

February 23, 2009

Conservation Easement Oversight Commission meeting - all commissioners present

The first order of business was the review, amending, and approval of minutes from the December 11, 2008 CEOC meeting and from the executive session.

The second order of business was an update on HB09-1014 from Hollis Glenn, Conservation Easement Program Manager. He informed the Commission that both the House and Senate had passed the bill and that they were waiting on the Governor to sign the bill (update: Governor Ritter has since signed the bill). Glenn gave a brief overview of the bill's history, the process, and what it will do: eliminate fee caps for both easement holder certification and appraisal review, changes the certification period from once every three years to an annual renewal certification, and allows the Division to accept donations (grants, gifts, etc.) in respect to the program.

The third order of business was a discussion about HB08-1353 with Roxy Huber, the Executive Director of the Department of Revenue. Chairman Pike asked Director Huber for comments on what DOR believes CEOC's role to be in the HB08-1353 process and what they can do to better work together. Director Huber thanked the Commission for the opportunity to participate and proceeded to give a background of what the Department has done, an update on what they are currently doing, and an idea of what they hope to do in the future.

She mentioned that DOR is excited for their role in this process, but that when they were originally tasked with some of their responsibilities, they lacked the requisite tools. She mentioned that confidentiality is a very important matter for the Department of Revenue and it does create limits on what they can say to whom.

Director Huber mentioned that the Department has hired someone for their appraisal review position. Terry Phillips has worked for DOLA and will now assume an appraiser position within the Department of Revenue. At this point, Director Huber mentioned that DOR has several appraisals ready to send over to the Division of Real Estate for additional review/investigation.

She also said that DOR is working with the Department of Agriculture to come up with scenarios (i.e. what DOR sees) in order to help inform and educate landowners. She is also planning a roadshow with the Commissioner of Agriculture, John Stulp, to tour communities and tell landowners what they are supposed to do when faced with certain scenarios. The Department of Revenue will also be creating a fact sheet that will be available on their website soon.

On the issue of landowners under audit or investigation by the IRS and/or Department of Revenue, Director Huber mentioned that the Department of Revenue did not know who IRS was auditing and still does not know who the IRS is auditing. She also said that it is important these landowners understand their civil options and that some civil remedies could be available.

Chair Pike asked Director Huber how she viewed the role of the CEOC and she responded by saying that the Commission is comprised with experts and that working with Revenue to help educate people would be a useful role. Commissioner Vezzani told the Director that the CEOC had met in La Junta and heard from landowners in need of information. He encouraged the Department of Revenue to get information available as quickly as profit.

Commissioner Winner then asked Director Huber to walk him through how the IRS gets involved in the DOR process. Director Huber told the Commission that the IRS made selections of who to audit, whether they did new appraisals was not known to DOR. IRS looks at 170(h) and public benefit aspects and denied some deductions for these reasons. That denial then filters to DOR and results in filing an adjusted return with the Department. Again, Director Huber mentioned that DOR does not know what IRS is doing until it is over.

Commissioner Winner asked if DOR just takes IRS' value and Director Huber said no, the Department does not.

Commissioner Lair asked about 170(h) questions and how much DOR cares about them or how they approach them. Director Huber said that in all processes, they are always careful to allow state-level due process.

Chair Pike said that it sounded as though people who think they are in limbo might not even be on DOR's radar and Director Huber agreed with his assessment.

Chair Pike then said that 1353 allows DOR to do a review of an IRS audited landowner and asked whether they have done that. Director Huber said they had not – no landowner had come forward asking them to do so. Chair Pike followed by saying he knew of several landowners who settled with the IRS and are worried about the impact it could have on their state review. Director Huber said she knew that there are valid times to not follow exactly what the IRS does without due process.

Vice-Chair Cochran said that the process surrounding 1353 is all about assuring people: certification assures them about the easement holder, appraisal review assures them about their appraisal – so where does DOR's process come in? How do we get confidence back in the process? Director Huber agreed and said that moving forward, she believes we will see a lower number of audits because there is some initial vetting now.

Chair Pike and Commissioner Weston both expressed a belief that 1353's specific language about consultation between DRE, DOR, and CEOC means that DOR can bring questions or concerns with specific cases to the Commission. Commissioner Weston asked how DOR sees CEOC fitting in to such a situation. Director Huber said that DOR plans on bringing scenarios and questions to the Commission.

Commissioner Vezzani said that DOR should understand that the Commission wants a process that goes hard after the schemers and fraudulent participants, but that there are some folks who did things right caught up in the process. He mentioned that it is a wonderful program, but one in desperate need of confidence returned to it. Director Huber said that they will be trying hard to educate people to understand the process.

Commissioner Winner asked whether DOR had any intention, or was being directed by the Governor's office, to grandfather in all conservation easements and their tax credits, as the rumor in southeastern Colorado goes. Director Huber hesitated to speak for the Governor, but Rebecca Swanson, a representative from the Governor's office, did say that it is a rumor only.

Commissioner Winner then informed the Commission and Director Huber that he has caught wind of what the next trend is going to be: A "broker" is contacting people telling them that if they have a tax

credit they have been unable to sell, they will buy it for 80 cents on the dollar, will put the proceeds in a C.D. for four years, and will immediately sell the tax credit for a higher rate on the dollar. There will be indemnification on the broker, so it will go back to the landowner if anything happens. The question becomes who will be responsible for the gap between amounts and the interest/penalty when that deal gets audited. Commissioner Winner asked Director Huber what a person could do about this scenario. Director Huber said she would take it back to her office and process it. At this point, Director Toll said that part of their job is education and that the Commission should tell the Division about scenarios like this. They will work to get information out there and educate people.

Director Toll thanked the Department of Revenue on behalf of the Division of Real Estate for being there and answering questions. Director Huber thanked everyone for the opportunity and reminded them that the process is never fast. They will do their best to accelerate conservation easement matters, but there are currently 240 conservation easement "issues" with six conferees working.

The third item of business was an update on 1353 implementation. Hollis Glenn told the Commission that there is a new strategic plan for the Conservation Easement Program. They will be addressing the following prioritized areas: budget, prescribing fees for application and renewal, and developing the expedited application for accredited organizations. They have not received any applications to date, but this is not a surprise due to the financial reporting requirements.

Vice-Chair Cochran asked if the landowner would ever know if the appraisal was under review or investigation. Commissioner Weston commented that the landowner owns the appraisal and pays for it, so they should be able to know. Marcia Waters, from the Division of Real Estate, said that current BOREA statutes say they can only tell once the complaint is resolved. Commissioner Weston said that it should be up to the appraiser to tell client they are under investigation. The comment was then made that perhaps pressure should be put on landowners to include a provision in their contract with the appraiser that they will be informed about any investigation.

Glenn then talked about the local government application and that they are balancing flexibility for local governments (recognizing how they are different from land trusts) while retaining the same standards. The Division of Real Estate is way ahead of schedule on this (the application needs to be ready Jan 1, 2010) and is welcoming comments on the draft application and proposed rule (circulated to the Commission).

The fourth item of business was to discuss the issues facing landowners throughout the state, but seemingly concentrated in southeastern Colorado, regarding IRS/DOR audits of their land and unsellable tax credits. Chair Pike said that many people have asked the Commission to look into this tough and complex subject, one that does not lend itself to simple solutions. Various Commissioners commented on how there are landowners in different situations – not everyone can be treated the same way. There was also consensus on the concern about valuation and subsequent IRS issues. The Commission asked Director Toll to collect information so that they could give informed advice to the Division and Department of Revenue on how to best approach the problem. Commissioner Aangeenbrug expressed a wish in knowing more information about the money involved, the number of landowners, and specific details about the problem the Commission is being asked to solve. Director Toll said that the Division would try and collect that information to be able to give to the CEOC. The Commission then set a meeting date for March 23, 2009 to discuss only this issue. The Division has been asked by the CEOC to have data available so they can provide advice (as asked for by the Division).