

DEPARTMENT OF REGULATORY AGENCIES
DIVISION OF REAL ESTATE
CONSERVATION EASEMENTS
4 CCR 725-4

NOTICE OF PROPOSED PERMANENT RULEMAKING HEARING
May 3, 2018

RULE CHAPTER 2. CERTIFICATION OF CONSERVATION EASEMENT HOLDERS

Pursuant to and in compliance with Title 12, Article 61 and Title 24, Article 4, C.R.S. as amended, notice of proposed rulemaking is hereby given, including notice to the Attorney General of the State of Colorado and to all persons who have requested to be advised of the intention of the Colorado Department of Regulatory Agencies and the Division of Real Estate to promulgate rules, or to amend, repeal or repeal and re-enact the present rules related to conservation easements.

STATEMENT OF BASIS

The statutory basis for the rules titled Conservation Easements is Part 7 of Title 12, Article 61, Colorado Revised Statutes, as amended.

STATEMENT OF PURPOSE

House Bills 18-1290 and 18-1291 repeal the authority of the Division of Real Estate (“Division”) and the Division Director in the oversight and administration of the Conservation Easement Tax Credit Program. As a result, the existing rules need to be repealed to be in compliance with the legislative directives in House Bills 18-1290 and 1291.

SPECIFIC PURPOSE OF THIS RULEMAKING

The specific purpose is to repeal the requirements necessary for the certification and discipline of qualified organizations that hold conservation easements for which a tax credit is claimed.

PROPOSED NEW, AMENDED AND REPEALED RULES

Deleted material is showed by ~~struck-through~~; new material is indicated by underline. Rules, or portions of rules, which are unaffected are reproduced. Readers are advised to obtain a copy of the complete rules of the Board at www.dora.colorado.gov/dre.

~~CHAPTER 2: CERTIFICATION OF CONSERVATION EASEMENT HOLDERS~~

~~2.1.—Qualifications for Certification to Hold Conservation Easements~~

~~The Division may conditionally certify or deny, refuse to renew, or revoke the certification of a conservation easement holder who fails to meet any of the following minimum qualifications:~~

~~A.—Organization~~

~~The conservation easement holder:~~

- ~~1.—Meets the requirements of a qualified organization under section 12-61-724, C.R.S. and the qualifications in section 38-30.5-104(2), C.R.S., to hold a conservation easement for which a state tax credit may be claimed;~~
- ~~2.—Has the capacity, including, but not limited to, a sufficient number of board members, staff, and/or volunteers, to accomplish the work of the organization; and~~
- ~~3.—*Repealed (Effective 01/01/2016).*~~
- ~~4.—If a non-governmental entity, the organization must be in good standing and have a good registration status with the Colorado Secretary of State.~~

~~B.—Process: Conservation Easement Selection, Review and Approval~~

- ~~1.—The conservation easement holder has and follows reasonable written policies and procedures for selecting conservation easements. These must include, but are not limited to:~~
 - ~~a.—Establishing and following selection criteria to identify conservation easements with a conservation purpose as defined in section 12-61-727(1)(b), C.R.S.;~~
 - ~~b.—Identifying and documenting the conservation purposes and the public benefits associated with protecting those purposes prior to accepting the conservation easement;~~
 - ~~c.—Working with the conservation easement grantor to identify and design the permitted uses, reserved rights, and prohibited uses for the conservation easement on an individual basis;~~
 - ~~d.—*Repealed (Effective 01/01/2016).*~~

- ~~e. Establishing and following a policy for phased conservation easements such that each proposed conservation easement of a phased project has an independent conservation purpose as defined in section 12-61-727(1)(b), C.R.S.; and~~
 - ~~f. Advising potential conservation easement grantors that the organization does not guarantee the qualification of the conservation easement for tax credit purposes, and that they should seek their own legal, financial and tax advice.~~
- ~~2. The conservation easement holder has and follows reasonable written policies and procedures for reviewing conservation easements. These must include, but are not limited to:~~
- ~~a. Performing due diligence on the title, water and mineral rights on the property prior to accepting the donation.~~
 - ~~b. Ensuring any liens or encumbrances are released, subordinated, or addressed in a manner so that the conservation purposes protected by the conservation easement will be preserved in perpetuity.~~
 - ~~c. Repealed (Effective 01/01/2016).~~
 - ~~d. Obtaining a legal review of each transaction.~~
 - ~~e. Repealed (Effective 01/01/2016).~~
 - ~~f. Requesting, receiving, and reviewing a copy of the appraisal for all conservation easements for which a tax credit may be claimed pursuant to section 39-22-522, C.R.S. The review should assess, at a minimum:
 - ~~i. The physical and legal aspects of the property description;~~
 - ~~ii. The conservation easement terms;~~
 - ~~iii. The ownership of the property;~~
 - ~~iv. The intended use of the appraisal report; and~~
 - ~~v. Whether there are any significant errors affecting the credibility of the appraisal.~~~~

~~g. Receiving and reviewing a baseline documentation report for the conservation easement before accepting the donation. The baseline documentation report documents the condition of the property and its conservation purposes at the time of the donation. Any updates should be documented in a separate document to be preserved in the conservation easement holder's records.~~

~~3. The conservation easement holder has and follows reasonable written policies and procedures for approving conservation easements. These must include, but are not limited to:~~

~~a. Declining projects that do not have conservation purpose, do not appear to have the necessary donative intent, or appear to be fraudulent;~~

~~b. Having the board approve all conservation easement donations, or establishing policies delegating the authority to approve transactions to a qualified committee or other designee; and~~

~~i. Such review and approval must be documented; and~~

~~ii. If an entity other than the holder performs the due diligence, the holder must review the transaction and document that the project is consistent with its policies and procedures.~~

~~c. Providing sufficient information to the board, a qualified committee or other designee for review before a conservation easement is approved.~~

~~d. Repealed (Effective 01/01/2016).~~

~~C. Stewardship: Practices and Capacity~~

~~1. The conservation easement holder has and follows reasonable written policies and procedures to ensure the fulfillment of the perpetual stewardship responsibilities of its conservation easements. These must include, but are not limited to:~~

~~a. Having adequate capacity and resources in place to provide annual monitoring of each conservation easement held in Colorado;~~

~~b. Monitoring all conservation easements on at least an annual basis, including one of the following methods: physically inspecting the property, visually inspecting the property from the air, utilizing remote sensing technology or other methods currently considered as meeting best practices for monitoring conservation easements;~~

- ~~c. Monitoring is documented in written format, and the documentation is reviewed by either the board, a qualified committee, or other designee;~~
- ~~d. Enforcing every conservation easement deed, including violations in a manner appropriate to the scale of the violation;~~
- ~~e. Reviewing proposed amendments to conservation easement deeds to confirm they do not result in a net loss of conservation value and do not create an impermissible private benefit to the grantor; and~~
- ~~f. Preserving original and duplicate copies of necessary and important records, such as deeds, baseline documentation reports, monitoring reports and appraisals, in a safe and secure manner.~~

~~2. The conservation easement holder has the necessary capacity and written policies and procedures to ensure the organization can meet its perpetual stewardship responsibilities. These must include, but are not limited to:~~

- ~~a. If a non-governmental entity, the organization must establish dedicated funds for the stewardship and enforcement of every conservation easement held. The funds must be supported by a financial plan that:
 - ~~i. Ensures the longevity of the dedicated stewardship and enforcement funds;~~
 - ~~ii. Determines the amount of stewardship and enforcement funds that will be needed for the perpetual stewardship of all conservation easements; and~~
 - ~~iii. The plan may consider enforcement insurance.~~~~
- ~~b. Using the dedicated stewardship and enforcement funds for stewardship and enforcement related purposes only, or other allowable uses only as established through written policies.~~
- ~~c. Repealed (Effective 01/01/2016).~~
- ~~d. Procuring the adequate stewardship and enforcement funds needed for all conservation easements as determined by the organization's financial plan or governmental budget as applicable.~~

- e. ~~If a government entity, sufficient funds must be allocated in the budget to acquire, accept, steward, and enforce conservation easements through the sunset of the funding tax initiative. Funds may not necessarily be held in a dedicated stewardship fund.~~

~~D. Finance~~

~~The conservation easement holder has and follows reasonable written fiscal policies and procedures to ensure the transparent and responsible management of its assets. These must include, but are not limited to:~~

- ~~1. Having the board review and/or regularly assess the organization's financial status, including the annual budget and any financial changes that have occurred; and~~
- ~~2. Having a financial evaluation conducted on an annual basis by an independent qualified accountant who has no financial or other interest in the organization. The level of evaluation is determined by the holder's total annual operating revenue without the value of conservation easements and/or fee properties:
 - ~~a. Less than \$100,000 requires an annual compilation;~~
 - ~~b. \$100,000-\$500,000 requires an annual financial review; and~~
 - ~~c. More than \$500,000 requires an annual financial audit.~~~~

~~E. Governance~~

~~The conservation easement holder demonstrates it has and follows reasonable written policies and procedures to ensure responsible management of its organization. These must include, but are not limited to:~~

- ~~1. The organization has board meetings to accomplish its work;~~
- ~~2. The organization has a written conflict of interest policy; and~~
- ~~3. Conservation easements and financial transactions with insiders must be documented to show that there is no private inurement.~~

~~2.2. Expiration Date for Certification~~

~~Certification for a conservation easement holder expires on December 31 following the date of issuance.~~

~~2.3.—Eligibility for Conservation Easement Holders After Revocation~~

~~A conservation easement holder whose certification to hold a conservation easement has been revoked is rendered ineligible to re-apply for certification until more than two years have elapsed from the date of revocation of the certification. Any re-application after such two-year period is required to be submitted on a new application.~~

~~2.4.—Certification Renewal~~

~~Renewal of a conservation easement holder certification can be executed only with the renewal application provided by the Division, submitted and accompanied by the prescribed nonrefundable fee by December 31 of each year.~~

~~2.5.—Reinstatement of Certification After Expiration~~

~~A certification that has expired may be reinstated within one year after the date of expiration if the holder meets all the requirements in section 12-61-724, C.R.S. and rule 2.1. A complete renewal application and the prescribed nonrefundable renewal fee must be submitted to the Division for reinstatement. Certification is effective on the date reinstatement is issued and cannot be applied retroactively. Any certification that has been expired greater than one year may not be reinstated and requires a new application for certification.~~

~~2.6.—Conditional Certification~~

~~A.—The Director in consultation with the Commission may issue conditional certification to any conservation easement holder that does not clearly demonstrate, to the satisfaction of the Director, compliance with rule 2.1, titled Qualifications for Certification to Hold Conservation Easements. The terms and length of conditional certification will be determined by the Director and may include, but are not limited to:~~

- ~~1.—A requirement that the conditionally certified conservation easement holder co-hold conservation easements for which a state tax credit may be claimed with a fully certified conservation easement holder.~~
- ~~2.—Submission of all requested project and governance documentation in a manner prescribed by the Director.~~
- ~~3.—Approval of project documentation by the Director prior to the conservation easement holder accepting a new conservation easement.~~
- ~~4.—Any other restriction or term deemed necessary by the Director to ensure ongoing compliance with all applicable statutes and rules.~~

~~B. Conservation easement holders granted conditional certification are subject to all fees, statutes and rules promulgated for certified conservation easement holders, including, but not limited to rule 2.1. titled Qualifications for Certification to Hold Conservation Easements, and all other rules regarding expiration and renewal of state certification.~~

~~2.7. Disciplinary Action~~

~~The Director may impose an administrative fine not to exceed two thousand five hundred dollars (\$2,500) for each separate offense, as defined in subparagraphs A-E, below; may issue a letter of admonition; may place a conservation easement holder on probation under the Director's close supervision on such terms and for such time as the Director deems appropriate; and may refuse to renew, revoke, or suspend the certification of any conservation easement holder if, after an investigation and after notice and hearing pursuant to the provisions of section 24-4-104, C.R.S., the Director determines that the conservation easement holder:~~

- ~~A. Has made false or misleading statements or material omission in their application for certification;~~
- ~~B. Has misrepresented or concealed any material fact from a conservation easement grantor;~~
- ~~C. Has employed any device, scheme, or artifice with intent to defraud a conservation easement grantor or any government agency;~~
- ~~D. Has failed to comply with any stipulation or agreement made with the Director; or~~
- ~~E. Has failed to comply with any of the certification requirements, or any lawful rule or regulation promulgated by the Director.~~

~~2.8. Information Request~~

~~A conservation easement holder must furnish to the Director such information or documentation as the Director in her/his sole discretion deems reasonably necessary for the enforcement of title 12, article 61, part 7, C.R.S. or any rules enacted by the Division. If information or documentation is required, the Director must give written notice, in detail, of the information so required and must allow an additional twenty one (21) days from delivery to present such material, which period may be extended only upon showing of good cause. Written notice may be hand delivered or mailed to the party entitled thereto. If hand delivered, said notice is deemed delivered upon hand delivery. If mailed, said notice must be mailed by registered or certified mail, return receipt requested, and said notice is deemed delivered the date of mailing.~~

~~2.9.— Cease and Desist~~

~~If the Division has reasonable cause to believe any public or private organization is not in compliance with section 38-30.5-104 (2), C.R.S. and section 12-61-724, C.R.S., the Director may enter an order requiring such organization to cease and desist from attempting to hold a conservation easement for which a state tax credit may be claimed.~~

~~2.10.— Transferring Conservation Easements to Non-Certified Entities~~

~~A conservation easement holder must not assign or otherwise transfer any interest in a conservation easement for which a state tax credit has been or may be claimed to a non-certified organization. An organization must not accept an assigned or otherwise transferred interest in a conservation easement for which a state tax credit has been or may be claimed if it is not certified by the Division at the time of acceptance. Governmental entities transferring a partial interest in a conservation easement to another governmental entity in accordance with an established written agreement are exempt from this prohibition on transferring a partial interest in a conservation easement. All certified organizations retaining ANY interest in the conservation easement must remain responsible for stewardship and defense of the conservation easement.~~

~~2.11.— Courtesy Filing~~

~~A certified conservation easement holder must provide the following information and/or documentation to the Division within 30 days of a substantive change in:~~

~~A. — Physical or mailing address of the organization; or~~

~~B. — Authorized contact person.~~

~~C. — Repealed (Effective 01/01/2016).~~

A hearing on the above subject matter will be held on Thursday, May 03, 2018, at the Colorado Division of Real Estate, 1560 Broadway, Suite 1250-C, Denver, Colorado 80202 beginning at 1:00 p.m.

Any interested person may participate in the rule making through submission of written data, views and arguments to the Division of Real Estate. Persons are requested to submit data, views and arguments to the Division of Real Estate in writing no less than ten (10) days prior to the hearing date and time set forth above. However, all data, views and arguments submitted prior to or at the rulemaking

hearing or prior to the closure of the rulemaking record (if different from the date and time of hearing), shall be considered.

Please be advised that the rule being considered is subject to further changes and modifications after public comment and formal hearing.