

MINUTES

COLORADO DIVISION OF REAL ESTATE

CONSERVATION EASEMENT OVERSIGHT COMMISSION MEETING

June 15, 2009

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MINUTES
CONSERVATION EASEMENT OVERSIGHT
COMMISSION MEETING

June 15, 2009

Colorado Division of Real Estate
1560 Broadway, Suite 925
Denver, CO 80202

A Conservation Easement Oversight Commission public meeting was held on June 15, 2009. The commissioners in attendance were Cindy Lair, representing the Colorado Department of Agriculture; 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. Lise Aangeenbrug, representing Great Outdoors Colorado, and Doug Robotham, representing the Colorado Department of Natural Resources, were absent. Also attending were Marcia Waters, Director of Compliance and Investigations; Hollis Glenn, Conservation Easement Program Manager; Lisa Brenner Freimann, Assistant Attorney General; Terry Phillips, Department of Revenue; Ken Schade, 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 1:08 PM.

Approval of March 23, 2009 Minutes:

It was moved by Commissioner Weston and seconded by Vice Chair Cochran to approve the minutes of March 23, 2009 as written.

Motion unanimously carried.

Approval of May 12, 2009 Minutes:

Commissioner Whisman suggested that, near the top of page four, "clarification about the difference between" be changed to "a straight comparison of."

It was moved by Commissioner Weston and seconded by Commissioner Whisman to make the change suggested by Commissioner Whisman and approve the minutes of May 12, 2009.

Motion unanimously carried.

Landowner Notification Regarding the Appraisal Review:

Vice Chair Cochran expressed concern that landowners whose conservation easement appraisals have been submitted to the Division for review aren't being notified when there are problems with their appraisals. She asserted that there needs to be some process whereby there's some notification to the landowner at least if there's a problem, but preferably whether the appraisal is a go or no go. She said that she thinks this is a consumer protection issue. She said that even though this is not intended as a pre-approval process, if a landowner sent an appraisal to a regulatory agency, didn't hear anything back, and filed his or her taxes, but then down the road heard from another state agency that something was wrong with the appraisal, that doesn't seem like a very open or equitable process.

Lisa Brenner Freimann said that there is a legal issue with notifying landowners that the appraiser who did their conservation easement appraisal is under investigation, which is that statute requires that all investigations have to be kept confidential until a notice of charges is filed.

Vice Chair Cochran suggested that this would eliminate a notification that there is a problem, but wouldn't eliminate a notification that there isn't a problem.

Vice Chair Cochran explained that landowners have to have their deals done by the end of the year, and then they have three and a half months to file their taxes. She asked how long an investigation would take, and whether a landowner could be notified of any charges against their appraiser in that period of time.

Hollis Glenn said that Harold Ovsowitz, the appraiser investigator for the conservation easement program, is still coming on board and getting up to speed. He said that the Division received 256 appraisals for conservation easements done in 2008. He explained that the Division is trying to develop process in which a preliminary review is done on every appraisal. He said that the implementation of such a process should allow the Division to be able handle the workload of the appraisals that are coming in.

Commissioner Weston said that he wonders whether it's an obligation of the appraiser to notify his or her client that a complaint has been filed. He explained that there's an appraiser-client relationship that wouldn't violate any confidentiality rules. He said that he doesn't know whether all appraisers do this, but it might be a way to address part of the concern, depending on when the appraisal gets pulled out of the stack and reviewed.

Lisa Brenner Freimann asked whether landowners could require this notification as part of their agreement with their appraiser.

Commissioner Weston said yes, but noted that this probably wouldn't be something that a landowner would know that he or she should do.

Commissioner Vezzani asked whether it could be a rule that appraisers must disclose this information to their clients. He agreed with Vice Chair Cochran that the suspense of not

knowing whether your conservation easement appraisal will be accepted or not is a stressful experience for the landowner, and that the state should try to notify the landowner as quickly as possible if there's a problem with the appraisal.

Hollis Glenn said that the appraisal review process will probably happen in stages. He said that, for example, an appraisal might get an initial review, and if the appraisal didn't pass that review it might get a more in-depth review, and if the appraisal still didn't pass an investigation might be opened. However, adding a "notification" aspect to the review process may be explored in which the appraiser is notified of the various stages of review their appraiser is in.

Chair Pike said that it's helpful to remember that the task force that created HB08-1353 was really concerned about pre-approval and made strong recommendations to Alice Madden not to have a pre-approval process. He said that the objective at that point in time was finding fraud. Commissioner Whisman said that she likes Hollis Glenn's idea of some sort of letter from the Division as an informational item for the landowner.

Marcia Waters said that the Division could probably provide letter to the landowner to let the landowner know that his or her appraisal has been received and explain the general process of an investigation, should an investigation be opened on their appraisal.

Commissioner Vezzani said that such a letter might help, because at least the landowner would know the process. He suggested that at a minimum, if the land trust could lay out the process for the landowner when they're discussing the conservation easement, even if it's a two-year process, this might help until the state can fix the problem.

Lisa Brenner Freimann asked Commissioner Weston whether there is a USPAP requirement that an appraiser tell a landowner if he or she is under investigation. She suggested that there may be some other way to require appraisers to inform their clients that doesn't require a legislative change.

Commissioner Weston said that he is not aware of a USPAP requirement to that effect, other than the overarching requirement that an appraiser shouldn't be slimy or engage in moral turpitude. He said, however, that he thinks that it's good business, if an appraiser wants to maintain a relationship with his or her client.

Hollis Glenn reminded the Commission that what Harold Ovsowitz is doing in his appraisal reviews is looking for material violations of USPAP, which may or may not have anything to do with the validity of the appraised value of the conservation easement. He said the Department of Revenue is the entity that analyzes the value.

Commissioner Lair said that she thinks the heart of the matter is that the Division needs to have some sort of communication with landowners so they know where they are in the process. She said that it will probably have a cost associated with it because the Division hasn't been doing it before, but that landowners are paying \$600 and they deserve the service of at least knowing where they are in the process, even if it doesn't mean that they're guaranteed that their credit will pass.

Vice Chair Cochran asked whether the issue is of big enough concern that the Commission is interested in pursuing it.

Chair Pike asked whether the Division is willing to look at what it can do to send a notification to landowners and/or appraisers.

State Oversight of Tax Credits:

Commissioner Lair said that during the 1353 task force, those on the task force learned about how much gate keeping conservation easement tax credit brokers do in the process. She recalled that the task force realized they needed to tighten up how the state managed the tax credit program because of all the taxpayer dollars that had been lost as a result of a lack of oversight in the past. She said that as all state departments that are working on this program moving forward are tightening their processes, she sees the tax credit program having more checks and balances in place such that any credit that's out there has a certain amount of backing by the state. She proposed that since it's a state program, it would be good to have the sale of tax credits organized and administered by a state agency. She explained that there are presently landowners whose appraisals have been cleared, but by virtue of their geographic location are still unable to sell their credits. She said that if tax credits were sold at the state level, a taxpayer could go and buy a credit, wouldn't have to know where the credit was from, and would get a certain amount of confidence that the credit is good and on one's going to come after them.

Vice Chair Cochran added that there's this appearance that a landowner gets a lot of money, but in her area it costs about \$100,000 to do an easement, and generally \$75,000 of that goes to the tax credit broker. She said that landowners are losing about 20% of their credit and aren't getting any added benefit. She said that she thinks the state legislature intended for the landowner to benefit from the credit, and if the state were to broker the credit and take a small percentage, she sees it as a way to fund the oversight of the program.

Commissioner Lair said that this would probably require legislation, which she knows is tricky.

Vice Chair Cochran said to think of it as matching credits, not brokering credits.

Commissioner Lair questioned what the benefit is to landowners to have a broker involved in transaction now that there is more state oversight over the program. She likes the idea of state oversight because it removes the geographical biases that currently exist.

Update on the Certification Application Process:

Hollis Glenn said that the Division has received eight Organizational Profiles so far and has been fielding phone calls from various land trusts. He said that the message is definitely out that land trusts need to submit their organizational Profile and \$4,200 fee to the Division by June 30th.

Update on the Pre-1253 Plan:

Hollis Glenn said that staff at the Division and the Department of Revenue have been meeting to discuss how to implement the pre-1353 plan as well as the review process moving forward. He said that the Division and the Department would like to have a Commissioner present at these meetings, and the Division and Department would like that Commissioner to be Commissioner Weston because of his appraisal expertise. He asked the Commission to authorize Commissioner Weston to attend the staff meetings.

It was moved by Vice Chair Cochran and seconded by Commissioner Whisman to authorize Commissioner Weston to attend the staff-level meetings between the Division and the Department of Revenue.

Motion unanimously carried.

Pre-1353 Conservation Easements:

Commissioner Winner had a pre-1353 conservation easement that he wanted to discuss. He said that when the Lower Arkansas Valley Water Conservancy District was first formed, they turned down 19 easements because of the appraisal. He said that this easement was the first one the District decided to take. He explained that the District had two attorneys and one of the most respected appraisers in the state review appraisal and conclude that the appraisal was fine. He added that the Internal Revenue Service audited the appraisal and didn't change anything. He said that the Department of Revenue is now denying the appraisal and was asking for \$160,000 from the landowners. He said that the Department of Revenue is now requiring another appraisal, which the landowners got.

Commissioner Winner said that he's been telling the Department of Revenue he can't get appraisers to come to southeast Colorado because appraisers are scared to death to do appraisals there. He said that when appraisers do come, they lowball absolutely anything in southeast Colorado. He asked what he should do about this, because once word gets out, there are going to be people in the next legislative session fighting to get rid of the credit.

Lisa Brenner Freimann asked Commissioner Winner to refrain from discussing specific cases and instead talk about general issues or concerns.

Commissioner Winner said that he thinks the bucket system proposed by the Division would work very well for both of his deals. He added that he thinks this bucket system would work well for a lot of deals in southeast Colorado if the state could implement the system quickly.

Vice Chair Cochran reiterated that appraisers are scared to do conservation easement appraisals. She said that her land trust is down to three appraisers that they're comfortable recommending to landowners, and even these appraisers lowball the value of the easement.

Hollis Glenn said that if the Department of Revenue sees problem with an appraisal or thinks an appraisal is bad, shouldn't the burden of proof be on the landowner to show that the value is there?

Commissioner Weston added that the appraisal capacity is shrinking. He said that many appraisers are saying that the process isn't fair or understandable, they can make a living doing something other than conservation easement appraisals, so why would they put their head in a noose by doing conservation easement appraisals.

Chair Pike said that some of the people who dealing with the Internal Revenue Service are spending \$20,000 to go through appeals process, and will have to spend more money if their case goes to court.

Commissioner Winner said that the Commission and the bucket system could help fix the problem and avoid a lot of costs to the taxpayer and the state of Colorado.

Hollis Glenn said that the Division and Department of Revenue have been meeting at the staff level and making progress towards implementing a process to fix the problem.

Commissioner Winner said that the process for landowners whose credits have been denied hasn't been slowing down. He said that the Commissioner has been meeting for almost a year, and he wants to know when the Commission will get to a place where it is helping the people from 2003-2007 who used certified general appraisers and did everything they were supposed to do.

Commissioner Whisman said that the purpose of the Commission is not solely to resolve the pre-1353 problems; the purpose of the Commission is also to address issues with conservation easements moving forward. She said that she agrees with Commissioner Weston that there are situations in various parts of the state where people didn't do what they were supposed to do, and that she would hate for the Commission to go on record in any form saying that they did.

Commissioner Vezzani said that the point is the state needs to separate those who tried to do the right thing from those who clearly committed fraud.

Commissioner Winner asked whether the Commission could make a recommendation that the state move forward with a process to resolve this issue as quickly.

Chair Pike said that if there was a quick fix, the state probably would have found it already.

Ken Schade from the Department of Revenue said that one of the major issues is the large volume of credits from 2003-2007. He contended that to develop a definitive opinion about an appraisal takes time, more than an hour or even a day. He said that he thinks the Department is doing a lot better job now reviewing credits up front, but resolving credits from 2003-2007 is going to take some time because there are so many of them. He said that a year ago, asking taxpayers to get second appraisals seemed like a good solution, but now that there aren't enough appraisers to do them he's not sure what the solution is. He said that what the Department needs is something to help establish a value for each easement. He explained that the Department has an appraisal the Department doesn't have any faith in, and the taxpayer can't get a second appraisal. He said that the Department is now at a point where it has an easement but doesn't have anything to establish the value of that easement, and the Department's staff is sitting in an

office trying to establish a value and that doesn't work. He said that he thinks the pre-1353 plan can be effective, especially if the Division or Department is able to get a few more appraisers on staff.

Chair Pike said that neither the Division nor the Department of Revenue has the resources to look at 600 appraisals. He contended that the only way the state will be able to prepare a case like the one Commissioner Weston described is by focusing on the egregious cases and letting some of the other ones go. He said that he doesn't think any of the Commissioners want to see the state pursue some cases and then not have the resources to follow them through to the end, because that would be a waste of everyone's time. He said that he thinks part of the state's challenge is to figure out which cases to pursue and which ones to let go.

Terry Phillips said that as a certified general appraiser, he puts his credentials on the line if he expresses an opinion of value but hasn't done the necessary work to support that value. He said that he can identify what's wrong with an appraisal, but if a case ends up in court a lot more is going to be required. He added that while he could do appraisals of these easements, that would take a lot of time. He said that conceptually, the plan proposed by the Division makes sense, and the Department of Revenue agrees with the concept of going after the really bad appraisals and spending less time on the appraisals that aren't as bad. However, he said that if he sees an easement that appears to be overvalued by 200% based on good data, he's not sure if he would be comfortable saying to the general public that that's acceptable.

Commissioner Whisman said that the Division's process works in an individual appraisal basis but doesn't work to deal with all 600 appraisals, because it doesn't talk about how the state is going to figure out how many appraisals should go in each bucket. She encouraged the Division and Department to think about how they are going to do that.

Public Comment:

There were no comments from the public.

Adjournment:

It was moved by Commissioner Whisman and seconded by Commissioner Weston to adjourn the meeting.

Motion unanimously carried.

The Conservation Easement Oversight Commission meeting adjourned at 3:15 PM on June 15, 2009.

Lisa Aangeenbrug, Great Outdoors
Colorado

Doug Robotham, Colorado Department of
Natural Resources

Cindy Lair, Colorado Department of
Agriculture

Martha Cochran, Commissioner

Dan Pike, Commissioner

R. Jay Winner, Commissioner

Janis Whisman, Commissioner

Mark Weston, Commissioner

Max Vezzani, Commissioner

Erin Toll, Director
Colorado Division of Real Estate