

**HABITAT CONSERVATION PLAN**  
**Stakeholder Advisory Committee**  
**Wednesday, October 19, 2005 3:00 – 5:00pm**  
**Arizona Game and Fish Department Conference Room**  
**555 N. Greasewood Road**  
**Tucson, Arizona 87545-3612**

**MEETING SUMMARY**

Attendees: David Goldstein, Sherry Barrett, Carolyn Campbell, Nancy Zierenberg, Greg Hess, Karen LaMartina, Michael Wyneken (City of Tucson – Planning), Leslie Liberti (City of Tucson – City Manager’s Office), Kathryn Schonhorst (SWCA), Chris Avery and Blake Ashley (City of Tucson – Attorney’s Office), Jean Emery (Pima County Real Property Services)

**1) Update on Recent TAC Meetings/Upcoming Meetings**

a. *Scheduled SAC Meetings:*

- **November 2**, 3-5 pm, @ AGFD. Tentative Topics: Monitoring and Adaptive Management Program and implantation/funding options.
- **November 16**, 3-5 pm, @ AGFD. Tentative Topics: Monitoring and Adaptive Management Program and implementation/funding options; Next steps – beginning Phase 2 of the HCP process.

b. *Scheduled TAC Meetings:*

- **October 25**, 1-4 pm, @ AGFD. Tentative Topics: Monitoring and Adaptive Management Program; feedback from SAC on conservation program, especially funding and implementation issues.
- **November 15**, 1-4 pm, @ AGFD. Tentative Topics: Monitoring and Adaptive Management Program; feedback from SAC on conservation program, especially funding and implementation issues.
- **November 29**, 1-4 pm, @ AGFD. Tentative Topics: Next steps – beginning Phase 2 of the HCP process.

Leslie gave an update on the previous TAC meeting. She said that the TAC is focusing on the Avra Valley planning area through October and will revisit the Southlands later in November. She said that Travis Bean, UA Desert Lab, gave a presentation on buffleggrass, the problems it presents to the City and County regarding environmental impacts, severe fire hazards, and potential approaches to eradication. She said that the TAC is looking at the layout of the land in Avra Valley, including land ownership and other constraints.

Leslie introduced Jean Emery from Pima County Real Property Services who will talk to the SAC committee about conservation easements.

**2) Old Business**

a. *Meeting minutes – No minutes available*

Leslie reviewed the second year grant issued by USFWS. She said that she talked to USFWS about the best approach for the Phase II process. She said that they concluded

that rather than starting the draft EIS, since the draft HCP will be so preliminary, that they discussed expanding the scope of the planning area, particularly to the south and east of the Southlands. She said that because the HCP ties into City issues like annexation and the Greater Southlands planning effort, it would be good to take a broader look. She said that the size of the area has not yet been firmed up, but will be significantly more area. She said that the City is currently discussing a possible boundary. Leslie said that the boundaries are still being discussed at the City-staff level, and it will then be brought to the SAC and TAC.

Karen said that in the last meeting they talked about a joint HCP. Leslie said that the City is facing similar funding challenges as the County, in particular for management and monitoring. Leslie said that the County is struggling with Pima pineapple cactus (PPC) mitigation. She said that one idea that has been proposed for a joint HCP is that the City could adopt the Conservation Land System (CLS). Leslie noted that this does not help the County with their PPC concerns. Leslie said that it might make more sense for the City to do something different than just adopting the CLS. Carolyn commented about the letters the County implementation subcommittee sent out to the City, County and Marana about the joint HCP, and said she would like to share the letters with the committee. Leslie said that that is possible.

*b. Report on Action Items Identified in the Previous SAC Meeting  
Community Facility Districts (CFDs) Information (See New Business)*

**3) New Business**

*a. Implementation and Funding Options – Update on new CFD information*

Chris said that the City of Tucson's Attorney's Office was asked to review various funding options. In addition, the SAC committee requested more information on improvement districts and community facilities districts (CFD). He provided a handout that summarized his presentation. He said that both funding mechanisms are items created by Arizona Law, and that they are commonly used to fund a variety of public improvements on a smaller scale.

Chris said that improvement districts are historically the most commonly used funding mechanism. He said that they have been used for at least the last 100 years. He said he provided copies of the State statute that establishes the purposes of the improvement district. He said that because this funding mechanism is older, its use is more limited in terms of an HCP, but that it is still feasible to use for funding infrastructure. Chris said that typically improvement districts are used for streets, sidewalks, drains, and for other municipal infrastructure. He pointed out that in Section 48-575, an improvement district could be formed for enhanced municipal services as opposed to infrastructure. He said that it could be possible to enhance municipal services in creative ways to get more services in particular locations other than just infrastructure.

Chris said that according to the "General Public Benefits," improvement districts could not be used to fund either services or improvements that have a general public purpose or general public benefit. He noted that there must be a benefit specific to the area that is assessing an improvement district.

Chris said that an improvement district is easy to form. He said an improvement district only requires the City Council to adopt a resolution, and then post the resolution in the area to be served. The owners of the properties in that area then have the opportunity to protest the improvement district. The protest is collected by the amount of street frontage in the area to be served. If more than 50 percent of the street frontage in the area protests within 15 days, the improvements will be put on hold for six months. If there is no protest, then the City Council can grant an improvement district.

Chris said that when forming an improvement district, the City could exempt, or include, public property. He said that if public property is included in an improvement district, then the City must fund it. Chris said the improvements could be funded by direct warrant and assessment (which are levied against landowners) or by municipally issued bonds (which include a lien or taxes).

Jean asked if the improvement district could be the entire City. Chris said that an improvement district could not be used to provide services for an overall public benefit.

Jean asked how street frontage on vacant property is measured. Chris said, for example, the City must secure an agreement with the State so that they are responsible for repaying the assessment for a particular improvement. Jean asked if the City could assess against the State. Chris said that the City could either assume all of the cost, or the City could find an agreement with the State in order for the State to fund the improvement district. Chris assumed that the reason an HCP is formed is to provide coverage for an incidental take of an endangered species. Jean asked how is it possible to find a reliable funding source so that the City can staff, monitor, and report on the condition of the property and the status of the species in the improvement district. She said she felt that the City would be looking for money internally to operate, which is a Catch-22. Chris said that the City would essentially be persuading the landowners that they are obtaining something of value by accepting the improvement district, and then the landowners would pay for it through the district's specific financing proposals. He said that developers usually pass the costs onto subsequent landowners, or write them off on their taxes. Chris said that the City has to designate the extent of the improvement district, and then those landowners in the district fund it. Chris said that it is his understanding an HCP must try to build infrastructure that would be precluded from building as a consequence of the Endangered Species Act. He said the HCP is in order to do something that would otherwise be prevented by the Endangered Species Act. Carolyn commented that the funding mechanism is to build. Chris said that the improvement district is to fund activities that would protect the covered species. Carolyn said that the HCP is being created because those activities and infrastructures area already being built, and hopefully paid for. She asked the purpose of a funding mechanism that raises money in order to build more. Leslie said that the question is how the City will fund land acquisition and the management and monitoring of that land. Chris said that the community facilities district might be able to address that kind of funding. He said that the improvement district might be a way to pay for things that need to be paid for as a result of infrastructure needs. Sherry commented that it is unclear if this answered the question put forth by the committee. She suggested moving on to the next mechanism.

Greg asked about the enhancement service portion of the improvement district where it mentions planning and landscaping, and said that he wonders if public parks could be interpreted as habitat areas. Chris thinks that the enhanced services portion of the improvement district provides the most funding opportunity for the HCP. Chris said that the enhancement services portion of the improvement district was a recent addition to the statute. He noted that it was created to rehabilitate decaying urban infrastructure. He believes it could be used creatively.

Carolyn asked if the improvement district could be used across jurisdictional boundaries. Chris said that it could be a way for municipalities to share resources around the state. He said that partnerships could be formed. Carolyn commented that it would then be possible to join funds. Carolyn asked if the bonds used with the improvement district have anything to do with the bond limit of the municipality. Chris said that the improvement district is part of the municipality, so it would be included in the bond limit.

Chris said that in 1988, the Arizona Legislature adapted the community facilities district statute (CFD). He said that in a CFD, the City could plan for public infrastructure. Chris pointed out that subsections "12f" and "12g" acknowledge open space for the public, and landscaping, which includes earthworks, structures, lakes, and other water features such as plants, trees, and related water delivery systems. He said that with this mechanism, it is possible to fund parks.

Chris said that to form a CFD, there must be approval of 25 percent of the landowners in the affected area before the City Council could go forward with the process. Sherry asked if this is based on the number of people. Chris said that it is based on acreage. He said there is one vote per acre, or fraction, thereof. He said that 1/5 of an acre earns a vote. He said that it is essentially 25 percent of the acres in the area. Chris said that there is no protest period in the CFD process.

Dave asked if the government has ever initiated a CFD. He said that usually the landowner or the developer initiates it. He said the CFD is primarily for financing infrastructure.

Greg asked how the CFD works with public land. He mentioned cases that include State Trust land, and remarked that one vote against the CFD by the State could overthrow any other landowners' vote for the CFD. Chris said that this could happen, but mentioned a paragraph in the statute that allows landowners to claim and receive judicial decision that they are not being benefited by the CFD. This is the only protest mechanism. Chris said for example, a school district in Northern Arizona built a new football facility because there was a power plant on the property.

Chris said that once the City approves the CFD, there is one of two processes that could take place to finalize the CFD. He said that the first process is typically used by developers when one party owns a majority of the land. He said in this case, a petition is signed by this landowner, and the developer can then move forward. The second process, which is more likely for the HCP, would be an election of all the landowners. He said that if more than one landowner is involved, there must be an election. He said that a 51 percent acreage vote is necessary for the City to proceed. Chris said that the City Council could act as director of the CFD, or a board of directors could be appointed.

Chris said that one limitation with the CFD is that it could only fund improvements that are worth 60 percent of the market value of the land, plus the value of the improvements on that land. He said that he does not think this would stop the formation of a CFD for the HCP, however. Chris said that CFDs could be funded with bonds, public money contributions, tax levies, special assessments, grants, private contributions, fees, loans, and any other money available to the district by law. He said that a CFD would be a quasi-municipality that must keep books, that has the authority to contract with the State, and that has the authority to hire employees to oversee the programs. He said that a CFD would have more extensive services available than an improvement district.

Nancy asked how a CFD relates to a HCP. Carolyn responded that the committee is searching for creative funding mechanisms for the HCP. She said that the committee is now finding limitations and has asked Chris to explain in more detail a couple of the mechanisms. David said that he does not think that either of the mechanisms is viable for the HCP. Nancy said that it sounds like these mechanisms are focused on development or improvement. Carolyn responded that the committee asked Chris to look into them to see if they would work with the HCP. Chris said that it is possible. He said that it would require that the State to cooperate. He said that the City would have to make the case that without a HCP, they would be unable to develop the Southlands (for example) and get any returns that are already invested in the lands. The State would have to be persuaded that there is a benefit received with the HCP such as increasing property value. He said that this would also fund a portion of the HCP so that the cost burden would not be imposed across all of Tucson. Greg asked if the districts could be formed without the assessments going into effect. Chris said that this is possible. He said that the State should be convinced that the State Trust lands would be worth more in auction with an HCP. Chris said that there are a wide variety of funding mechanisms in a CFD. He said that it is possible to levy money against the parcels themselves, issue bonds, or use other mechanisms. He said that it would not be easy, but that it could work. Greg said that it could work in a monitoring scenario. Chris said that it makes sense to use a funding mechanism that funds improvements from a specific area that will also reap the benefits.

Karen said that some areas of the HCP planning area would have multi-benefits, including open space reserves and recreational areas. She said that she thinks that it is unfair that only a specific area should pay for it when really all of Tucson will benefit from it. Chris said that with a CFD, user fees can be charged for parks and public spaces. He said that in an improvement district, money could only be received through bonds or assessments, but with a CFD, a wide variety of funding mechanisms are available. He said that a CFD is much like a municipality; it can use taxes, get grants, and assess user fees. He said it is possible to receive money from outside the CFD, and spend it within the CFD, without charging the CFD.

Karen said that the funding mechanisms are something that should be considered more, but there are still outstanding questions. She commented that for the projected build-out in the Southlands, that unless a user fee is imposed for the area, it will be a long time before any money comes in. She said she is not sure how this would sit in terms of the application for permit. Leslie said that the take home message here is that there is no single mechanism that can be used to fund the HCP. Carolyn said that if anything, the

committee could begin to see which funding mechanisms could be excluded. Chris said that the CFD could use the funds raised by the CFD to pass on services. He said that a CFD could use the money to acquire open space and manage the open space after it is acquired.

Jean asked how this would work with protecting endangered species and habitat. She asked what is the service being provided, and what is the enhancement encompassed in the HCP. Chris said that the enhancement would be that the City would be doing something in the area encompassed by the HCP, which is not ordinarily done outside of the HCP. Carolyn said that she would hope these would be new things above and beyond what is already done. Chris said that with an HCP, you would be acquiring additional open space, providing management and monitoring, and including some sort of adaptive management compliment. He said that the HCP would be providing services and filling functions that would not usually be done outside of an HCP.

Carolyn said that the problem would be interpreting the CFD, because it was not written for an HCP or for critical habitat management. Chris said that he does think there are paragraphs written for providing open spaces. He said that a CFD could be used to fund recreational areas. He said this is a common process. Greg said that subsection "13f" of the CFD does seem clear about providing open spaces.

Jean asked how they could include sensitive species. Sherry said that it would be a matter of looking at the recreational area as a whole and then designating critical area not to be impacted by the public. Chris said that it is a matter of balancing public access with protecting the covered species. He said that it is necessary to have the approval of the public while maintaining a low impact in the areas.

Greg asked if there are any species so sensitive that an open space reserve would have to limit access to people. He suggested seasonal closures for some areas. Sherry said that it is possible to keep people out of sensitive areas by providing clearly marked restrooms at the parking lots and clearly marked trails. Sherry said that most species are compatible with people.

Chris said that one of the advantages of a CFD is that it is like a quasi-municipality, so it is not subject to expenditure limitations. A CFD can fund infrastructure and could be free from tax limits that the City is constrained by. Leslie stressed the importance of finding the limitations in each of these tools. She said that until it is clear what is to be done in each of the planning areas, it is not possible to identify which tools will fit especially for implicating land monitoring and management, and land acquisition. She said that the CFD is the primary tool of focus because it seems to be a better fit than other funding mechanisms on the list.

Dave impressed that a CFD would not work in the HCP. He said that it would be difficult to convince the property owner to put a lien on their property. He said that a property owner would only do this if there were a direct benefit. He said that developers who want to acquire one large property and build hard infrastructure usually initiate these funding mechanisms. He said that it could work if the City confronts the State, but that the State is hesitant to put a lien on their lands too. Michael said that it would be difficult, because even if the State agreed to create a CFD, the district might not sell the bonds

until the State sold a piece of land. Michael asked if the bonds would have any attractiveness in the market. He said that if bonds were not making improvements on the land, but are only for acquiring the land, he wonders if it would be a financially feasible bond on the market. He said that it is not improving the value of the property, which is being put up as collateral for the bonds. Michael added that the only value is the 60 percent value of the land that the State sold off, because as long as ASLD holds on to the rest of the land around it, it theoretically has no value.

Dave said the way a CDF works is that first a district is formed, and then someone puts down the money and does all of the work. He said then after the value of land goes up because everything has been built and there is a high assess value, the bonds are sold and the person who originally put down the money gets paid back.

*b. Implementation and Funding Options – Conservation Easements*

Jean passed out a handout called “Protecting Species or Habitat with Conservation Easements: A Primer Gene.” She said for her discussion, she would extrapolate what has been debated within the County and assume that the City and County are dealing with similar issues involving conservation easements. She said that when the County’s bond measure was discussed and posted on the ballot, it was implied that by using a conservation easement it would help save money. She said that for the SAC, she will discuss what conservation easements are and how they work, and then she will leave it to the committee to decide if they could save money by using them. She said that sometimes it is a myth that conservation easements are a way to save money.

Jean said a conservation easement is a tool. She defined “grantor” as the property owner providing the easement, and the “grantee” as the recipient of the easement. A conservation easement could be sold or donated, so sometimes the words “donor” and “donee” are used. Jean compared property interests to a “bundle of sticks.” She explained that when someone owns a property, they have many rights for using that property, and each right is like a stick that is peeling from the bundle. She said that a conservation easement is just one of those sticks. Easements are very flexible and are referred to by a variety of names, such as conservation easement or agricultural easement. She said that an easement is intended to protect a particular interest or purpose.

The fee owner still has the right to use the land, but it can be written into the contract how the fee owner can use the land in order to protect the intended interest or purpose. She said that no two conservation easements are written the same. She said they are each written to pertain to a specific property. There are standard attributes written into a contract, but it can then be tailored. She said that an easement could apply to an entire parcel of land or to a specific portion of land. Conservation easements “run with the land” and legally bind future landowners as successors in interest. She explained that the City can hold a conservation easement on a piece of land, but that the underlying landowner can still sell that land; so that in the future, the City would be dealing with a different land owner. Arizona has a statute about conservation easements, and it says that third party beneficiaries may be granted enforcement rights. She said, for example, USFWS could be granted to protect and enforce the terms of the conservation easement. In a court of law in Arizona, this must be stated in the deed of easement. She said that most easements are permanent. She said that some are written to extend

for only a certain period of time, but most of them are written in perpetuity. She said that the landowner can receive tax benefits by including conservation on their land, but the IRS require that the easement then be in perpetuity. One benefit to the conservation easement is that because the land stays privately owned, the taxes collected on the land stays on the tax rolls. There are many tax benefits that she would not discuss because it would be better to speak with a tax specialist, and she encouraged the committee that the landowners talk to a tax specialist before entering into an easement to see if there would be a benefit to put an easement on their property. She said that often times, easements are seen as a way to save money, but she said that easements are usually acquired at a percentage of the value of the title of the property. Currently, the fair market values on easements are 50-80 percent. She said that even if the cost of the property may be lower, that monitoring and enforcing the interest of that property is in the hands of the grantee. She said that stipulations regarding the grantees right to enter the property to enforce the interests of the conservation easement should be factored into the contract. Jean said that if open space is what is defined in the conservation easement, that monitoring will be easy. She said that by flying over the parcel of land to take a photo or walking through the land once a year to make sure the parcel is okay is quite easy. She mentioned that if the interest of the conservation easement is ecological diversity, a method to track changes on the property needs to be developed so that it can be repeated over time. From a legal standpoint, it is important to obtain the required documentation in order to prove that what is being done on the property is affecting the change on the property, either positively or negatively. She said that a baseline determination on the property would need to be established. She commented that monitoring will be costly, so it is important to understand the costs of monitoring, such as how often it is required; depending on the situation, it would be cheaper to buy the property outright. She said that it is also important to understand the costs of litigation in case the property is being used inappropriately. She said that in this case, it would have to go to court to be enforced. Jean said that a conservation easement is different than other easements, because the property holder does not have possessory rights; the grantee does not have the right to use or occupy the land. It is necessary to include in the contract what right the holder has to come on the property. Even though conservation easements are supposed to be in perpetuity, there are still ways to terminate or modify a conservation easement. She said that the stipulations for this could be written in the contract. She said that there is a State statute that allows the Court to terminate a conservation easement. It is possible to prove that the purpose or value of the land is no longer being achieved and therefore be terminated.

She said that conservation easements are a product of State law. She said that each state has their own take on conservation easements. A few years ago, 40-some states got together to form a uniform conservation law. The Arizona Revised Statutes are attached in the back of the handout she provided. Jean said she would discuss the conservation purposes. Protecting species or habitat is a valid conservation purpose. She said that an easement could be called by many names, but that it is important to specify in the contract what the purpose or value of the easement. It is important to be as specific as possible. An appraisal would be done on the property when the easement is sold or donated. It is important for the grantor and the grantee to understand the value of the property for The fair market value of the land would first be appraised as though it has no restrictions on it, then it will be appraised with the restrictions on it, so that the percentage of the value of the easement is known. The valuation of an

appraisal could be creative at times because it is difficult to know the value of ecological diversity, for example.

Jean pointed out that Pima County has run into a complicating factor with conservation easements. She said that on the land that the County wants to acquire under the Sonoran Desert Conservation Plan, USFWS want to know that the land will be protected in perpetuity, so the County has been looking for someone to hold a conservation easement over these lands. She said that this is a legal hurdle for a governmental entity that has acquired land or owns land because the property has value. There are statutes that stipulate how a public entity can dispose of this public property. She said that for the County to grant a conservation easement without compensation, or return on a property that is worth 80 percent of the value paid for the property, raises some questions. She said, for example, will the holder have the funds to reimburse the County, and if the County purchases land with bond funds, can the County dispose of and turn the money over by selling the interest. One solution could be that Pima County Flood Control District holds the conservation easement so that the rights stay with the governmental entity. She said that there are restrictions on how the governmental entities can dispose of the property. It is important to be able to argue that the property is a public benefit and there is no need for compensation of funds.

Jean stressed the importance of gaining a relationship with the landowner. She said, for example, that if the City is the holder of the property, then the City is “married” to the property owner. She said that this situation puts the City in charge of telling the landowner how they can use their property. She stressed that not all landowners like being told how they can use their property, so it is important to establish a relationship. She said that the next step is to have staff that can receive calls from the landowner and answer or solve any problems that arise. She said that the staff should be able to look at the contract and answer the landowner’s questions. She discussed what the document should exactly say. Jean said that there are two approaches to take when writing activities that are prohibited and permitted within the conservation easement. One approach is to be as specific as possible so that it is absolutely clear what is prohibited or permitted. She warned that situations will arise in which a scenario is not contained within the document, and then the question is asked of whether it can be done or not. If the courts become involved, they may allow such a scenario because the language in the documentation was so specific. The other approach is to be general, so that the documentation encompasses everything. She said to be careful that the purpose and prohibited activities are narrowly focused so that boundaries are not overreached, and the landowners’ rights are not abused.

Jean reminded the committee that it is not required that the public be allowed access to the easement. She warned the committee to consider the public relations component, so to keep harmony if it is decided to keep the public off the property.

Jean referred back to the baseline monitoring and stressed that it is important to define the limit of change that is acceptable. For example, at what point are there adverse impacts to the property. She warned that unforeseen situations could occur with baseline monitoring. She told the committee about a Pima County project in which the baseline sampling was taken during the wettest decade, and then there was a drought. She said that it was difficult to adjust and understand whether the land was being

adversely impacted. There could be a court ordered injunctions if there are actions taking place on the property that are unacceptable. She said that if the injunction occurred too late and damages were already done, that the City could be reimbursed for those damages. Jean posed the question of the level of environmental sensitivity the conservation easement would aim to achieve. It may not be possible to replace habitat or species. She warned that if the City should fail to protect and monitor the property, however, the City could lose the conservation easement. It is important that the City pursue the terms of the agreement. She pointed out that enforcement should not be ignored. She stressed that the legal interest needs to be protected. It is also important to think about this when considering a conservation easement as a tool for the HCP.

Jean gave a brief summary and pointed out the references in the back of the handout. She specifically addressed The Conservation Easement Handbook.

#### **4) Call to the Public**

No members of the public were present.

#### **5) Next Steps/Future Meetings**

Leslie said that the next meeting is scheduled for November 2, and that they should potentially have the initial recommendations from the TAC regarding Avra Valley. She said that this will be the only new development between this meeting and the next meeting, and asked the committee if there are any pressing issues, or should they hold the meeting off for four weeks. Sherry said that, at the next meeting, the committee could discuss Phase II of the HCP process and define the next series of steps, which could include the expanded boundary.

Leslie said that she would send out the maps of the reserve areas and the conservation measures summary.