

**MINUTES**  
**COLORADO DIVISION OF REAL ESTATE**  
**CONSERVATION EASEMENT OVERSIGHT**  
**COMMISSION MEETING**  
**February 23, 2009**

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**MINUTES**  
**CONSERVATION EASEMENT OVERSIGHT**  
**COMMISSION MEETING**  
**February 23, 2009**  
**Colorado Division of Real Estate**  
**1560 Broadway, Suite 925**  
**Denver, CO 80202**

A Conservation Easement Oversight Commission public meeting was held on February 23, 2009. The Commissioners in attendance were Lise Aangeenbrug, representing Great Outdoors Colorado; Doug Robotham, representing the Colorado Department of Natural Resources; Martha Cochran, representing a local land trust; Dan Pike, representing a statewide land trust; R. Jay Winner, representing a local government land conservation agency; Janis Whisman, representing a historic preservation organization with experience in easements on properties of historical significance; Mark Weston, representing certified general appraisers; and Max Vezzani, representing landowners who have donated a conservation easement. Commissioner Cindy Lair, representing the Colorado Department of Agriculture, joined the meeting by phone. No Commissioners were absent. Also attending were Erin Toll, Director; Marcia Waters, Director of Compliance and Investigations; Hollis Glenn, Conservation Easement Program Manager; Eric Maxfield, Assistant Attorney General; Roxy Huber, Executive Director of the Colorado Department of Revenue; and several members of the Division's staff. The meeting was open to the public and several people attended.

Full and timely notice of the meeting was given to the public and the meeting was held pursuant to the Colorado Sunshine Law, Title 24, Article 6, C.R.S., as amended.

The meeting was called to order by Chair Pike at 1:05 PM. Chair Pike asked if anyone had items to include on the agenda.

Commissioner Whisman asked for an update on certification. Commissioner Weston asked to talk about amending the conflict of interest policy. Vice-Chair Cochran asked for a discussion of appraisal review issues.

All three items were added to the agenda.

**Approval of December 11, 2008 Minutes:**

Commissioner Weston suggested that the last sentence of the first paragraph on page 4 be changed to "However, he thought that there might be federal limitations on mandating education requirements from a specific provider."

Commissioner Whisman suggested that the sentence "She said that the application should only focus on conservation easements with a donation component" be added to the end of the third paragraph on page 5.

It was moved by Vice-Chair Cochran and seconded by Commissioner Weston to make the corrections suggested by Commissioner Weston and Commissioner Whisman and approve the minutes of December 11, 2008.

**Motion unanimously carried.**

**Acknowledgement and Signing of December 11, 2008 Executive Session Minutes by the Chair:**

It was moved by Vice-Chair Cochran and seconded by Commissioner Vezzani to have Chair Pike acknowledge and sign the executive session minutes of December 11, 2008.

**Motion unanimously carried.**

**HB09-1014 Update:**

Hollis Glenn informed the Commission that HB09-1014 was passed. He said once the bill is delivered with signatures to the governor, the governor will sign it.

Hollis Glenn explained that HB09-1014 will do three things: 1) eliminate the fee caps for certification and appraisal submission; 2) replace the three-year certification period with an annual renewal process; and 3) allow the Division to receive gifts, grants and donations to help cover the costs of the program.

**Discussion of the Commission's Role in HB08-1353:**

Chair Pike explained that, with the passage of HB09-1014, the Commission is reevaluating its role with regard to past and future conservation easements. Chair Pike then gave the floor to Executive Director Huber.

Executive Director Huber provided a brief history of the Department's involvement in the review of conservation easements in Colorado. She said the Department knew that problems with conservation easements existed, but they didn't have the capacity to do much about it, because they didn't feel like they had the capacity to analyze values. The Department felt like they'd been given something to monitor without the tools to monitor it. She explained that confidentiality is a big issue for the Department and restricts what they can say and do.

She contended that it's a mistaken notion that when the IRS audits were done, the Department knew who those audits were on – she said the Department didn't. She said the IRS told the Department to make settlement offers, but the Department didn't know all of the facts before making those offers. She explained that there has been a disconnect between the IRS and the Department. She said they now have an agreement to share information, but that it's been a slow process.

Executive Director Huber said the Department opened a position for an appraiser to assist with the reviews of conservation easements, but then there was a hiring freeze. She told the Commission that the Department now has an appraiser by the name of Terry Phillips.

She contended that the Department's first focus is on past conservation easements. To this end, she said the Department is going to be sending a number of appraisals to the Division for review shortly. In addition, Executive Director Huber said she is going to meet with Commissioner Lair to put together some scenarios for the Commission to review. She said the scenarios will be general, because the Department can't disclose taxpayer-specific information. She said she doesn't think the

Department will be able to provide the Commission very much information beyond these general scenarios.

Executive Director Huber said the Department is working on a public outreach program that will include a fact sheet and a road show. She said one of the goals of the outreach program will be to inform landowners of their right to protest. She explained that when a landowner gets an evaluation of their tax credit from the Department, but the landowner disagrees with that evaluation, the landowner has 30 days to write a protest letter to the Department. The Department will then contact the landowner about the protest process. She said the landowner will have to tell the Department why they disagree with the Department's evaluation. Finally, she explained that in situations where there is both a seller and a buyer of the tax credit, the seller is the one who has the power to protest, but the buyer is the one who is claiming the tax credit, so the situation can become complicated.

Executive Director Huber declared that because every case is different, the Department isn't going to say that every conservation easement tax credit is okay and will be allowed. However, she stated that it's important for people to understand their civil remedies, since it seems like there are probably cases where people were boondoggled and the Department won't be able to provide the answer in these cases.

Chair Pike asked Executive Director Huber what she views as the role of the Commission.

Executive Director Huber replied that she hopes that somehow the Department can work with the Commission and the Division to educate people about their options.

Commissioner Vezzani said the Commission heard from a tremendous number of landowners in La Junta. He explained that while none of their issues are exactly the same, there is a tremendous amount of frustration among people in the area. He said he hopes – and recommends – that the Department will provide more information to these landowners soon.

Commissioner Winner asked Executive Director Huber to explain the IRS/Department of Revenue process in more detail.

Executive Director Huber explained that the IRS selected conservation easements to audit. She said she isn't sure if the IRS told the landowner to get a new appraisal or if the IRS obtained a new appraisal. She said the IRS looked at the value as well as the public good of the conservation easement. Then, the IRS sent their denial of the federal deduction to the taxpayer, and the taxpayer had to file an amended return. Executive Director Huber said the Department finds out about an audit after it's gone through the IRS process.

She emphasized that the Department has due process at the state level for the state tax credit. She said a landowner has the opportunity to file a protest with the Department even if he or she settled with the IRS. She also asserted that the Department considers value separately from the IRS.

Commissioner Lair asked how the Department views the value of a conservation easement if that value was questioned by the IRS.

Executive Director Huber reiterated that the Department has due process at the state level for the state tax credit. However, she acknowledged that the Department does receive information about a dispute over conservation value with the IRS.

Chair Pike pointed out that under HB08-1353, a landowner under audit by the IRS can request a review by the Department. He asked whether anyone has done this.

Executive Director Huber said no.

Chair Pike said he is aware of people under audit by the IRS who didn't claim all of their federal deduction. Thus, they were able to settle with the IRS without a deduction in value, but they're afraid that their settlement with the IRS will affect their tax credit with state.

Executive Director Huber said the IRS value is the starting point for the Department, but it isn't the required ending point for the state tax credit.

Commissioner Lair asked Executive Director Huber where the Commission might assist the Department on a case-by-case basis. For example, she said the Commission might be able to provide recommendations to the Department.

Executive Director Huber said the Department can put together general scenarios for the Commission's input. She emphasized that the Department has to err on the side of making sure that things are right.

Commissioner Winner said he had heard that the IRS can come back and say there is no conservation value, while the Department can come back and say there is. He asked Executive Director Huber whether this is true.

Executive Director Huber said yes.

Vice-Chair Cochran asked what the Department's relationship is to the processes set up by HB08-1353, namely appraisal review and certification. She asked whether a conservation easement can go through these processes and still end up being questioned by the Department. Vice-Chair Cochran explained that the land trust community needs to get confidence back in program and wants to be able to tell landowners it's okay to do conservation easements.

Executive Director Huber told the Commission that she hesitates to say that no future conservation easements will be questioned by the Department. She said she wishes she could say that the Department won't question conservation easements, but explained that land trusts could get certified and then turn around and try to scam people. She said she hopes that fewer and fewer audits of conservation easements will be necessary.

Chair Pike stated that he does not think that it will serve the state well if the Division and the Department make different determinations about the same appraisals.

Executive Director Huber pointed out that HB08-1353 allows the Division and the Department to communicate.

Commissioner Weston stated that it seems to him that HB08-1353 was born from a desire to create a three-party effort between the Division, the Department, and the Commission. For example, he pointed out that the bill contains the word consultation in several places. He explained that in one place, the bill says the Department will review specific conservation easements in consultation with the Commission and the Division. He asserted that the law wants the Commission to talk about these issues with specificity. He also pointed out that the bill says that the program the Department creates to review conservation easements will be developed in consultation with the Commission. He asked Executive Director Huber how she sees this working out. He explained that the Commission wants to make sure that it isn't taking on more than the statute tells it to take on, but also wants to make sure that it's complying with the law.

Executive Director Huber said that looking backward, the Department will talk to the Division, but has to go through its own process. She said that going forward, it will be important to discuss and watch for new schemes.

Commissioner Vezzani stated that if people committed fraud or put together schemes, the state should go after these people hard. He explained, though, that it's a very difficult decision for people to give up rights to their property to create a conservation easement. He said many people who put conservation easements on their property spent a lot of money and sought professional advice to do so. He said that, on its face, the conservation easement tax credit is a wonderful program for Colorado, but there is a desperate need to have confidence restored in the program.

Executive Director Huber asserted that when people get involved in a conservation easement, knowledge is power. She contended that when people understand the process, they're going to want to do it again. She pointed out that it's also a complicated tax transaction, and said this is where people didn't have enough knowledge in the past.

Commissioner Winner said rumors are flying in southeastern Colorado that the Governor is going to grandfather in easements from 2003-2007.

Executive Director Huber said while she can't speak for the Governor, she doesn't think this is likely.

Rebecca Swanson from the Governor's office added that the governor does not intend to grandfather in past easements.

Commissioner Winner informed the Commission that there is a tax credit broker who is telling people that if they have conservation easement credit that they can't sell, the broker will buy it for 80 cents on the dollar. The broker will put that 80 cents on the dollar in a 4-year C.D. He said the broker will then turn around and sell the credit, probably for 90 cents on the dollar, with an indemnification agreement. He posited that when the IRS and/or the Department disallow the credit, the seller will have to pay both the buyer and the state, with penalty and interest.

Director Toll agreed that education is important. She said the Division can help get information out to the public via its website and press releases. Director Toll thanked Executive Director Huber for coming to the meetings, and said she thinks the spirit of cooperation between the Department and the Division is evident.

Chair Pike thanked Executive Director Huber for attending the meeting.

**Status Update on Certification:**

Hollis Glenn told the Commission that the Division has come up with a new strategic plan for the conservation easement program, which includes evaluating the budget and then proscribing the certification application and renewal fees.

He said the Division anticipates starting to receive certification applications in late spring.

**Status Update on Appraisal Review Process:**

Vice-Chair Cochran asked when a landowner will find out if there is a problem with his or her appraisal.

Marcia Waters said if there is a major issue with an appraisal, a complaint will be opened by the Board of Real Estate Appraisers. She explained that with the way the Board's statutes work, a complaint has to be resolved before it can become public information.

Vice-Chair Cochran asked when a broker reviews an appraisal and wants changes made to the appraisal, if that appraisal has to be submitted to the Division.

Marcia Waters said there is a distinction between updated appraisals with no change in value and updated appraisals with a change in value. She explained that the Board had discussed a different fee structure for these two types of updated appraisals, but it was nipped in the bud due to budgetary issues.

Commissioner Weston added that some credit brokers are requesting or requiring that they review draft appraisals prior to agreeing to transfer tax credits, and as a result appraisers not completing and submitting a final appraisal to the Division until these drafts have been reviewed. He said also that while appraisers may not be required to tell a landowner that a complaint has been opened on his or her appraisal, appraisers could or probably should do so.

Harold Ovsowitz said there may be an ethics requirement that appraisers tell the landowner.

Marcia Waters told the Commission that the Division is filing exemptions to fully staff the program, including an exemption for the appraiser position.

**Discussion of Pre-1353 Conservation Easements:**

Director Toll asked the Commission for their opinions on the issues surrounding past conservation easements in southeastern Colorado and elsewhere.

Chair Pike said the Commissioners all agree that it's a really tough, complex problem that does not lend itself to simple solutions. He said the Commission realizes that everyone isn't in same boat and that there are a lot of different situations out there. He posited that the biggest enigma is the IRS. He said many Commissioners have been following the actions of the IRS on behalf of landowners and constituents. He added that as a group the Commission feels much better in terms

of getting a handle on what's going on in southeastern Colorado as a result of Executive Director Huber's appearance, because the Department is a big part of what's going on.

Commissioner Weston said the Commission is interested in being available to the Department and the Division, when asked, to jump in and advise as to what some solutions to the problems might be. He added that it's a complicated situation given that some issues are appraisal issues, some are conservation value issues, and some may be tax fraud issues.

Vice-Chair Cochran asserted that 99% of the issues are valuation issues. She contended that the biggest role of the Division is to review appraisals and deal with appraisers on a go-forward basis. She said the backlog mostly involves the Department, and there may not be a lot the Commission can do, except advise the Department.

Commissioner Winner asked Director Toll to clarify whether her question was what the Commission can do for the Division, or what the Division can do for Commission.

Director Toll said both. She offered that the Division could collect information from the Colorado Coalition of Land Trusts and other organizations on possible solutions to present to the Commission. Then, the Division could ask the Commission for advice. She asked whether this is an issue the Commission wants to tackle.

Chair Pike said it's probably not an issue the Commission can avoid.

Commissioner Lair said while this may not be an issue the Commission can solve, the Commission can work on solutions. She recalled that during the last Commission meeting in December, there was a discussion about holding another Commission meeting to further discuss the issues. While that meeting didn't take place because of budgetary issues, she said she thinks this is a meeting the Commission needs to have. She added that she thinks that this is a state problem, and if people don't get together at the state level to work on solutions, a disservice will be done to the landowners.

Director Toll confirmed that she is asking the Commission to give the Division advice on the problem.

Chair Pike inquired whether there were some specifics the Division could provide the Commission.

Director Toll said yes, although the Division could only give non-taxpayer specific information provided by the Department.

Commissioner Aangeenbrug said she does not feel like the Commission knows much about the problem. She asserted that the Commission knows that there is a problem, but does not know how big the problem is.

Commissioner Winner said he disagrees with Commissioner Aangeenbrug; he thinks that the Commission knows enough about the problem to create different buckets based on the types of issues present. He added that the sooner the Division can take action on certain appraisers, the better, because some of the questionable appraisers are still conducting business.

Commissioner Lair agreed, and recalled that at the December Commission meeting, the Commission thought they could come up with different buckets and ideas for solutions based on general information or scenarios.

Chair Pike made two suggestions. First, he asked the Division to research some specific items, including: the number of people under audit by the IRS, the number of people under review by the Department, the number of people who can't sell their tax credits, and the number of different appraisers that were used. Second, he proposed scheduling a Commission meeting specifically devoted to this topic.

Vice-Chair Cochran disagreed with Chair Pike. She asserted that knowing the number of people involved won't help. Instead, she said naming names and knowing who did the appraisals and who holds the easements will help.

Director Toll said the Division can't name names because of privacy laws, but didn't think that the Division needed to do so. She told the Commission that the Division will be meeting with the Governor's office and the Department in the next two weeks to get information that isn't taxpayer specific.

Commissioner Vezzani stated that the Commission created the expectation that it will do something by going to La Junta and meeting with landowners there. He argued that the Commission should let people in southeastern Colorado know what, if anything, the Division and the Commission can do.

Commissioner Robotham pointed out that while these issues are concentrated in southeastern Colorado, they're not limited to southeastern Colorado, and suggested that the Commission use language that reflects this. He added that the Commission may want to caution against saying there might be a blanket solution from the state of Colorado, as the state may need to deal with things on a case-by-case basis.

Chair Pike asked whether all of the Commissioners were okay with scheduling a meeting on this issue.

The Commissioners nodded.

Hollis Glenn pointed out that there is a Commission meeting tentatively scheduled for March 23<sup>rd</sup>, which could be used to discuss this issue.

Commissioner Winner asked whether, if the Commission is able to put issues in buckets, the Division could do anything about it.

Director Toll said no. She said there is a grand jury investigation that's ongoing and should be wrapping up in next month or two. She said after the grand jury investigation is over, the Division will be able to learn from the Attorney General's office the names of other people who were implicated in the investigation.

### **Review of Local Government Application and Historic Preservation Addendum:**

Hollis Glenn asked the Commission to send comments on the drafts of the local government application and historic preservation addendum to the Division.

Commission Weston asked whether the Division had vetted the local government application with any local governments yet.

Hollis Glenn said no, but that the Division is planning on doing so before the end of the year.

### **Review of Proposed Rule A-1, Qualifications for Certification to Hold Conservation Easements:**

Hollis Glenn asked the Commission to send comments on the draft of the rule to the Division. He said the Division hopes to get the rule in place soon.

### **CEOC Meeting Schedule for 2009:**

Hollis Glenn suggested that the Commission's third and fourth quarter meetings be held on Monday, September 14<sup>th</sup> and Monday, December 14<sup>th</sup> respectively.

Commissioner Weston said he has a conflict with September 14<sup>th</sup>.

Chair Pike suggested the September 21<sup>st</sup> instead.

### **Public Comment:**

There were no comments from the public.

### **Executive Session:**

It was moved by Commissioner Vezzani and seconded by Commissioner Whisman that pursuant to 24-6-402(3)(a)(II), C.R.S. to convene the Conservation Easement Oversight Commission into Executive Session for the purpose of conferring with the Commission's attorney for the purpose of privileged attorney-client communications.

### **Motion unanimously carried.**

Executive Session discussions began at 3:04 PM.

It was moved by Commissioner Weston and seconded by Commissioner Whisman to adjourn out of Executive Session at 3:47 PM.

### **Motion unanimously carried.**

### **Adjournment:**

It was moved by Vice-Chair Cochran and seconded by Commissioner Lair to adjourn the meeting.

**Motion unanimously carried.**

The Conservation Easement Oversight Commission meeting adjourned at 3:58 PM on February 23, 2009.

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Lisa Aangeenbrug, Great Outdoors Colorado

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Doug Robotham, Colorado Department of  
Natural Resources

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Cindy Lair, Colorado Department of  
Agriculture

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Martha Cochran, Commissioner

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Dan Pike, Commissioner

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R. Jay Winner, Commissioner

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Janis Whisman, Commissioner

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Mark Weston, Commissioner

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Max Vezzani, Commissioner

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Erin Toll, Director  
Colorado Division of Real Estate

## **EXECUTIVE SESSION MINUTES**

After a two-thirds majority vote and pursuant to §24-6-402 (3)(a)(II), C.R.S., the Conservation Easement Oversight Commission held an Executive Session during its regular public meeting held on February 23, 2009. The Commission publicly announced the subject matter of the Executive Session, which was to confer with the Commission's attorney for the purpose of attorney and client privileged communications.

### **ATTESTATIONS**

Pursuant to § 24-6-402(2)(d.5)(I)(B), C.R.S., as counsel for the Commission, I attest that it is my opinion that all matters discussed during the executive session of the Conservation Easement Oversight Commission meeting held on February 23, 2009, constituted privileged attorney-client communications and, therefore, the contents of such discussions are not reflected within these minutes.

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Eric Maxfield, #  
Assistant Attorney General  
Attorney for the Conservation Easement  
Oversight Commission

Pursuant to §24-6-402(2)(d.5)(I)(B), C.R.S., as Chair of the Conservation Easement Oversight Commission, I attest that the executive session of the Conservation Easement Oversight Commission held on February 23, 2009 was confined to the topic authorized for discussion pursuant to §24-6-402(3)(a)(II), C.R.S.

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Dan Pike, Chair  
Conservation Easement Oversight Commission