



White Paper Summary Report for Arizona Counties



PREPARED BY
The ULI Arizona Technical Assistance Panel Program

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Acknowledgments

Sponsor



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Local Partner

Cochise County joined with ULI Arizona to convene the Technical Assistance Panel Program (AzTAP) on rural open space protection in Arizona counties. The AzTAP took place in Sierra Vista on June 8, 2015 and all interested parties from throughout Arizona were invited to attend.

AzTAP provides strategic advice to local jurisdictions on complex land use and real estate development issues. To learn how AzTAP assists communities and nonprofit organizations throughout Arizona, visit www.arizona.uli.org.

Introduction

Open space plays an important role in Arizona's landscape, development patterns, economy, culture, environment and social well-being. It is essential to quality of life and health, flood safety and environmental protection, well managed growth and a sustainable built environment. The different types of open spaces are valuable to economic development and the character of places where people want to live, work and visit in Arizona.

The creation, protection and improvement of open space and connected networks are important elements of state statutory and county land planning processes. Preserving valuable open space land in Arizona counties often involves a collaboration of many strategies. Among these are the various protection tools, land planning techniques, intricate partnerships, and dedication and hard work by public, private, and nonprofit entities.

Privately owned rural open spaces may be managed by homeowners associations, land trusts, and other entities using regulatory mechanisms, land use planning tools, and private/nonprofit resources and monies. Public open spaces may be managed with tax dollars, and other tools, resources, and practices to ensure the lands are available for public use. When funding for private open spaces declines or stops, surrounding development and connected public open space can be significantly impacted.

In June 2015, the Urban Land Institute Arizona District Council (ULI Arizona) and Cochise County convened a Technical Assistance Panel (AzTAP) in Cochise County of select legal, planning, and conservation experts to discuss some of the issues and opportunities in managing publicly and privately held open spaces. The Panel discussed the different types and purposes of public and private open spaces in rural areas, management challenges, and the various strategies available for continuing open space use, protection, and conservation.

This document provides a reference for rural open space preservation summarizing discussion from the Cochise County AzTAP Panel with supplemental information from some of the Panel experts. It is not intended to be a complete guide but rather an initial working paper where concepts and ideas may be expanded over time.

Prioritizing the Conservation and Economic Value

Open space serves many purposes, whether it is publicly or privately owned. It may include natural areas and habitats such as floodplains, forests, washes, riparian areas, deserts, mountains, and grasslands, as well as areas for passive recreational activities such as wildlife viewing, biking, and hiking trails. The protection of critical ecological lands is important to protect vital natural resources.

An overall strategic vision can help identify regional priorities and inform and justify open space planning, acquisition decisions, and long-term operations. This is especially important when

open space conservation interests are competing for limited acquisition and maintenance funds. Decisions to purchase, accept or decline offers or donations of open space land or easements should be defensible, based on the best available data for that parcel. The conservation value of open space is contingent on its design, impacts from nearby areas, and long-term management.

A variety of electronic tools and models are available to help vet the most valued open space areas and prioritize where to spend critical dollars. Many land trusts have detailed geospatial maps and data layers to inform planning strategies, such as hydrologic, migration, etc. Land trusts are not always willing to accept an easement if it does not fit their defined mission or if the land does not have sufficient conservation value.

Determining conservation purpose and value, i.e. wildlife, riparian, can be challenging. However, prioritizing lands for acquisition can maximize the conservation benefit of each dollar spent. Determining which lands to conserve and in what pattern is important for maintaining connectivity and minimizing the negative effects of fragmentation.

Achieving value for protected open space within conservation subdivisions requires a working partnership of all the parties and understanding and mutual agreement on the purpose and public benefit of the conservation easement. In a subdivision, finding ways to design and site “meaningful” open space is important. If there is no meaningful day-to-day functional value, it will be hard for property owners to justify paying for it. Adequate endowments and having the money in place to maintain annual monitoring will make sure the easements are being upheld for the long term.

If the goal is to protect lands with significant conservation value, it is essential to conduct a conservation analysis prior to the development of a subdivision plat or site plan. It is often helpful to have an active land trust be part of the planning process from the beginning to assist careful selection of the open space to be conserved and ensure its proper long-term management and maintenance. Where homeowner associations (HOAs) are involved, bringing them on board early to understand important issues and priorities will help to encourage long-term compliance with conservation easements and covenants.

Legal Framework

A complex web of federal, state and local laws govern local land use actions. Some examples are outlined below.

Overall Legal Framework

- Federal, State & Local laws
- Police Powers
- Limitations on Police Powers

Federal Laws

- National Environmental Protection Act

- Endangered Species Act
- Clean Water Act
- Clean Air Act
- Religious Land Use and Institutionalized
 - Persons Act (RLUIPA)
 - Federal Court Decisions

State Laws

- Enabling law - counties and cities can't do something unless the Arizona Legislature has expressly described it

Local Laws

- County comprehensive plans, city/town general plans
- Special plans
- Zoning ordinances
- Other ordinances & regulations
- Design guidelines
- Environmental guidelines
- Development exactions and impact fees to provide additional public facilities or services required by new growth
- Application submittal requirements

Private Controls

- Covenants, Conditions and Restrictions (CCRs) - contractual agreements between property owners about how they use their land. CCRs are intended to protect, preserve, and enhance neighborhood property values

Police Power

- The basis for all land use regulation.
- Authorizes local governments to take action to “protect the health, safety, and general welfare” of its residents

Limitations on the Police Power

- Preemption – local land use regulations may not conflict with state or federal law
- Takings Clause – cannot take private property for public use unless there is just compensation. In Arizona if the court finds there is a regulatory taking, then can require compensation

Fair and Equitable Process

- Due process – no deprivation of life, liberty or property
- Substantive – vested rights
- Procedural – notice and hearings

Sticks

- Regulations/Police power – zoning, subdivision regulations, flood plain regulations

In Between

- Purchase/condemnation –“just buy it”

Carrots

- Incentives – providing discounts or bonuses to encourage projects or actions in designated areas

Planning Framework

Local governments guide open space conservation through the ownership of local open space resources, through local planning, and through land use controls. Under Arizona State Growing Smarter Law A.R.S. § 11-806, counties are authorized to prepare comprehensive plans and the laws provide direction about the elements to include, several of which relate specifically to local open space planning, the Open Space, Growth Area, and Land Use Elements.

Open Space Element: addresses open space and recreational resources in the region, and typically is closely tied to the land use element.

- A comprehensive inventory of open space areas, recreational resources, and designations of access points to open space areas and resources.
- An analysis of forecasted needs, policies for managing and protecting open space areas, and resources and implementation strategies to acquire additional open space areas and further establish recreational resources.
- Policies and implementation strategies designed to promote a regional system of integrated open space and recreational resources, and consideration of any existing regional open space plans.

Land Use Element: contains a land use map, and should designate the proposed general distribution, location, and extent of uses of the land for housing, business, industry, agriculture, recreation, education, public buildings and grounds, open space and other categories as appropriate.

- Statement of the standards of population density and building intensity recommended for the various land use categories covered by the plan
- Specific programs and policies that the county may use to promote compact form development activity and locations where those development patterns should be encouraged
- Consideration of air quality and access to incident solar energy for all general categories of land use
- Policies that address maintaining a broad variety of land uses including the range of uses existing in the county at the time the plan is adopted, readopted or amended.

Planning for Growth Areas Element: should also be closely tied to the land use element, and is intended to identify areas (if any) that are particularly suitable for planned multimodal transportation and infrastructure expansion and improvements designed to support a planned concentration of a variety of land uses.

- Make automobile, transit and other multimodal circulation more efficient, make infrastructure expansion more economical, and provide for a rational pattern of land development
- Conserve significant natural resources and open space areas in the growth area and coordinate their location to similar areas outside the growth area's boundaries
- Promote the public and private construction of timely and financially sound infrastructure expansion through the use of infrastructure funding and financing planning that is coordinated with development activity

Overlay zones: apply a common set of standards to a designated area that may cut across several different conventional or underlying zoning districts. When planning to protect open space, a zoning ordinance can be amended to place an overlay zone on an area that is determined to be unsuitable for development. Development in an overlay zoning district can only occur at the density which is authorized by the zoning regulations for the underlying zoning district and without impairing the sensitive environmental features in the area, if that is the stated purpose of the overlay, i.e. hillside ordinance, native plant preservation, etc.

Specific Policy Plans: serve as the vision and blueprint for a county's land conservation efforts. Goals and objectives direct priorities, policies, and implementation actions, i.e. Pima County's Sonoran Desert Conservation Plan.

Subdivision Ordinances: Under A.R.S. § 11-806.01, counties are granted the power to regulate the subdivision of lands within their boundaries. Locally adopted subdivision ordinances typically dictate the number of units that can be placed on the land based on parcel acreage (residential density), and the ordinances set a variety of performance standards including minimum lots sizes, road frontage and sideline setback requirements, etc. Preserving open space in subdivisions and site plans involves the design and development of land in such a manner as to preserve the natural and scenic qualities of open space. The open space is often owned by the subdivision homeowners association and may include neighborhood trails and provide some habitat benefit.

Conservation Subdivisions (CSDs): use a design strategy that preserves undivided, buildable tracts of land as communal open space for residents. Some conservation subdivisions use homeowners' association fees to pay for open space management, while others have organized community workdays.

Land Use Planning Challenges

"Zombie" subdivisions are subdivisions that are locally approved but are not built for an extended period of time or sometimes never. Some planning mitigation strategies that a local jurisdiction can employ include adding expiration dates onto the approval so when a development doesn't

get built, the slate is wiped clean. Also the plat might expire but the underlying zoning remains the same. Subdivision regulations should be carefully designed to not encourage lot splitting.

Under Arizona State Growing Smarter Law A.R.S. § 11-806, counties also cannot designate private or state land in the comprehensive plan open space or growth area elements as open space, recreation, conservation, or agriculture without either the written permission of the landowner or the plan alternatively designating, or the existing zoning allowing, a density of at least one house per acre. In rural counties with low density rural residential areas, designating this type of zoning presents challenges because 1 du/acre could essentially be quadrupling existing residential density.

Resources and Tools

Land Trusts

Land Trusts and other private, not-for-profit conservation, recreation and preservation organizations play important roles in statewide and local open space conservation efforts. Land trusts are independent organizations that work with landowners interested in protecting open space, and they often work cooperatively with government agencies. Land trusts can accept donations of land, funds to purchase land, or development rights that permanently limit land development, or they can purchase land for permanent protection.

LAND PROTECTION METHODS

Property owners are entitled to a set of rights, often referred to as a bundle of sticks, which can include development rights, water rights, mineral rights, or timber rights. A landowner may sell or give away the whole bundle of rights or just one or two of the bundle's rights through various land protection methods.

Fee Simple Acquisition

With fee simple acquisition, a landowner sells their rights, title and interest in the property to the buyer, who then owns and manages the land.

Conservation Easement

One of the most effective tools for ensuring private lands are protected in perpetuity is a conservation easement. A conservation easement is a legal agreement that restricts development and land use. It is an agreement between a landowner and an agency or land trust, identifying activities that are permitted and prohibited on the property, for the purpose of protecting the property's conservation values in perpetuity. Land trusts and government agencies are qualified to accept, hold, and administer conservation easements. The land trust or government agency holding a conservation easement is entrusted to ensure that the terms of the agreement are upheld. Annual monitoring by the conservation easement holder is an accepted practice by most land trusts and government agencies.

Purchase of Development Rights

Purchase of development rights (PDR) programs involve buying a portion of a landowner's "bundle of sticks" to compensate the owner for restricting rights to develop. PDR program restrictions are often implemented through conservation easements. Purchasing a property owner's developing rights is often less expensive than full purchase and provides property owners with an economically attractive alternative to subdivision and development. County planning statutes (ARS 11-254.05) provides that a county board of supervisors may purchase or lease development rights on private land from willing property owners using monies from public or private sources.

Management Agreements/Leases

Management agreements and leases are common for land protection measures on large, working ranches and farms. Agreements are entered into mutually between the landowner and the managing entity(s) setting forth authorities, responsibilities, and procedures to allow all parties to plan for the long-term protection of the property. The managing entity(s) often maintain the property in exchange for low-intensity, environmentally-sensitive use of the property, such as providing for public enjoyment of a natural setting, wildlife viewing, or cattle grazing.

Covenants/Mutual Covenants

Covenants and are land use tools that facilitate different types of neighborhoods. A developer might stipulate in the contract of sale that the owners must maintain certain property specifications. The rules of certain neighborhood subdivisions and homeowner associations are set forth in a declaration of Covenants, Conditions, and Restrictions (CC&Rs). The use of mutual covenants typically occurs in circumstances where several landowners mutually agree to protect certain conservation values on their collective properties. If a number of landowners are concerned about protecting open space they jointly own or a view they all share, they can exchange mutual covenants to protect these features as deed restrictions on each participating landowner's property, which can be enforced by the other landowners. Unlike conservation easements, covenants may not provide permanent land protection because they can be abolished by subsequent agreements of all participating landowners or by failure to enforce.

APPROACHES TO LAND PROTECTION METHODS

Determining which land protection approach is most suitable for open space property will depend on numerous factors, including funding availability and suitable resources for ongoing maintenance, tax issues, current and future use of the land.

Fair Market Sale

A fair market value sale refers to the purchase price for a property or for the conservation easement on a property. Market value refers to the price a buyer would be willing to pay and the price a seller would be willing to accept on the open market. An appraisal determines the market value for the property.

While high land values may limit a land trust from acquiring a property or conservation easement through fair market value acquisition, it does occur often by local jurisdictions with open space bond programs. In many counties with voter approved open space bond programs, paying fair market value is the most common way to permanently protect natural and cultural resources.

Bargain Sale

A bargain sale is the sale of a property to a qualified non-profit organization, such as a land trust, at a price well below the fair market value of the property. The difference between the bargain sale price and fair market value is considered a charitable contribution from the landowner to the qualified non-profit organization, and therefore provides potential income and estate tax deductions for the landowner.

Installment Sale

A land trust may purchase a property over time using an installment sale, as opposed to acquiring a property with a lump sum payment. Installment sales can be used in conjunction with any of the land protection methods or approaches discussed above. Both the landowner and land trust benefit from installment sales because the landowner spreads income and taxable gain over a specified period of time, and the land trust is given additional time to raise the funding necessary to complete the purchase.

Donating the Land

Another way for landowner to protect their property is with the outright donation of their land or a conservation easement to a land trust. An outright gift of property to a private, non-profit, 501 (c) 3 conservation organization potentially offers the landowner maximum immediate tax benefits. The landowner may receive the full market value of the property as a charitable tax deduction, and can avoid the capital gains tax that would be due from a sale. Community Steward Organizations (CSOs) may be set up and funded as part of a development process to manage and restore open space and carry activities beyond the development of the project.

Special Considerations

Land use adjacent to military installations can have significant mission impacts. It is important to understand each base's unique missions, i.e. artillery, intelligence, electromagnetic spectrum testing, unmanned vehicle training, etc. Open space and farmland are often used to protect military land from incompatible development and encroachment, often with a two-mile buffer zone. Encroachment is the cumulative effect of uncontrolled urban development that impedes the military's ability to carry out its testing and training missions on affected bases. Most bases that have closed or have had their mission's realigned by the Department of Defense and the Defense Base Closure and Realignment Commission (BRAC) process have been the result of surrounding impacts and encroachment.

The long-term retention of Arizona's network of military facilities and the sustainability of their missions are vital to Arizona's economy. Recognizing that incompatible land use and

encroachment in the vicinity of Arizona’s military facilities constrains a base’s ability to perform current and future missions, Arizona Revised Statutes defines the “high noise or accident potential zone” for each military airport and ancillary military facility and restricts zoning and development in these areas to nonresidential zoning based on the day-night sound level. Local governments are required to adopt strategies to ensure that incompatible development does not occur nor interfere with important military training exercises. Senate Bill 1387 (2008) Designated the Buffalo Soldier Electronic Test Range and requires careful land use planning to ensure planned development and infrastructure does not interfere with the Range.

The Military Installation Fund (MIF) was established to allocate monies for military installation preservation projects, including property in high noise or accident potential zones and acquiring real estate, property rights and related infrastructure that are vital to the preservation and enhancement of military installations. Eighty percent of the monies are awarded for the acquisition and management of property for preserving and enhancing military installations and for structural renovations or building modifications that mitigate or attenuate impacts in high noise or accident potential zones. The remaining twenty percent of the monies are awarded to cities, towns or counties to use for military installation and enhancement projects. The MIF is non-appropriated and is subject to fluctuations since funds are received from the state General Fund.

Conclusion

Arizona’s counties and rural areas have incredible natural open land, diverse landscapes, and recreational opportunities that are critical to maintaining the character and quality of life of Arizona communities and regions. Local strategic land use and open space planning actions to designate and protect open space areas is important to preserves scenic views, floodplains, wildlife habitat, and places for people to enjoy nature, benefiting the health of the land itself and the vibrancy and value of adjacent developments. Local governments often guide open space conservation through the ownership of open space resources, through local planning, and through various land use controls. Developing long-term management plans with adequate funding for open space maintenance is ideally developed at the beginning of planning and development processes. Long-term management of open space can have many challenges with resources constraints, strong competition for funding, unreliable state and federal budgets, and shifting private property issues and ownership. Land trusts and other private not-for-profit conservation organizations play important roles in open space protection. Acquiring and protecting open space areas is important in the conservation and protection of land and resources. Ultimately it is a region’s ongoing commitment to land stewardship and collaboration with public, private, and nonprofit partners that ensures continued enjoyment of open space resources.