AGENDA ITEM or FINAL CONTRACT REVIEW SUBMITTAL FORM

AgendaTitle:
Large Parcel Incentive Process Code Change

Action Requested: Discussion

Parties to the Agreement:

Term Begins: **Term Ends:** **Grant Contract #:**

Summary:
LPIP language needs to be changed to not allow existing conservation easements to qualify. The BoCC should also discuss the possibility of removing LPIP altogether.

Fiscal Impact: None

Submitted by: Mike Pelletier **Submitter's Email Address:** mpelletier@gunnisoncounty.org

Finance Review: ○ Required ● Not Required

Comments:

Reviewed by: Discharge Date:

County Attorney Review: ● Required ○ Not Required

Comments:

It may be that, given the valuation concerns and the lack of use of this provision over time, that the most expedient solution is the deletion of this option from the LUR. db 5/27/14

Reviewed by: GUNCOUNTY1\dBaumgarten Discharge Date: 5/27/2014 Certificate of Insurance Required

Yes ○ No ●

County Manager Review:

Comments:

Reviewed by: GUNCOUNTY1\mbirnie Discharge Date: 5/27/2014

○ Consent Agenda ● Regular Agenda ○ Worksession Time Allotted: 30

Agenda Date: 6/3/2014 Follow Up Agenda Date:

Revised April 2013

To: Board of County Commissioners

From: Mike Pelletier, GIS Manager

Date: May 27, 2014

RE: LUR Amendment - Large Parcel Incentive Process

A serious flaw has been found in section 14-100 Large Parcel Incentive Process (LPIP). The current language allows a proponent to propose using existing conservation easements to qualify for the conserved land required in this subdivision process. This is contrary to conservation easement normal practice and creates a host of potentially significant problems. Staff within Community Development and the County Attorney's Office have discussed the matter and have additionally determined that the BoCC should consider removing LPIP entirely from the LUR or lessen its density bonus for reasons to be described later.

Background

LPIP was adopted in 2001 and was then modified in 2004 to allow existing conservation easements to potentially qualify (subject to approval by County) for the required conserved land in the subdivision process. This change came at the request of the developers of the Gunnison Riverbanks subdivision located off Hwy 135, north of Ohio Creek. This is the only project to have used LPIP in its entire existence.

The following excerpt from the LUR is the subject language in question:

c. **EXISTING CONSERVATION EASEMENTS**. Land encumbered by a conservation easement that exists before issuance of a Land Use Change Permit for an LPIP application may, in the County's discretion, satisfy the preserved land requirement of this Section under the following conditions:

1. **TERMS OF EASEMENT ARE SATISFACTORY TO COUNTY**. The terms of the existing easement are acceptable to the County.
2. **PRESERVED LANDS MEETS STANDARDS**. The preserved land meets the following standards:
   a. **SUFFICIENT VALUES.** The preserved land has sufficient natural, scenic, open space, wildlife habitat, agricultural, horticultural, recreational, forest or other value to justify the applicant receiving the LPIP benefits;
   b. **SIGNIFICANT PUBLIC BENEFIT.** Significant public benefit has occurred by preservation of the land subject to the conservation easement;
   c. **SUFFICIENT ACREAGE.** Sufficient acreage has been preserved pursuant to this Section;
   d. **PRESERVATION QUALIFIES UNDER INTERNAL REVENUE CODE.** Preservation of the land qualifies as a conservation contribution under Section 170 (h), as amended, of the *Internal Revenue Code;*
   e. **PRESERVED LAND HAS REQUIRED CHARACTERISTICS**. The preserved land has the characteristics set forth in Section 14-102: B. 2. b: *Characteristics*;
   f. **PUBLIC WELFARE IS ENHANCED.** The public health, safety and welfare have been enhanced.
3. **PREVIOUS DONATION MAY NOT MEET REQUIREMENTS.** The previous donation of a conservation easement does not create a right to apply the preserved land to satisfy the preserved land requirements of this Section. Each case will be subject to the discretion of the County and will be reviewed on an individual basis to determine if it satisfies the standards set forth in this Section 14-102: *LPIP Standards*.

Problem with current LPIP Language

While approval of using existing conservation easements is discretionary on the part of the County, there are still several serious problems this creates. The following experts all agree that this language is a serious problem: Susan Lohr, Gunnison Ranchland Conservation Legacy; Arnie Butler, conservation easement appraiser; and Dan Pike, Colorado Open Lands. Please find the attached documents and emails from them.

Conservation easements (CE) remove development rights and the language within CEs state that the subject land cannot be used in the process of future subdivision on other land. The IRS does not allow charitable donations from conservation easements if that land has been or will be used in a future subdivision. Thus, the language in question leads to the following problems:

1. If an existing CE were to be used to qualify for required open space in a future LPIP project, then future CE values would plummet because appraisers would be forced to show that CEs are no longer giving up as much value. In words of Arnie Butler, this could be "fatal" to the future of CEs in Gunnison County. Please see his attached letter.
2. GOCO and other CE funders would be far less likely to fund projects in Gunnison County if they felt their funded CEs could be used to justify more density elsewhere in the County.
3. The County Assessor currently greatly reduces property tax on property with CEs. They would have to rethink how much tax these properties should be paying if the land could be used to qualify for the required open space in future subdivisions. Please see the attached letter from Kristy McFarland, County Assessor.
4. The vast majority of CEs have a charitable donation value. The County should not have a regulation that allows individuals to propose the use of CEs with donation value for the required LPIP open space, as this would be contrary to Federal tax law.
5. It would likely put Land Trusts in conflict with the County as they are in the position of having to enforce terms of the CE.
6. It undermines the arguments made to the USFWS regarding the effect CEs could have had toward long-term conservation of the Gunnison Sage-grouse.

Why Remove LPIP Entirely or Lessen its Density Bonus

LPIP was created as a means to encourage clustering developments via the incentives of density bonus and shortened review process. However, it was created during a time when the market is quite different from today. According to Arnie Butler, LPIP was created at a time when 35 acre developments were attractive to investors. In contrast, today on a per acre basis 35 acre lots are less valuable than properties in the 160 acre range. It seems rather than buying a "slice of heaven" buyers are wanting and can afford a "ranch in heaven". From an agricultural standpoint, this is fortunate as the smaller lots create many problems for agriculture.

LPIP currently has a significant density bonus beyond 1 per 35 acres. The bonus starts at 3 per 70 acres or (1.5 times) when 75% open space is conserved. If 85% open space is conserved, then extra density is given in the form of one additional lot per 140 acres (1.75 times). This has the potential to locate a significant number of homes adjacent to existing agricultural operations. There is a long history of examples where this situation creates problems.

With this background, staff offer the following reasons for removing LPIP entirely.

1. The density bonus has the potential to negatively affect existing agricultural operations, as well as it being contrary to the overall goal of locating density closer to urbanized areas. The density bonus is generous in that Routt County has a successful program that offers a bonus of 1.3 homes compared to Gunnison County's 1.75 density bonus.
2. The density bonus is no longer the incentive for clustering rural developments as the market values larger acre ranch properties higher.
3. LPIP has not proven to be an attractive subdivision process as it has been used only once in its history, despite being an option during periods of significant market growth. Removing it would remove unnecessary language in the LUR.
4. LPIP's shortened process involves treating it as a Minor Impact rather than Major Impact and creating a limited time period for County review. It also is given priority over other applications. The fairness of these incentives relative to other applications is questionable. However, if this process is still deemed valid it may be a viable reason to keep LPIP.
5. The existing Ranchland Process (adopted in 2010) provides an alternative means of incentivizing clustering. Rather than offering a density bonus, its incentives are using staff time to assist the owner in designing the project and a shortened process that skips the Planning Commission.
6. According to Susan Lohr, attracting conservation easement dollars to Gunnison County is much easier when proponents (i.e., land trusts) are able to say that all the County's policies are working together to promote agriculture and land conservation. Removing or lessening the density bonus in LPIP would further that end.

Staff is asking the BoCC for direction from the following list:

1. Remove LPIP's existing CE language only,
2. Remove LPIP entirely, or
3. Remove LPIP's existing CE language and reduce its density bonus.

The following are emails from experts regarding the problems with use existing CEs in LPIP:

REAL ESTATE APPRAISERS & CONSULTANTS
300 Main Street, Suite 301
Grand Junction, Colorado 81501
R. Arnold Butler, MAI Phone 970-241-2716 Melinda Schminke
Certified General Appraiser Fax 970-241-5653 Licensed Appraiser
Licensed in Colorado and Utah TIN: 84-1086139 Kori S. Satterfield
E-mail: arnie@wic.net Licensed Appraiser

April 9, 2014
Ms. Susan Lohr
Conservation Assistance Program
Gunnison Ranchland Conservation Legacy
123 Santa Fe Dr.
Grand Junction, CO 81501

Re: Gunnison County – Large
Parcel Incentive Program (LPIP)

Susan:

I have reviewed the Large Parcel Incentive Program (LPIP) that has been implemented by Gunnison County. This letter addresses my concerns with this program as it relates to the appraisal of Conservation Easements. From an appraisal perspective, the LPIP can create a major detriment to the Conservation Easement program in Gunnison County, if not fatal.

The overriding concept for Conservation Easement Appraisals is that the property owner extinguishes most, if not all residential development rights, which has a negative impact on the property value. Based upon the potential density transfers allowed within LPIP, the loss of development rights are mitigated, if not eliminated. As I understand the IRS Tax Code, this is a form of Quid Pro Quo, and anything the IRS considers Quid Pro Quo is not allowed as a charitable donation.

I have not paid too much attention to the LPIP allowances in past Conservation Easement appraisals because there has only been one such development in Gunnison that I am aware of. If LPIP developments had become a prominent factor within the Gunnison market, then significant weight would have had to be applied to determine their affects on value. In most cases, the LPIP would have reduced or completely eliminated the conservation value to any given property.

The allowance of existing Conservation Easement encumbered properties to apply for LPIP is directly contrary to my conclusions within past Easement Appraisals. Overall, from an appraisal and value standpoint, this program jeopardizes the entire Conservation Easement program for Gunnison County. I am not aware of any other county in western Colorado having any similar type of program and if they did, I would have the same opinion.

Sincerely,

Arnie Butler & Company
R. Arnold Butler, MAI
Certified General Appraiser
Colorado License No. CG01313160

From Kristy McFarland, Gunnison County Assessor

Mike, Russ, David,

It appears that the following statute is in direct conflict with section c, EXISTING CONSERVATION EASEMENTS from the LUR.

§ 39-1-103(5)(d), C.R.S.
"If a parcel of land is classified as agricultural land as defined in section 39-1-102 (1.6) (a) (III) and the perpetual conservation easement is terminated, violated, or substantially modified so that the easement is no longer granted exclusively for conservation purposes, the assessor may reassess the land retroactively for a period of seven years and the additional taxes, if any, that would have been levied on the land during the seven year period prior to the termination, violation, or modification shall become due."

ARL:
The intent of these statutes is twofold. First, they are intended to encourage those agricultural land owners choosing to preserve the open character of their land rather than allowing it to be developed for other purposes. Second, they are intended to ensure that those owners who preserve their land by means of a perpetual conservation easement, and their heirs, will benefit from low property taxes whether the land is used for agricultural purposes or only for the conservation purposes permitted by the conservation easement.

Note that the assessor's office currently values conservation easements at 40% of market value due to their lack of development rights. Should development rights be allowed within the context of a conservation easement, that discount would not apply. We agree that the LUR language is contrary to the intent of conservation easements and would best be eliminated.

Kristy

From Dan Pike, Colorado Open Lands to Susan Lohr, Gunnison Ranchland Conservation Legacy

Susan:

I had a conversation with Jessica Jay about the Large Parcel Incentive Process. We generally had three concerns, particularly as it relates to section 102 (2)(C) – Existing Conservation Easements :

1. Valuation. There's two levels to this: 1. What does an appraiser assume? Do they assume the rights reserved under the conservation easement, or do they assume the rights allowed in the LPIP. Presumably the rights in the easement could reflect the acquired rights under the LPIP, but that is probably problematic in existing easements. 2. What will the IRS assume in an audit? If the landowner claims a value reflected in the easement as opposed to a final LPIP determination, will the IRS challenge that assumption?

2. Permanency. Lately the IRS has argued that permitting greater development than allowed under an easement in effect is a termination of the easement in the new development areas (i.e., new construction). They have taken the position that such a termination in effect means the easement is not in perpetuity, and therefore not qualified under federal regulations.

3. Prohibited private benefit. If the LPIP process allows development greater than that permitted in the easement, the development would still be prohibited by the easement, and the easement holder (i.e., land trust) would likely be obligated to enforce the terms of the easement and oppose the additional development. 501(c)(3) land trusts are prohibited from providing a private

benefit to landowners, and presumably amending the easement to allow additional development would constitute such a private benefit.

Those are our initial thoughts. Happy to discuss.

Dan Pike
Colorado Open Lands

From Susan Lohr, Gunnsion Ranchland Conservation Legacy

Mike and Rachel-

The applicable law is the charitable section of the IRS, specifically section 170(h). Conservation easements follow the Standards and Practices of the Land Trust Alliance in order to be accredited, but the actual law is all charitable contribution law and lives with the IRS. Here is a link that gives many references:

http://www.landtrustalliance.org/policy/tax-matters/rules/conservation-donation-rules

People do easements because they get tax benefits. If they violate the tax code, the tax benefits are taken away. That happened to Trout Ranch - they lost their case in tax court. I don't know all the details, but it was because their conservation easement appraisal overvalued what they were giving up.

Here are the things that make me nervous about the LPIP amendment:

1. Conservation easements clearly intend that development density is permanently given up. They must have that language in order for an appraiser to place a value on their easement, which is a charitable contribution.

2. Programs that fund easements (GOCO, NRCS, Gunnison County) clearly support the easement language that development is given up, and they provide funding toward some of that value.

3. Appraisers like Arnie Butler must analyze any benefit that the landowner might receive by this charitable act, and reduce the value of the easement donation by any increase in adjacent assets (called "private inurement" or "benefit to the contiguous family owned parcel"). This analysis is required by the IRS in all CE appraisals, and has emerged as a huge issue in audits since 2005. I just spoke with Arnie and he said to let you know that having only one case of using LPIP and it being 10 years ago means he can conclude the likelihood of inurement is low, so as of now it isn't reducing the value of Gunnison County conservation easement donations. But if it is used one more time he will have to calculate a reduction in conservation easement values for everyone.

4. The IRS is scrutinizing conservation easements like never before. Did you know that the Hidden River (Hendrickson) easement from the 1990s lost its value as a deduction through an IRS audit? In that case I believe the county required the conservation easement in order to receive a denser development, thereby killing the donation value. I realize that the current regulation is designed to be voluntary, but anyone who succeeds by that process clearly benefits financially from having placed a conservation easement, and that violates the donative intent.

5. I know the county isn't a party to the conservation easement, so the terms of the easement don't bind the county. Is that still true when the county provides finding toward the easement?

I'll be in Gunnison later this afternoon and could visit with you if you have any questions. I've asked a few colleagues to give me some other legal references to pass along to you too.

-Susan