

**Wheatsville Board of Directors**  
**Special Meeting Agenda**  
**Sunday October 5, 2014**  
**10:00AM @ Guadalupe Meeting Room, 3103 Guadalupe**



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<b>TIME</b>	<b>TOPIC</b>	<b>ACTION</b>
<b>10:00AM</b>	<b>1. AGENDA REVIEW</b>	<b>DISCUSS</b>
<b>10:05AM</b> (25 min) (30 min)	<b>2. COMMITTEE WORK/GOVERNANCE</b> Conflict of Interest Allocations	<b>VOTE</b> <b>VOTE</b>
<b>11 :00AM</b>	<b>Adjourn Meeting</b>	

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Wheatsville will be at the forefront of a transformed society that has:

- a thriving community centered on hospitality, kindness, and generosity
- a robust cooperative economy
- easy access to sustainable, healthy food solutions



# Board of Directors Special Meeting Minutes October 5, 2014

Present in person: Reyna Bishop, *President*; Doug Addison, *Secretary*; Kitten Holloway, and John Vinson; present by phone: Steven Tomlinson, *Treasurer*; Marcia Erickson; Deborah Ingraham; and Michelle Hernandez.

Also Present: Dan Gillotte, *Chief Executive Grocer*; John Perkins, *Finance Manager*; and Thane Joyal, *CDS consultant to the Board*, (by phone).

**Call to Order** **10:10 AM**

Reyna called the meeting to order.

**1. CONFLICT OF INTEREST** **10:10 AM**

Directors Steven Tomlinson, Doug Addison and John Vinson are Wheatsville investor shareholders, as is CEG Dan Gillotte. Thane Joyal opened the discussion by stating that it is common for co-op directors to have multiple relationships with their cooperative; they can be investors as well as owners. She said that Conflict of Interest is best dealt with by brief discussion and disclosure to assess/understand the (perceived or real) conflict. Each director with the conflict must self assess whether the cooperative's interest can be put before their own and the rest of board must decide whether that director can participate without compromising the quality of the decision. Kitten noted that the Bylaws give the Board the authority to define a conflict of interest.

John Vinson voiced concern that the decision before the Board is extra sensitive because the proposal breaks with Wheatsville historical methods of accounting. He is worried about using EBITDA, a non-GAAP financial measure, for calculating net savings for the purpose of allocating funds to investor dividends as stipulated by the Texas Business Organizations code chapter 251. Additionally, John noted that the attorney representing Wheatsville Co-op has only told operations that it could rely on the advice of its accountant for this change in the way the Co-op defines net savings, but did not specifically provide a formal legal opinion on the subject.

At Thane's request, Dan noted that the shareholder dividends for FYE2014 are about \$58,000 to approximately 250 investors, meaning that none of the dividends would be substantial. The largest investor would receive about \$1200 (and this person is not on the Board). Based on the knowledge of the amounts, Thane affirmed that owning shares is unlikely to taint the judgment of the directors who own shares, therefore, the real decision, is whether to use EBITDA for net savings.

---Reyna moved that as the Allocation of Net Savings vote does not represent a substantial conflict of interest for the directors who are also investor shareholders, that all directors be included in the vote. If any of the shareholder directors still feel uncomfortable, they can abstain from the vote. The remaining Board members (Kitten, Reyna, Deborah, Marcia, and Michelle) approved the motion 5-0-0.



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Kitten asked Steven, Doug and John to affirm ability to participate in the vote. All three indicated that they could put the interests of the Co-op ahead of their own.

## 2. FY 2014 ALLOCATION

10:34

Reyna read aloud questions about the resolution shared by Steven and others by email prior to the meeting. John Vinson replied that all questions are moot if using EBITDA to calculate net savings is not legal, even though the official opinion of the Wheatsville's accountant, Wegner CPA, is that it is both legal and commonly done, and the opinion of Wheatsville's attorney is that it is reasonable to rely on the opinion of our accountant.

John Perkins walked the Board through the language of his fourth draft of the allocation resolution. The actual allocation is to dividends and retained earnings. A cooperative always has the right to make a patronage rebate in years with positive net earnings under IRS code. It does not have the option to pay patronage in years with a loss. Wheatsville had a financial loss in FY 2014, so there is no income on book for patronage. Wheatsville does have to calculate net savings according to TBOC statute. Wheatsville has had a vote on the allocation of net savings every year. In the past, the Co-op has used net earnings synonymously with net savings and this issue did not come up because there was profit. Dan added that net savings is not the same as net earnings. Patronage is dictated by IRS rules and calculated from net earnings, which were negative in FY 2014. Net savings is only mentioned in TBOC code in order to calculate dividends, retained earnings and other allocations

This year's loss was planned as part of the opening of the S Lamar store. Though there is a loss, the coop has cash and had planned to use that cash for dividends. Paying dividends is important to the Co-op because it encourages current investors to keep their money with the coop and also because not paying dividends could adversely affect Wheatsville's ability to raise money through owner investors for future projects.

John Vinson noted that the IRS rules relate only to co-op tax exemption – which is certainly important to co-op finances – but state law governs all operations of a co-op. In a conflict between state law and IRS rules, the state law controls and we would have to change the state law to remedy the conflict. Several participants suggested that ACBA should take the lead on any such state legislative changes. John Perkins urged caution in suggesting that the Legislature alter co-op law.

John Vinson asked if the resolution has to mention that the Co-op had a loss in FY 2014 if we are going to use EBITDA as the measure for both dividends and the remaining allocation.

Kitten asserted that we are debating the validity of advice given by our own lawyer and accountant. She agrees that there could be other perspectives, but thinks we have a good stance



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here. We've been advised that we can do this. We have what we need to defend this decision. Michelle concurred.

Deborah said she has inadequate information to assess the issue and she would have preferred to see a formal written opinion from Wheatsville's attorney and accountant prior to being asked to vote on the allocation resolution. Such documentation protects the Board, she said.

John Vinson said the resolution indicates that we favor investors over owners.

Reyna moved to approve the fourth draft of the resolution, as attached. Kitten seconded. Motion passed 6-2-0. John Vinson and Deborah Ingraham voted against.

**3. ADJOURN**

**11:04 AM**



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## Resolutions Regarding Net Savings for Fiscal Year Ending June 1, 2014

*Whereas* Section 251.302 of the Texas Business Organizations Code and Article IX of the Wheatsville Bylaws provide for an annual apportionment of net savings by the Board of Directors to specified uses including payment of investment dividends, retained earnings, and distribution of patronage allocations to owners; and

*Whereas* the draft income statement for Wheatsville's fiscal year ending June 1, 2014, provided by Wegner CPAs, subject to final approval in their audit process, shows negative earnings in the amount of \$150,758 after netting revenues and expenses from both operating and non-operating activities;

*Now therefore*, the Wheatsville Board of Directors has determined that there will not be a patronage allocation for the fiscal year ending June 1, 2014.

*Further, whereas* payment of investor dividends as described in the 2005 and 2013 offering memoranda and individual investor subscription agreements is a high priority for the general welfare of our co-op; and

*Whereas* Section 251.301 of the Texas Business Organizations Code provides that investment dividends distributed may not exceed 50 percent of the net savings for the period, "net savings" being defined in Section 251.001 (5) as "the total income of a cooperative association less the costs of operation"; and

*Whereas*, following consultation with legal counsel and the accounting professionals who performed our audit for fiscal year ending June 1, 2014, the Board of Directors has determined that EBITDA (Earnings Before Interest, Taxes, Depreciation, and Amortization) is a reasonable measure of Wheatsville's "net savings" for fiscal year ending June 1, 2014; and

*Whereas* Wheatsville's net savings for fiscal year ending June 1, 2014 as measured in this way per the draft financial statements provided by Wegner CPAs are \$557,613 and the investor dividends earned for this accounting period are \$58,302; and

*Whereas* the Board of Directors has determined by due diligence that funds are legally available, that the net worth of the co-op exceeds the amount to be distributed as required by Wheatsville's Bylaws, and that payment of dividends will not place the co-op in any fiscal jeopardy;

*Now therefore*, pursuant to the Texas Business Organizations Code and Wheatsville's Bylaws, the Wheatsville Board of Directors hereby declares investment dividends in the amount of \$58,302, to be distributed to investor shareholders for the fiscal year ending June 1, 2014, as provided in the individual shareholder agreements, with any remainder of net savings allocated to retained earnings as permitted by Section 251.302 of the Texas Business Organizations Code.