distinguished from the holding in the *DeVilbiss* case out of Colorado discussed above. The analysis of vested rights in the context of an appeal in Wyoming views any construction or other expenditures undertaken while an appeal is pending or even during the time period in which an appeal could be filed as a calculated risk. The Wyoming Court expressed concern over the *DeVilbiss* holding in that it could incentivize rapid construction for the sake

[121] An Assessment Procedure Agreement (APA) in the context of the *Gallup* case is analogous to the development agreements discussed elsewhere in this paper. An APA serves as a contract between the developer and the local land use authority to assign rights, obligations, timelines and other matters pertinent to the orderly construction of the project.

of mooting appeals or judicial review. Therefore, although the Wyoming Court recognized the serious potential costs involved in tearing out a mostly or fully completed subdivision in the event that an appeal such as the one in this case were successful, the Court was clear that such a result is part of the developer's calculus and does not provide a basis for declaring an otherwise valid claim moot. In this case, the claims that could have resulted in the dismantling of the subdivision were ultimately resolved in favor of the developer.

Time, Labor, and Expenses

The common law establishes a standard where courts evaluate vested rights based on how much time, expense, and labor were put into the development. The following cases out of Arizona clearly enunciate the principles that the courts of that state examine in making a common law determination of whether a development right has vested. The exception to the application of common law vested rights principles is where a statute or ordinance declares a certain set of circumstances or actions that automatically triggers the vesting of a given entitlement.

- *Verner v. Redman*, 77 Ariz. 310, 271 P.2d 468 (1954)
  "Where the amount of work done toward construction is of small consequence, the holder of a building permit has acquired no vested right to complete the construction if the property is rezoned and the permit revoked."

- *Town of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz. App. 600, 557 P.2d 532 (Ariz. App. Div. 1 1976)
  "To have a vested right to develop property in accordance with the prior zoning, a permit must have been legitimately issued, and the permittee must have incurred substantial expenses in reliance on the permit. . . . No actual physical construction need be commenced but substantial money expenditures, considerable contractual commitments, and extensive preparation is necessary to vest a protectable interest."

- *Fidelity National Title Insurance v. Pima County,* 171 Ariz. 427, 831 P.2d 426 (Ariz. App. Div. 2 1992)
  Issue: Question of vested rights in the context of conditional rezoning; landowner argued that the two-year time limit to meet the conditions in order to retain the conditional rezone was invalid, and that the $100,000 spent by the landowner between 1986 and 1988 in an attempt to work towards meeting the conditions established a vested right in the conditional rezone. **Held:** The Court of Appeals would have bought that argument, but none of the money that had been spent had actually gone towards any physical construction or had fulfilled any of the conditions. While the court recognized the outlays of money in the final analysis, it was not tied closely enough to making changes in the land to justify continuing to keep the county government from making decisions based on present-day circumstances. The court gave deference to the legislative decision of the county supervisors who determined that the conditional rezoning agreements that had no expiration date needed to have one. Once the county gave the property owners notice by certified mail, and held

public hearings as requested, and allowed for extensions based on specific criteria, there was no harm that could be found from those actions.

Thus, in Arizona it is clear that merely spending money, or spending money to purchase land where a development may, or may not be someday permitted, is not enough to create any kind of vested right. Extremely large expenditures used to alter the land *may* create a vested right, but this does not extinguish the right of local authorities to cause a languishing project to "expire" pursuant to sufficient notice and hearing procedures. Contrast this approach with Idaho, where the Supreme Court does not even view large construction expenditures as creating a vested right.[122]

Failure to Obtain Final Plat Approvals

As another general rule in all eight states, there are no vested rights if developer does not successfully obtain final plat approvals. In the case of *Applebaugh v. Board of County Commissioners of San Miguel County*, 837 P.2d 304 (Colo. App. 1992), the Colorado Court of Appeals held that the county commissioners could restore original agricultural zoning in light of the developer's failure to apply for final development plan approval. Pursuant to an earlier decision in *Spiker v. Lakewood*, 198 Colo. 528, 603 P.2d 130 (Colo. 1979), the County's initial automatic rezone that took place after the developer failed to meet the requirements of approval for a commercial PUD (and had never sought building permits for the property) was invalidated. Instead, a public hearing was conducted four years after the expiration of the PUD agreement. At the hearing, the developer presented evidence and the land was reverted to agricultural zoning against his wishes. The Colorado Supreme Court held that the conduct of the hearing was valid and the County had the power to rezone land based on a failure to complete a conditionally approved development as long as proper notice and hearing procedures were followed.

Individual Lot Owner Rights to Common Areas of a Development

In limited situations, lot owners may acquire protected property rights to use common areas of a development, which may affect the feasibility of future plat modifications. The right to use common space is frequently determined by consulting the way a given parcel is dedicated on the development's plat, but not exclusively. Equitable factors are sometimes taken into consideration as well any establishment of prescriptive rights to common areas. The series of Idaho cases outlined below provides insight into how the courts undertake the process of analyzing rights to common space.

- *Middlekauff v. Lake Cascade Inc.,* 110 Idaho 909, 719 P.2d 1169 (Idaho 1986)
  Issue: In the late 1960s and early 1970s, certain individuals purchased subdivision lots near Lake Cascade. Those purchases were made in part based on the oral representations of the landowner's agent, a realtor, as well as the descriptions in the

[122] *See*, the discussion of *Idaho and the half-built high-rise, infra.*

developer's written advertisements/pamphlets that the section of land between the subdivision lots and the lakefront would remain undeveloped land with a right of common access. The developer had also charged a premium price for "lakefront" lots. In 1977, the developer engaged in reorganization in federal bankruptcy court where a section of that common space was sold off. Two years later, another section was sold. At that time, the new owners of the common space built fences and began to exclude the other lot owners from the use of that land. The lot owners sued to declare that the lakefront land be used exclusively for common use purposes. **Held:** The oral representations made to the lot owners regarding the common use and ownership of the lakefront parcel were sufficient to establish a common right that vested through the continued use and enjoyment of that parcel by the lot owners in the subdivision. The subsequent purchasers were held to have made their purchases with actual notice on account of the footprints, tire tracks, airstrip, and boat landing that existed on the land at the time of their respective purchases.

- *Sun Valley Land and Minerals Inc. v. Hawkes*, 138 Idaho 543, 66 P.3d 798 (Idaho 2003)
  Issue: A developer obtains a mortgage on two parcels of land that he intends to develop. The first phase of the development is a subdivision on 240 acres. An additional 80 acres is encumbered by the prior recorded mortgage that is intended for use to complete the infrastructure of the initial 240-acre parcel. The developer obtained approval of the 240-acre subdivision plat on condition that certain improvements be made within two years. The developer posted a performance bond to ensure that the improvements would be made. The improvements were never completed. The developer lost the land through foreclosure, though five lots had been sold prior to the foreclosure. In addition, the developer had recorded the plat as well as CC&Rs on the day that the plat received conditional approval. The CC&Rs provided that ownership and responsibility for maintenance of the common space depicted on the plat would vest in a homeowner's association. The requirements and procedures for creating the homeowner's association were also laid out in detail in the CC&Rs. The homeowner's association was never created. After many years of litigation, the relevant issue before the Idaho Court in this case was whether the recording of the CC&Rs and the depictions on the plat were sufficient evidence to vest ownership of the common space in the five lot owners in the development. **Held:** The Court found that the ownership of the common space and any easements, roadways, and other dedications on the map was intended to vest in the homeowner's association that was never formed. Furthermore, any rights of the homeowner's association would be junior to that of the prior recorded mortgage holder. Therefore, the lot owners in this case, who had been informed of the risks prior to purchase, had no rights in the common space, depicted roadways, or other easements in the now-defunct subdivision. Here, even though the dedications were clearly depicted on the plat, the failure to meet the additional requirements for perfecting those rights to the common space negated the vested rights claim of the lot owners.

- *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 139 Idaho 699, 85 P.3d 675 (Idaho 2004)
  Issue: The developers filed a plat that depicted an irregular lot with the words "lake access." The dedications on the plat made no mention whatsoever of the intended ownership of the lake access parcel. The question before the Idaho Court was whether the ambiguous depiction on the plat amounted to a dedication of a lake access easement to the general public. **Held:** The court applied the two-part test of (1) Unequivocal offer; and (2) Acceptance to determine whether a common law public dedication had taken place with the lake access lot. The Court concluded that no public dedication could be inferred from the evidence in the record, as there was no unequivocal offer of ownership to the public. The Court then remanded the case to the District Court to determine where ownership of that lake access had in fact vested. Without a clear dedication on the plat, there was insufficient evidence in the record to determine whether the access was owned by the adjoining landowners, the homeowner's association, or some other individual or entity. The subsequent case, *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc*., 143 Idaho 407, 146 P.3d 673 (Idaho 2006) held that the depiction on the plat had created a private easement and that the developer had retained the right to transfer that easement. The developer did transfer all of their rights and interests in the subdivision property to another party via quitclaim. That individual was eventually named the owner of the lake access easement.

- *Armand v. Opportunity*, 141 Idaho 709, 117 P.3d 123 (Idaho 2005)
  Issue: The developer prepared a subdivision lot with a clear and unequivocal grant of common space for the use and enjoyment of all lot owners in the subdivision. The deeds of many of the lot owners also included specific language and references to certain lots and areas of the plat that were intended to be dedicated common space. That plat was not actually recorded until some time after the lot owners made their purchases in reliance on the promises of the plat. Approximately one year after the recording of the plat, the remaining property under the control of the developer was sold off to another group of individuals and investors. That second group of purchasers replatted the portions of the original plat that they now controlled and changed the nature of the common space dedications. The original group of lot owners claimed a vested right to the common areas on the plat that they had relied upon in making their purchases. **Held:** The original group of owners retained a common right of ownership and access to the lands dedicated to such use on the original plat. While the second group of purchasers retained a right to replat sections of the subdivision that were under their sole control, they lacked the authority to replat areas of common access or otherwise alter the original dedications.

- *Saddlehorn Ranch Landowners, Inc. v. Dyer*, 146 Idaho 747, 203 P.3d 677 (Idaho 2009)
  Issue: The Idaho Court's task here was to evaluate the validity of a plat dedication and the type of right that it created in the common space of a recorded subdivision. The dedication on the plat specifically referenced a dedication of certain lots to the homeowners' association for common use. The association was later created and that dedication was accepted. The parties in the case got entrenched in litigation over the

question of actual title to the dedicated lots. **Held:** The title of the two lots should not be in question as it clearly belongs to the developer in this case. However, the plat dedication clearly created an easement allowing for common use and enjoyment of the specified lots. A common law dedication made on a plat will always create an easement rather than transfer title, unless more specific terms are included. Because lots were sold with ongoing reference to the plat, which included the dedicated common space, the easement was perfected and the homeowners' association owns a common use easement over the specified lots.

Vested Rights and Changing Regulations

Naturally, local and even state land use regulations will change from time to time. Often change occurs concurrently with evolving public standards for community design and development. This begs the question: What happens to development and subdivision applications when state and local laws or regulations are changing? Some states, (like Idaho and Utah) vest the development application in the rules that are in place at the time the application is submitted. That said, Utah does not allow a developer to rely on ordinances in place at the time of a development application if proceedings or referenda are formally underway to change those regulations in a manner that would prohibit approval of the application. In other states, regulations may be revised and updated as development applications are considered.

- *El Dorado at Santa Fe v BOCC*, 89 N.M. 313, 551 P.2d 1360 (N.M. 1976)
  Issue: (1) Was the Board of County Commissioners empowered to adopt subdivision regulations prior to the State's passage of rural subdivision enabling legislation? (2) If the phasing regulations were void at the time that the subdivision application was presented to the Board of County Commissioners, was the approval of the final plat a ministerial act rather than a discretionary decision? **Held:** (1) The lack of state enabling legislation empowering county commissioners to adopt rural subdivision standards and regulations above and beyond the minimum standards set forth in state statutes rendered the subdivision phasing regulations in Sante Fe County null and void at the time that the El Dorado at Sante Fe final plat was presented to the commissioners. (2) On the basis that the phasing regulations were invalid as well as the express acknowledgement of the commissioners that the proposed final plat met all other criteria at the time that the final plat was presented to the commissioners for approval, that approval was a ministerial act that can later be compelled through a writ of mandamus as the decision involved no discretion.

- *Dawe v. City of Scottsdale,* 119 Ariz. 486, 581 P.2d 1136 (Ariz. 1978)
  Issue: Property owner recorded a plat during a three-month period in which the county lacked a valid zoning scheme on account of unrelated court action. As a result, the plat that was filed called for 120 lots of a maximum of 10,000 square feet where the zoning both before and after that three month period required a minimum 35,000 square feet per lot. The developer then performed no further work or improvements until 1975 when this declaratory action was filed. The question before the court was whether or not the filing of the initial plat created a vested right to develop that land

at that density and layout. **Held:** No. "The mere filing of a plat does not vest rights to develop property in a certain zoning category." The court further noted that it has been repeatedly held that new subdivision ordinances apply to lots on prior recorded maps that are unsold at the time of the ordinance's enactment. *Id*. at 487; *citing Ziman v. Village of Glencoe*, 1 Ill. App.3d 912, 275 N.E.2d 168 (1971); *Sherman-Colonial Realty Corp. v. Goldsmith,* 155 Conn. 175, 230 A.2d 568 (1967); *Blevens v. City of Manchester*, 130 N.H. 284, 170 A.2d 121 (1961); *State ex rel. Mar-Well, Inc. v. Dodge*, 113 Ohio App. 118, 177 N.E.2d 515 (1960); *Caruthers v. Board of Adjustment*, 290 S.W.2d 340 (Tex.Civ.App.1956). The Arizona Court's analysis analogized the determination of when common law rights would vest in a plat with the determination of when rights vest under a building permit. The requirements for reasonable reliance and substantial change in position based on that reliance remain requirements in the context of plat entitlements.

- *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah, 1980)
  Issue: After receiving an application for subdivision approval, the City amended the zoning ordinance to prohibit single-family home construction on the land where the subdivision was proposed. **Held:** A subdivision applicant is entitled to rely on the zoning and other requirements in place at the time that the application is filed. The limitations on that rule, however, are that the developer must proceed with reasonable diligence, that there be no compelling, countervailing public interest that would require denial of the application, and that if the governing body has initiated procedures to amend its zoning ordinances in a manner that would prohibit the approval of the application as filed, the applicant has no vested right to rely on the ordinances currently on the books. In this case, the developer was allowed to proceed with the single-family residential subdivision subject to the reasonable requirements imposed by the municipal council with respect to roads, access, and other mitigations.[123]

- *Folsom Investments v. City of Scottsdale,* 620 F.Supp. 1372 (D.C. Ariz. 1985)
  Issue: Vested development rights in the context of a subsequent downzone. City begins work to rezone section of Scottsdale. Developer purchases land with a particular zone and then submits a preliminary plat application that conforms to the underlying zoning in place at the time. City denies preliminary plat on the basis of municipal ordinance that states an application may be legitimately denied if it fails to conform to current *or proposed zoning*. City subsequently downzoned property pursuant to the proposed zoning that was on the table. **Held:** Federal District Court found: City had no explicit health, safety or welfare cause to deny preliminary plat application, as enumerated under state statute. State statute set forth explicit notice and hearing provisions that must take place prior to changing zoning. By denying the preliminary plat application on the basis of proposed zoning, City's action amounted in effect to rezoning the land without having gone through the required notice and hearing procedures. Because the developer was able to prove that but for the denial

[123] In 2005, the holding in this case was codified as Utah Code Annotated §§ 10-9a-509 and 17-27a-508.

by the City they would have commenced construction activities and obtained permits and such long before the City made a final decision on the downzone proposal, that the City had in effect stripped the developer of a vested right.

- *In re Sundance Mountain Ranches*, 107 N.M 192, 754 P.2d 1211 (N.M. App. 1988)
  Issue: The property owner submitted a subdivision application to the Bernalillo County planning commission that was later approved by the Board of County Commissioners as it complied with the county subdivision regulations in place at the time that the application was submitted. The approval was then appealed to the district court. While the appeal was being considered, the Board of County Commissioners enacted a more restrictive set of subdivisions regulations. The district court found that the county had failed to provide reasonable notice of the hearing, and the court issued an order remanding the application to the county commissioners for a new hearing. At that hearing, the new ordinance was not considered, and the subdivision was once again approved. The question raised in this appeal is whether the remand from the district court should require the applicant to essentially start over and become subject to the regulations in place at that time as opposed to the time when the application was initially filed. **Held:** The New Mexico Court of Appeals here found that the subdivision regulations in effect at the time of the original application should control the analysis of the application.

- *South Fork Coalition v. Board of Comm'rs of Bonneville County* ("South Fork II"), 117 Idaho 857, 792 P.2d 882 (Idaho 1990)
  Issue: The property owner obtained preliminary plat approval for a PUD in a zone designated for grazing. The property was situated amongst a number of protected private lands near the South Fork of the Snake River in a pristine natural area. The preliminary plat approval was subject to judicial review, during which time the county zoning ordinance was amended to disallow such a dense development in a grazing zone. The question was raised as to whether the submission of the PUD application and the preliminary plat approval vested the developer with a right to develop in accordance with the regulations in place at the time of the original application or not. **Held:** The Idaho court duly recognized the minority status of its rule in this case. That said, the case law in Idaho is well established that a developer who submits a subdivision or PUD application is entitled to proceed under the rules in place at that time, regardless of changes in ordinances that may occur at a later time. The Idaho Court stated the applicable rule as follows: "Although a majority of courts from other jurisdictions have adopted that line of reasoning and held that a change in the law following an application for a building permit will be applied to the application, Idaho law is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit." Subsequent case law in Idaho has continued to hold up this minority principle. *See, e.g., Chisholm v. Twin Falls County*, 139 Idaho 131, 134-35, 75 P.3d 185, 188-89 (Idaho 2003) ("It is well established that an applicants' rights are determined by the ordinance in existence at the time of filing an application for the permit."); *Urrutia v. Blaine County*, 134 Idaho 353, 359, 2 P.3d 738, 744 (Idaho 2000) ("Idaho law is well established that an applicants' rights are determined by the

ordinance in existence at the time of filing an application."); *See also*, *Payette River Property Owners Ass'n v. Bd. of Comm'rs of Valley Co*., 132 Idaho 551, 555, 976 P.2d 477, 481 (1999)).

- *Stucker v Summit County*, 870 P.2d 283 (Utah App. 1994)
  Issue: Stucker purchased a parcel of land in 1990 that had been originally platted as part of a subdivision in 1964 and designated for commercial use. The county did not adopt zoning regulations until 1977. At that time, the parcel in question was designated as commercial property and the requested use was permitted as a matter of right. In 1985, the county adopted an additional zoning overlay that included the property in question and required that additional scrutiny be applied to the land prior to the issuance of any development permits in order to ensure that the proposed use would be consistent with the neighborhood and to satisfy other concerns. The 1985 procedures also incorporated a public hearing process where necessary. The Stuckers contend that a grandfather clause in the 1985 zoning ordinance applied to the entire subdivision of which their lot was a part, and that, as such, the 1977 commercial zoning as a matter of right should provide the relevant standard for the county to review their development application. **Held:** The Utah Court of Appeals held that in general the date of application for a building permit fixes the applicable zoning laws. In reviewing the claim that the grandfather clause in the 1985 ordinance should apply to any lot in any subdivision where some development had started would "eviscerate the power of municipalities to effectively change zoning practices to meet community needs and future growth." The purpose of that clause was viewed as protecting landowners who were actively engaged in the process of development at the time that the new ordinances were being adopted, but was not intended to create a perpetual right to the zoning scheme that was in place in 1977.

- *Mouty v. Sandy City Recorder*, 122 P.3d 521 (Utah 2005)
  Issue: The citizens of the City of Sandy submitted a petition to hold a referendum on an amendment to a zoning classification that would allow a particular development to move forward. The developer claimed, among other things, that the referendum would be moot in any case as a development application had been submitted following the zoning classification change and therefore the developer had a vested right to proceed with under the amended zoning code. **Held:** The exercise of the referendum power in Utah cannot be contravened by the vested rights doctrine. Further, the fact that the Utah Constitution does not allow for municipal ordinances to take effect until after any referendum has been taken up in addition to the open and notorious nature of the referendum activity, the Utah Supreme Court analogized the situation here to be similar to the submission of a development application when the governing body is in the midst of changing its regulations. Therefore, the developer had no vested rights in the amended zoning classification and the referendum would properly determine the zoning that would apply to the developer's land.

- *Andalucia v. Albuquerque*, 148 N.M. 277, 234 P.3d 929 (N.M. App. 2010)
  Issue: Developers obtained approval of a general site plan for a multi-phase development that included unplatted "bulk tracts" designated for future development.

Over the course of time, sections of the property were platted and presented for approval to the city. Phase 1 and Phase 2 both received approval for their proposed platting plans. After the approval of Phase 2 and before the approval of Phase 3, the city passed an impact fee ordinance requiring payment from any new development within the city limits. Developments with rights that vested prior to the enactment of the impact fee ordinance were exempted from payment under the ordinance. The city and the developers of Phase 3 sought to determine whether Phase 3 was subject to the impact fee requirement. **Held:** No development rights can be considered vested until an actual plat has been approved and filed. General site plan approval cannot constitute the creation of a vested right, as it is not possible to take that site plan approval and proceed directly to develop the property. Thus, the developers were responsible for the payment of impact fees for Phase 3 and any subsequent phases approved.

Divided Ownership

Vested rights also become a sticky issue in the context of replatting, especially if even a few lots in the subdivision have been sold or transferred. Division of ownership in a development can greatly complicate a landowner's ability to replat. In many cases, divided ownership gives subsequent property owners a right of private action to prevent the replatting of common areas of the plat, such as streets as well as open space. It would depend on the facts of the situation if a lot owner would have a right to enjoin the replatting of lands that were not dedicated to common ownership and use. Certainly, as noted in the above discussion of *Brumbaugh v. Mikelson Land Co,* 185 P.3d 695 (Wyo. 2008), all or part of a plat of a subdivision or PUD can be vacated and the CC&Rs altered, as long as those actions are taken in accordance with relevant statutes, ordinances, and contracts that are implicated in the situation. A similar right to amend a subdivision plat was recognized by the Colorado Court of Appeals in *Whatley v. Summit County Board of County Commissioners*, 77 P.3d 793 (Colo. App. 2003).

In *Brumbaugh*, the express easements and other common interests that were dedicated on the plat did remain in effect for the three landowners who had purchased lots before the remainder of the project was vacated. The result with respect to the common ownership of utility and access easements can be reconciled with the holding of *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.,* 77 N.M. 730, 427 P.2d 249 (N.M. 1967). As was discussed in an earlier section of this paper, *Ute Park* affirmed the right of a lot owner in a subdivision who purchased their land in part based on the representation and dedications on the subdivision plat of certain amenities under common ownership and control, to assert the right to retain those common amenities against a developer intent on changing the use of those dedications on the plat. That holding was further supported by the New Mexico Court of Appeals in *Knight v. Albuquerque*, 110 N.M. 265, 794 P.2d 739 (N.M. App., 1990). As was also discussed in an earlier section of the paper, the developer in this case attempted to retain a right to alter or change the use of amenities depicted on the subdivision plat. The court's analysis here focuses on the potential for a "bait and switch" scenario where potential buyers are promised amenities, such as a golf course or a park, while the developer retains the power to unilaterally alter the use of the

golf course or park. While divided ownership does not necessarily mean that replatting a development is impossible, the need to satisfy multiple ownership interests does raise the complexity and potential transaction costs of such an endeavor.

The Role of Development Agreements

Development entitlements are often formalized into a development agreement between the developer and political subdivision. The scope of these contracts typically includes the short-term nuts and bolts for how the project will be financed and timing for completion of infrastructure. Some development agreements also include obligations that run with the land, such as management plans for open space and lands dedicated to the public, public access agreements, cost sharing agreements for future developments that will utilize the infrastructure built by the developer, and management plans for public utilities, such as sewer plants. These contracts often touch on the basic functions of local government, but there are certainly times when conflicts arise between the development and a political subdivision.

With the recent housing crash and decline in lending for real estate development, many of these contracts are expiring with the developer not being able to complete his or her contractual obligations. In some jurisdictions, the developer has sold lots in the incomplete project. In other jurisdictions, the city or county is no longer in a position to provide public services to this development if it is eventually built out. What is the way forward at this intersection of police powers, property rights, and contract rights and obligations? The role of expired development agreements is a fertile topic for future research. See discussion of development agreements, *infra.*

Recent "Takings" Cases

Takings in General

The 5th and 14th Amendments to the U.S. Constitution and corresponding clauses of many individual state constitutions prohibit the "taking" of private property for public purposes without payment of just compensation or due process of law.[124] As new local land use regulations are developed and implemented, many landowners continue to challenge these regulations on the grounds that they violate these two "takings" clauses. In grappling with these challenges, the U.S. Supreme Court and other lower courts have distinguished between "physical" and "regulatory" takings.

[124] "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The Fifth Amendment applies to state actions via the due process clause in the Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV.

Physical Takings

A physical taking occurs when government regulations result in "direct government appropriation of property."[125] Government actions arise to a physical taking "when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] possession.'"[126] In the world of land use regulations, the most common physical takings are government actions requiring mandatory land dedications for public services, easements for roads, or public utilities, such as requiring a landowner to allow a utility company to place facilities or equipment on their property.[127] When private property is physically taken for a government purpose, the government's obligation to compensate the landowner is absolute, regardless of whether the taking constitutes an entire parcel or merely a small part of the property.[128] If the government requires a property owner to suffer a permanent physical invasion of their property, no matter how minor, the land owner must receive just compensation.[129]

When the government acknowledges its obligation to pay for property that it takes, these actions typically proceed via eminent domain or condemnation. These types of takings are so obvious, there is no question that a taking has occurred; so the issue is typically the valuation of the property and any other damages owed to the owner. The real argument begins when the government denies any obligation to compensate property owners for taking their property. These cases usually proceed as inverse condemnation or takings actions initiated by the owner.

The tricky part of physical takings caselaw is determining whether the invasion is truly "physical". Even if the government never actually sets foot on the property, the action may still constitute a physical taking if the loss suffered by the landowner "would be complete as if the United States had entered upon the surface of the land and taken exclusive possession of it."[130] If the government requires public access across a property, this also constitutes a physical invasion because the right to exclude, which is a fundamental element of property rights, has been taken away from the landowner.[131] Even

---

[125] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, (2002).

[126] *Tulare Lake Basin Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1878).

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

[128] *Tahoe-Sierra* at 322; *See also, Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992).

[129] *Lingle v. Chevron,* 544 U.S. 528, 538 (2010); c*iting, Loretto v. Teleprompter Manhattan CATV Copr.,* 458 U.S. 419, (1982)

[130] *United States v. Causby,* 328 U.S. 256, 261 (1946).

[131] *Kaiser Aetna v. United States,* 444 U.S. 164, 179-180 (1979).

if the physical invasion is relatively small, or only imposes a minimal impact on the property owners, so long as it is a permanent physical occupation of private property by a government entity, the action is a *per se* taking requiring compensation.[132]

Another less common issue is voluntariness. Takings are usually viewed as involuntary on the part of the owner. When land dedications are offered by the landowner, this is perceived as a "giving" instead of a taking.[133] In the real-world context of development applications however, a landowner may be pressured to "dedicate" portions of their property in their development application in an effort to ensure speedy approvals from local governments. Thus, the question of what is truly "voluntary" is fertile ground for debate with the one limited rule being that express dedications included in development applications are not considered takings.

Assuming the dedication was involuntary on the part of the landowner, another issue is whether exactions, (where the government has demanded an easement or some other physical appropriation of property in the permit approvals process) require compensation from the government. Defining what exactly constitutes an "exaction" is somewhat nuanced, where the process by which the property is taken determines whether it is considered an exaction or some other kind of taking. If the government obtains property via direct appropriation, this is usually a *per se*, or physical taking. If it is taken as part of an exchange or condition in the permit approvals process, is tends to be called an exaction. Because exactions are indirect physical appropriations of property, they are not analyzed as a physical taking, but rather, a regulatory taking.[134] As a general rule, exactions such as requiring a public easement in the subdivision approvals process will constitute a taking if they do not bear an "essential nexus" to some public need created by that particular development.[135] The dedication must substantially advance legitimate state interests and the size, scope, and type of dedication must bear a rough proportionality to the impact of the proposed development.[136] Thus, if an exaction can satisfy the essential nexus, legitimate state interest, and rough proportionality tests, then no compensation is required. If an exaction cannot satisfy the criteria, then the question of compensation to the landowner is reviewed under the regulatory takings analysis outlined below.

---

[132] *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

[133] A good example of this involuntariness requirement is when an Idaho developer included a public dedication in his development application in an effort to expedite the approvals process, but then challenged the dedication later. This was held to not be a taking that required compensation, but rather, a voluntary dedication. *KMST, LLC v. County of Ada,* 138 Idaho 577, 67 P.3d 56 (2003).

[134] *Lingle v. Chevron, USA, Inc.,* 544 U.S. 528 (2005); *Daniel v. County of Santa Barbara,* 288 F.3d 375, 380 (9th Cir. 2002).

[135] *Nollan v. California Coastal Commission*, 483 U.S. 825, 836 (1987).

[136] *Dollan v. City of Tigard,* 512 U.S. 374 (1994).

While physical takings challenges were historically brought in federal court and analyzed the U.S. Constitution, state actions have become more common where takings issues are analyzed under the relevant provisions in that particular state's Constitution.

Regulatory Takings

Regulatory takings do not involve the occupation of private land as in a physical taking, but instead involve government regulatory actions, which impose limitations, sideboards, or restrictions on private property. One key difference between physical and regulatory takings is the compensation analysis. In a physical taking, occupation of any part of the property, even a very small part, requires commensurate compensation. In a regulatory taking; however, the amount or possible uses of the property taken must be quite substantial before the landowner will be compensated. However, many lower courts have differed on what is considered "substantial" enough to require compensation. Some have established very high or very low thresholds for compensation, resulting in great state-by-state variety.

The criterion for evaluating whether a regulatory action rises to the level of a "taking" of private property rights typically consists of a case-by-case factual analysis. The big three questions to ask are: (1) whether the regulation is intended to promote a legitimate governmental purpose, and in doing so, balancing public benefits and private interests; (2) whether the regulation is rationally related to the development impact that it is intended to address; and (3) while diminution in property value alone is insufficient to constitute a takings, what is the economic impact on the property owner, particularly in light of the landowner's reasonable investment-backed expectations?[137] Does the government's regulation leave the landowner with any reasonable economic use of their property, or have they suffered a complete elimination of the property's value?[138] There is great variability in how courts have evaluated the economic impacts of a regulation. What one court may consider a mere this diminution in value, another may consider to be a much more severe and overreaching economic loss.[139]

---

[137] *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *See also,* Elliott, Don, "Premature Subdivisions and What to Do About Them" (2010), pages 13-16; *And,* Givens Pursley, LLC, *The Idaho Land Use Handbook: The Law of Planning, Zoning, and Property Rights in Idaho* (2009);

[138] *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019 (1992).

[139] For example, in *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1015 (1992), the U.S. Supreme Court indicated that perhaps a 95% decline in value would constitute a taking. Compare this with Idaho, where the Idaho Supreme Court rejected a property owner's assessment of a $29,000 decline in property value, stating that the diminution in property value alone was not sufficient to establish a taking. *Covington v. Jefferson County,* 137 Idaho 777, 782, 53 P.3d 828, 833 (2002).

State Adoption of Takings Legislation: More fizzle than buzz?

Because of the variability in how regulatory takings are compensated, some states have adopted regulatory takings statutes as a means to provide some certainty and compensation for landowners; however, the case law on these statutes is not well developed. For example, Arizona recently adopted Prop 207 in 2008,[140] but so far, there has been limited application of these new laws. To date, there are only two unpublished opinions addressing Prop 207 as a vehicle for an inverse condemnation action.[141]

Similarly in 1993/1994, Utah passed the Private Property Protection Act and the Constitutional Takings Issues Act, requiring political subdivisions and state agencies to adopt regulatory takings guidelines, issue takings assessments, and provide for takings appeals procedures. There are no published opinions using these provisions in the state code and local practitioners have considered them of little importance. In the 18 years these regulations have been available, no "takings assessment" (as required by these acts) has ever been filed by a state agency, and very few local takings hearings have been held, and few, if any, "takings guidelines" exist. Of far more significance than the passage of these two property rights acts was the Utah legislature's 1997 enactment of the Office of the Property Rights Ombudsman. This is a state-wide office staffed with three attorneys who issue advisory opinions on land use issues, mediate, and arbitrate takings claims, and intervene in eminent domain disputes. The staff also offers free advice to property owners and government entities involved in takings issues and can order state and local entities to participate in mediation or arbitration.[142] The Office of the Ombudsman has taken on a unique role as an intermediary between local governments and the public, encouraging citizens and officials to better understand civic property rights, which, in turn, reduces expensive and time consuming litigation. Presumably, better local laws and ordinances are crafted as well.

Colorado was one of the earlier western states to go down this pro-property rights road with the adoption of the Regulatory Impairment of Property Rights Act (RIPRA),[143] which was meant to protect against exactions requiring a landowner to bear burdens for the public good that should more properly be borne by the public at large. However, the only meaningful Colorado jurisprudence interpreting this relatively new legislation declined to apply RIPRA to the facts at hand and instead held that the City of Colorado Springs' decision to exempt a landowner from a legislatively-determined drainage fee

[140] Also known as the "Arizona Private Property Rights Act," Arizona Statutes §§ 12-1134 et seq.

[141] *McDowell v. City of Avondale,* 2010 WL 2602047, Ariz. App. Divi 1, (2010). This was a question of standing to pursue an inverse condemnation claim under Prop 207, but this is not a published decision and does not create legal precedent. See also, *Regner v. City of Flagstaff,* 2010 WL 251129, Ariz. App. Div. 1, (2009). This is another Prop 207 condemnation action as well as an unpublished opinion which does not create legal precedent.

[142] Utah Code Annotated § 13-43-101 et seq

[143] Colorado Revised Statutes §§ 29-20-201 to 29-20-205.

was not the type of exaction that the Colorado legislature intended to be covered by RIPRA.[144]

Idaho incudes regulatory takings language in LLUPA, but it simply states that denial of a permit (i.e. subdivision permit, special use permit, variance, etc.) is subject to a regulatory takings *analysis*, not compensation. See Appendix VIII for a chart summarizing the takings legislation adopted in each state.[145]

Zombie Subdivisions and Property Rights

When it comes to "undoing" a zombie subdivision, what property rights are implicated? Will courts continue to affirm land use regulations as described above if local governments take action to address the glut of obsolete subdivisions? Some argue that plat approvals and development rights may be a protected property interest. Landowners do have property rights to access their property, and they also have the right to non-conforming uses of their property.[146] If the subdivisions infrastructure was already installed to the satisfaction of the local government authority, who then subsequently allowed the plat to be recorded, some argue that the property owner has perfected his right to the subdivision. But what about a paper plat? If a local government vacates an obsolete paper plat and the property is subsequently downzoned, does the landowner have a *Lucas* – type takings claim?

The first question is what is the relevant parcel? Does each individual lot have a separately protected development right under the applicable state laws? If there are several lot owners within the subdivision, does each individual have an equal right, or are their rights proportionate to the percentage of lots they own, or even the percentage of the gross acreage that they own? In *Kelly v. Tahoe Regional Planning Agency,* 109 Nev. 638, 855 P.2d 1027 (Nev. 1993) (See discussion of *Kelly*, *supra.*) the U.S. Supreme Court established that, as a rule, a takings analysis in the context of a subdivision must look at the property as a whole, rather than as individual lots in order to determine whether the owner had been deprived of all economically valuable use. Would this rule hold true if the ownership was divided amongst several owners? What if there are multiple owners, but one owns a substantial majority share? Are rights in common areas treated separately as property rights?

---

[144] *Wolf Ranch, LLC v. City of Colorado Springs,* 207 P.875 (Colo. App. Div. 2 2008). This was affirmed in 2009 by the Colorado Supreme Court (see *Wolf Ranch, LLC v. City of Colorado Springs,* 220 P.3d 559 (Colo. 2009).

[145] A note about state-specific statutory provisions for Eminent Domain actions: Most states also have constitutional provisions for Eminent Domain actions, and some have adopted concurrent statutory language to provide a process valuation and recovery for Eminent Domain takings. These types of actions are not being addressed in this paper, but may provide fruitful grounds for further inquiry.

[146] *Hampton v. State,* 445 P.2d 708, 710 (Utah 1968); Utah Code Ann. §§ 10-9a-511 and 17-27a-510. *See also,* Call, Craig M., *How Property Rights are Protected by the Constitutions of the United States and the State of Utah* (2010).

Additionally, just because the zoning has now changed, there is not necessarily a total taking, or even a substantial diminution in value. Arguably, some downzoning may increase property values by reducing the supply of potential development inventory and protecting landscapes. While *Kelly* addressed takings in the context of a development moratorium, the court clearly noted the value of regulations aimed at curtailing the flood of development; the property owner would actually benefit from the regulations because preserving the beauty of Lake Tahoe would keep property values higher than if the lake were sullied and overdeveloped. Similarly, in the recent case of *Martin v. Camas County,* 36605 (IDSCCI February 17, 2011), the plaintiff landowner Martin raised the argument that by up-zoning large swaths of lands around his property, Camas County had essentially flooded the market with potential development inventory, thus devaluing Martin's property – a simple supply and demand argument. Martin was ultimately unsuccessful because he had sold the properties in question and thus lacked standing, so the court did not address Martin's issue of property devaluation. However, it is a novel argument that may be a sign of things to come.

The second question is whether a preliminary land use application or an approval of a final plat can be considered a protected property right subject to due process and just compensation in that particular state. In states like Arizona where the approval of a subdivision is essentially ministerial, if the zoning and subdivisions requirements are fulfilled, then the subdivision must be approved. Can this be construed as a property right? What if a state has adopted takings legislation, how does this affect the analysis? (See discussion of states that have adopted individual takings regulations, *supra*)

There are no easy answers here. When it comes to undoing a zombie subdivision, the facts surrounding each development may control the options available to local governments. Another route would be to develop incentivized vacation or replaying processes that reduce the potential for resistance from property owners and subsequent litigation.

State Courts Affirming Government Land Use Regulations

While state-level takings challenges are on the rise, courts continue to affirm several well-recognized forms of land use planning and exercises of land use authority. Common themes to these kinds of challenges are the constitutionality of zoning amendments and even challenges to planning duties in general. The denial of development applications has also become fertile ground for takings claims, although they are rarely successful. This suggests that should local governments address the glut of zombie subdivisions by way of zone changes and denying development agreement extensions in jurisdictions where infrastructure must be installed prior to final plat approval and plat recordation, there is court precedent to affirm these actions.

Decisions Affirming the Constitutionality of Planning in General

These state court decisions confirm that legislation like comprehensive planning, impact fees, and growth management plans do not constitute a regulatory taking.

- *Kelly v. Tahoe Regional Planning Agency,* 109 Nev. 638, 855 P.2d 1027 (Nev. 1993)
  Issue: Beginning in 1974, the property owner had been attempting to obtain subdivision approval for property governed by the Tahoe Regional Planning Authority. At various points in the process, rules, policies and procedures changed and the application was delayed. By the time of this appeal, nearly 20 years had been spent litigating various questions in regards to the development application. The relevant issues before the Nevada Court at this point include: whether the development regulations in place constituted a taking, whether a temporary taking had occurred on account of the delay, and whether the owner had been deprived of all economic use of the land, which would create a categorical taking. **Held:** The Tahoe Regional Planning Agency had effectively articulated the public purpose behind its regulations and demonstrated the need for regional planning in the Tahoe basin and thus there was no per se regulatory taking that had occurred as a result of the exercise of the planning function. Because the property owner's land had remained valuable throughout the disputed period, and the owner had in fact been allowed to sell off many of the less-intrusive lots and realized millions of dollars in profits, no temporary taking could be found in this case. Finally, the court stated as a rule, a takings analysis in the context of a subdivision must look at the property as a whole, rather than as individual lots in order to determine whether the owner had been deprived of all economically valuable use. As opposed to the landmark *Lucas v. South Carolina Coastal Commission,* 505 U.S. 1003 (1992) decision, here the owner was able to develop and sell the vast majority of his lots, and therefore whether or not the remaining lots would ever be buildable under regional planning regulations was irrelevant as part of the takings analysis. An additional factor in the analysis was the temporary nature of the regional planning agency's regulations and building moratorium. The Nevada Court here noted that the property owner would actually benefit from the regulation in that by preserving the beauty and clarity of Lake Tahoe, his property values would remain higher than if the lake were despoiled. The Nevada Court then declared that the regional planning authority could postpone building in critical areas for a reasonable period of time, as long as the benefit received by the property from the ordinances is direct and substantial and the burden imposed is proportional – a threshold that was met in this case.

- *Krupp v. Breckenridge Sanitation District,* 1 P.3d 178 (Colo. App. 1999)
  Issue: Developers sought review of decision of a sanitation district's board of directors, upholding the district's determination that the mandatory plant investment fee (PIF) for each unit in a triplex would be approximately 80% higher than for each unit in a duplex building. **Held:** Court of appeals held that this was not an unlawful taking or an abuse of discretion. The Court of Appeals found sufficient evidence in the record that the PIF had been set for various types of housing based on direct evidence of the average impacts of different types of housing users on the peak flows

of the sewage system. The court noted that the evidence in the record tended to suggest that if anything, the duplexes were being assessed at too low a rate and instead should be assessed at the same rate as the triplexes. Finally, because there was no individual discretion applied in the setting of the sewage rates, there could be no abuse of discretion in applying the established sewer rates as they had been passed and approved by the district.

- *KMST v Ada County,* 138 Idaho 577, 67 P.3d 56 (Idaho, 2003)
  Issue: The developer challenges the requirement that he build and dedicate a public road as a condition of development approval. An unconstitutional exaction is alleged. The developer also challenged the validity of the impact fees assessed. **Held:** No taking occurred here because the highway district who had requested that the developer build the road and dedicate it to the public has no authority to enforce that request. The Board of County Commissioners made the final determination; at the time that the application was in front of the commissioners, the developer had agreed to the terms of the development agreement, including the building and dedication of the road. By including the road dedication in its development application, the developer is precluded from coming back later and claiming an unconstitutional taking. On the matter of the impact fees, the Idaho Court held that the developer had failed to exhaust its administrative remedies with respect to the amount of the impact fees and therefore the constitutionality of that issue was not ripe for review.

Constitutionality of Zoning Amendments

Here are some notable cases dealing with the constitutionality of rezones, downzones, and other kinds of zoning district amendments.

- *Jafay* v. BOCC, 848 P.2d 892 (Colo. 1993)
  Issue: A developer begins preliminary work and the installation of infrastructure on land based on the zoning in place at that point in time. Part of the property is rezoned after the developer obtains final plat approval, and that rezoning does not allow for the construction of every element of the project that the landowner had anticipated. The landowner challenges the rezoning action as a taking. **Held:** The Colorado Court denied all of the landowner's per se takings claims and remanded the case to the trial court for a determination as to whether the landowner retained any economically viable use of the land.

- *Covington v Jefferson County,* 137 Idaho 777, 53 P.3d 828 (Idaho 2002)
  Issue: Property owners allege a taking from the operation of a hot mix asphalt plant and landfill across the street from their residence that has caused a diminution in value. **Held:** The actions of the county did not constitute a taking under the Idaho Constitution, as it is well-established law in Idaho that an actual "taking" of property must occur as opposed to mere "damage." The specific language of the Idaho Constitution with respect to takings is compared in that of other state constitutions in arriving at that determination, In addition, the landowners never alleged that they were permanently deprived of any economic use or even that they have been deprived

of any economic use whatsoever and mere diminution in value is not adequate to allege a taking.

Denial of Development Applications

There are several recent cases from different states clearly affirming that denial of a development application does not constitute a regulatory taking.

- *Madison River R.V. LTD v. Town of Ennis,* 298 Mont. 91, 994 P.2d 1098 (Mont. 2000)
  Issue: Landowner submitted a preliminary plat application for an R.V. park in the town of Ennis. The application was considered, public hearings were held, and the application was denied on the basis of expert and public testimony that raised health, safety and welfare concerns. The landowner then challenged the denial in district court in the form of a petition for judicial review under various theories including that of inverse condemnation. **Held:** The landowner had no vested right to the approval of the preliminary plat application and the decision to deny the application was based on competent evidence in the record. With no right that has been denied, the landowner has no claim that can amount to a taking of such a right; therefore the inverse condemnation claim was also rejected.

- *Arnell v. Salt Lake County* 2005 UT App 165; 112 P.3d 1214 (UT App 2005)
  Issue: Arnell filed an application to build a residence on a recreational lot in Utah's Big Cottonwood Canyon near the Brighton Ski Resort. Salt Lake County refused a building permit because the relevant land use ordinance prohibited construction on a steep slope. **Held:** Summary judgment against Arnell was reversed. Arnell has a valid takings claim where the ordinance was a complete bar to any construction and no variance procedure was provided. Owner may proceed to trial to establish that using the lot for a dwelling imposed no hazard to neighboring property owners or the public. An excellent discussion of Utah takings law is included in this opinion, which found the loss of all economically viable use of this single lot could be a taking.

- *BAM Development v Salt Lake County*, 196 P.3d 601 (Utah 2008)
  Issue: The county in question required a developer to widen a state highway in order to obtain a development permit. The question at hand is whether the exaction of the additional property that was required to widen the road was constitutionally permissible under the test of "rough proportionality" that governs such situations. **Held:** The Utah Court in a lengthy discussion determined that the U.S. Supreme Court had actually meant to establish "rough equivalency" as the standard for analyzing exactions rather than "rough proportionality." Under the Utah standard, the appropriate measure of an exaction is to obtain an estimate of the cost of the exaction to the developer and ensure that that is roughly equivalent to the cost to the governmental body to mitigate the relevant impact in the case. As a result, the Utah Court remanded the case to the trial court to determine whether the exaction in this case was "roughly equivalent" and whether the county could impose an exaction benefitting another level of government, the state Department of Transportation.

- *Kirk-Hughes v. Kootenai County Board of County Commissioners,* 149 Idaho 555, 237 P.3d 652 (Idaho 2010)
  Issue: Kirk-Hughes filed a PUD application for a 500-unit resort-type community. The Board of County Commissioners denied this first PUD application. Kirk-Hughes appealed to the district court, but then entered into a post-mediation agreement where the Board of County Commissioners agreed to consider a new PUD application on an expedited basis. Kirk-Hughes submitted a second PUD application, which was also denied by the board. He then appealed to District Court again, and the Court ruled in favor of the board on all counts. The Idaho Supreme Court unanimously affirmed.
  Held: Kirk-Hughes failed to demonstrate that his substantial rights were prejudiced by the denial. Note that the Idaho Supreme Court does not make any kind of finding that the prolonged process, dual denials, time, and expenses, somehow prejudiced Kirk-Hughes.

Other Extraordinary Decisions

Unusual circumstances can lead to some very interesting case law. The facts and decisions in the two cases below are so extraordinary, they may serve as outliers to the norm. However, they are still noteworthy examples of state courts affirming local government police powers to regulate development through zoning and building codes. *Police powers in the Cowboy State?* One limited case in Wyoming represents the far end of the spectrum in terms of affirming a government's ability to enact and enforce zoning and land use regulations. In the *Board of County Com'rs of Teton County v. Crow,* 65 P.3d 720 (Wyo. 2003), 131 P.3d 988 (Wyo. 2006), 170 P.3d 117 (Wyo. 2007) the Wyoming Supreme Court affirmed (three times!) the Teton County building regulations which placed an 8,000 square footage limitation on the size of a house as a rational and reasonable exercise of the police power. The court upheld the constitutionality of the county's efforts to enforce this size limit and enjoin the construction of housing additions in excess of this limitation while ruling that this did not constitute a regulatory taking. What may have influenced the court's logic was the fact that Crow added 3,000 square feet of habitable space outside of the county's building permit process after the county had expressly denied his request to do so. The court also upheld the county-imposed fines in excess of $363,000 (but did note that the fine technically allowed a property owner to "buy" their right to build in excess of the size restrictions.) The county's request to abate the expansion and tear down the unlawful additions was denied by the Wyoming Supreme Court in light of the substantial fines that were imposed. This case may represent an outlier since it is unknown how similar issues would be handled in other states.[147]

[147] *Bd. of County Comm'rs v. Crow*, 65 P.3d 720 (Wyo. 2003); *Bd. Of County Comm'rs v. Crow,* 131 P.3d 988 (Wyo. 2006); *Bd. Of County Comm'rs v. Crow,* 170 P.3d 117 (Wyo. 2007). This is more of a building regulations enforcement case, but takings issues were addressed in light of enforcement of zoning regulations, clearly affirming local government's police powers to regulate the height, scale, and bulk of buildings.

Idaho and the half-built high-rise. What happens if you begin to build a high-rise tower, but then the building permit expires? *Boise Tower Associates v. Hogland,* 147 Idaho 774, 215 P.3d 494 (Idaho 2009) deals with this question of vested rights and what happens when a developer runs out of extensions of time after investing large expenditures of time and money into a project. In *Hogland,* the Idaho Supreme Court affirmed Boise City's ordinances placing two-year time limits on building permits and extensions — even though the result was a partially built tower in the middle of downtown Boise. That said, the case was ultimately remanded because the Boise planning administrator had mistakenly calculated the building permit expiration date a few days off from the actual expiration date and the lower courts had failed to address the developer's taking and state tort claims arising from this small miscalculation. The meat of this decision, and what makes *Hogland*, so interesting, is that the Idaho Supreme Court held firm on the City's two-year deadlines. The extremely large amounts of time and money invested into partially building the tower did not create any kind of vested or equitable right that would waive the completion date established by city ordinance.

State-Specific "Outside" Authority for Environmental and Land Use Controls

Sometimes states pass laws outside of the typical land use planning statutes, which act to regulate land use planning decisions. Here are some state-specific outside sources of authority, which may impact land use.

Nevada's Regional Planning Agencies

In Nevada, statutorily mandated[148] regional planning coalitions can sometimes take the place of county planning. The most prominent application of these regional agencies is the Tahoe Regional Planning Authority (TRPA), formalized in a bi-state compact between California and Nevada that was ratified by the U.S. Congress in 1969. TRPA's mandate is to protect the environment of the general Tahoe region through the adoption of land use regulations. Were these agencies created by virtue of Nevada's sparsely populated landscape where towns are located a great distance apart? Or are regional planning agencies a tool to facilitate coordinated planning between California and Nevada in the unique situation of the Tahoe area where two states share a high-mountain valley and harsh winter weather creates the need for coordinated emergency services?

[148] Nevada Revised Statues § 278.02514: "In a county whose population is 400,000 or more, the Board of County Commissioners and the city council of each of at least the three largest cities in the county *shall establish a regional planning coalition* by cooperative agreement pursuant to chapter 277 of NRS." (Emphasis added.) While the formation of a regional planning coalition is not as expressly mandated for counties whose population is between 100,000 and 400,000, Nevada Revised Statutes § 278.0261(4) clearly states, "It is the intent of the Legislature with respect to NRS 278.026 to 278.029, inclusive, that each local government and affected entity shall exercise its powers and duties in a manner that is in harmony with the powers and duties exercised by other local governments and affected entities to enhance the long-term health and welfare of the county and all its residents."

Either way, these regional planning authorities transcend cities and counties to create the truest from of cooperative local government.

Arizona's Active Management Areas

Arizona's groundwater code[149] provides for the designation of "active management areas" which are geographical areas designated as requiring active management of groundwater

resources. Four areas were initially established by the state legislature, but the groundwater code outlines procedures for the director of the Arizona Department of Water Resources to designate any additional areas necessary in order to preserve existing or threatened groundwater supplies. Active management areas may also be designated upon petition by 10 percent of the registered voters residing within the boundaries of the proposed active management area, which is then put to the voters as an election question to be decided by a simple majority vote.

Lands within these designated areas are subject to additional, superseding requirements for demonstrating an assured water supply for the proposed development. More specifically, if a subdivision is comprised of subdivided land within an active management area, the plat shall not be approved unless it is accompanied by a certificate of assured water supply issued by the director of water resources, or unless the subdivider has obtained a written commitment of water service for the subdivision from a city, town, or private water company designated as having an assured water supply by the director of water resources. The board shall note on the face of the plat that a certificate of assured water supply has been submitted with the plat or that the subdivider has obtained a commitment of water service for the proposed subdivision from a city, town, or private water company designated as having an assured water supply.

Recommendations, Model Language, and Best Practices Identified through Research Process

While no particular state has adopted the ideal land use scheme, certain aspects of each state's regulations serve as best practices that may transfer well to other jurisdictions.

Required Disclosures and Truth in Advertising Regulations

The new reality for the Intermountain West is that there is simply an oversupply of platted lots, many of which include incomplete infrastructure. Owners of the subdivisions may need to raise capital in order to complete their projects or simply "hang on" to their land. Lot sales quickly become complicated when infrastructure is not yet complete, or worse, when the development agreement with the local government authority has expired. Both Arizona and New Mexico require sellers to submit extensive written disclosures on the condition and future liabilities of their property prior to being allowed

[149] Arizona Statutes §§ 45-401 to 45-704.

to sell lots. Both states also heavily regulate the content and representations of real estate advertisements.

While one might opine that instead of the government regulating the real estate industry, the buyers should be doing their own due diligence before purchasing a lot, there is no doubt that lawsuits over incomplete infrastructure are costly to everyone. Real estate fraud lawsuits can be deleterious to an entire community's reputation and property values. For example, the struggles of the Teton County, Idaho, Board of County Commissioners in grappling with homes and lots purchased in incomplete subdivisions have proven to be costly and time consuming for local government. In some cases, people living in houses along incomplete subdivision roads compromise the efficiency of local emergency services. The adoption of disclosure and fraud regulations such as those in New Mexico and Arizona may reduce the likelihood of these kinds of conflicts and costly lawsuits.

Integrated, Regional Growth Management

The Tahoe Regional Planning Authority is a novel model for shared growth management between two states, which may translate well to shared growth management plans in other similarly situated communities such as Teton Valley "Wydaho" (a remote mountain valley located on the Wyoming/Idaho border). Broadening the vision of community growth and planning to include the region as a whole may ultimately reduce planning and infrastructure costs in cities and counties while also increasing the efficient distribution of public services. While this ideal of forming a regional authority may seem lofty, the cost savings in essential services and infrastructure would offset the administrative costs of this change.

Reversion to Acreage

Nevada is the only Intermountain West state to adopt "reversion to acreage" statutes which enable plats to be quickly and cheaply vacated, reverting land back into large agricultural tracts. With the current large supply of obsolete developments platted throughout the West, this type of expedited reversion process could be used to "undo" much of what was recently platted. The facility of Nevada's reversion statutes could function as an incentive for landowners to revert their properties in order to reduce their tax liabilities.

Best Overall Subdivision Statute: New Mexico

If a state were to mandate the regulation of subdivisions through a singular, statewide statute to ensure consistency throughout each jurisdiction, the New Mexico Subdivision Act[150] is the most complete, comprehensive, integrated model for subdivision of land. The Act's list of state-mandated preliminary plat requirements are extensive, including assurances of water availability, protection of water and other natural resources,

[150] New Mexico Statutes §§ 47-6-1 to 47-6-29.

protection of cultural properties, fencing, etc.[151] The Act mandates interagency consultation before a subdivision application is approved. This expectation of interagency cooperation is highlighted by the extensive minimum requirements for preliminary plat "summary review," which include seeking comments from the department of the environment, the office of cultural affairs, soils and water conservation districts, the department of transportation, local tribes, school districts, and the state engineer.[152] The state engineer plays a particularly critical role in determining whether the amount of water permitted is a sufficient quantity to fulfill the maximum annual water requirements for the development, and a final plat will not be issued in the absence of a water permit from the state engineer. Finite application deadlines are also outlined in the Act; preliminary plat approvals will expire within 24 months unless a timely application is submitted for a one-time extension of up to 12 additional months. And finally, the Act also includes the disclosure, fraudulent advertising, and right of reversion provisions previously mentioned.

Identification of Topics Requiring Further Inquiry

Researching a topic this broad naturally uncovers new questions and fertile subjects for future inquiry. Two rather large questions are particularly deserving of focused research:

1. How previously approved development agreements affect the ability to modify or vacate plats.
2. How the taxation of subdivided land affects the ability to modify or vacate plats.

Development Agreements: Where Contract Obligations Collide with Police Powers.

Most states allow (or even require) that development entitlements are formalized into a development agreement between the developer and the political subdivision. Some states have minimum requirements for what must be included in these agreements,[153] while other state statutes require no specifics and thus the terms of the contract may vary greatly.[154] The quality of these contracts ranges from good to very bad in terms of how

[151] New Mexico Statutes § 47-6-9 (establishing a lengthy list of minimum requirements for city and county subdivision regulations). *See also,* Appendix X for full text.

[152] New Mexico Statutes § 47-6-11.

[153] Arizona Statutes § 11-1101 (County development agreements). This statute clearly contemplates development agreements that include both the short-term nuts and bolts for how a project will be completed (i.e.: timing of construction, maximum height and size of buildings, financing requirements for public infrastructure, etc.), but also the inclusion of obligations that run with the land, such as permitted uses on the property and provisions for preservation of historic structures. *See,* Appendix IX for the full text of this statute.

[154] Both Idaho Code § 67-6511A and Montana Statutes §7-15-4258 allows for local governments to enter into (and in the case of Idaho, even terminate or rescind) development agreements, but there are no real statutory specifics as to what must be included in these agreement.

well they address unexpected future events, some heavily favoring the developer, others empowering cities and counties. The scope of these contracts can range from simply the short-term nuts and bolts on how the project will be financed and timing for completion, while others may include obligations that run with the land, such as management plans for public utilities, open space, or lands dedicated to the public. Some of these contracts bind cities and counties with sewer and water service requirements. Others have even required cities and counties to complete the project's infrastructure should the developer default. Many contracts were hastily written during the boom times, and now there are remaining questions as to the interpretation of vague or ambiguous provisions. In limited situations, some contracts have even lacked a firm deadline for when the development was required to be finished.

With the recent housing crash and decline in lending for real estate development, many of these agreements are now expiring with the developer (or the political subdivision) not being able to complete their contractual obligations. These contracts were typically secured with a letter of credit, which has often either expired or the lending institution has now failed. Every situation is unique; each struggling development has its own background story as to where the project became derailed and the challenges posed by the terms of the agreement. In some situations, the project may be partially or almost entirely completed, but the developer has no viable financing prospects to finish the project any time soon. In other cases, a local government's financial stability has simply changed. When times were booming, the city or county agreed to extend sewer and water services to a development, but prospective public revenues have now dried up, leaving no funds (or incentive) for infrastructure investments. How long should a city or county have to reserve capacity and funds for extending services to these struggling developments? If the developer is unable to post a sureity to secure the contract, should local governments accept alternative forms of sureties? Should a city or county honor earlier contractual obligations that will now result in large losses for the public entity?

These are all very complicated situations that boil down to one fundamental question: *How do municipal and county contractual obligations intersect with local government police powers?* When does one trump the other? How should cities and counties navigate this new world of contractual obligations in light of emerging new financial realities?

Tax Regulations: How Do Taxes Affect New Development?

Taxation issues with development entitlements are also a ripe topic for future research. How land is taxed affects when and how a landowner seeks to develop his or her property. For example, subdivision tax regulations can affect the carrying costs for speculative development. If land is pulled out of agricultural use to be subdivided into residential development, states that allow for land to be taxed as residential upon plat recordation will naturally result in higher tax consequences than states that do not permit land to be taxed as residential until a house in built on the property. And if a plat is vacated, how do the mechanics of changing back to agricultural taxation work? In addition, how open space and natural lands are taxed impacts how land is developed, providing either an incentive or disincentive for cluster or conservation designs.

Additional Topics

In addition to taxes and development agreements, other intriguing topics for further study include a review of local water regulations, impact fees, transfer and purchase of development rights, and adequate public facilities requirements and how they impact the ability to develop in each state. As local governments struggle to maintain levels of service to far-flung developments, service requirements and impact fees may emerge as valuable tools to address these challenges.

Conclusion

The glut of zombie subdivisions in the Intermountain West is not likely to dry up any time soon. The facts and circumstances surrounding each distressed development are unique, as are the local laws in each jurisdiction. The magnitude and potential consequences of this problem may soon provoke a legislative response in heavily-impacted states, at which time lawmakers may look to the laws and jurisprudence in other neighboring states for ideas and guidance. Each of these eight states has its own quiver of tools available to address this problem, but there is no, one, single, magic bullet. Certain state approaches shine above the others, such as incentivized statutes for reversion to acreage, guidance on termination of development agreements, and a clear, concise process for vacating subdivision plats.

For all of these struggling local governments, new questions of law and procedure continually arise with every distressed development that turns to the city or county for assistance or extensions of time on their entitlements. Incentive-based "carrot" approaches may ultimately be more successful than turning towards the regulatory "stick" simply because litigation is costly for local governments, even if they ultimately prevail. For these cities and counties, strategically planned responses that are fair, predictable, and equitable to both the landowner and the public at large will be the easiest for local governments to administer and defend.

Appendix

I. "Home Rule" and "Dillon's Rule" States

This chart compares the degree to which each of the eight Intermountain West States are "Home Rule" and "Dillon's Rule" states.

State	Home Rule?	Dillon's Rule?
Arizona	Yes. Article VIII of the Arizona Constitution provides for Home Rule of cities of 3,500 or more.	Yes
Colorado	Yes. Article XX of the Colorado Constitution grants Home Rule to all cities and towns. Over 100 cities and counties have elected Home Rule charters.	Yes There are still another 170+ cities and towns operating under statutory charters.
Idaho	Not really. Idaho is not a Home Rule state except for the three cities (Bellevue, Boise, and Lewiston), which obtained Home Rule charters prior to Idaho's statehood.	Yes
Montana	Yes. Article XI of the Montana Constitution grants limited Home Rules to local governments and directs the legislature to adopt procedures for permitting local governments to adopt self-government charters.	No
Nevada	No. Article VIII of the Nevada Constitution directs the state legislature to provide for the organization and operation of cities and towns.	Yes
New Mexico	Mostly Yes. Article X Section VI of the New Mexico Constitution (adopted by the electorate on 11/3/1970) authorizes any municipality's electorate to adopt a Home Rule charter allowing them to exercise all legislative powers and perform all functions not expressly denied by general law or charter. Ten municipalities have adopted Home	Yes. The legislature still retains constitutional powers to enact states that limit of prohibit the exercise of powers by local governments. Cities that have not adopted a Home Rule charter are considered to still function under Dillon's Rule.

	Rule charters since 1970. Only two municipalities with charters (Las Vegas and Silver City) are not Home Rule; this is because their charters were adopted before this constitutional amendment, and no new charters have been adopted since.	
Utah	Yes. Home Rule authority has developed through Utah's case law. Broad local discretion was granted in *State v. Hutchinson* where Dillon's rule was specifically held inapplicable to Utah.	No
Wyoming	No. Articles XII and XIII of the Wyoming Constitution directs the state legislature to provide for the organization and operation of cities and towns.	Yes

II. Extraterritorial Jurisdiction

Comparison of statutes authorizing extraterritorial jurisdiction to cities within the eight states of the Intermountain West.

State	**Authorizes extraterritorial jurisdiction to cities?**	**Notes**
Arizona	Yes; A.S. §§ 9-461.11; 9-462.07; 9-463.04	• Where no county planning agency has authority over unincorporated lands, a municipality may exercise its planning powers up to three contiguous miles in all directions of its corporate limits. • Any municipal ordinance intended to have extraterritorial jurisdiction must expressly state that intent. • Where two or more municipalities have boundaries that are less than six miles apart, their respective extraterritorial jurisdiction terminates at a point equidistance between their respective corporate limits or at a mutually agreed upon point.

		• In order to exercise extraterritorial jurisdiction, the municipal planning agency is required to add at least two additional members who reside in the unincorporated area to be covered by the extraterritorial ordinances. Those members are to be appointed by the respective board of county supervisors. • Where no county zoning ordinance or subdivision regulations are in place over unincorporated lands contiguous to a municipality, the same extraterritorial powers with the same requirements and limitations as noted with respect to planning powers may be applied.
Colorado	Yes; C.R.S. § 31-23-212 Intergovernmental cooperation and joint land use planning and regulation responsibilities authorized and encouraged by C.R.S. § 29-20-105	• Territorial jurisdiction of any municipal commission over the subdivision of land includes all land within the legal boundaries of the all lands located within the legal boundaries of the municipality. • EXCEPTION: The municipal government may also assert jurisdiction over all land lying within three miles of the municipal boundary, but only in reference to a major street plan. • Jurisdiction over the subdivision of lands outside the boundary of a municipality shall apply equally to any municipality. • Intergovernmental cooperation agreements allow for local governments to mutually agree to the exercise of extraterritorial jurisdiction. • Where a Planned Unit Development is concerned, C.R.S. § 24-67-104 calls for any county to enact relevant regulations that cover any unincorporated territory in the county and any municipality to enact relevant regulations that cover any territory within the municipal boundaries.
Idaho	No; Art 12, Sec. 2 Idaho Constitution	• Any county or incorporated city or town may make and enforce, ***within its limits***, all such local police, sanitary, and other regulations that are not in conflict with its charter or with the general laws.

Montana	Yes & No; M.C.A. § 76-2-310	• Where no county zoning or subdivision regulations exist, municipalities may extend the application of their subdivision and zoning regulations into the unincorporated county under the following conditions: • For a city of the first class, as defined by M.C.A. § 7-1-4111, up to three miles beyond the city limits. • For a city of the second class, up to two miles beyond the city limits. • For a city of the third class, up to one mile beyond the city limits. • Where a city is organized under a commission-manager system, the city is not allowed to exercise extraterritorial jurisdiction. • Where two or more noncontiguous cities have a potential extraterritorial jurisdictional conflict, the jurisdiction of those cities to impose zoning and subdivision regulations must terminate at a boundary line agreed upon by the cities.
Nevada	No; N.R.S. §§ 268.098, 268.099, and 268.105; *See also* N.R.S. §§ 278.640 to 278.675 inclusive	• Where the State has established a regional planning agency, or where the State has entered into an interstate compact establishing a regional planning agency, the City's powers to plan are subordinate to the powers of the regional planning agency. • Where land within the state of Nevada has not been made subject to a municipal, county, or regional planning agency's comprehensive land use plan or zoning regulation, the Governor of Nevada shall have the authority to impose planning and zoning regulations for that area.
New Mexico	Yes & No; N.M.S. § 3-19-5 & N.M.S. § 3-20-5. *See also*, N.M.S. §§ 3-21-2 – 3-21-4.1 inclusive and N.M.S. §§ 3-56-1 – 3-56-9 inclusive.	• Where a municipality has a population of 25,000 or more, its planning and platting jurisdiction shall include all territory within five miles of its boundaries that is not also within the boundaries of another municipality. • Where a municipality has a population of fewer than 25,000, its planning and platting

		jurisdiction shall include all territory within three miles of its boundaries that is not also within the boundaries of another municipality. • But, where a municipality is located within a Class A county with a population of more than 300,000, the municipality shall not have planning and platting jurisdiction in the unincorporated county. • Where territory outside the boundary of a municipality is within the planning and platting jurisdiction of more than one municipality, that jurisdiction shall terminate at a point equidistant from the boundary of each municipality – unless one municipality has a population under 2,500 persons and the other municipality has a population of more than 2,500. In that case, the planning and platting jurisdiction of the municipality with the greatest population shall extend to such territory. • Concurrent jurisdiction for the purposes of approving subdivision and platting land is as follows under N.M.S. § 3-20-5: (1) Jurisdiction of the county covers all territory not within the borders of a municipality; (2) Jurisdiction of a municipality having a population of greater than 25,000 persons shall extend up to five miles beyond the municipal borders where no other municipality also claims such jurisdiction; (3) Jurisdiction of a county with fewer than 25,000 persons shall extend 3 miles into the unincorporated county where no other municipality also claims such jurisdiction; (4) A municipality with more than 200,000 persons located within a Class A county shall share approval authority with the county through an Extraterritorial Land Use Commission and Authority; (5) Where county and municipal subdivision and platting jurisdiction overlaps, they shall exercise concurrent authority. • Extraterritorial zoning authority is divided in a similar manner as planning, platting, and

		subdivision authority. N.M.S. §§ 3-21-2 – 3-21-4.1 inclusive. • Finally, regional planning is authorized by N.M.S. §§ 3-56-1 – 3-56-9 inclusive, where adjacent municipalities or counties may choose to create a regional planning commission to which any or all planning powers and functions may be delegated.
Utah	No; U.C.A. § 10-9a-403	• Municipal planning commissions are authorized to include areas outside the boundaries of the municipality where, in the judgment of the commission, the planning of those areas is related to the planning of the municipality's territory. • But, when a municipal plan includes areas outside of the municipal boundaries, the municipality cannot take action without the concurrence of the county or other municipalities affected. • Utah's cities are granted extensive extraterritorial controls over watersheds critical to a city's water sources. UCA 10-8-5. • Utah counties may extend notice to and invite participation from cities where county decisions affect territory that a city has declared to be part of its intended annexation area in an annexation policy plan adopted under UCA 10-2-401.5. This is not required by state statute.
Wyoming	No & Yes; Wyo. Stat. Ann. § 15-1-503	• Where a municipal planning commission takes action to adopt a master plan and that plan involves territory outside the city or town, action shall be taken with the concurrence of county commissioners, county planning commission, or other municipal legislative body concerned. • However, the state code expressly limits the jurisdiction of county planning commissions to unincorporated territory, which is defined as: lands which are one mile from the limits of a town or city whose population is 2,000 or less, two miles from the limits of a town or city with a population between 2,000 and

		3,000, and three miles from the limits of a town or city with a population of 3,000 or more. Wyo. Stat. Ann. §18-5-101.

III. Statutory Definition of "Subdivision"

This chart compares how a "subdivision" or "subdivided land" is statutorily defined in each of the eight Intermountain West states.

State	Notes on definition of "subdivision"
Arizona	• The state subdivision regulations of Arizona do not include an explicit definition of what constitutes a "subdivision" within an unincorporated county. However, A.S. § 32-2181(E), which regulates the sale of subdivided lands in the State of Arizona, only requires that notice of the intention to offer subdivided lands for sale be provided where the subdivision in question has created six or more lots of which each of those lots is less than 36 acres in size. • Where five or fewer lots, parcels or fractional interests, any of which is 10 acres in size or smaller, are created through a division of land, A.S. § 11-831 allows for a county board of supervisors to adopt regulations directing that those land divisions be reviewed and approved by county staff. However, the county is explicitly prohibited from denying the land division. Where a land division fails to meet minimum regulatory requirements under this section, the county may require that those deficiencies be listed on the plat to be recorded and that the deficiencies must be corrected prior to the issuance of a building permit. • At the municipal level, a "subdivision" is defined as follows: "Improved or unimproved land or lands divided for the purpose of financing, sale or lease, whether immediate or future, into four or more lots, tracts or parcels of land, or, if a new street is involved, any such property which is divided into two or more lots, tracts or parcels of land, or any such property, the boundaries of which have been fixed by a recorded plat, which is divided into two or more parts."
Colorado	• According to C.R.S. § 30-28-101(10), a "subdivision" refers to any division of land that results in parcels smaller than 35 acres. • However, a "cluster development" under C.R.S. § 30-28-403 consists of a rural, single-family residential use of land where up to one home per 17.5 acres can be clustered together on an area of less than 35 acres, as long as at least 2/3rds of the larger parcel remains conserved as open space for a period of at least 40 years. Cluster developments are subject to a "rural land use process" as adopted by

	the county in which the territory is located rather than the standard subdivision regulations. These cluster developments are authorized under a different section of the statutes than Planned Unit Developments. • Finally, within the boundaries of a municipality, a subdivision refers to any division of a single parcel of land into two or more parcels for the immediate or future purpose of sale or development. C.R.S. § 31-23-201(2).
Idaho	• I.C. § 50-1301(16) defines a subdivision as any tract of land divided into five or more parcels for the purpose of sale or building development, whether immediate or future. • Exempted from the definition of subdivision is the bona fide division or partition of agricultural lands for agricultural purposes. The test of such a partition being bona fide is that each lot must be five acres or larger and must remain in agricultural production. • Cities and counties are also empowered to adopt their own definition for subdivisions in lieu of the state's version.
Montana	• For purposes of state sanitation requirements, a subdivision shall comprise only those parcels of less than 20 acres which have been created by a division of land, and the plat thereof shall show all parcels, whether contiguous or not. M.C.A. § 76-4-103. • Aside from sanitation requirements, subdivisions in Montana are required to undergo a public review and approval process where one or more parcels of less than 160 acres in size are being created through a division of land. M.C.A. § 76-3-604. • However, a "minor subdivision" consists of a proposal to create five or fewer lots from a tract of record. M.C.A. § 76-3-103(9).
Nevada	• N.R.S. § 278.320(1) defines a subdivision, for the purposes of subdivision regulation, as being any division of land that creates five or more lots or parcels for the purpose of transfer or development, or for a proposed transfer or development. • N.R.S. § 278.320(4) carves out an exception for agricultural parcels that are 10 acres in size or greater, except where the zoning laws require a greater minimum lot size. • For purposes of the regulation and licensing of real estate sales, a "subdivision" is defined by N.R.S. § 119.110 as any tract of land that is divided or has been proposed for division into 35 or more parcels or lots.

New Mexico	• For purposes of the New Mexico Land Subdivision Act, "Subdivided land" is defined as land divided into 25 or more parcels for the purpose of sale or lease. N.M.S. § 47-5-2. • For purposes of the New Mexico Subdivision Act, "subdivision" means the division of a surface area of land into two or more parcels for the purpose of sale, lease, other conveyance, or development. Exceptions include: (1) The sale, lease, or conveyance of any parcel larger than 35 acres that has been used primarily and continuously for agricultural purposes for at least three years; and (2) The sale, lease or conveyance of land that creates a parcel no smaller than 140 acres. N.M.S. § 47-6-2(M). • The New Mexico Subdivision Act creates five types of subdivisions: 1. Type-one subdivision: Any subdivision containing 500 or more parcels, any one of which is less than 10 acres in size. 2. Type-two subdivision: Any subdivision containing not fewer than 25 but not more than 499 lots, any one of which is less than 10 acres in size. 3. Type-three subdivision: Any subdivision containing not more than 24 parcels, any one of which is less than 10 acres. 4. Type-four subdivision: Any subdivision containing 25 or more parcels, each of which is more than 10 acres in size. 5. Type-five subdivision: Any subdivision containing more than 24 parcels, each of which is more than 10 acres in size. • For the purposes of a municipal planning authority under N.M.S. § 30-20-1, a subdivision within the territorial limits of the municipality shall consist of the division of land into two or more parcels for the purposes described below: 1. Sale for building purposes. 2. Laying out a municipality or any part thereof. 3. Adding to a municipality. 4. Laying out suburban lots. 5. Re-subdivision. • For a municipal planning authority exercising extraterritorial jurisdiction, subdivision shall refer to the division of land into two or more parcels of less than five acres in any one calendar year for the purposes described above.

Utah	• Under the Utah Municipal Code, U.C.A. § 10-9a-103(51), a subdivision is defined as any land that is divided, re-subdivided or proposed to be divided into two or more lots or parcels for the immediate or future purpose of sale or development. U.C.A. § 17-27a-103(55) includes the same definition of a subdivision at the county planning level. • Utah code also incorporates specific exemptions from the plat requirement for a subdivision for both cities and counties where the appropriate land use authority may approve a subdivision of 10 lots or less without a recorded plat, though other requirements must still be met. U.C.A. § 10-9a-605; U.C.A. § 17-27a-605. • A "minor subdivision lot" can be created where an agricultural property of at least 100 contiguous acres splits off a single lot of at least one acre in size located at least 1,000 feet from any other minor subdivision lot on the property. Such a division may still be subject to reasonable health, safety and welfare regulations. U.C.A. § 17-27a-605. • NOTE: The Utah Legislature has amended the subdivision standards in the land use code four times in the last six sessions. Be sure to consult the most current version of the code regarding subdivision definitions and standards.
Wyoming	• With respect to county planning, "Subdivision" means the creation or division of a lot, tract, parcel, or other unit of land for the immediate or future purpose of sale, building, development or redevelopment, for residential, recreational, industrial, commercial or public uses. The word "subdivide" or any derivative thereof shall have reference to the term subdivision, including mobile home courts, the creation of which constitutes a subdivision of land. Wyo. Stat. Ann. § 18-5-302(vii) • Specific state code requirements for subdivision are imposed under Wyo. Stat. Ann. §§ 18-5-301 – 18-5-315 where the parcels involved are less than 35 acres in size. • A less-restrictive set of subdivision requirements may be adopted by counties with respect to subdivisions that create parcels that are 35 acres or larger and up to 140 acres. Wyo. Stat. Ann. § 18-5-316. • Any subdivision parcel that is 35 acres in size or greater and is used for agricultural purposes, regardless of whether the parcel is part of a large-acreage subdivision or constitutes a large parcel within a regular subdivision, shall for tax purposes under Wyo. Stat. Ann. § 39-13-103 be deemed not to be part of a platted subdivision. Wyo. Stat. Ann. § 18-5-318.

	• Of note, within the planning jurisdiction of an incorporated city or town, the definition of a subdivision is as follows: "Subdivision" means the division of a tract or parcel of land into three or more parts for immediate or future sale or building development. Wyo. Stat. Ann. § 15-1-601. • Also, the minimum requirements for the issuance of a subdivision permit in the unincorporated portions of the state allows counties to exempt subdivisions creating five or fewer lots from all or part of the mandatory minimum statutory requirements. Wyo. Stat. Ann. § 18-5-306.

IV. Prohibitions on Lot Sales

This chart compares states that prohibit the sale of lots prior to the proper recordation of a plat.

State	Prohibition on the sale of lots prior to proper recordation?	Notes
Arizona	Yes & No	• A.S. § 32-2181 requires that notice of intent to subdivide must be provided to the state real estate commissioner prior to a subdivider offering those lands for sale. One element of the minimum required notice that must be submitted to the state commissioner before an agent may offer subdivided lands for sale is a copy of the properly recorded subdivision plat that has been filed with the county in which the territory is located. • But, A.S. § 32-2181.03 allows for a sub-divider to accept deposits for "lot reserve-tions" prior to meeting the requirements of recording the plat and filing the notice of intent to subdivide. Where a subdivider does accept lot reservations, certain notice and refund requirements must be met, however, if those requirements are met then there is no restriction on the practice. • In addition, certain sales are exempt from the provisions of A.S. § 32-2181, including: (1) The sale or lease in bulk of six or more lots to one buyer in one transactions; (2) The sale or lease of lots or parcels of 160 acres or more; and (3) The sale or lease of lots that are

		zoned and restricted to commercial or industrial uses. • Lot sales in municipal subdivisions are more restricted, pursuant to A.S. § 9-479, which explicitly states that no property shall be sold or described in a conveyance or other instrument by reference to subdivision map or plat unless the map or plat has been prepared and filed in accordance with the provisions of the municipal subdivision article, which requires the proper recordation of such a map or plat.
Colorado	Yes	• C.R.S. § 30-28-110(4) makes it a misdemeanor for anyone to transfer title or sell subdivided lands prior to the final approval and recordation of the plat in the county where the territory is located. C.R.S. § 31-23-216 creates similar penalties for the same actions at the municipal level. • C.R.S. § 30-28-137 requires any subdivision plat that includes public facilities, roadways, or other improvements to become subject to a subdivision improvements agreement with the governing body, as well as provide bonding or collateral sufficient to complete the improvements, prior to the final approval and recordation of the plat.
Idaho	Yes	• Small fines are imposed for sales before recordation. I.C. § 50-1316. Any person who shall dispose of or offer for sale any lots in any city or county until the plat thereof has been duly acknowledged and recorded, as provided in sections 50-1301 through 50-1325, shall forfeit and pay one hundred dollars ($100) for each lot and part of a lot sold or disposed of or offered for sale.
Montana		• M.C.A. § 76-3-301 requires that a final subdivision plat must be approved prior to recordation, and that no lots may be sold, leased or transferred in reference to such plat until it has been recorded. • However, under M.C.A. § 76-3-303, once a preliminary plat has been either approved or

		conditionally approved, the subdivider may enter into contracts for sale of the subdivision tracts. Any payments from the purchasers of such tracts must be deposited with an escrow agent and may not be distributed to the subdivider until the county certifies that a final plat has been filed. If two years after the approval or conditional approval of the preliminary plat the subdivider has not recorded a final plat, the escrow agent must refund the entirety of any payments to the purchaser.
Nevada	No	• See grounds for denial of a license to sell lots in a given subdivision as stated in N.R.S. § 119.160. However, N.R.S. Chapter 119 inclusive intensively regulates the details of the sale of subdivided lands in the State of Nevada.
New Mexico	Yes & No	• N.M.S. § 3-19-6(C)(3) allows a municipality to enter into a development agreement that allows for a plat to obtain final approval and be recorded, if within two years the developer is obligated to complete the utilities and infrastructure for the development. In that agreement, the municipality may provide the developer with the option of selling, transferring or otherwise improving any lots within the subdivision, which have been provided with utilities and other infrastructure, even if the remainder of the project is not yet completed. • N.M.S. § 3-20-14 makes it a misdemeanor for anyone to sell or transfer subdivision lots prior to proper approval and recordation of the plat as set forth in the municipal code. • Interestingly, N.M.S. § 3-20-15 also makes it a misdemeanor for any utility to be connected to a subdivision lot prior to proper approval and recordation of the plat as set forth in the municipal code.
Utah	Yes	• U.C.A. § 10-9a-601 states that a municipality may implement a requirement that a subdivision plat be in compliance with the applicable ordinances and regulations before:

		(1) It may be filed in the recorder's office; and (2) Lots may be sold. • U.C.A. § 10-9a-604 requires that a subdivision plat must have received full and final approval from the governing planning authority prior to recordation. But, U.C.A. § 10-9-604.5 provides criteria for the local planning authority to allow for the recordation of a plat and the commencement of "development activity," wherein the developer has provided the planning authority with adequate assurance that the project will be completed satisfactorily and in conformance with the requirements on the plat. • U.C.A. § 10-9a-611 prohibits the sale or transfer of subdivision lots prior to the approval of a plat by the planning authority and recordation of the plat with the County Recorder.
Wyoming	Yes & No	• Under Wyo. Stat. Ann. § 18-5-304, No person shall sell land subject to subdivision regulation, record a plat or commence construction of a subdivision without first obtaining a subdivision permit. • Under the minimum requirements for the issuance of a subdivision permit, Wyo. Stat. Ann. § 18-5-306, the subdivider is required to submit a final plat for approval by the Board of County Commissioners; however, there is no explicit requirement that the plat be recorded before the permit issues. • Within the Conservation Design process, a subdivision permit shall not issue until the plat has been approved and recorded with the county clerk in the county in which the land is located. Wyo. Stat. Ann. § 18-5-403. • In 2001, the Wyoming legislature repealed Wyo. Stat. Ann. § 18-5-310, which prohibited the recording of a plat until a subdivision permit had been issued.

V. Statutes Addressing the Vacation or Amendment of Plats

This chart compares the states that have adopted statutes addressing the vacation and/or amendment of plats. These regulations vary widely in their scope and detail.

State	Do replatting statutes exist?	Notables
Arizona	No	• A.S. § 9-463.01 and 11-806.01 vest responsibility in cities and counties to adopt regulations and comply with state requirements pertaining to the hearing, approval or rejection, and recordation of final subdivision plats, plats filed for the purpose of reverting to acreage of land previously subdivided, plats filed for the purpose of vacating streets or easements previously dedicated to the public, and plats filed for the purpose of vacating or re-describing lot or parcel boundaries previously recorded.
Colorado	Yes	• C.R.S. § 30-28-139 sets forth a process for a county government to merge lots for the purposes of eliminating interior lot lines, obsolete subdivisions, or other reasons. The county is first required to adopt an applicable ordinance or regulation allowing the merger of lots; however, if the county so chooses it is merely required to provide notice to each affected lot owner, who is then obligated to timely request a hearing. Where no hearing is requested or the owner consents, the county commission may then merge the lots into one parcel. Under the same statute, any property owner or group of property owners who submit a request to the county for lots to be merged are entitled to have that done without a hearing. • In addition, the Colorado Planned Unit Development Act at C.R.S. § 24-67-106 does contemplate subsequent changes to plats. Specific provisions within the statute allow for the relevant governmental agency to hold a public hearing in order to alter the public uses or publicly dedicated portions of the Planned Unit Development without the consent of the owners. Though, any affected landowners retain the right to judicial remedies in the event that the governmental alterations to the development impair any private rights. • Finally, C.R.S. §§ 30-28-301 – 30-28-313 inclusive sets forth a uniform process for creating a subdivision

		exemption plat to deal with inaccuracies and inconsistencies in platting of land and subdivisions prior to the implementation of current subdivision regulations. The process instituted under this section is intended for the clarification of legal descriptions rather than the vacation of obsolete plats.
Idaho	Yes	• I.C. §50-1301 et. seq. establishes procedures for vacations of plats, the requirements for consent from adjoining owners, and an appeals process. The specific procedures for replatting might just be the most detailed of any of the eight states.
Montana	Yes	• M.C.A. § 76-3-207(1)(f) exempts the process of aggregating multiple parcels into a single larger parcel, as long as the resulting parcel conforms to the applicable zoning regulations. • But, under M.C.A. § 76-3-207(2)(a), the governing authority must review any division, redesign or rearrangement of lots within a platted subdivision that either increases the total number of lots or rearranges six or more lots. • M.C.A. §§ 7-5-2501 to 2504 establish procedures for the vacation of townsite plats. • M.C.A. § 76-3-305 allows for the vacation of any subdivision in whole or in part as provided by M.C.A. §§ 7-5-2501, 7-5-2502, 7-14-2616(1) and (2), 7-14-2617, 7-14-4114(1) and (2), and 7-14-4115.
Nevada	Yes	• N.R.S. §§ 270.010 – 270.150 establishes procedures for correction and vacation of plats. N.R.S. §§ 278.479 – 278.4965 established a different procedure for large agricultural parcels, called "reversion to acreage."
New Mexico	Yes	• N.M.S. § 3-20-8 requires a municipal planning authority to establish summary procedures for the administrative approval of the following types of subdivisions: (1) Subdivisions of not more than two parcels of land; (2) Re-subdivisions, where the combination or recombination of portions of previously platted lots does not increase the total number of lots; and (3) subdivisions of two or more parcels of land in areas zoned for industrial use. • N.M.S. § 3-20-12 outlines the procedure for landowners who wish to vacate all or part of the

		subdivision plat where they own territory. First, the owners of the land all must provide written consent to the vacation. Second, the planning authority must consider the interests and impacts on other persons with interests either within the subdivision or who own lands contiguous to the subdivision to be vacated, as well as the implications for any streets or other public dedications on the original plat that may be impacted. The decision of the planning authority may include conditions surrounding the publicly dedicated lands and roadways within the subdivision. • Vacating plats is addressed in several parts of New Mexico's code. N.M.S. § 3-20-12 establishes procedures for vacating plats, § 47-6-7 outlines the duties of the county clerk in formalizing a plat vacation, and § 19-4-1 covers the vacation of townsites. § 3-20-2 also describes the requirements for amending a municipal subdivision plat where the original tracts are less than one acre in size and the amendments are intended to either increase or decrease the size of the contiguous tracts. • Under N.M.S. § 47-6-9.1, a Board of County Commissioners, through appropriate notice and public hearing procedures, may require the consolidation of contiguous parcels of land with common ownership for the purpose of enforcing minimum zoning or subdivision requirements on the parcels.
Utah	Yes	• U.C.A. §§ 10-9a-207, 608, 609, and 609.5 govern municipal vacations of roads and rights of way as well as subdivision vacations and replats while, U.C.A. 17-27a-207, 608, 609, and 609.5 govern county vacations and replats.
Wyoming	Yes	• The Wyoming Constitution Art. 3 §27 directs the legislature to pass laws concerning the vacating of road and town plats. Wyo. Stat. Ann. §§ 34-12-106 through 111 establishes the procedures for vacating plats.

VI. States Requiring Subdivision to be in Conformance with the Underlying Zoning
This chart compares the states with statutes requiring all land subdivision to be in conformance with the underlying zoning standards. While at first blush it might seem that all subdivisions must mirror the zoning requirements, surprisingly, most states do not expressly require congruence between the two. In particular, any state the allows for planned unit developments or conservation or cluster designs by definition waive the requirement of development conforming with the underlying zoning regulations for those projects.

State	Statutes requiring subdivisions to conform to zoning?	Notes
Arizona	No	
Colorado	The answer is "No" for subdivisions, but "Yes" for Planned Unit Developments	• In the municipal planning context, C.R.S. § 31-23-215 allows for the planning commission to impose conditions on the use, height, area, or bulk restrictions or requirements prior to approving a subdivision. • With respect to Planned Unit Developments, C.R.S. § 24-67-103(3) states as follows: "Planned unit development" means an area of land, controlled by one or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational, or industrial uses, or any combination of the foregoing, the plan for which does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations.
Idaho	No	
Montana	Yes	• Title 76, Ch. 3 – Local Regulation of Subdivisions: Division or Aggregations of Land Exempted from Review but Subject to Survey Requirements and Zoning Regulations (76-3-207) • Exemptions include family land gifts, rearranging boundaries. They will be exempt from subdivision regulations, but still subject to the applicable zoning regulations.
Nevada	No	

New Mexico	Yes	• In the municipal planning context, New Mexico Subdivision Regulations § 3-19-6(E): E. If the requirement or restriction does not violate the zoning ordinance, the governing body or planning commission of the municipality may agree with a person seeking approval of a subdivision upon the use, height, area, or bulk requirement or restriction governing buildings and premises within the subdivision. The requirement or restriction shall: (1) accompany the plat before it is approved and recorded; (2) have the force of law; (3) be enforced; and (4) be subject to amendment or repeal as the provisions of the zoning ordinance and map are enforced, amended, or repealed.
Utah	No	• Under U.C.A. § 17-27a-603 and U.C.A. § 10-9a-603, where a subdivision application is in conformance with the relevant land use regulations including the applicable zoning regulations, the applicant is entitled to receive approval of the application. Thus, if a subdivision is in compliance with the zoning, it shall be approved. But, there is no statutory authority that restricts a board from approving a subdivision where the plan is not in accordance with the underlying zoning.
Wyoming	Yes & No	• Wyo. Stat. Ann. 18-5-306: Minimum Requirements for Subdivision Permits (a)(i) Evidence satisfactory to the board that the proposed subdivision complies with any applicable zoning or land use regulations; • Wyo. Stat. Ann. 18-5-316: Requirements for Large Acreage Subdivision Permits (b)(i) Evidence that the proposed subdivision complies with any applicable zoning regulations o NOTE: This section applies to parcels 35-140 acres in size.

		• Wyo. Stat. Ann. 18-5-203: Certificate Required to Locate Buildings or Use Land within Zoning Resolution It is unlawful to locate, erect, construct, reconstruct, enlarge, change, maintain, or use any building or use any land within any area included in a zoning resolution without first obtaining a zoning certificate from the Board of County Commissioners. No zoning certificate shall be issued unless the plans for the proposed building, structure or use fully comply with the zoning regulations then in effect. BUT, see Wyo. Stat. Ann. §§ 18-5-401 – 18-5-405: Conservation Design Process, especially Wyo. Stat. Ann. § 18-5-403: Cluster Development Permits. In application, cluster developments under the Wyoming Conservation Design Process will likely violate density and lot-size restrictions under the applicable zoning scheme.

VII. States with Statutory Vested Rights Provisions
Comparison of states that have adopted vested rights provisions into their code.

State	**Vested rights provisions in the state code?**	**Notes**
Arizona	Yes	• Both Title 9 (Cities and Towns), A.S. §§ 9-1201 – 9-1205 inclusive and Title 11 (Counties), A.S. §§ 11-1201 – 11-1206 inclusive, include protected development rights provisions that deal with development rights in the context of phased developments. • Under A.S. § 11-1203, a protected development right established under a protected development right plan in an unincorporated county is valid for three years for a non-phased development, five years for a phased development, and 10 years for a phased development that has a gross acreage of more than 640 acres. The county may extend such a

		right for up to two years, except that a phased development of greater than 640 acres may obtain a maximum extension of up to 10 years. • Similarly, A.S. § 9-1203 allows for a city or town to issue a protected development right under an approved protected development right plan that is valid for 3 years for a non-phased development or 5 years for a phased development. A maximum extension of two years may be granted for either form of development. • That said, under A.S. § 11-1101 it appears that a county could enter into a development agreement that extended the time period wherein a protected development right remained valid, though such an action still would not alter the nature of that right, just its duration. A.S. § 9-500.05 creates a similar loophole for cities and towns entering into development agreements. Even so, any county, city, or town that enters into a development agreement must then record that agreement within 10 days of its entry, effectively providing public notice of the contents of the agreement. • Arizona's protected development rights are distinct from a common law vested right in that the right terminates at the end of the applicable period established by statute. A.S. § 11-1203(D). The right to continue work under the protected development right can only extend beyond the statutory time period where a valid building permit has been issued and the footings or foundations for those buildings have been completed. A.S. § 9-1203(D) sets forth similar limitations for municipal protected development rights. • In contrast, A.S. §11-1205(B) states, "Nothing in this article precludes judicial determination, based on common law principles or statutory provision, that a vested right exists in a particular case or that a compensable taking has occurred. Except as expressly provided in this Chapter, nothing in this Chapter shall be

		construed to alter the existing common law of vested rights." • Vested rights in the context of a municipal development moratorium are defined as follows: "A right to develop property established by the expenditure of substantial sums of money pursuant to a permit or approval granted by the city, town or county." A.S. § 9-463.06(I)(6). • Under A.S. § 11-806.01(J), once an approved subdivision plat is recorded in the county where the subdivision is located, the fee of the streets, alleys, avenues, highways, easements, parks and other parcels of ground reserved to the use of the public vests in trust in the county for the uses and to the extent depicted on the plat. If such lands within the county are subsequently annexed into a city or town, that fee automatically vests in the city or town.
Colorado	Yes	• Colorado Vested Rights Property Act, C.R.S. §§ 24-68-101– 24-68-106 inclusive, applies to both cities and counties • Under C.R.S. § 24-68-102(5), a "vested right" means the right to undertake and complete the development and use of property under the terms and conditions of a site-specific development plan. This definition is notable in that no actual work or expenditure on a project is required in order for a development right to vest but merely the issuance of a permit to do so. • A county or city government may issue a conditional right to develop where the landowner or developer is required to fulfill certain obligations in order that the right to develop is not forfeited. In such a situation where a conditional right has issued and the right-holder fails to fulfill their obligation, the vested property right is thereby forfeited. C.R.S. § 24-68-103(1). • Zoning that is not tied to a site specific development plan does not constitute a vested right. C.R.S. § 24-68-103(2).

		• Development rights that vest under the Vested Property Rights Act have a lifespan of three years, unless explicitly extended by approval of the local government, subject to popular referendum. C.R.S. § 24-68-104 • Interestingly, under C.R.S. § 24-68-105(1), if a local government were to enact new zoning or other regulations inconsistent with a previously vested development right, the local government would only be liable to the landowner for actual costs and fees incurred in the course of development and not for any diminution in value of the property as a result of the change. This provision mirrors the common law standard of damages in the case of a breach of a vested right and appears to provide for no real practical difference between the common law of vested rights and the statutory rights available to landowners in Colorado. • In addition, C.R.S. § 24-68-106(3) allows for the continued application of common law principles in determining whether a vested right exists or whether a compensable taking has occurred.
Idaho	No	• Assume common law principles of vested rights.
Montana	No	• Assume common law principles of vested rights.
Nevada	No	• Assume common law principles of vested rights.
New Mexico	No	• Under N.M.S. § 47-6-25, the Board of County Commissioners may suspend or revoke approval of a plat as to the unsold, un-leased or otherwise un-conveyed portions of a subdivider's plat if the subdivider does not meet the schedule of compliance approved by the board. • Common law principles of vested rights are assumed to apply under other circumstances.
Utah	No	• Under U.C.A. § 10-9a-509(1) (a) (municipalities) and U.C.A 17-27a-

		508(1)(a)(counties), an applicant is entitled to approval of a land use application submitted to a land use authority where the proposed development conforms to all the applicable planning and zoning regulations. The only limitation on that entitlement, once issued, is that under U.C.A. § 10-9a-509(1)(g) and 17-27a-508(1)(g) the applicant must continue to implement its obligations under the development agreement with reasonable diligence. However, no explicit language is incorporated into the statutes regarding permanent vesting of development rights, and common law principles apply
Wyoming	No	• Assume common law principles of vested rights.

VIII. States with Takings Regulations

This chart compares which of the eight Intermountain West states have adopted takings statutes. Takings statutes are still relatively uncommon, and there is little to no published case law on how these regulations are to be practically applied. Takings statutes are uncommon as several ballot initiatives proposing these regulations failed to pass in many states.

State	**Takings statutes?**	**Notes**
Arizona	Yes	• Arizona has adopted Prop 207; however, there have only been two unpublished opinions addressing Prop 207 as a vehicle for an inverse condemnation action.
Colorado	Yes	• C.R.S. §§ 29-20-201 – 29-20-205, Regulatory Impairment of Property Rights codifies the common law and constitutional principles enumerated in current federal and state case law surrounding regulatory takings. The statutes focus on the current tests in place for determining the constitutionality and availability of just compensation for exactions and dedications. • Under C.R.S. § 29-20-204(2)(d), judicial review of an alleged taking shall employ the following four-part test: (1) Whether the government action was accomplished pursuant to a duly adopted law, ordinance, or

		other regulation; (2) Whether the action furthers a legitimate government interest; (3) Whether the exaction or dedication is roughly proportional to impact of the proposed use or development; and (4) Whether there are adequate legislative standards and criteria to ensure that relevant regulation is rationally and consistently applied.
Idaho	Sort of	• Regulatory takings language is a presence in the Local Land Use Planning Act (LLUPA), but it simply states that denial of a permit (i.e. subdivision, special use, variance, etc.) is subject to a regulatory takings analysis.
Montana	No	• No explicit takings statutes have been adopted in Montana, though it is worth noting provisions such as M.C.A. § 76-2-209 which prohibits zoning regulations from preventing the complete use, development, or recovery of any mineral, forest, or agricultural resource. The practical impact of such a provision is to create a category of zoning provisions that would lead directly to a constitutional or common law takings claim. Thus, the statute can be considered to be a sort of indirect takings provision.
Nevada	No	
New Mexico	No	• Common law and constitutional principles related to the taking of private property and the requirement of just compensation apply in the absence of any additional statutory scheme.
Utah	Yes	• Under U.C.A. § 10-9a-103(6) and U.C.A. § 17-27a-103(7), a constitutional taking is defined as a governmental action that results in a taking of private property such that compensation is due to the owner under the federal or state constitution. Such a determination would have to be made in reference to common law and constitutional provisions through judicial review. • In 1993, Utah adopted the Private Property Protection Act, which requires state agencies

		to adopt regulatory takings guidelines and file takings assessments. The law has been virtually ignored. In 1994, Utah adopted the Constitutional Takings Issues Act, which requires political subdivisions to adopt regulatory takings appeals processes. A number of local governments have complied, but such appeals processes are statutorily not required to exhaust administrative remedies and are rarely used. • In 1997, Utah created the Office of the Property Rights Ombudsman, which is actively involved in issuing advisory opinions, facilitating mediation and arbitration, and otherwise assisting agencies and property owners in resolving hundreds of takings, eminent domain and land use issues each year. U.C.A 13-43-101 et seq. (more information at propertyrights.utah.gov.)
Wyoming	No	

IX. Arizona Statutes

Here are a few noteworthy Arizona Statutes referenced in the body of the paper. This list is not exhaustive but includes those particular statutes containing unique or novel language, which may prove useful to other jurisdictions.

- **A.S. § 11-1101 Development Agreements**

  A. A county, by resolution or ordinance, may enter into development agreements relating to property located outside the incorporated area of a city or town.

  B. The development agreement shall be between the county and a landowner or any other person having an interest in real property and may specify or otherwise relate to any of the following:

  1. The duration of the agreement.

  2. The permitted uses of property subject to the agreement.

  3. The density and intensity of uses and the maximum height and size of proposed buildings within the property.

  4. Provisions for reservation or dedication of land for public purposes and provisions to protect environmentally sensitive lands.

5. Provisions for preservation and restoration of historic structures.

6. The phasing or time of construction or development on the property.

7. Conditions, terms, restrictions, financing and requirements for public infrastructure and subsequent reimbursements over time.

8. Conditions, terms, restrictions and requirements relating to the county's intent to form a special taxing district pursuant to title 48.

9. Conditions of sewer services.

10. Any other matters relating to the development of the property.

C. A development agreement shall be consistent with the county comprehensive plan adopted pursuant to chapter 6, article 1 of this title and applies to the property on the date the development agreement is executed.

D. A development agreement may be amended, or cancelled in whole or in part, by mutual consent of the parties to the development agreement or by their successors in interest or assigns.

E. Within ten days after a development agreement is executed, the county shall record a copy of the agreement with the county recorder, and the recordation constitutes notice of the development agreement to all persons. The burdens of the development agreement are binding on, and the benefits of the development agreement inure to, the parties to the agreement and to all of their successors in interest and assigns.

F. Section 32-2181, subsection I does not apply to development agreements under this section.

G. Notwithstanding any other law, a county may provide by resolution or ordinance for public safety purposes, and with the written consent of an owner of property that has entered into a development agreement pursuant to this section, for the application and enforcement of speed limits, vehicle weight restrictions or other safety measures on a private road that is located in any development outside the corporate boundaries of a city or town and that is open to and used by the public. The county may require payment from the property owner of the actual cost of signs for speed limits or other restrictions applicable on the private road before their installation.

- **A.S. § 32-2183.01. Advertising material; contents; order prohibiting use, costs of investigation, drawings or contests.**

  A. Within ten days after request by the (State Real Estate) commissioner, the subdivider shall file with the commissioner a copy of any advertising material used in connection with sales of the subdivided lands.

B. No advertising, communication or sales literature of any kind, including oral statements by salespersons or other persons, shall contain:

1. Any untrue statement of material fact or any omission of material fact which would make such statement misleading in light of the circumstances under which such statement was made.

2. Any statement or representation that the lot or parcels are offered without risk or that loss is impossible.

3. Any statement or representation or pictorial representation of proposed improvements or nonexistent scenes without clearly indicating the improvements are proposed and the scenes do not exist.

4. Any statement or representation that the lot or parcels are suitable as homesites or building lots unless either of the following is true:

(a) Potable water is available from a certificated public utility or a municipal corporation and either an individual sewage disposal system will operate or a sewer system is available from a certified public utility or a municipal corporation.

(b) Facts to the contrary are clearly and conspicuously included in each advertisement pertaining to the property.

C. All advertising and sales literature shall be consistent with the information contained in the notice of intention pursuant to section 32-2181 and the public report pursuant to section 32-2183. The subdivider shall retain and have available for department review copies of all advertising materials used in marketing lots in the subdivision for three years after the last use of the advertising materials.

D. If it appears to the commissioner that any person is or has engaged in advertising or promotional practices in violation of this article, the commissioner may hold a hearing as a contested case under title 41, Chapter 6, article 10 and issue such order or orders as he deems necessary to protect the public interest, or the commissioner may bring an action in any court of competent jurisdiction against such person to enjoin such person from continuing such violation.

E. The commissioner may adopt such rules and guidelines as the commissioner deems necessary to protect the public interest and to assure that all advertising and promotional practices with respect to land subject to the provisions of this article are not false or misleading.

F. It is unlawful for any owner, subdivider, agent or employee of any subdivision or other person with intent directly or indirectly to sell or lease lots or parcels subject to the provisions of this article to authorize, use, direct or aid in any advertising,

communication, sales literature or promotional practice which violates this section.

G. Nothing contained in this section shall apply to the owner or publisher of a newspaper or magazine or to any other publication of printed matter wherein such advertisement appears or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher or operator has no knowledge of the intent, design or purpose of the advertiser.

H. For any subdivision investigation made under section 32-2183 of an out-of-state subdivision or any in-state subdivision to which the commissioner issues any order necessary to protect the public interest and insure compliance with the law, rules or public report, the subdivider shall reimburse travel and subsistence expenses incurred by the department.

I. A subdivider may hold a drawing or contest to induce prospective buyers to visit a subdivision if all of the following requirements are met:

1. The subdivision has in effect a current public report.

2. The subdivider is not the subject of an ongoing investigation by the department. The department may give permission to hold a drawing or contest to a subdivider who is the subject of an ongoing investigation.

3. The details of the contest or drawing, including the method of awarding any prize, are submitted to the department for review and approval prior to holding the contest or drawing.

4. Any drawing or contest is limited in time, scope and geographic location.

5. The material terms of the drawing or contest are fully disclosed in writing to participants.

6. No fee is charged to any person who participates in a drawing or contest.

7. No participant in a drawing or contest, as a condition of participation, must attend a sales presentation or take a tour.

8. The subdivider is in compliance with all other applicable federal, state and local laws involving drawings or contests.

9. The subdivider is responsible at all times for the lawful and proper conduct of any drawing or contest.

X. New Mexico Statutes

Here are a few noteworthy New Mexico Statutes referenced in the body of the paper. This list is not exhaustive but includes those particular statutes containing unique or novel language that may prove useful to other jurisdictions.

- **N.M.S. § 47-5-4. Conditions affecting use or occupancy of subdivided land; written disclosure prior to sale.**

  It shall be unlawful to sell or lease until there has been disclosed in writing to the purchaser or lessee of a lot or parcel in the subdivided land, the following:

  A. all restrictions or reservations of record which subject the subdivided land to any unusual conditions affecting its use or occupancy;

  B. the fact that any street or road facilities have not been accepted for maintenance by a governmental agency when such is the case;

  C. availability of public utilities in the subdivision including water, electricity, gas and telephone facilities;

  D. if water is available only from subterranean sources the average depth of such water within the subdivision;

  E. the complete price and financing terms or rental; and

  F. the existence of blanket encumbrances, if any, on such subdivision, unless such blanket encumbrances provide for a proper release or subordination of said blanket encumbrances to such lot or parcel.

- **N.M.S. § 47-5-5. Advertising standards.**

  Brochures, publications and advertising of any form relating to subdivided land shall:

  A. not misrepresent or contain false or misleading statements of fact;

  B. not describe deeds, title insurance or other items included in a transaction as "free," and shall not state that any lot or parcel is "free" or given as an "award" or "prize" if any consideration is required for any reason;

  C. not describe lots or parcels available for "closing costs only" or similar terms unless all such costs are accurately and completely itemized or when additional lots must be purchased at a higher price;

  D. not include an asterisk or other reference symbol as a means of contradicting or substantially changing any statement;

  E. disclose that individual lots or parcels are not identifiable when such is the case;

F. if illustrations of the subdivision are used, accurately portray the subdivision in its present state, and if illustrations are used portraying points of interest outside the subdivision, state the actual road miles from the subdivision;

G. not contain artists' conceptions of the subdivision or any facilities within it unless clearly described as such, and shall not contain maps unless accurately drawn to scale and the scale indicated;

H. not contain references to any facilities, points of interest or municipalities located outside the subdivision unless the distances from the subdivision are stated in the advertisement in actual road miles.

- **N.M.S. § 47-6-9. Subdivision Regulation; county authority**

  The Board of County Commissioners of each county shall regulate subdivisions within the county's boundaries. In regulating subdivisions, the Board of County Commissioners of each county shall adopt regulations setting forth the county's requirements for:

  A. preliminary and final subdivision plats, including their content and format;

  B. quantifying the maximum annual water requirements of subdivisions, including water for indoor and outdoor domestic uses;

  C. assessing water availability to meet the maximum annual water requirements of subdivisions;

  D. water conservation measures;

  E. water of an acceptable quality for human consumption and for protecting the water supply from contamination;

  F. liquid waste disposal;

  G. solid waste disposal;

  H. legal access to each parcel;

  I. sufficient and adequate roads to each parcel, including ingress and egress for emergency vehicles;

  J. utility easements to each parcel;

  K. terrain management;

  L. phased development;

M. protecting cultural properties, archaeological sites and unmarked burials, as required by the Cultural Properties Act [18-6-1 NMSA 1978];

N. specific information to be contained in a subdivider's disclosure statement in addition to that required in Section 47-6-17 NMSA 1978;

O. reasonable fees approximating the cost to the county of determining compliance with the New Mexico Subdivision Act and county subdivision regulations while passing upon subdivision plats;

P. a summary procedure for reviewing certain type-three and all type-five subdivisions as provided in Section 47-6-11 NMSA 1978;

Q. recording all conveyances of parcels with the county clerk;

R. financial security to assure the completion of all improvements that the subdivider proposes to build or to maintain;

S. fencing subdivided land, where appropriate, in conformity with Section 77-16-1 NMSA 1978, which places the duty on the purchaser, lessee or other person acquiring an interest in the subdivided land to fence out livestock; and

T. any other matter relating to subdivisions that the Board of County Commissioners feels is necessary to promote health, safety or the general welfare.