

**COSAC IV Meeting Minutes
City Council Chambers
April 9, 2013, 8:30 a.m.**

COSAC members in attendance: Suzanne Sheridan, Stewart Gross, Rhonda Sideris, Cara Goodman, Cheryl Fox, Tim Henney, Tom Brennan, Jim Doilney, Bill Cunningham, Carolyn Frankenburg, Meg Ryan, Charlie Sturgis, Andy Beerman, Kathy Kahn (via phone), Judy Hanley, Wendy Fisher

Excused:

Staff: Heinrich Deters, Mark Harrington, ReNae Rezac

Public: Kate Sattelmeier, Michael Barille

PUBLIC COMMUNICATIONS

Chair Ryan called for comments from the public for items not on the agenda. There were none.

STAFF AND COMMITTEE DISCLOSURES/COMMENTS

Heinrich presented the outcome of the COSAC discussion at City Council regarding alternates' attendance at meetings. City Council affirmed that alternates could sit in COSAC closed sessions for information purposes, but they are prohibited from voting when the committee member they are an alternate for is in attendance. Alternates can participate (and not vote) as members of the public during regular sessions, but not during closed sessions.

There are several alternates who have not completed and signed their disclosure affidavits. Heinrich asked the stakeholders to reach out to their alternates and remind them to complete the affidavits.

Mission Statement

"It is the mission of the Citizen's Open Space Advisory Committee to make timely recommendations and provide input to the Park City Council on acquiring, managing and/or preserving open spaces in the greater Park City area by wisely leveraging the public's monies, by using other resources as available and by entering into appropriate partnerships. The Citizens' Open Space Advisory Committee will employ a variety of innovative strategies and tools to accomplish this goal in an expeditious manner."

Committee member Doilney stated any time there's an open space dedication, there are some folks nearer the open space than others. Those people might be interested in "chumming the deal". Is it advisable to make it a condition when buying land to get participation from others? If the property owners in Risner Ridge want to participate in buying land near their subdivision and they have funds, would that influence COSAC's recommendation to City Council? Does that belong in our Mission Statement . . .

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leveraging our funds and potentially conditioning decisions because of participation by other beneficiaries in buying open space?

Vice chair Henney felt it already is included since the Mission Statement talks about " . . . leveraging the public's monies, by using other resources as available and by entering into appropriate partnerships". Mr. Henney continued that then the statement talks about innovative strategies and tools. Committee member Doilney agreed.

Chair Ryan said it is important to always look at the big picture. She suggested the philosophy as stated by Committee member Doilney should somehow be incorporated in the COSAC's criteria.

Motion: Committee member Doilney moved approval of the mission statement as written; Vice chair Henney seconded the motion.

Vote: The motion carried.

Criteria

Chair Ryan called the committee's attention to the criteria information in the packet. She asked the group to review the information and come prepared to set criteria at the next meeting.

Presentation by Nancy McLaughlin

Chair Ryan welcomed Nancy McLaughlin, professor at the University of Utah School of Law, to the meeting. Heinrich introduced her to the group. Professor McLaughlin teaches trusts and estates, estate planning, federal income tax, and a course on conservation easements. Her research is in conservation easements and non-profit governments.

Professor McLaughlin said it is important to choose an appropriate method of land protection. Ms. McLaughlin recommends a structured approach to land use protection. She explained she is going to outline possible options during her presentation because land preservation is not a one size fits all situation.

The first step is to think about the City's goals and priorities with respect to each individual parcel of land. Evaluate and document all the values associated with the property under consideration for purchase. Values can include habitat, scenic, recreational, agricultural, culture, and water shed values. She counseled COSAC members to consider what uses the property may be used for, both long term and short term and to keep in mind the City's General Plan, projected population growth, transportation planning, impact on water sheds, conservation planning, and sustainability awareness and encouragement.

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Professor McLaughlin encouraged COSAC members to be aware of the goals and priorities relating to each specific parcel; i.e., habitat protection and natural values on the land even though it may limit recreational and other public uses. The paramount goal may be recreational use; i.e., trail connections or pathways, or it might be more expansive like a mountain bike obstacle course or ball fields.

It is possible to have mixed goals with regard to a specific parcel of land. Portions of the property might be perfect for recreational use and other portions of the property might have some critical habitat or scenic areas that may need protection. After thinking about different reasons and values for protecting a parcel, consider whether the parcel should be protected in perpetuity.

In some cases, it may be wise for the City to retain the right to later sell the land and use the proceeds to protect other parcels. If perpetual protection is decided upon, it would be worthwhile for the City to consider whether at some point in the future the purpose for which the property has been protected could be changed. For example, if a parcel of land was protected initially for habitat and natural values and over time, because of climate change or surrounding uses of the land, there's not much good habitat left on the property, it may be beneficial to elevate the recreational purpose of the property and lower the habitat purpose in terms of prioritization.

Another example would be if a parcel of land is preserved primarily for recreational purposes and over time, it gets "loved to death" by the public and experiences a negative conservation impact, elevating the conservation purpose to protect those conservation values may be indicated. Having the option to change the reason for the preservation over time is something that should be considered when the initial preservation type and method is being decided upon. Setting the procedure to modify the purpose is important. Consider whether modifications should be done through the public process with a public hearing or referendum. Should it be done in conjunction with the holder of a conservation easement? Or should the City have to go to court to prove that the original purpose has become impossible or impractical over time.

Unanticipated events can happen with regard to perpetual protection such as wind or solar energy farms. Consider whether or not wind or solar energy farming can be done on conservation easement encumbered property. Flexibility should be built in to protect and accommodate unanticipated uses.

Think through what land protection options are available. Professor McLaughlin distributed a chart that outlined the various options available and discussed each one. A copy of the chart is attached hereto and made a part of these minutes.

Chair Ryan noted that COSAC IV's funding source is not from a bond, but rather an ongoing infusion of cash from resort sales taxes. Heinrich said a portion of the resort sales tax goes towards open space acquisition. Another portion is a funding source for

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capital improvement projects. Committee member Fox added the bond language has been updated to include funding for parking lots at trails heads. Ms. Ryan asked what tools are available to COSAC to further define the current funding source. Heinrich said the funding mechanism is not as rigid as it was for previous COSAC groups. Ms. Ryan added the criteria are important in framing the funding and continued that each specific parcel will be handled individually. City Attorney Harrington said COSAC may be asked to determine the bond authorization language for a new bond using the sale tax proceeds. COSAC may be asked to come up with a recommendation on the next language for a bond issuance. Such action will only become necessary should the City decide to bond for the resort sales tax prior to collecting it.

Committee member Fisher clarified there is no protection in the current sales tax language that would create the kind of protection that past bonds currently have.

Professor McLaughlin asked the group to consider what would happen if in the future, different ideas emerge as to the definition of public use, which is a very broad term. She suggested the group may want to consider additional layers of protection since the public use term is so broad. Ms. McLaughlin is opposed to the "shotgun" approach to easements since they are extremely hard to enforce and are a recipe for conflict.

City Attorney Harrington addressed the group and stated his goal is that COSAC members understand the primary goal of what protecting open space means. Moving forward, Mr. Harrington wants to be sure COSAC becomes more sophisticated than past open space committees, doesn't make the same mistakes twice and utilizes the correct tools for open space acquisition and protection. He reiterated Professor McLaughlin's point that over time, the purpose for which a property has been protected could change. The proper preservation instrument and bond authorization language should be carefully considered and chosen. The bond language, deed restriction language and conservation easement permitted use language should all match to avoid future conflict regarding land use on protected parcel. Mr. Harrington recommended COSAC review the inventory of current protected open space.

Vice chair Henney asked what happens if the enabling legislation changes. Does it have an impact on any of the properties that were restricted via alternate means during the time that the enabling legislation was being changed. Would the legislative change be retroactive? Professor McLaughlin responded enabling legislation can change at any time. Applying revised legislation retroactively is more complicated. If there is a conservation easement that was donated as a charitable gift and the easement provides that it can only be terminated through condemnation or court proceeding and the state legislature tries to pass legislation affecting the property, there is a serious constitutional issue. There is a prohibition both in state constitutions and in the federal constitution on impairment of private contracts. That has been applied in the charitable context so that state legislatures cannot change the terms of

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existing charitable gifts. Ms. McLaughlin hoped the courts would apply the same concepts when considering retroactivity, but it is not guaranteed. The law is unclear.

City Attorney Harrington added Utah is a good state for contract rights and deed enforcement. That applies to both conservation easements and deed restrictions. He thinks the legislature would be limited in retroactively trying to void past easements and deed restrictions, but that won't prevent them from trying. The legislature could expressly limit the ability to transfer public property to another entity without fair market consideration.

Professor McLaughlin noted it is important to include the language "to be held in trust for the benefit of the public" in the first paragraph since that would alert the court when they are looking at the document this is similar to a charitable and/or public trust. Incorporating such language makes it much less likely the court would apply legislation retroactively.

Professor McLaughlin is planning to work with the Attorney General's office to educate them about their role should the legislature try to pass legislation to weaken conservation easement protections. The Attorney General's office is charged with overseeing those protections on behalf of the public.

Ms. McLaughlin cautioned the group not to include *terminable* clauses in *perpetual* easements. The term *perpetual* should be confined to easements that are intended to protect the conservation values for as long as it is possible to do so.

Michael Barille asked if it is possible to have a perpetual easement with a list of pre-agreed upon uses without effecting the perpetual nature of an easement. Professor McLaughlin said yes, as long as the amendments are consistent with the overall purpose of the easement.

Chair Ryan thanked Professor McLaughlin for her open space/conservation easement/deed restriction overview. She remarked that maintaining a balance between all interested parties appears to be the key. She encouraged COSAC members to read the June 12 staff report in the packet since it provides valuable background on easements. The definitions provided by COSAC member Fox are also in the packet and present what Summit Land Conservancy objectives and intentions are.

Council member Beerman asked COSAC members to write down their thoughts relating to the following questions and bring them to the May 7th meeting:

1. Does Council wish to fund stewardship endowments that already have conservation easements on them? In answering this question, the Council should ask itself are the City's management goals and reasons the City wants

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easements aligned or the same as the "stewardship" concepts articulated in the attached material from Summit Lands.

2. If Council wished to place conservation easements on some or all, of the city's open space parcels that currently do not currently have easements, does Council wish to fund stewardship endowments for those properties?
3. Does Council wish to establish a policy for funding future stewardship endowments, in the case where a new open space bond fund was established?
4. Does Council wish to place conservation easements on some or all City-owned open space that does not currently have a conservation easement? If so, should this be policy direction for the future?
5. Does Council wish to place conservation easements on some or all City-owned open space on a case-by-case basis? If so, should this be policy direction for the future?
6. Should staff incorporate this Council direction (received in response to questions 1-5) in the new RFP?

Heinrich indicated answering the questions will be good preparation for the criteria discussion to be held on May 7.

Chair Ryan referred to page 12 of the staff report where it is stated the RAB would have the power to approve annual monitoring payments to the non-profit entity holding the easement. She asked if that decision had been finalized. City Attorney Harrington said it had not.

Chair Ryan summarized items for the May 7th agenda: Minutes, criteria discussion, and electronic meeting participation policy.

Professor McLaughlin offered to answer questions online if COSAC members contact her via the internet.

The meeting adjourned at 10:08 a.m.

Protection Options for Land Acquired by City With Open Space Bond Funds or Other Sources of Revenue



No Added Protection

Potential Limits on City

- Open Space Zoning
- Voter Authorization/Bond Language*
- Terms of Conveyance/Public Dedication
- Public outcry/Politics
- Public Trust Doctrine

Bond Language

1998: “to acquire and forever preserve undeveloped park and recreational land”

2002: “to acquire and forever preserve undeveloped park and recreational land and to make improvements to lands so preserved to protect the natural amenities and provide for public access and use”

2006: “to acquire, improve and forever preserve park and recreational land, together with related historical or cultural improvements, to protect the conservation values thereof, to remove existing unneeded man-made improvements, and to make limited improvements for public access, parking and use”

* Permitted uses seem intentionally broad (e.g., “parking” and “public access and use”)

* Members of public and City may have different ideas regarding meaning of “open space,” “park,” “recreational land,” “improvements,” “public access and use”

* Do voter authorizations and enabling resolutions prevent in-kind swaps or sales where proceeds are used to preserve other open space?

Perpetual (§ 57-18-1) Easements

Perpetual “Conservation” Easement

- “Forever Wild” easement or
- Primary purpose is protection of natural and habitat values; subsidiary purpose is recreation

Perpetual “Recreational/OS” Easement

- Primary purpose is recreation; subsidiary purpose is protection of natural and habitat values

Perpetual Multi-Purpose Easement

- Establish different use zones
 1. Purposes, permitted/prohibited uses negotiated with holder – purpose is “touchstone”
 - * Are holder’s purposes consistent with all potential permitted uses?
 2. Should state that Easement is held “in trust” f/b/o people of Park City and State of UT regardless of manner of acquisition
 3. Should state that Easement is terminable only:
 - (i) through condemnation or
 - (ii) in court proceeding/impossible or impractical,
 - (iii) and proceeds for easement must be used to replace lost conservation or recreation values
 4. Should include:
 - (i) flex. to amend consistent w/stated purpose,
 - (ii) process for “permitted use” decisions, and
 - (iii) mech. for dispute resolution
 - * City and holder could agree on amendments and permitted uses without public notice or process, subj. to AG oversight
 5. Very powerful permanent land protection tool
 - * Overuse weakens tool
 - * Dilution weakens tool

Other Options

Nonperpetual (§ 57-18-1) Easement

1. Deed states alternative conditions under which easement can be swapped, sold for proceeds that will be used to preserve other open space, or otherwise terminated, e.g.:
 - by agt of parties;
 - by govtal proceeding;
 - upon approval of public official;
 - upon holding of public hearing;
 - when parties deem it essential to orderly development of community

Deed Restriction/Right of Reverter

1. Must be done at acquisition
2. Potential common law impediments to enforceability
3. Possibly terminable by agreement of City and Grantor
4. City loses entire investment (land and \$) on reverter
5. Purposes and permitted uses negotiated with Grantor (private entity not organized and operated f/b/o public)
6. No third-party watchdog
7. Status unclear - courts may treat as public dedication or as private servitude (interpreted in favor of free use of land versus public purpose)

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