Land Acquisition Methods

Land use attorneys often refer to land ownership as a “bundle of rights.” These rights include the rights of possession, access, and various uses, such as hunting, mining, and construction. These rights are severable and can be sold, either in whole or in part, to other individuals or entities. This section describes different ownership options relating to the bundle of property ownership rights. Offering the most control, and the greatest amount of rights, is fee simple ownership of land. At the other end of the spectrum are easements or other similar conveyances which provide specified, and limited, ownership rights.

As might be expected, land acquisition programs can be quite effective in promoting desert preservation goals. For instance, the City of Boulder has the oldest open space program in Colorado and has used a specially earmarked .073 percent sales tax to raise $100 million and buy 25,500 acres of dedicated open space in a greenbelt around the city. The sales tax revenue stream now produces about $15 million each year. Another 8,000 acres of mountain parks in the Boulder foothills have been separately set aside through the parks and recreation department. Some of the Boulder open space land is leased to farmers to maintain the agricultural uses. Other parcels are maintained as natural areas, allowing passive recreational uses, such as walking, bicycling, and horseback riding. Jefferson County, Colorado has had an open space acquisition program in place since 1972. Funded by a one-half percent sales tax that generates $22 million in annual revenue, the county has spent approximately $123 million to acquire 29,500 acres of land. The lands are used for a variety of purposes, including natural areas, buffers, and trail corridors. Open space funds are also distributed to eight cities in the county, with Lakewood receiving more than $13 million and Arvada receiving more than $11 million since 1972.

Peoria has a variety of types of open space. These include agricultural remnants in the southern areas; undeveloped hillsides, rivers corridors, river terraces and riparian areas, foothills and bajadas in the northern part of the City. This section of the Open Space master Plan focuses primarily on the undeveloped northern areas.

The floodplains are somewhat protected by the Desert Lands Conservation Ordinance and by drainage and floodplain regulations. Hill sides over 10% slope are somewhat protected by the City’s Hillside Ordinance. Federal and State land ownership also provides some protection through regulations for public use and sale or lease of public lands. These undeveloped areas also provide important public benefits. They create a unique border around the developed areas of the City and provide for aesthetic benefits that can be enjoyed from virtually any part of the City. The dramatic visual backdrop that Peoria’s northern area provide set the community apart from the majority of other Phoenix metropolitan communities in Maricopa County.

In the last several years, surveys indicate that the City residents have expressed a desire for public open space. In 2001, Peoria voters approved the sale of bonds for the purpose of purchasing open space. In 2001, Arizona voters approved a measure that created the Arizona Preserve Initiative (API) providing matching funds to cities that qualify for the purchase of open space.

Nationally, open space preservation measures demonstrate strong voter support. The Land Trust Alliance compiled the results of 148 local ballot questions on open space funding appearing on the November 1998 ballot and found that 124 (84 percent) were approved by the public. Most of these measures were local bond authorizations, a property tax levy, or a special tax.

As has been noted in the above discussion of organizational options, many open. space programs rely extensively on Federal and State grants to achieve open space goals. Grants may either be competitive or categorical, but the competitive category is predominant. Typically, grant programs have a relatively narrow focus, usually involving protected resource conservation. Local program priorities often must be adjusted to take advantage of grant funding. In addition, a significant amount of resources must be expended in application for the competitive grants.

Privately owned parcels that have significant scenic, cultural, ecological, or biological values are typically zoned in a way that would allow some development, and the owners have a reasonable expectation of some productive use. Bonds and matching funds only go so far in obtaining the amount of land that preserves an entire character, includes linkages, or provides for expansion of open space at a later date.

There are a variety of uses for open space. Often, the intended use dictates the appropriate sources of funding that may be used for acquisition. In addition, use often dictates operations and maintenance costs which must be considered as part of the overall cost of the acquisition.

Under State law each city in the state is required to prepare and adopt an open space element to the General Plan. Peoria's plan includes statements of policies focusing on unimproved land for the preservation natural resources, and for outdoor recreation. It is worth noting that the State requires nothing beyond a plan, and does not require that the plan be implemented.

Peoria intends to leverage impact fee collections to apply for matching funds from the State API. Over half of the approved funds have been spent and time is of the essence to identify appropriate State Lands for acquisition. This is often a lengthy process to complete as by law the State may only sell public land at the cost for highest and best use. This requires much planning, analysis, and deliberation.

Local Government Regulatory tools for the acquisition of open space

1. **Mandatory Dedication of Open Space or in-lieu Impact Fee.** *Developers are either required to dedicate a portion of property to be developed or pay an equivalent impact fee that the city uses for acquisition.*

   Pros: Open space is protected, and recreation lands are acquired at little cost to the public.

   Cons: The developer determines the location and area of open space unsuitable for development. Open Space may not be dedicated to public uses.

2. **Urban Growth Boundary.** *Demarcation of a limit of urban infrastructure (water and sewer extensions). Such a boundary typically identifies a 10-20 year 'land supply' of buildable land.*

   Pros: Limits sprawl and encourages more compact development

   Cons: Reduces land available for development

3. **Transfer of Development Rights (TDR).** *The rights to develop one parcel of land are sold or transferred to another parcel of land to protect resources on the first, in exchange for increasing development density on the second. Areas to be protected are "sending" parcels and parcels to receive higher density are "receiving" parcels.*

   Pros: Resources can be protected without huge capital expenditures. Large tracts of protected land can be created in "sending" areas.

   Cons: Complicated program to establish, administer, requires professional staff assigned to administer. Receiver areas have to be defined and these areas may be limited.

   Purchase of Development Rights (PDR). *The owner's rights to develop a parcel of land are sold to the local government or to a land trust. Most PDR programs are voluntary and offer a viable* *financial option to interested landowners. From a practical standpoint best done in partnership with land trust or conservancy.*

Pros: a proven technique communities with strong support to acquire lands for preservation.

Cons: Voluntary nature may miss some opportunities. Can be high-cost depending upon the value of the development rights. Property owner and open space buyer may have radically different ideas of the value of development rights.

4. **Purchase of Agricultural Rights and Other Easements.** *In addition or in/lieu of purchasing development rights, agricultural rights, grazing rights or other rights could also be purchased. Other customized easements could be developed.*

   Pros: less expensive than Fee-Simple acquisition or Purchase of Development Rights.

   Cons: Limited applicability for preserving open space.

5. **Conservation Easement**. *A legal agreement between a landowner and a qualified conservation organization or government agency to voluntarily restrict the use and development of the property. Easements run with the land.*

   Pros: Can be :significantly more effective in preserving open space than purchase, if it meets mutual goals of landowner and agency.

   Cons: Management intensive: easements must be monitored and enforced.

6. **Lease.** *An agreement between agency and landowner to rent the land in order to protect and manage a sensitive resource.*

   Pros: Low cost approach to site protection.

   Cons: Short-term protection strategy

7. **Fee Simple Acquisition.** *Usually the sale of land at full market value. Many variations are possible including a discounted sale where part of the consideration is a donation, a land swap or other mutually acceptable arrangement*

   Pros: The most straightforward acquisition method; provides the City with full control

   Cons: Most expensive method; some revenue lost when land is removed from tax rolls.

8. **Installment Sale.** *A percentage of purchase price is deferred and paid over successive years.*

   Pros: Possible capital gains tax advantages for seller. Allows agency to avoid debt financing.

   Cons: May be more expensive than tax exempt borrowing

9. **Right of First Refusal.** *Agreement giving conservation agency the option to match an offer and acquire the property if the landowner is approached by another buyer.*

   Pros: Can be good protection at low cost.

   Cons: Higher costs associated with verification of offers. Funding by City could be problematic without a designated reserve.

10. **Outright Donation.** *Owner grants full title and ownership to conservation agency. Variations of this approach include donation via a bequest or a donation with right to reserved life estate.*

    Pros: Resources acquired at very low costs to the agency. Agency may receive endowment for long-term land stewardship. Donor may qualify for income tax deductions, estate tax relief, and property tax breaks.

Cons: Receiving agency must accept conditions, responsibility and long term costs of land management. Stewardship endowments may make donations cost prohibitive for landowner.

11. **Acquisition & Saleback or Leaseback**. *City or private organization acquires land, then places protective restriction or covenants on the land, then resells or leases land resources acquired at very low prices.*

    Pros: Proceeds from sale ,or lease can offset acquisition costs. Land may be more attractive to buyer due to lower sale price resulting from restrictions. Management responsibilities assumed by new owner or tenant.

    Cons: Complicated procedure. Owner retains responsibility for land but may have less control over the property. Leases may not be suitable on some protected lands.

Fee Simple Purchase

As noted above, ownership of land includes rights of possession, access, exclusion, disposition, and rights to specified uses. Where one party owns the entire bundle of these rights, that party owns the land in "fee simple" and is subject only to the constraints imposed by nuisance laws and valid public regulations. Fee simple ownership provides the most effective means of control. If the City of Peoria assumes fee simple ownership, it possesses a wide range of options. It may re-convey selected interests in the land, restrict future uses of the land, lease the land, or otherwise control the bundle of property rights in a manner appropriate to its intended objectives. Generally, federal, state, and local governments have used fee simple purchases for properties to be reserved as parks.

Advantages include full landowner control of land and the highest degree of flexibility and protection. Permanent protection and public access are allowed (if desired). Weaknesses include the cost of purchase, which may be beyond the government's or non-profit's ability to pay. In addition to the initial acquisition costs, carrying costs – interest on debt, foregone interest on alternative investments, and maintenance costs – can also be quite high. Another disadvantage is that publicly-owned land is removed from the property tax rolls.

Installment Sale

An installment sale allows a public sector or non-profit buyer to pay for property over time. Advantages include lower taxes for the seller. Weaknesses include the long term financial commitment to a mortgage and the owner's lien rights on the land.

Purchase and Sellback or Leaseback

Government entities may use the purchase and subsequent resale or leasing of property to direct land development patterns. A municipality may acquire property in fee simple and retain certain development rights – essentially affixing a negative easement to the property – and then re-convey the property less the retained rights.

Alternatively, a governmental entity may purchase the property and then lease it, subject to conditions and restrictions as provided in the leases. These arrangements, known as "purchase and sellback" and "purchase and leaseback" arrangements, enable the government to recover at least a portion of its acquisition costs while exercising direct control over the sort of development activity that occurs on the purchased property.

The California Coastal Conservancy, charged by the state to assist in the protection of undeveloped coastal land, has a successful program that provides grants to land trust organizations to purchase agricultural and other land and resell with preservation restrictions. Funded by the state, the experience of the program is that agricultural lands purchased at full market value, can be resold with preservation restrictions that allow for agricultural and other open space uses at nearly the original purchase price. Therefore, the cost of the program is minimized and land is kept in productive use.

Advantages of this technique are a relatively low cost of imposing development restrictions, a high level of control with the opportunity to impose specific types of development controls, and keeping the land in productive use. Disadvantages include less control that fee simple acquisition and enforcement of restrictions placed on the land that is sold or leased.

Right of First Refusal

While a local government may not need to keep ownership of an entire fee interest in land to achieve its goals, it may also not need to purchase the property at all until an alternative use or sale of the land is contemplated. Under this concept, a landowner agrees to provide first right of purchase to designated public sector or non-profit entities. This right is usually triggered through the prospect of a sale or proposed redevelopment of the property.

Advantages include short term preservation of open space and low cost of rights. Weaknesses include no control over eventual asking price for land and, if the government decides to purchase the land to ward off the threat of development, the ultimate purchase cost will be higher than if initially purchased because of increases in property values over time and the addition of the costs incurred by obtaining a right of first refusal.

The Sword of Damocles

This technique has been employed to protect federal reserves and national recreation areas from adverse development on private property holdings. This system has been used in Idaho's Sawtooth National Recreation Area, where regulations and design controls imposed on private properties to preserve the natural setting. Under this approach, the government agency devises a comprehensive land use plan for the area and designates various zones for different uses and developments. As long as the landowner voluntarily agrees to comply with the plan and restrictions, the government's power to condemn is suspended. However, if a use in contravention of the plan is proposed or undertaken, the power to condemn is triggered and the land is taken into public ownership to prevent the undesirable development.

A primary advantage is that the technique offers effective protection in interim periods during which government budgets may not allow for immediate purchase. It allows the land to remain in private ownership and on the tax rolls if uses are compatible with preservation goals. Disadvantages include the increased costs of purchase if property values rise over time. Also, the technique is only as effective as the resolve of the relevant agency to exercise its power of condemnation and the availability of money to pay compensation – both of which may waiver or fall short under political and/or fiscal pressures.

Bargain Sale

A bargain sale involves selling a parcel for less than its market value. In this instance, it becomes part donation and part sale. Entities, such as land trusts, can purchase land at less cost, while the difference in value can be offset to some degree by tax benefits through the donation of the difference in value between the sale price and the market price.

Advantages of this approach include tax benefits to the seller for donation portion of the transaction and, as noted, lower purchasing costs to the buyer. Weaknesses include the willingness of a seller to engage in a more complicated transaction that a sale at market value and an agreed-upon definition of what constitutes fair market value.

Condemnation/Eminent Domain

Eminent domain is permitted under the Fifth and Fourteenth Amendments to the United States Constitution, which grant the right of government to take private property for public purpose upon payment of just compensation. Communities throughout the United States have employed this technique for a wide variety of public purpose projects, including the provision of parks and open space.

Advantages of this approach include using the power of the state as a last resort if no other techniques are feasible. Weaknesses include cost the just compensation and ill will engendered by the technique. Additionally, there is the ever-present possibility that these actions will be litigated. If that is the case, another drawback is that the legal environment for any measure related to takings is uncertain and will be evaluated on a case-by-case basis.

Land Exchange

This technique entails swapping developable land for property with high open space value. Advantages of this mechanism include no hard cost for public or non-profit entities and avoidance of capital gains tax for landowner. Weaknesses include the potential unwillingness of landowners to swap, and complexity of closing the deal.

Dedications

Strapped by budget limitations and encouraged by the quest to ensure that new development pays its fair share of infrastructure costs, a number of local governments in Arizona and around the United States are imposing dedication requirements, exactions, fee in lieu, or impact fees, as conditions for permit approvals. Fees in lieu and impacts fees will be examined in greater detail under the category of funding or financing techniques.

A dedication is a conveyance of land by a private owner in the nature of a gift or grant and the acceptance of that land by or on behalf of the public. Streets in a subdivided development are usually acquired by local governments through a dedication to the public of the property comprising the streets. Other dedications may be required that require land for parks and recreational facilities, school sites, bike paths, or local transit facilities.

Advantages of this technique include the equity of development helping to finance the open space which it threatens. Weaknesses include the difficulty of calculating fair fees or dedications, the substantial amount of staff time needed to craft and review dedication and exaction requirements, and ensuring that all of the legal requirements are met. Also, opposition from the development community can usually be anticipated, which prefers property taxes, public bond issues, and other traditional sources of funding to provide for infrastructure. Finally, dedications and exactions will increase the cost of new housing.

Exactions

An exaction is a payment or dedication made by a developer for the right to proceed with a project requiring government approval. They can be in the form of a fee, the dedication of public land, the construction or maintenance of public infrastructure, or the provision of public services. The purpose of the exaction must directly relate to the need created by the development. In addition, its amount must be proportional to the cost of the improvement.

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Partial Property Acquisition Techniques

For any number of reasons, including cost, it may not be necessary to obtain full ownership rights to a parcel. In these instances, the goals of the desert preservation plan may be fulfilled, at a lower cost, by acquiring only partial rights to a specific piece of property. Among other things, by allowing the property to remain in private ownership, taxes continue to be collected and governmental maintenance costs are reduced. Several techniques for acquiring partial ownership are examined below.

Easements – General Issues

Easements are severable rights or interests in land. The severable nature of easements allows a landowner to convey or reserve specific rights associated with a property, apart from other essential rights of possession and use. There are two distinct types of easements. Positive easements grant an affirmative right to use property in a specified manner, or to interfere with the title holder's otherwise enforceable property rights. A right of access across a neighboring property is a common example of a positive easement.

In contrast, negative easements affix restrictions upon the landowner's property rights. Negative easement do not grant affirmative rights. The purchaser of a negative easement simply affixes a restriction. Particular restrictions vary in accordance with the objective. Where the aim is the preservation of scenic vistas, scenic easements may prevent new construction that exceeds height limitations or block specified views. Where the object is historic preservation, government entities may affix easements prohibiting certain specified types of property alterations. A few of the more common easements related to desert preservation are examined below.

Conservation Easements

Partial interest in property generally for expressed purpose of protecting open space. Advantages include low purchase cost than purchasing fee rights, and landowner retention of non-conflicting development rights, including keeping the property on the tax rolls. Weaknesses include the need for enforcement, limitations to resale opportunities, and potential public access restrictions.

Preservation Easements

Same as conservation easements, with an emphasis on historic landscapes. Advantages and weaknesses are the same as for conservation easements.

Prescriptive Easements

A prescriptive easement is a means of acquiring an access easement in or on the land of another by continued regular use of a statutory period of time. It is similar in legal doctrine to the concept of adverse possession.

Purchase of Development Rights

Governments or non-profit organizations purchase the rights of more intensive land use from the current owner. In the Seattle metropolitan area, King County has administered a successful purchase of development rights program for the purpose of preserving agricultural land in the face of metropolitan growth pressures. Utilizing a $50 million bond issue, the program has provided for the county's purchase of development right for properties facing development pressures, with priority rankings determined in accordance with the intensity of such pressures.

Advantages include lower initial purchase costs (if only a portion of the development rights are purchased), landowner incentives for selling rights, lower residual property value, the land remains on the tax rolls, and the government avoids management and maintenance costs. Weaknesses include the cost of purchase (if most, or all, of the development rights are purchased), which may be beyond the government's or non-profit's ability to pay.

Purchase Right-of-Way Easement

Provides the public with the right to access and use a parcel of land for a specified purpose. Strengths include avoiding the cost of outright purchase. Weaknesses include time limits, and the ability of the landowner to exercise development rights.

Transferable Development Rights (TDRs)

Density transfers involve the shifting of permissible development densities from unsuitable development areas to more appropriate sites – in this case, from important habitat areas to less important areas. Under this concept, the local government studies and designates appropriate "sending" and "receiving" areas on a map. TDR programs can be designed to be voluntary in the sending and receiving areas, mandatory in both areas, or voluntary in one area and mandatory in the other.

The TDR concept has been used in a number of different jurisdictions in the United States. Montgomery County, Maryland has used a TDR program to protect agricultural lands against strong urban growth pressures. The Montgomery County program involves three elements:

- The identification of a "sending area" that includes the county's best agricultural lands
- Down-zoning in the sending area from five-acre minimum lots to 25-acre minimum lots, with landowners retaining TDRs equal to their original five-acre lot development rights
- The identification of a "receiving area" in which landowners may augment their development rights with additional rights purchased from the sending area.

Another successful TDR program for natural area protection has been employed in the Pinelands National Reserve in New Jersey. To date, more than 10,000 acres have been preserved, and the TDR market provided by the program was recently held to be an important consideration in rejecting a takings challenge to the Pinelands' strong system of regulatory controls designed to protect existing agricultural lands and open space.

Lease Techniques

Lease/Use Agreements

Short and/or long term public sector rental of land with use agreement for open space. Strengths include lower cost for the control of the land, and landowner incentives to receive a regular income stream. Weaknesses include lack of equity and long term protection.

Life Estates

Occasionally, the owners of agricultural or ranch lands would prefer not to develop their lands and would like to see the farm or ranch remain intact as long as possible. However, many of these same owners would like to be able to pass their land on to their children for them to do with as they wish. For that reason, they are unwilling to grant easements or impose deed restrictions or covenants that would bind their children's use and disposition of the land. The local government may want to purchase a life estate in the land and lease the property back to the current owner at roughly the same cost. The terms of the transaction allow the government to control the use of the land during the owner's lifetime, but terminate that control at the time of the owner's death. Even though the land could be put to incompatible use some time in the future, the purchase of a life estate can buy time for the community to consider follow-up steps and/or to raise money for the eventual purchase of the property.

Federal/State/County Governmental Regulatory Agencies

At both the State and Federal level there are units of government involved in open space preservation. These agencies or programs are usually *involved* in *open* space as a result of administering State or Federal regulatory laws aimed at protecting the environment. All this makes open space preservation and management a very specialized and fragmented business. This is not a comprehensive list but provides an idea of the number of agencies active in the regulatory area.

1. U.S. Fish and Wildlife Service
2. National Park Service
3. Bureau of Land Management
4. Bureau of Reclamation (Central Arizona Project)
5. USDA Forest Service
6. U.S Army Corp of Engineers
7. Arizona State Fish and Game
8. Arizona State Parks
9. Flood Control District of Maricopa County
10. Maricopa County Parks and Recreation

Federal/State/County Governmental Non-regulatory Agencies

These programs and agencies operate a variety of open space programs that fund preservation efforts. Each program has its own requirements and focus. Again, this is not a comprehensive list but it *gives* an idea of the wide variety of programs that are available.

1. Land and Water Conservation Fund
2. National Fish and Wildlife Foundation
3. Wetlands Reserve Program
4. ISTEA / CMAQ Federal Transportation Programs
5. Arizona State Lands Department
6. Habitat Conservation Fund
7. Endangered Species Conservation Fund

8. Private, non-profit or public benefit land trusts (such as):
    a. Trust for Public Lands
    b. Alliance of Land Trusts
    c. Nature Conservancy
    d. Soil and Water Conservation Association
    e. Greenbelt Alliance

Revenue Options

There are various options available for developing a revenue source for open space program activities. Currently, besides the bonding authority passed in 2001, the only revenue specific to open space is through a development impact fee for open space. This fee is currently set at $000 per??? In the 2010 approved City of Peoria budget, $000000000 has been set aside for the purchase of open space through impact fees.

1. **Sales Tax.** Can be adjusted at local level only with voter approval.
2. **Base Property Tax.** Fixed at 1% of property value.
3. **Grants.** Varies, usually requires city match and is specific to designated purpose.
4. **General Taxes.** For general purposes.
5. **Special Taxes.** Revenues earmarked for specific purpose. Requires voter approval.
6. **Property Assessments/Special Districts**. May be imposed in a variety of ways and used for a designated purpose.
7. **Property Related Fees**. In addition to basic property tax.
8. **Fees**. Voluntary charge for service charge for service provided.
9. **Developer Impact Fees.** A special class of property related fees.

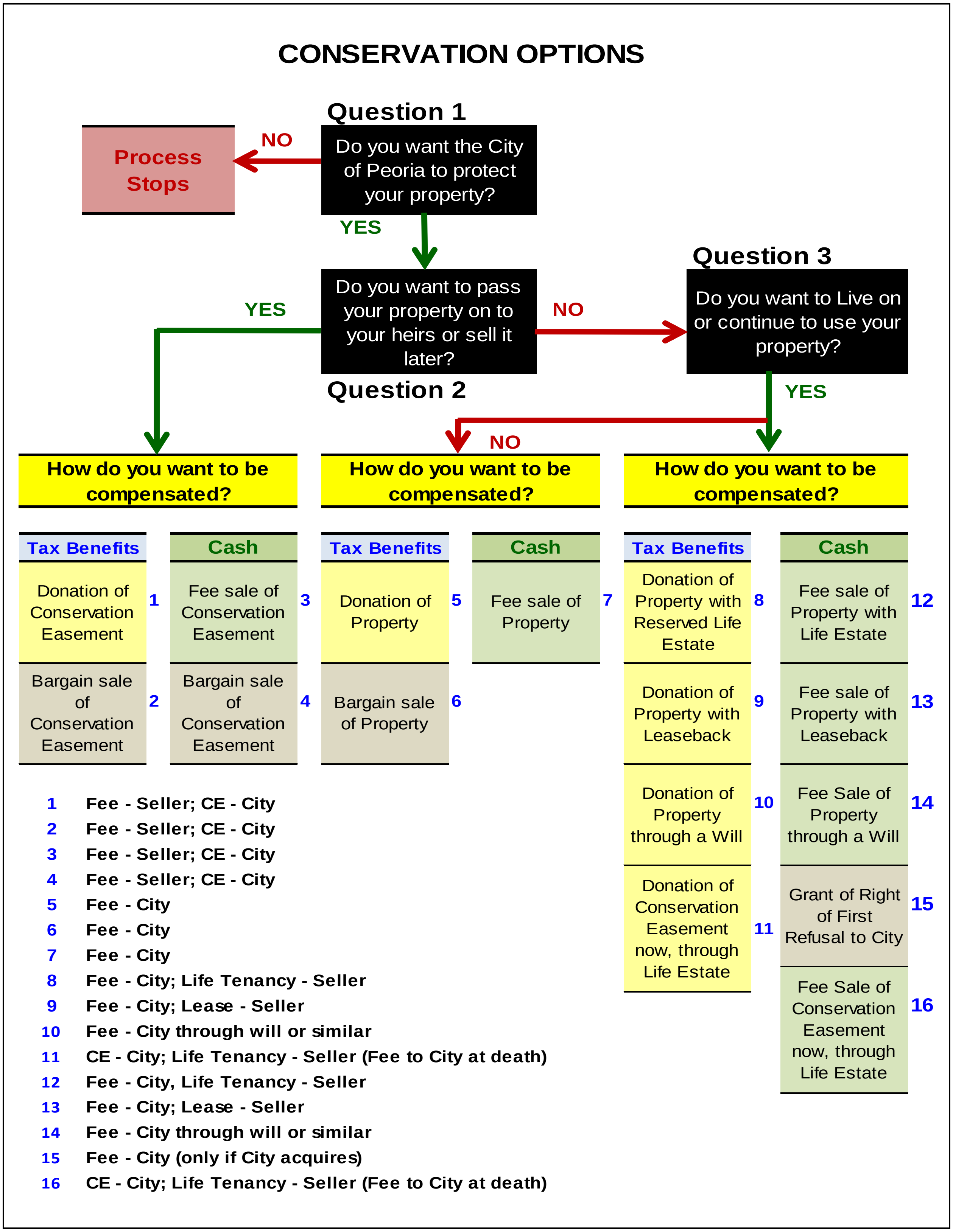
A "typical" open space plan would include the following major sections.

1. **Establish Goals and Objectives** Discusses setting, relationship to other local and regional plans, provides background, sets forth a mission statement and program objectives.
2. **Organizational/Management Capability** For a smaller government entity, especially one without a dedicated revenue source, this would usually be a blend of paid staff and volunteers.
3. **Strategic Plan** This is really the heart of the document in that it would establish a work program. In an open space program one of the first orders of business is to establish a database and then develop criteria for setting priorities.

After this is accomplished, the work of developing a prioritized inventory of important properties can be initiated. Ultimately, plan development would precede something as follows:

1. Identify area and database.
2. Develop goals for preservation and associated criteria
3. Complete an inventory

4. Apply criteria and establish priorities
5. Define program tools and match tools with priorities
6. Develop an program budget and funding sources
7. Based on financial feasibility create an implementation plan, or plans based on different funding scenarios
8. For implementation plans establish objectives and performance measurement and reporting



Question 1 – Does the owner have an interest in preserving the current property use?