

# ZONING **PRACTICE**

MARCH 2017

AMERICAN PLANNING ASSOCIATION



➞ ISSUE NUMBER 3

## **PRACTICE** COMMUNITY ASSOCIATIONS



# Community Associations, Hazard Mitigation, and Development Regulation

By Tyler P. Berding and Joseph DeAngelis

Common-interest community associations, including home owner associations (HOAs), condominium associations, and housing cooperatives, play a critical role in the maintenance of local infrastructure.

Over the past few decades, a growing number of cities and counties have delegated the responsibility for long-term maintenance of common infrastructure associated with new residential development to community associations. This often includes maintenance of common open space and may include maintenance of private streets and sidewalks, stormwater facilities, or other infrastructure that plays a role in hazard mitigation.

For healthy and stable associations, requiring home owners to maintain their own common open space can reduce the fiscal burden on the local government. But do community associations have the expertise to manage complex critical infrastructure such

as levees, retention basins, and stormwater infrastructure? What about cases where community associations fail? Are cities and counties ready, willing, or able to assume control over long-neglected infrastructure?

This article will: (1) lay out the increasing role that community associations play in the maintenance of critical disaster mitigation infrastructure; (2) provide an overview of the risks of delegating maintenance responsibilities to community associations; (3) discuss the role of performance guarantees in the development process and their impact on long-term infrastructure maintenance; (4) make recommendations for local development regulations to ensure that community associations

are capable of long-term disaster mitigation infrastructure maintenance; and (5) present three examples that potentially illustrate “better” practices in dealing with community association responsibilities for critical disaster mitigation infrastructure maintenance.

## THE INCREASING ROLE OF COMMUNITY ASSOCIATIONS IN HAZARD MITIGATION

What is different today from subdivisions built four or more decades ago is that most will be built and incorporated as community associations. In many cases, the engineered facilities to protect these developments from storms, rising tides, and sea levels will not be maintained by cities or states, but will be the responsibility of the home owners who live there.

Since the early 1960s, community associations have served as surrogates for cities and counties to manage new infrastructure. To conserve tax dollars that would otherwise be necessary to maintain streets, parks, and public utilities in new developments, many local governments shifted fiscal responsibility for that infrastructure to the small group of owners living within that new subdivision. The community association provided a useful way for developers to entice municipalities to approve their projects—generating new tax dollars without the consequent public works expense.

Statutes in most states and hundreds of municipal ordinances provide the authority for this shift. They cover the gamut from what is required in the governing documents to how a community association is to maintain the resulting infrastructure. They generally assume that the financial wherewithal and necessary expertise will follow. These assumptions might be untrue, but that misunderstanding is usually not corrected by the enabling ordinances. Statutes and ordi-



Owners in gated subdivisions typically assume full responsibility for maintaining private streets, common open areas, and any stormwater or flood control infrastructure.



nances promote the *creation* of a community association to own and maintain certain facilities, but are sorely lacking in requiring the oversight or enforcement to make sure that maintenance happens.

Streets, levees, storm sewers, parks, parking lots, and sidewalks in old developments are owned and maintained by cities and counties using tax dollars raised from a broad tax base. In many newer projects the community association is responsible for maintaining most “common areas” as well as critical facilities like levees, berms, pumps, riprap, and retaining walls. Developers and municipalities thereby avoid long-term responsibility for such projects. The homes and units within the development are sold off in the near term. The developer takes the profits and is protected from long-term liability not only by the assessment or taxing arrangement that moves the cost of future repairs to owners, but also by various statutes of limitation that cut off legal liability within a few years of projected completion.

After that, the property owners within the association are on their own. What will happen when sophisticated, critical improvements are maintained solely with owner assessments? Levees and seawalls in marine coastal areas, and critical mitigation facilities in flood-prone lowlands elsewhere, will depend upon the willingness of individual home owners to assess themselves to provide adequate funding and to provide the necessary management.

It's one thing to let the landscaping go to seed or to allow chuckholes to exist in the parking lot, but a crumbling dam or bay levee is at another threat level altogether.

Relatively few cities and counties include provisions in their subdivision codes that indicate how the locality will ensure that a required community association is actually created. In practice, the developer remains on the hook for infrastructure and common space completion and maintenance until he can provide evidence that he has transferred responsibility to a community association. Some cities and counties do, however, require evidence of the formation of an association before issuing either a preliminary or final plat approval.

In these cases, the developer must produce documentation (e.g., articles of incorporation, bylaws, and recorded covenants) showing how and when ownership of common facilities will be conveyed to the new association. When localities explicitly address



La Cita Via (residential community, Wikimedia CC BY-SA 2.0)



A stormwater retention pond serving a residential subdivision in Prince George's County, Maryland.

the timing of the transfer of responsibility from the developer to the association, the language is typically vague. For example, a number of cities and counties require association bylaws or covenants to contain a schedule for the transfer to owners and stipulate that developers must disclose the timing of the transfer to prospective buyers.

A few communities set out a specific threshold that triggers the transfer (e.g., a percentage or number of units sold).

### THE RISKS OF DELEGATING INFRASTRUCTURE MAINTENANCE TO COMMUNITY ASSOCIATIONS

Planning decisions involving community associations are usually based on three assumptions: (1) The association will have an infinite life; (2) During that period the owners will assess themselves as necessary to properly maintain critical facilities; and (3) The owners and their managers have the expertise to maintain critical facilities or know how to get it. Each of these assumptions will usually prove false.

Generally speaking, local governments require community associations in order to ensure that common (private) property and infrastructure is maintained in perpetuity. If the association fails to adhere to maintenance requirements, the local government has the

authority to perform the maintenance itself and bill the owners (often by creating property liens). In reality, though, every community association has a limited “service” life because it is not self-sustaining over time. Most community associations will eventually become obsolete because funding for normal and extraordinary maintenance is not sufficient, leading to increasing deferred maintenance until the property becomes uninhabitable. This is more pronounced in attached housing, but will also occur in single-family home developments eventually. Critical infrastructure within these subdivisions will suffer a similar fate. The timing of obsolescence is the only question. We're talking decades, but with many older projects, we're already there.

Because owners determine the cash contributions to long-term maintenance reserves, and because most plan for a near horizon, owners will reject assessment increases to bring long-term reserves to an acceptable level or to specially assess themselves for emergency repairs brought on by normal deterioration. If a natural disaster occurs, and insurance or government assistance is not available, the owners may not fund a rebuild.

Owners and most community managers have no experience with sophisticated infrastructure like floodgates, dams, levees, and weirs. They might not understand what those

facilities are or how they operate—especially decades later. The owners may not realize that a lake is part of a regional flood and stormwater control facility. To them, a lake is a lake, not a reservoir, and when the lake silts up from years of neglect and loses capacity to hold back floodwaters, downstream communities may be damaged. A levee can be riddled by critters that weaken it, but if the problem is not recognized, or if the funds to strengthen or rebuild the levee are not available, a critical piece of infrastructure may fail. Owners are not engineers, and they can't draw on the services of city engineering staff or tax dollars to help them fix a facility for which the municipality has no responsibility.

In local government, decision makers consider the long-term interests of their city or county when they set revenue goals. They plan for a far horizon. With community associations, the interest of the individual owner rarely extends beyond five to seven years—a near horizon. Owners determine how much to assess themselves for such things as maintenance reserves based on their individual interests, which are usually short-term. There is no third-party oversight, so long-term maintenance obligations rarely receive the funding to sustain the subdivision.

If all we were concerned about were paint, roofs, asphalt, or landscaping, that could be handled. But developments managed by associations have grown in size. They are in floodplains, abandoned quarries, and landslide-prone hillsides, and endowed with

levees, dams, debris fences, lakes intended as holding ponds, weirs, and other disaster mitigation facilities. And there has been too little attention given to whether the proposed association will have the financial capability and expertise to manage these critical facilities for decades. Usually, it won't.

The planner is presented with a professional package created by a developer which anticipates most questions the planner might ask. Too often, the problem is that no one present then is asking all of the right questions. A developer is the ultimate short-timer. Its horizon is maybe three to four years, depending on the size of the project and its ability to sell out. No one representing the ultimate user—the community association—is present when critical decisions are made.

### COMMUNITY ASSOCIATIONS AND PERFORMANCE GUARANTEES

Traditionally, cities and counties have relied on performance guarantees to minimize the risk associated with delegating infrastructure development and maintenance to subdivision developers. But conventional approaches to performance guaranteeing may be of limited utility for ensuring long-term infrastructure maintenance by community associations.

Performance guarantees are “legal and financial tools used to increase permittees’ compliance with regulations” (Feiden and Burby 2002). They are often used by cities and counties in the subdivision development process to ensure developer compliance

with agreed-upon infrastructure development responsibilities and in order to avoid complex and expensive litigation. There are two general categories of performance guarantees: financial and non-financial. Financial performance guarantees require that funds necessary to complete agreed to development (including infrastructure) are obligated before construction or permitting. This is a useful tool to avoid half-finished “zombie” subdivisions in the event that the developer defaults. Non-financial performance guarantees do not rely on the availability of funds, but seek to ensure continuity of operations and adequate attention to the municipal permitting process. Requiring the formation of a community association or the use of special assessments are common non-financial performance guarantees. However, there are significant risks and downsides of this approach.

According to Feiden and Burby, HOA covenants can grant the government the right to perform required infrastructure maintenance and later charge the association for the work performed (2002). The local municipality controls an escrow account on behalf of the association, or has the authority to place liens on properties to ensure eventual reimbursement of maintenance costs.

However, this is no guarantee that critical infrastructure such as levees or stormwater storage will be maintained effectively. In the event that a common-interest development fails, there is neither a means to locally manage infrastructure (as there will be no HOA), nor the possibility of the municipality to recoup costs for necessary maintenance. This impact can be mitigated if there is a maintenance guarantee (a financial performance guarantee that ensures adequate maintenance of infrastructure over a required time period) in place with the developer. But if there is still no HOA in place upon conclusion of the maintenance guarantee, the municipality will still be on the hook for maintenance costs.

In the event that a community association is formed, there are still significant barriers to guaranteeing adequate infrastructure maintenance. New improvements or maintenance work may be opposed by residents who were not properly informed about the responsibilities of the association. Further, residential turnover can have a detrimental impact on the overall stability of an association, and newer residents may be less willing to contribute toward shared maintenance.



Aaron Volkering (Greendale\_AmniusPark\_DryDetention, Flickr CC BY 2.0)



A dry detention pond serving a residential subdivision in Greendale, Wisconsin.



Raymond Shobe (flood water retention pond with broken levee, Flickr CC BY-SA 2.0)



Heavy rains in 2010 revealed flaws in the maintenance of this levee protecting the Mission Lakes subdivision in Desert Hot Springs, California.

Without strong and stable association management, what had once been a “guarantee” between the developer and the municipality risks becoming an unsustainable burden for owners.

#### RECOMMENDATIONS FOR CODE REFORM

Require a maintenance plan for any subdivision proposal that includes flood control or stormwater management facilities that would be managed and maintained by owners. This plan must identify what expertise will be necessary, where it can be obtained, what maintenance will be required, and the annual cost likely to be incurred by the owners of the subdivision to carry out those obligations. Cost estimates and work scope should be based on an evaluation by an estimator independent of the developer just as if the city itself were taking ownership.

If the funding proposed for maintenance and repair of critical infrastructure relies on assessments levied only on homes within that subdivision, the proponent must demonstrate not just adequate funding for construction, but at least a 30-year funding plan that includes allowances for inflation, delinquent assessments, expert assistance, a disaster contingency, and a realistic reserve for long-term maintenance and replacement. The city or county should have the authority to step

in and levy additional assessments to pay for inspections, maintenance, or repair, and the authority to make emergency repairs. Adequate funding may mean owner assessments must be set higher than the proponent wants to qualify enough buyers. Assessment underfunding to attract sales is a popular tool, but that can leave the subdivision unable to address long-term maintenance of critical facilities and force the city or county to advance its own funds to do it.

If a critical improvement’s projected cost to repair or rebuild is greater than, say, 15 percent of the market value of all of the lots in the subdivision and if there isn’t adequate insurance or government assistance, the owners may not voluntarily raise the funds to rebuild it, and there won’t be sufficient equity to support a special assessment secured by a lien. Cities and counties should not count on the equity in the homes for reimbursement for emergency repairs. There is always an upper limit on emergency funds that any community association can raise by assessing its owners, and the equity in the homes may be illusory. Lenders usually have priority to whatever equity there is, and equity does not always increase with time—especially where the project has been damaged by a natural disaster.

Public officials not experienced with the long-term management of a community asso-

ciation may ask why ordinances or provisions in an association’s governing documents can’t be used to enforce compliance with a community’s obligation to properly maintain critical infrastructure. They can be, but someone has to know that enforcement is necessary. A jurisdiction that rarely inspects private facilities may not know of the condition until the facility fails. When that happens, years of neglect will cost much more to remedy than if the city or county itself had conducted regular inspections and performed necessary maintenance.

The local municipality can reserve for itself, by ordinance or conditions of approval, the right of reimbursement from the owners in the subdivision for any funds it has to spend to maintain or repair critical facilities.

But even if that right exists, it may not be useful. To realize cash would require foreclosure and a dispute with lenders with superior rights. In some states, associations enjoy priority lien status over lenders, but they are in the minority. Usually lenders’ rights come first, and there may well be nothing left after that. If it should come to that, the municipality should instead take ownership of the infrastructure in the beginning and use its expertise and taxing authority to maintain it, rather than wait to see if the lay owners will do the job properly. There is definitely a “tipping point” where a critical piece of infrastructure is too expensive or too sophisticated to be maintained by lay home owners. The trick is recognizing that in the beginning and convincing the municipality it is a better candidate to own it.

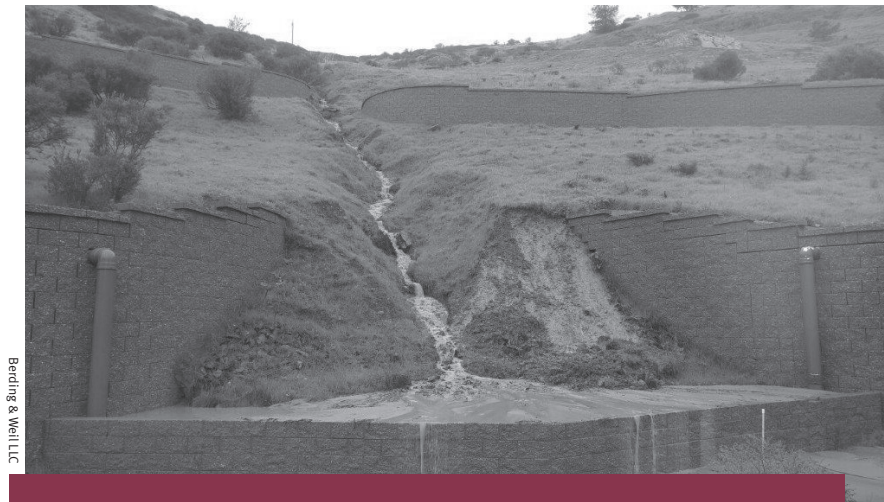
#### TOWARD ‘BETTER’ PRACTICES

The examples below discuss steps three specific jurisdictions have taken to minimize the risks associated with delegating maintenance responsibilities to community associations. While these approaches do not address every potential problem, they do show how some cities and counties are going beyond the status quo.

##### Lake County, Illinois: Requiring Maintenance Plans

Effective management of flood mitigation infrastructure requires regular inspections, specialized upkeep, and dedicated funding. A community association that is unfamiliar with or unwilling to dedicate the time, funds, or expertise to proper maintenance of critical disaster mitigation infrastructure is likely to suffer significant impacts in the event of a flood.





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An HOA is responsible for maintaining this complicated hillside stabilization and stormwater infrastructure, but silt-laden runoff has clogged the drainage inlets behind the lower retaining walls, causing polluted water to run into the San Francisco Bay.

Local officials in Lake County, Illinois, recognized some of the primary issues and solutions associated with HOA-managed stormwater best management practices (BMPs). Lacking the budget for a dedicated maintenance program, maintenance of stormwater BMPs in Lake County is often the responsibility of the local HOA. Rather than relying solely on guidance or trusting in the good faith of the home owners association, the Lake County Stormwater Management Commission developed a multistep process focused on codifying maintenance in plan approval procedures, education, and outreach for HOAs, and direct collaboration with the HOA in BMP inspections.

Lake County engages with the developer early in the permitting process, requiring that a dedicated source of funds be allotted to stormwater infrastructure maintenance in perpetuity. Often, this funding source is HOA dues. Next, the stormwater plan is incorporated into the subdivision plat. The commission then develops a maintenance plan along with the HOA, clearly spelling out the roles and responsibilities of the association and the necessary maintenance schedule. Finally, the commission performs regular inspections of the infrastructure, and directly involves a representative of the HOA in the inspection. This allows the commission and the HOA to address any issues on site.

Outside of this formal permitting and

maintenance process, the commission holds workshops and education sessions with HOAs to increase local expertise in local stormwater maintenance issues (Rafter 2000).

#### **Roanoke County, Virginia: Proactive Inspections and Service Districts**

A recent public outreach process undertaken by the Roanoke County Department of Stormwater Management sought to address some of the primary issues of HOA management of stormwater infrastructure. The Roanoke County Stormwater Advisory Committee (RCSWAC) developed a report highlighting the primary improvements that should be made to the permitting, inspection, and long-term maintenance process. While conclusions were wide-ranging, the committee also directly addressed crucial gaps in how stormwater infrastructure is (or isn't) managed by HOAs, and how that process can be improved.

Enforcement of stormwater infrastructure maintenance has traditionally been undertaken by the HOAs themselves. Inspections were rare as they tended only to follow reports of violations. RCSWAC suggested that proactive and regular inspections by county staff are necessary to ensure proper maintenance procedures are being followed.

Additionally, as many HOAs simply lack the expertise to perform BMP maintenance, the advisory committee recommended the use of a local service district in order to fund direct county maintenance of HOA stormwater infra-

structure. Under this plan, a service district fee would allow the program to be cost-neutral for the county (cost being one of the primary reasons for HOA-managed infrastructure in the first place) and absolving the HOA of maintenance responsibilities. As proposed, this would be a voluntary program. An alternative proposal would allow the county to serve as a contractor for the HOA, performing required maintenance and directly billing the association (Roanoke County 2014).

In 2014, the county updated its stormwater management ordinance with provisions refining the process of transferring stormwater facility maintenance responsibilities to HOAs and establishing a five-year schedule for county inspections of all HOA-maintained stormwater facilities (§23-1 et seq.). However, the county has not yet implemented the service district proposal outlined in the RCSWAC draft stormwater program.

#### **Gadsden, Alabama: Establishing Clear Responsibilities**

Gadsden, Alabama, directly addresses maintenance of private stormwater infrastructure in its stormwater management regulations. According to the code, property owners (and HOAs) served by on-site stormwater management facilities must: (1) agree to and execute a deed-restricted maintenance plan; (2) provide for defined and periodic inspections by a registered professional engineer; (3) provide minimum maintenance and repair according to the standards outlined in the BMP manual; (4) perform repairs according to a city-determined time line; and (5) allow for city-performed maintenance, should maintenance not occur in a timely manner at the expense of the association or property owner (§108-5.g).

This transparent process allows the city to communicate clearly with subdivision developers and subsequent HOAs on the rules and responsibilities governing stormwater infrastructure maintenance and repair. Direct codification of clear rules and responsibilities is an approach that can be clearly replicated in other municipalities nationwide, though the efficacy of this approach relies heavily on funding for enforcement and inspections.

#### **CONCLUSION**

For planners and local officials aiming to mitigate hazard risk associated with new

development, development regulations addressing community association responsibilities are where the rubber hits the road. A review of a subdivision proposal based on aesthetics, compliance with existing zoning, traffic, the availability of public utilities to service it, and similar criteria is typical.

With a large subdivision, a street and trail plan, open space management, parks, schools, and similar facilities add challenges that are nothing unusual. If a community association with “normal” improvements—streets, parks, tot lots, and open space—fails in its job or its funding, the place will look bad but won’t threaten someone’s health or well-being.

When you add to that mix critical flood or stormwater control facilities, the planner must question owner capability. If the development includes engineered improvements—dams, levees, landslide mitigation measures such as debris fences or large retaining walls, recreational lakes that are part of a regional stormwater management system, or any similar improvement—which, if they fail, will endanger

other property or human life, the planner should carefully analyze the situation before responsibility is delegated to lay owners for maintenance and repair.

If the planner cannot with confidence say that the future owners of a proposed subdivi-

sion can fund the proper maintenance and repair of a critical piece of infrastructure, serious consideration should be given to rejecting the project outright, recommending that the mitigation facilities be publicly owned and maintained using broad-based tax revenues, or requiring the developer to post a financial performance guarantee calculated to underwrite at least half of the cost of failure, while bearing interest to guard against inflation.

In many jurisdictions, any of the foregoing options will elicit objections from

the developer, the planning commission, or both. But unless we realistically evaluate the capability of the eventual owner to properly care for critical facilities, the planner will leave too much to chance and the local government may inherit it anyway, but at a much less opportune time.

If the planner cannot with confidence say that the future owners of a proposed subdivision can fund the proper maintenance and repair of a critical piece of infrastructure, serious consideration should be given to rejecting the project outright . . .

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Cover: Photo by Dean Terry (A large community in Plano, Texas, near Dallas, Flickr CC-BY-NC-ND-2.0)

## Vol. 34, No. 3

**Zoning Practice** is a monthly publication of the American Planning Association. Subscriptions are available for \$95 (U.S.) and \$120 (foreign). James M. Drinan, JD, Chief Executive Officer; David Rouse, FAICP, Managing Director of Research and Advisory Services. **Zoning Practice** (ISSN 1548-0135) is produced at APA. Jim Schwab, FAICP, and David Morley, AICP, Editors; Julie Von Bergen, Senior Editor.

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Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.

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