

ULI Land Use Policy Forum Report

Market Mechanisms for Protecting Open Space

**Prepared by
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and Gary Binger**

ULI/National Recreation Foundation Policy Forum on Open-Space Preservation

San Francisco, California

April 23, 2004



**Urban Land
Institute**

About ULI

ULI—the Urban Land Institute is a nonprofit education and research institute that is supported by its members. Its mission is to provide responsible leadership in the use of land to enhance the total environment. ULI sponsors education programs and forums to encourage an open, international exchange of ideas and sharing of experiences; initiates research that anticipates emerging land use trends and issues and documents best practices; proposes creative solutions based on that research; provides advisory services; and publishes a wide variety of materials to disseminate information on land use and development. Established in 1936, ULI has more than 22,000 members in 80 countries representing the entire spectrum of the land use and development disciplines.

Richard M. Rosan
President

ULI Land Use Policy Forum Reports. ULI is in the forefront of national discussion and debate on the leading land use policy issues of the day. To encourage and enrich that dialogue, the Institute holds land use policy forums at which leading experts gather to discuss topics of interest to the land use and real estate community. The findings of these forums serve to guide and enhance ULI's program of work. The Institute produces summaries of these forums in its Land Use Policy Forum Reports series, which are available on the ULI Web site at www.policypapers.uli.org. By holding these forums and publishing summaries of the discussion, the Institute hopes to increase the body of knowledge that contributes to the quality of land use policy and real estate development practice throughout the country.

Acknowledgments

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Policy Forum Summary

The 2004 ULI Policy Forum “Market Mechanisms for Protecting Open Space” considered how the process of open-space protection could be reinvented through effective land development planning, creative financing, and tax incentives. A group of 21 participants, representing ULI leaders and eminent professionals involved in land use and open-space issues, discussed the current process of open-space preservation, and explored related innovative approaches. Two main questions framed the forum:

- How can the process of open-space protection be reinvented to leverage current resources to deliver better results?
- If property rights must be respected, as must ecological systems and the land ethic, how can this process be accomplished in a way that is fair and that works? What are the responsibilities of the landowner?

Five speakers gave presentations that led to an exchange of views by forum participants. Following each presentation, participants focused on three questions:

- What is the strength of this approach?
- What is the scope of its impact?
- What are its shortcomings?

Participants agreed that now is an exciting time to pursue additional methods of open-space conservation. Through a public education campaign, significant gains can be made in land preservation and stewardship that are critical for future generations. Several key issues, however, need to be addressed in order to develop a strategy to preserve open space on a comprehensive communitywide or regional level rather than on the level of individual parcels.

Introduction

Open-space conservation programs are regarded as some of the most popular strategies for managing urban growth in the United States. Significant growth in metropolitan areas is emphasizing more than ever the relationship between open-space policies and decisions on growth issues. In 2003, voters in 23 states approved three-quarters of all local and state conservation—related ballot measures. These 100 measures will generate approximately \$1.8 billion in total

funds, including more than \$1.2 billion dedicated specifically to land conservation purposes. By comparison, the ten largest developers in the United States consume about \$2 billion of land per month.

Development as a Tool to Preserve Open Space

Mike Sands, environmental team leader of Prairie Holding Corporation, opened the forum with a presentation on the use of land development as a tool to protect critical open space. He pointed out that two common perspectives arise in open-space preservation, both of which are demonstrated in the recent Illinois development known as Prairie Crossing. “The first is the perspective of the developer who is interested in open space as a project amenity to fulfill some regulatory requirements. The second perspective is that of conservationists and those involved in land protection, who are interested in development as a tool to protect additional open space that is not affordable by other means.”

Prairie Crossing, a 667-acre development located 38 miles north of Chicago, comprises 359 homesites located on parcels of 5,000 to 20,000 square feet, totaling approximately 20 percent of the total acreage. The impetus for the open-space project was provided in 1989 when a new toll road was proposed, motivating landowners to preserve existing open space. The result was the Liberty Prairie Reserve, a public/private partnership formed to establish a distinctive open-space sanctuary in Central Lake County. Under both public and private ownership, the 5,800-acre reserve contains nearly 3,200 acres of open space. Prairie Crossing, in effect, illustrates how development can be encouraged in an area to enhance its existing open space.

Prairie Crossing lies at the edge of two important watersheds that direct water into the Illinois River, on to the Mississippi River, and ultimately into the Gulf of Mexico. Under principled stewardship, Prairie Crossing was designed to limit the impact of water runoff into sensitive habitats. Sands observed, “Hydrology and stormwater are the two biggest challenges the development presents to ecological health in and around the Chicago region, with a series of nature preserves immediately downstream, and a high-quality wetland directly below the site.” The environmental team established a stormwater treatment plan that replaced an engineered

stormwater system of concrete curb and gutter with a system of specially designed landscaped depressions to collect water. From there, the water moves through a series of natural swales and is diffused through prairies and wetlands into various lake and pond basins located throughout the development.

The water quality in on-site lakes meets all of Illinois's standards for swimming. Pollutants were removed by native plants, which were covered in the existing landscaping budget and therefore saved \$2 million in development costs.

Sands pointed out several factors that are important to conservation development and open space preservation. These include developing an appropriate initial ecological design, establishing an institutional stewardship capacity, ensuring a long-term funding strategy, and developing good metrics to measure and evaluate results. All efforts involved from the onset the appropriate stakeholders who would likely be essential in the long-term stewardship of the open space—the developer, the ecologists, the Liberty Prairie Foundation, the Liberty Prairie Conservancy, and the Lake County Forest Preserve District. The parties received benefits either of increased fundraising/profit margins or of technical knowledge as a result of their participation.

To help ensure long-term financial support, the Liberty Prairie Foundation receives funds from deed restrictions that include a provision requiring the seller to pay 0.5 percent of the sales price each time a home is sold, to go toward supporting the open-space area.

The quality of the open space being preserved should be considered. Sands suggested looking carefully at a potential open space to seek answers to the following questions:

- Does it leverage additional open-space protection?
- Is it appropriately designed open space?
- Is there sufficient ecological integrity?
- Is there sufficient access for stewardship?

The answers to these questions require looking beyond the parcel to evaluate impacts within the larger regional landscape. Sands recommended: “Look at any potential project within the context of the regional green infrastructure, but act locally. Think about what is needed to

preserve the open space long term, and involve those people and organizations from the start to create a sustainable landscape.”

Safeguarding Green Infrastructure

Christie Oostema, director of community outreach and education at the Center for Green Space Design, spoke about the process of working with the various stakeholders needed to make individual developments and open-space efforts fit into a larger regional strategy. She explained that the most significant aspect in safeguarding green infrastructure and incorporating the local open-space preservation effort into a larger regional plan is to prepare the public sector for market-driven conservation. “An important part of that is preparing the public for the policy [general plan] updates that support a market-driven approach,” Oostema noted, “and in Utah at least, we don’t want the government getting into our business, but you can’t have your cake and eat it too if you are not willing to play the game and work with the government to conserve open lands that are valuable to a community as a whole.”

Oostema pointed out two requirements in preparing for policy updates. The first is to address the gap in the municipal planning process, which includes at least two issues: the failure to define open space, and a focus on development first, with open space as a leftover.

The second requirement is to address the gap between the language of the general plan, which is in sync with public opinion, and the language of the development code, which does not reflect these desired outcomes.

To deal with some of these gaps, the Center for Green Space Design (CCSD) is working with communities in Utah that are anticipating most of the state’s growth over the next 15 years, especially at the urban fringe. In order to bring everyone to the table, CCSD realized that it needed to apply a definition that allowed for all people to participate. Oostema introduced the CEDAR model as an effective tool to define and address open-space values. CEDAR stands for: cultural—educational, artistic, historic, archeological values; ecological—habitat, vegetation, and wildlife values; developmental—green spaces designed as part of the development; agricultural—farm preservation; and recreational—leisure and outdoor activities.

CCSD has found that these values can bring most people to the table by helping them to expand their ideas to include the various purposes and types of open space that are important to community members.

Through a public participation process, the community has been able to identify the various purposes of potential open space according to the CEDAR definition. With CCSD's help, the potential types of open space are then consolidated into a comprehensive map that reflects the priorities and values of the community. Once the open-space map is completed, how and where development should occur becomes apparent. Educated compromises can then be made within the community, which will lead to more politically feasible developments.

Oostema noted that an important part of working with communities is helping them to understand that growth will happen, and that if they want to preserve open space it is important to use smart growth. Working with maps of the community, citizens should identify areas where future growth should go, and at what level of intensity, and areas that need to be preserved as open space. The community can then focus on policies and regulations needed to balance the desired open spaces with future development. In this way, a community-supported plan is in place that sets the stage for the policies needed to implement a green-space system in a community.

Landpooling

In his presentation, David Renkert, managing partner for Landpooling Administrators, focused on implementation. Once a community has adopted policies to allow for a market-driven open-space conservation program, how does it deal with the individual property owners, he asked.

Renkert then suggested that an answer lies in landpooling, whereby property owners form a partnership (either as an LLC or an LLP) and assign development and planning decision responsibilities to the partnership entity. Individual landowners hold a prorated equity stake in the partnership, with landpools geographically defined by the ecological and economic links among properties. "Ecology doesn't recognize parcel and political boundaries, and markets don't really either—you need a controller to maximize the value and optimize the potential of the area," Renkert noted.

When the framework for the plan is adopted, potential links among properties can be identified under the goals of the plan. The partnership entity then can approach property owners to find out what their goals and needs are, and can secure backing from financial markets to prevent individual parcels from being sold off, resulting in fragmented development.

According to Renkert, landpools generally are formed to:

- Integrate property owner needs with broader social goals and local municipal control.
- Prevent fragmentation of natural resources and habitats, and provide buffering of and connectivity to protected patches.
- Increase property values and real estate investment liquidity.
- Capitalize on new economic opportunities, particularly future ecosystem service markets, recreation, and branding.
- Deliver more comprehensive information with which to make development decisions

Landpooling is a difficult, time-intensive task, however, requiring that the following steps be taken over a period of several years:

- Organize baseline data to identify project goals, potential partners, and available resources.
- Perform a suitability analysis to assemble ecological and economic data, along with individual, community, and regional objectives.
- Delineate approximate landpool boundaries.
- Perform base line appraisals to determine equity basis.

Renkert's first landpool project is expected to be completed in the next few years, with potential benefits already being recognized. For the developer, bringing landowners into a partnership organized under an LLC can reduce NIMBYism, decrease unwanted influences that do not directly relate to the project, minimize risk, and produce cost savings with the consolidation of large parcels under single ownership that would be available for conservation development.

All participants gain. Landowners gain a sense of certainty about development potential and increased profits from collective valuation of revenue streams. Local government agencies realize cost savings from consolidated planning and management; instead of 50 individual parcels to work with, one professionally managed entity engages with government officials.

Also important is that landpooling can be used to professionalize the transfer of development rights within the private market, with urban stakeholders buying into landpools at the urban fringe.

“The idea here is to enlarge the pie, not just divide it up,” Renkert said in closing. Landpooling provides a private market-based approach to implement the best of regional and local planning techniques. This can protect environmentally or agriculturally sensitive areas while allowing for concentrated, efficient, and locally appropriate development.

Evolving Land Ethic and Land Use

Speaking over lunch, Wellington “Buddy” Huffaker, executive director of the Aldo Leopold Foundation, shared the life story and philosophy of Aldo Leopold, renowned Wisconsin conservationist. Leopold is considered one of the first professionally trained conservationists in the United States, graduating from the Yale Forestry School in 1909. His subsequent work with the forest service led to the proposal of the Gila Wilderness Area in 1924. Later in life, Leopold wrote several important books and essays on land conservation and land ethics, including *Game Management* (1933), *The Conservation Ethic* (1933), and *Thick Billed Parrot* (1937).

One of Leopold’s most influential contributions to open-space conservation and stewardship is his notion of the land ethic. Huffaker quotes Leopold’s definition of a land ethic from *Sand County* (1949) as that which “changes the role of homo sapiens from conqueror of the land community to plain member and citizen of it.”

Building on the equity model of landpooling presented by David Renkert, Huffaker emphasized that land equity includes both financial and social aspects. Aldo Leopold’s concepts of the value and responsibility of land stewardship are informed by intellect as well as emotions. As the open-space conservation effort is privatized, with front-end-loaded visioning processes, the emotional aspect of landownership can change over time.

Huffaker explained that part of this change lies in the need for “the environmental community to expand its own horizons beyond the legislative agenda to be able to [discuss] land use and the public interest in private land.” Aldo Leopold recognized this by recommending that the purchase of lands for conservation not replace the need for private land stewardship.

Tax Incentives as a Market Mechanism for Open-Space Conservation

Steve Small, attorney-at-law, wrapped up the forum by discussing tax incentives for open-space conservation. He described section 170 (h) of the IRS tax code—the conservation easement tax section—which outlines the definitions and regulations surrounding conservation easements.

Small recognized that after writing the IRS regulation on open-space conservation in 1982, he was the nation’s leading expert on something that no one cared about. However, he noted that recently developers have begun to recognize the value of open space and conservation development, but there remains a shortage of expertise on potential tax incentives. “The demand for private land conservation and work has outstripped the ability of the professionals to provide services. It is especially a problem with the nonprofit land conservation movement in the country,” Small noted. He pointed out some common misconceptions related to tax code 170 (h). These include:

Meeting Conservation Purposes Tests

You do not get income tax deductions for building fewer houses on a lot than allowed by law. Small clarified, “The federal tax rule starts with the proposition that some significant conservation value is protected.” If something is to be received in return, a tax deduction is not possible.

Confusing Quid Pro Quo Standards

In order to have an IRS-qualified charitable conservation contribution, a real property interest must be donated to a qualified publicly support charity or unit of government—not a private foundation. This means a developer cannot say, “I will donate 60 acres if I can build on these other 40 acres.” The project might be approved, but it would not qualify for an income tax deduction. In addition, tests to determine a true conservation purpose as outlined in section 170 (h) of the tax code must be met.

Confusion of Tax Basis Allocation Rule

If the qualified basis is lowered through donation of a conservation easement, potential implications might exist for developers when lots are resold. For example, if a developer donates a lot to charity, the allowable deduction is limited to the qualified basis of the cost of that parcel—not to the value according to the highest and best use.

Small reinforces that “it is difficult, but not impossible, for a developer to get a meaningful income tax deduction for a conservation easement donation.” Highly complicated tax rules discourage developers from conservation development, but with an informed approach, significant incentives can be leveraged to create additional open space. Advocacy work around some of these issues, as well as education about open-space conservation in general, could generate a lot of interest from the development community.

For developers now working under current tax law, Small presented three recommendations that can maximize tax deduction benefits:

- Evaluate the potential for a conservation easement at the outset, even before acquiring title to land.
- Separate conservation property from “inventory” property, possibly through separate entities, and strive for large contiguous blocks of open space.
- Compare today’s tax benefits to the potential value of future development sales.

Conclusion: Key Issues Shaping ULI’s Agenda

Discussion by forum participants after each presentation and during the closing session sought to synthesize ideas that emerged and to consider topics on which ULI could focus its efforts. Participants identified the following trends, priorities, and questions for ULI to consider:

Define Open Space

The development community, environmental organizations, government agencies, and the general public need to operate from a common understanding of what open space is. This will allow for politically feasible policies that reflect community desires and reduce NIMBYism and development risk. Facilitating a dialogue to develop a working definition of open space means working through disparities of opinion to find common ground. For example, is agricultural land open space?

Connect with the Regional Landscape

All participants noted the importance of working with the regional landscape when engaging in conservation development and open-space preservation. This includes making connections between the rural and urban landscapes, and linking local conservation efforts to a regional plan.

Link Conservation Development to Green Building and Sustainability Issues

The ideals of open-space preservation are directly intertwined with other ecology issues such as green building designs and sustainable development issues. Participants recognized the value of constructing green buildings using smart growth techniques that enhance the natural environment. This was deemed especially important when engaging in conservation development. Michael Pawlukiewicz, director of environment and policy education at ULI, suggested establishing a business-oriented sustainable development network with real estate entities that work in the sustainability realm. Pawlukiewicz observed, “The [open-space] aspect has really gotten legs at ULI in the past couple of months. In the past, we hadn’t really addressed the open-space side of the issue—only the development side. That’s changed now.”

Build a Toolbox

Participants were excited to learn about innovations that can make the process of open-space preservation feasible through conservation development. There exists a need for appropriate tools that can be used in local efforts. The synergy between the CEDAR process and landpooling was noted many times over the course of the day, and participants commented that these and other similar tools for planning, financing, and managing open-space preservation need to be developed and distributed nationally.

Jane Adams, executive director of the California Park and Recreation Society, expressed concern about the lack of resources and tools that are available, and of qualified people who are willing to engage in this field of work. “As part of this equation, we need to consider how these issues are talked about at universities, and figure out how people are given opportunities to intern and gain experience in these types of deals to begin to develop a set of skills.”

Provide Education on Conservation Development Advocacy

Even though it was noted that the general public has voted to support 90 percent of all open-space referenda, participants observed a discrepancy between public support for the acquisition and protection of open space and a willingness to pay for ongoing maintenance and stewardship. With guidance in advocacy, developers could tailor conservation efforts to complement current open-space referenda.

A great need also exists to advocate for tax code updates that streamline tax deduction issues for conservation easements. This would encourage more developers to consider conservation development elements in their work. Educating the public about the need to provide long-term financial support for open space is essential in order for developers to engage in conservation development.

To achieve these efforts, participants pointed out that many of the studies that focus on open-space preservation and development tax issues need to be updated and made available to diverse stakeholders.

The Role of Public Policy

Participants agreed that while various efforts to preserve open space are being undertaken on numerous levels, no overriding open-space policy agenda exists. At the least, local jurisdictions should be able to implement open-space plans that are regionally appropriate, which requires removing any barriers that might prevent locally supported conservation development—such as inadequate planning processes and outdated planning codes, ordinances, and mitigation policies. Open-space policy at the local level needs to consider regional implications and opportunities so that the most valuable lands first are identified and connected, and then appropriate development is encouraged.

A Role for ULI

The Urban Land Institute has an opportunity to educate developers, government bodies, and conservation groups about this topic, as well as serve as a facilitator to advocate for policy changes needed to support market mechanisms for conservation development. Forum participants identified several useful resources that can be developed through ULI’s education and research programs:

- Prepare a ULI working paper—including case studies—that examines recent new innovations in conservation development and adaptive land use management.
- Develop a toolkit, made accessible via the Internet, to support local open-space preservation and conservation development efforts.
- Develop educational seminars in which to share new approaches and best practices among developers and conservation groups

Finally, ULI’s District Councils can act as conveners to get the word out about good examples of conservation development projects and potential open-space preservation opportunities.

Policy Forum Agenda

APRIL 23, 2004

- 8:30 a.m. **Welcome and Introductions**
Chairman: George S. Nolte, Jr., *President/CEO, Nolte Associates, Inc., Sacramento, California, and ULI Board of Trustees*
- 9:00 a.m.–10:15 a.m. **Land Development as a Tool to Protect Open Space**
Introductory Speaker:
Michael Sands, *Environmental Team Leader, Liberty Prairie Conservancy, Grayslake, Illinois*
Discussion
- 10:15 a.m.–11:30 a.m. **Safeguarding Green Infrastructure**
Introductory Speaker:
Christie Oostema, *Director of Community Outreach and Education, Center for Green Space Design, Salt Lake City, Utah*
Discussion
- 11:30 a.m.–12:30 p.m. **Landpooling: A Private Approach to Land Conservation Through Community Development**
Introductory Speaker:
David Renkert, *Managing Member, Landpool Administrators, LLC, Seattle, Washington*
Discussion
- 12:30 p.m.–1:30 p.m. **Lunch: Aldo Leopold’s Land Ethic and Land Use in the 21st Century**
Introductory Speaker:
Wellington “Buddy” Huffaker, *Executive Director, Aldo Leopold Foundation, Baraboo, Wisconsin*
- 1:30 p.m.–2:30 p.m. **Tax Incentives to Encourage Private Donations of Parkland and Recreation Land**
Introductory Speaker:
Stephen J. Small, *Esq., Law Office of Stephen J. Small, Esq., P.C., Boston, Massachusetts*
Discussion
- 2:30 p.m.–3:30 p.m. **Wrapup: Where Do We Go from Here?**
George S. Nolte, Jr., *Chairman*
- 3:30 p.m. **Adjourn**

Policy Forum Participants

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