# VIRGINIA
# HOUSING
# STUDY
# COMMISSION

**2002 Annual Report to the**

**Governor**

**and the**

**General Assembly of Virginia**

# VIRGINIA HOUSING STUDY COMMISSION

## General Assembly of Virginia

**The Honorable William C. Mims**
Chairman
Senate of Virginia
33rd Legislative District
Leesburg

**The Honorable Jackie T. Stump**
Vice Chairman
Virginia House of Delegates
3rd Legislative District
Oakwood

**The Honorable Thelma Drake**
Virginia House of Delegates
87th Legislative District
Norfolk

**The Honorable Bradley P. Marrs**
Virginia House of Delegates
68th Legislative District
Richmond

**The Honorable G. Glenn Oder**
Virginia House of Delegates
94th Legislative District
Newport News

**The Honorable Terrie L. Suit**
Virginia House of Delegates
81st Legislative District
Norfolk

**The Honorable Mary Margaret Whipple**
Virginia State Senate
31st Legislative District
Arlington

**The Honorable Martin E. Williams**
Virginia State Senate
1st Legislative District
Newport News

## Gubernatorial Appointees

**Mr. F. Gary Garczynski**
Woodbridge

**Mr. F. Andrew Heatwole**
Virginia Beach

**Mr. T. K. Somanath**
Richmond

## Executive Director and Counsel

**Nancy M. Ambler, Esquire**
Richmond

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## INTRODUCTION

### Background

Established by the 1970 Virginia General Assembly, the Virginia Housing Study Commission was originally mandated "to study the ways and means best designed to utilize existing resources and to develop facilities that will provide the Commonwealth's growing population with adequate housing." The Commission was further directed to determine if Virginia laws "are adequate to meet the present and future needs of all income levels" in Virginia, and to recommend appropriate legislation to ensure that such needs are met.

The Commission is comprised of eleven members, including five members of the Virginia House of Delegates, three members of the Virginia State Senate, and three gubernatorial appointees. Senator Bill Mims serves as Chairman of the Commission.

The Commission has long been recognized as a forum for new ideas in housing and community development, and as a focal point for developing consensus for such ideas in the form of landmark statutory, regulatory, and non-governmental initiatives. Nationally, the Commission is the only such entity that works closely with the public and private sectors, nonprofit organizations, and private citizens to develop workable and sustainable responses to housing and community development challenges and advocates for the implementation of those initiatives. Commission recommendations have led to homeownership for thousands of Virginians, job creation and retention in localities large and small, enhanced fire safety and building code consumer protection, and neighborhood revitalization across the Commonwealth.

### 1971 - 1987

From 1971 throughout the early 1980s, the Commission introduced numerous legislative initiatives, subsequently passed by the Virginia General Assembly, to further its goal of ensuring safe, decent affordable housing for every Virginian. Commission accomplishments during that time period include:

- establishment of a state office of housing, now the Virginia Department of Housing and Community Development
- establishment of the Virginia Housing Development Authority
- passage of the Uniform Statewide Building Code, and establishment of the State Technical Review Board and local boards of building appeals
- passage of the Virginia Residential Landlord and Tenant Act
- passage of the Virginia Mobile Home Lot Rental Act

The 1992 General Assembly approved the following Commission recommendations: comprehensive consumer protection language in the Virginia Mobile Home Lot Rental Act; a one-time right of redemption of tenancy prior to an action for eviction or unlawful detainer; expansion of the Virginia tax credit program fostering rent discounts to low-income elderly or disabled tenants; and restoration of the Virginia Housing Partnership Fund to the Virginia General Fund Budget.

In its 1993 Session, the General Assembly adopted comprehensive Commission recommendations related to the operation and management of condominium, cooperative, and property owners' associations. The Assembly also adopted the Commission's landmark legislation designed to assert the responsibility of localities to consider the affordable housing needs of a more broadly defined community, as well as its recommendations to extend the innovative state tax check-off for housing and rent reduction tax credit programs.

In 1994, the General Assembly approved Commission recommendations to ban self-help evictions in the case of all residential leases and allocate additional funding for the Virginia Homeless Intervention Program, both adopted to help prevent homelessness. In the area of blighted housing, the Assembly approved Commission recommendations which authorize localities to: acquire and rehabilitate or clear individual properties which constitute "spot blight" in a community; require the issuance of certificates of compliance with current building regulations after inspections of residential buildings, located in conservation and rehabilitation districts, where rental tenancy changes or rental property is sold; and control the growth of grass and weeds on vacant property as well as property on which buildings are located. The 1994 General Assembly also approved Commission recommendations authorizing all Virginia localities to develop affordable dwelling unit (ADU) ordinances and authorizing VHDA to issue adjustable rate mortgage loans.

In its 1995 Session, the General Assembly adopted two Commission recommendations relating to landlord-tenant law in Virginia. In response to requests by tenants seeking to make their neighborhoods more safe, the Commission initiated expedited eviction proceedings where a tenant has committed a non-remediable criminal or willful act which poses a threat to health or safety. In response to requests to help prevent eviction-related homelessness, the Commission initiated reform of Virginia removal bonds, fostering removal of eviction actions from general district to circuit court in cases not involving nonpayment of rent. The 1995 General Assembly also adopted the Commission's comprehensive package of legislation addressing blighted and deteriorated housing. These bills: address violations of the Virginia Uniform Statewide Building Code clarifying that every Virginia circuit court has jurisdiction to award injunctive relief in cases involving USBC violations and by mandating that local building departments enforce Volume II (Building Maintenance Code) of the USBC where the department finds that there may be an unsafe situation; foster local government removal of graffiti from public or private structures; assist localities to identify and locate owners of blighted properties by requiring the name and address of the owner of real property in local land book records; and authorize localities without redevelopment and housing authorities to engage in "experiments in housing," such as homesteading programs.

- promulgation of design standards to ensure accessibility by disabled persons to public buildings
- passage of numerous legislative initiatives to foster effective operation, management, and creativity of Virginia redevelopment and housing authorities
- passage of the Virginia Condominium Act
- passage of the Virginia Real Estate Cooperative Act
- passage of the Virginia Timeshare Act
- passage of legislation coordinating fire safety programs in Virginia.

1987 - 1999

Following a period of dormancy, the Housing Study Commission was reactivated in 1987. That year, the Commission proposed the creation and capitalization of the landmark Virginia Housing Partnership Fund. In 1988, at the Commission's recommendation, the General Assembly established the Fund and increased state allocations for housing programs from $400,000 to $47.5 million for the 1989-90 biennium. Other successful 1987-88 recommendations include the establishment of a Virginia income tax voluntary contribution program for housing programs, the Virginia Housing Foundation (now the Virginia Community Development Corporation), and the annual Governor's Conference on Housing (now the Virginia Housing Conference).

Commission recommendations embraced by the 1989 General Assembly include: a state low-income housing tax credit program; state authorization of such flexible zoning techniques as planned unit developments, mixed unit developments, and density bonuses; and exemption of nonprofit housing organizations from tangible personal property tax on materials purchased for the development of affordable housing.

In 1990, the General Assembly approved additional Commission initiatives, including: creation and capitalization of the landmark Indoor Plumbing Program; a state tax credit program for landlords providing rent discounts to low-income elderly or disabled tenants; a legislative mandate that localities study affordable housing needs in preparing their comprehensive plans; and legislation requiring localities to provide for the placement of double-wide manufactured housing in districts zoned primarily for agricultural purposes.

Commission recommendations passed by the 1991 General Assembly include: amendments to the Virginia Fair Housing law to ensure that Virginia law is substantially equivalent to federal law; amendments to the Virginia Residential Landlord and Tenant Act reducing the exemption for single family rental housing from ten to four units held by owners of such property (and thereby ensuring that some sixty percent of such rental units in the state are covered by the Act); and establishment of the Virginia Manufactured Housing Licensing and Transaction Recovery Fund.

The Commission's 1996 recommendations focused on expansive ("shrink-swell") soils, building code matters, and community land trusts. Its landmark legislation on soils and related building code issues was embraced by the General Assembly and set new standards in providing localities, the homebuilding industry, and homeowners a framework for addressing problem soils found statewide.

The 1997 General Assembly approved the Commission's package of legislation relating to such issues as preservation of affordable housing subsidized under federal programs and with subsidy contracts expiring; homeless children; common interest communities; and the composition of the state Board of Housing and Community Development.

The 1998 General Assembly adopted the Commission's legislation focusing on the following broad areas of study: strategies to foster installation of indoor plumbing; residential rental security deposit returns and interest rates; condemnation by public housing authorities; common interest community association issues; education and licensure issues relating to the multifamily residential housing industry; and allocations and production data for the Virginia Housing Partnership Fund.

In its 1999 Session, the General Assembly approved Commission legislative recommendations stemming from its three diverse and complex 1998 study issues: fire sprinkler systems in multifamily residential buildings; establishment of an entity to foster the preservation of affordable housing; and affordable assisted living options for Virginia's seniors. (The Commission issued some forty recommendations following its two-year comprehensive assisted living study.)

The 2000 General Assembly embraced the Commission's proposed comprehensive reorganization of the Virginia Residential Landlord and Tenant Act in a more logical and technically accurate format with clarified and updated provisions. Other Commission recommendations not requiring legislation addressed provisions of certain municipal services to homeowners by their common interest community associations and the localities in which such associations are located; carbon monoxide safety issues relating to chimneys, fireplaces, and vents for solid fuel-burning appliances; and the creation of a new foundation to preserve affordable housing in the Commonwealth.

In its first Session of the new millenium, the General Assembly unanimously adopted the Commission's eminent domain reform legislation. This comprehensive package of bills was crafted to ensure greater balance of rights and responsibilities of both local housing authorities redeveloping neighborhoods and property owners whose land, homes, and businesses lie in path of redevelopment. In addition, members of the 2001 Session adopted the Commission's bill to foster harmony, increased property values, and decreased litigation among common interest community associations through the establishment of a state liaison position within the Virginia Real Estate Board. Commission 2001 proposals to refine further various provisions of the Virginia Residential Landlord and Tenant Act were also successful, as was Commission legislation designed to clarify that the Uniform Statewide Building Code supersedes the provisions of certain local ordinances.

The 2001 General Assembly also requested the Commission's assistance in studying ten housing-related bills and resolutions. To address the same, the Commission and its Work Groups held an unprecedented 30 meetings. Commission members and the Executive Director also participated in eight of nine Regional Housing Needs Forums convened at the request of the Virginia Secretary of Commerce and Trade, and the Commission was honored for its three decades of leadership by the Virginia Housing Coalition on the occasion of the Coalition's gala Twentieth Anniversary Celebration. Members of the 2002 General Assembly subsequently adopted the Commission's 2001 comprehensive recommendations relating to common interest community association reserve funds, rural homelessness, and eminent domain.

## 2002 WORK PROGRAM

The 2002 General Assembly requested that, pursuant to Senate Joint Resolution 111, the Commission address four broad study areas: reimbursement of certain litigation-related expenses relating to eminent domain; enforcement of fair housing law; problematic formulations of new building products; and predatory lending. Commission Chairman Senator Mims assigned these issues to four Work Groups, each chaired by legislative members of the Commission.

To address the issues before them the Work Group Co-Chairs convened a total of 18 meetings. In addition, Senator Mims convened three meetings of the full Commission, including a May organizational meeting at which members received briefings from the Commission Executive Director and from the Directors of its state and federal housing and community development agency partners; a September meeting in conjunction with the Virginia Housing Conference at which Work Group Chairs presented interim study reports; and a December meeting at which, after reviewing issue papers and Work Group recommendations, Commission members present reached unanimous consensus on the recommendations published in this report.

In conjunction with legislative, public information, and study activities, the Commission responded to hundreds of inquiries regarding housing and community development policy, finance, statutory, and regulatory issues. The Commission Executive Director also met regularly with board members and key staff of the Virginia field offices of the U. S. Department of Housing and Urban Development and the U. S. Department of Agriculture/Rural Development, Department of Housing and Community Development, Virginia Housing Development Authority, Virginia Interagency Action Council for the Homeless, and Virginia Housing Coalition, as well as housing advocates, government officials, and industry representatives from around the Commonwealth. In addition to serving as a member of the Boards of Directors of the Virginia Foundation for Housing Preservation and the Preservation Alliance of Virginia, the Director also played an active role in the national housing and community development arena, serving as a member of the Board of Directors of the National Housing Conference; as Chair of the American Bar Association Forum on Affordable Housing and Community Development Law/Committee on State and Local Programs, and as a representative to the ABA Commission on Homelessness and Poverty.

## EXECUTIVE SUMMARY

Following is a brief summary of Virginia Housing Study Commission 2002 studies and recommendations to the Governor and the 2003 General Assembly of Virginia.

### Eminent Domain

The Commission concluded its study of eminent domain policy and procedure in the Commonwealth, focusing on the desirability and feasibility of reimbursement of certain litigation expenses relating to eminent domain by housing authorities and such other condemnors as the Virginia Department of Transportation and public utilities. Following a thorough review of the study issues by a Commission Work Group and its task forces, and mindful that legislation proposed to address a relatively small number of egregious cases likely would lead to increased litigation and have a significant impact on all condemnors in Virginia, the Housing Commission recommends that newly codified, Commission-initiated consumer protections be given time to work and that the subject of additional protections be revisited should the same be warranted.

### Enforcement of Fair Housing Law

The Commission study on enforcement of fair housing law in the Commonwealth focused on the importance of education and training relating to the Virginia Fair Housing Law, the complaint resolution process under the Law, the relationship among the Virginia Fair Housing Office, Real Estate Board, and Virginia Office of the Attorney General, and Uniform Statewide Building Code issues relating to building accessibility for persons with disabilities. The Housing Commission submits the following recommendations stemming from its study of fair housing enforcement issues.

- Create and capitalize a new Virginia Fair Housing Board, to be housed within the Department of Professional and Occupational Regulation and with initial funding from several Real Estate Board-related sources. The new Board, to be in place as of July 1, 2003, would be responsible for the administration and enforcement of Virginia's Fair Housing Law.

- Establish, pursuant to regulations to be promulgated by the new Fair Housing Board, an education-based certification or registration program for those subject to the Fair Housing Law involved in the renting or selling of dwellings.

- Request the Board of Housing and Community Development (HCD) to adopt, as soon as reasonably practical, the 2000 International Building Code of the International Code Commission (ICC) and coordinate HCD Building Code-related training programs in partnership with the ICC, particularly with regard to issues relating to building accessibility for persons with disabilities.

New Building Products

The Commission also concluded its study addressing failures of certain formulations of new building products in recent years and the resulting multi-millions of dollars in repair and/or replacement costs, generally borne by homeowners or their homeowners' associations, relating to such failures. The Commission noted that, while most new building products have proven durable and cost-effective, some, most recently certain formulations of "synthetic stucco," or, more specifically, the exterior insulation and finishing system (EIFS), have fallen short of their promised benefits.

The Housing Commission recommends amending Section 36-99 of the Uniform Statewide Building Code to provide the Board of Housing and Community Development additional authority to address in a more timely manner building products identified in multiple localities as problematic and detrimental to the health, safety, and welfare of citizens of the Commonwealth. Such amendment, which also would provide protections for notice and an opportunity of a hearing to the known manufacturers of and parties with an interest in products alleged to be problematic, would close the current multi-year gap between the identification of problem products and such time as they are removed from the market.

Predatory Lending

The Commission concluded its multi-year study of Homeownership Opportunities for Minorities and New Immigrants with a focus on predatory lending. As part of such study the Commission also focused on a legislatively-requested review of issues relating to rent-to-own contracts.

The Commission noted that while there is no real definition of predatory lending, there are many indicators of lending that is predatory. Such indicators include: misleading borrowers about loan terms and costs, steering a borrower to higher cost loan products when the borrower could qualify for a lower cost loan, and disregarding a borrower's ability to repay a loan. Predatory lending practices, which typically involve victims who are elderly, female African-Americans with substantial home equity, often result in a stripping of equity from or foreclosure for the individual victims and, when such practices involve a larger community, depressed property values and community disinvestment.

The Housing Commission submits the following recommendations to address the widespread abuses of predatory lending.

- Amend Section 6.1-411 of the Virginia Mortgage Lender and Broker Act (VMLBA) to exempt fewer small lenders from the provisions of the Act. Currently lenders making ten or fewer mortgage loans annually are exempt while the Commission recommendation would exempt those making three or fewer such loans.

- Amend VMLBA Section 6.1-422.1 to strengthen existing state law relating to loan "flipping," in which borrowers receive repeated financings that due to unreasonable fees, terms, or rates, tend to benefit only the lender. The recommended amendment would list six factors to be considered in determining whether a refinancing is in a borrower's best interest.

- Amend VMLBA Section 6.1-422.1 to clarify that no mortgage broker shall knowingly or intentionally flip a loan. Currently mortgage lenders are prohibited from flipping but the Act is silent on the issue of brokers.

- Amend VMLBA Section 6.1-422.1 to clarify that the Attorney General, the State Corporation Commission, or a party to a mortgage loan may enforce not only the VMLBA loan flipping provisions but also the Act's provisions relating to certain other predatory lending practices.

- Amend VMLBA Section 6.1-425 to provide the State Corporation Commission with tools to identify the "bad apples" of the mortgage lending and brokerage industry and prevent them from continuing to victimize borrowers.

In its review of rent-to-own contract issues, the Commission noted that, while such contracts can provide an important opportunity for homeownership for persons unable to access credit in the traditional marketplace, used by unscrupulous sellers they can also be tools for predation on the unsophisticated buyer. The Commission was advised of scenarios involving such contracts in which a buyer could agree to purchase property for an agreed-upon price with a regular monthly payment for a term of years, after which term the deed would transfer to the buyer, but in which the buyer could lose all equity near the end of the contract period as a result of one late payment after regular payments for the duration of the contract. Where the property requires extensive repairs, the cost of such repairs could exceed its fair market value and the ability of the buyer to afford them, leaving the buyer facing not only property condemnation but also loss of equity accrued and loss of housing.

In attempting to address rent-to-own contract abuses, the Commission discussed at length a proposed amendment to Section 55-248.52 of the Virginia Landlord-Tenant law. Such amendment would define rent-to-own contracts and require that, prior to execution of the contract, the local building official of the jurisdiction in which the subject property is located inspect the premises for compliance with the Uniform Statewide Building Code and provide the buyer a copy of the inspection report. The Housing Commission took no action on the proposed amendment, but encouraged interested parties to reach a compromise on the same. Such subsequent efforts were unsuccessful.

## EMINENT DOMAIN

Issue

In concluding its multi-year study of eminent domain policy and procedures by local housing authorities, and following subsequent successful legislative recommendations relating to the same, the Virginia Housing Commission in 2001 agreed to address the desirability and feasibility of reimbursement of certain litigation expenses relating to eminent domain by housing authorities and by such other condemnors as the Virginia Department of Transportation (VDOT) and public utilities. Commission Chairman Senator Bill Mims requested that Delegates Thelma Drake and Jackie Stump co-chair the study, to which he also appointed representatives of local housing authorities, the homebuilding and realty industries, small business, VDOT, and electric power and natural gas utilities.

The rationale for the study stemmed from arguments advanced by advocates for property owners that, where owners resort to litigation to resolve a price offer by a condemning authority, and where the court awards an amount substantially greater than that made by the authority, the plaintiff property owner still suffers a loss on the value of the property given fees of accountants, appraisers, attorneys, and other experts incurred by the owner in building the case for the value of the property. Commission members had also noted that, despite the fact that local redevelopment projects, new roads, and enhanced utility capacity exist for the common good, it is important that appropriate protections are in place to ensure equitable remuneration for those Virginians whose property is situated in the path of such projects.

Deliberations

Delegates Drake and Stump convened one Work Group meeting, at which members focused primarily on a review of the policies of other jurisdictions relating to reimbursement of certain litigation-related expenses, most notably the State of Florida. In that jurisdiction, which was one of the first to initiate fee reimbursements, the condemnor is required to pay reasonable appraisal fees as well as attorneys' fees based solely on the benefit received by the client (i.e., the difference between the final judgment and the last offer made by the condemnor before retention of the attorney or, if no such offer were made, the first offer after retention of the attorney). The Florida fee equates to 33 percent of the benefit up to $250,000, 25 percent of the benefit from $250,000 to $1.0 million, and 20 percent of the benefit over $1.0 million. Some Work Group members proposed Virginia reimbursement of costs and fees where the client benefit exceeds at least 25 percent of the first written offer by the condemnor.

Most Work Group members representing condemnors expressed concerns that such reimbursement would tend to increase not only litigation *per se* but also settlement agreement amounts and the initial price offer made to a property owner. Work Group members representing property owners countered that the process currently in place is unconstitutional in that it fails to "make whole" property owners whose land, business, or residence is being condemned, and that a few should not suffer for the good of many.

Advocates for property owners were also critical of the mass appraisal approach, in which a condemnor may import an appraiser from another region to appraise multiple properties, without knowledge of the local property market or consideration for special features of individual properties. In such circumstances, according to advocates, property owners frequently must engage expert counsel to assist them in making their case for a fair price offer from the condemnor.

Prior to meeting adjournment, the Commission Executive Director was requested to solicit additional information on point from the National Council of State Legislatures (NCSL), the American Legislative Exchange Council (ALEC), and the Institute for Justice. Delegates Drake and Stump appointed two task forces to address 1) the adequacy and 2) the constitutional equity of the eminent domain process in the Commonwealth. Each task force, co-chaired by Delegates Drake and Stump, met once.

*Task Force on Process Adequacy*

The meeting began with an overview of the eminent domain process from the perspective and practice of an electric utility company, a natural gas utility company, VDOT, and local redevelopment and housing authorities. All representatives of such industries and agencies stressed the desire of the same to acquire property interests by mutual agreement of the parties rather than by litigation. Further, all such representatives stated that, of tens of thousands of Virginia eminent domain cases, only a small percentage of the same actually proceed to trial. Rather, the vast majority tend to be settled by mutual agreement following a price offer by the condemnor or settled in pre-trial deliberations.

Task force members discussed several alternatives that would lend additional protections to those property owners in an adversarial relationship with a condemnor. Such options included: i) an intermediary meeting of the parties prior to the pre-trial settlement negotiations, ii) a Commonwealth of Virginia liaison to provide additional information on rights and responsibilities to condemnees, on their request, iii) required reimbursement of condemnees for the cost of a property appraisal independent of that provided by the condemnor, and iv) independent panels of appraisers to review the appraisal submitted to the condemnee by the condemnor. Interested task force members were requested to provide information, as available, from other jurisdictions and proposed draft language for discussion and review by the full task force. However, such material proved subsequently unavailable. Similarly, despite repeated information requests by the Commission Executive Director of NCSL and ALEC, and her extensive literature search, limited available information provided little new insight on issues on point.

*Task Force on Constitutional Equity*

Building on the information provided by members of the companion task force regarding the small number of condemnation cases that actually proceed to trial, task force members began by focusing on concerns that mandatory reimbursement of litigation expenses, no matter how minimal nor how high the threshold for the same, could trigger an increase in litigation. Concerns were expressed that, in turn, such increased expenses on the part of

condemnors could have a chilling effect on an already-distressed Virginia economy, particularly as such expenses could effect transportation projects already jeopardized by drastically reduced resources.

It was observed that, while some three to ten percent of Virginia condemnation cases go to trial, in Florida (the eminent domain statute of which state was discussed by the full Work Group, as noted above) that figure is about 42 percent. Further, a VDOT representative provided "a cautionary document," prepared by the Florida equivalent of the Virginia Joint Legislative Audit and Review Commission (JLARC), setting forth an overview of expenses and delays resulting from the Florida litigation reimbursement approach.

Prior to adjournment, the task force discussion came full circle as members focused on the enhanced equities for property owners codified in recent years as a result of the work of the Housing Commission. The overwhelming majority of members pointed out that it would be inadvisable to initiate legislation designed to address a relatively small number of egregious cases but that, based on the experience of at least two other jurisdictions (Florida and California), likely would have a significant impact on all condemnors in the Commonwealth. The overwhelming majority also urged that the Commission-led protections now in place be allowed to work and, if at such time it appears that additional protections are needed, then the subject could reasonably be revisited.

Recommendation

Following the above-described thorough review of the study issues by the Work Group and its task forces, the recommendation that newly codified consumer protections be given time to work and that the subject of additional protections be revisited should the same be warranted was presented to and subsequently adopted by the Housing Commission.

## ENFORCEMENT OF FAIR HOUSING LAW

### Issue

The Virginia Housing Commission agreed to undertake a 2002 study of enforcement of the Virginia Fair Housing Act following a presentation at its 2001 legislative meeting by Ms. Constance Chamberlin, Executive Director of the Richmond-based nonprofit housing counseling and referral agency, Housing Opportunities Made Equal (HOME). Ms. Chamberlin summarized HOME's findings, through testing, of housing barriers that exist for African-Americans and disabled persons in Hampton Roads and in the Roanoke/ Lynchburg/Charlottesville/Fredericksburg markets. Hampton Roads and Roanoke Valley tests, for example, revealed a 96 percent and an 84 percent noncompliance rate, respectively, relating to accessibility for disabled persons. White testers were favored 60 percent of the time over African American testers in Hampton Roads and 44 percent more often in the Roanoke Valley. Commission Chairman Senator Bill Mims and Delegate Terrie Suit served as Co-Chairs of the Fair Housing Enforcement Work Group, to which Senator Mims also appointed representatives of the realty and homebuilding industries, community associations, local governments, the disabilities community, and key state government agencies, as well as advocates for consumers.

### Deliberations

Senator Mims and Delegate Suit convened three meetings of the Work Group. The first two meetings served primarily as opportunities for Work Group members to gather information that served as a basis for their deliberations and recommendations crafted at their third meeting.

*Background*

The Virginia Fair Housing Law is administered and enforced by the Real Estate Board, with staff assistance from the Fair Housing Office, both of which are housed at the Virginia Department of Professional and Occupational Regulation (DPOR). The Virginia Law is "substantially equivalent" to the federal Fair Housing Law, administered and enforced by the U.S. Department of Housing and Urban Development (HUD), and as such the Virginia Law is administered under a funding contract with HUD, which agency also approves Virginia's Fair Housing Law independent administering status.

At the Work Group's first meeting, three DPOR officials reviewed DPOR's relationship with the Virginia Office of the Attorney General -- the prosecutorial authority for the Law -- in administering the Law. Ms. Louise F. Ware, DPOR Director, Mr. James L. Guffey, DPOR Deputy Director for Enforcement, and Ms. Lizbeth Hayes, DPOR Investigative Supervisor, discussed the administrative process of the Law step-by-step, from filing of a complaint to closure of a case.

(Never in the course of the Housing Commission study was any suggestion made or concern advanced that enforcement problems might lie with the DPOR staff. A recent $150,000

grant from HUD to DPOR for additional fair housing training only underscores the knowledge and professionalism of the DPOR staff. Rather, concerns were advanced by several presenters during the course of the study regarding the complaint resolution process generally.)

The DPOR officials explained that complaints submitted under the Fair Housing Law currently are heard by the Virginia Real Estate Board, which is comprised largely of real estate professionals and which has responsibility for governing the more than 50,000 real estate licensees in the Commonwealth. The officials pointed out, however, that the Law covers a far more broad scope of activities than real estate transactions governed by licensure-related provisions. Also included within its purview are issues relating to the residential property management, mortgage lending, and property casualty industries, manufactured home parks, local governments, architects, and contractors, among others.

Following the overview of the Fair Housing Law by Ms. Ware, Mr. Guffey, and Ms. Hayes, HOME's Ms. Chamberlin provided Work Group members with a reprise of her previously referenced December 2001 presentation to the Housing Commission.

Mr. Jack A. Proctor, Deputy Director for Building Code Administration of the Virginia Department of Housing and Community Development (HCD), followed Ms. Chamberlin with an overview of the relationship among Virginia's Uniform Statewide Building Code and Fair Housing laws. Mr. Proctor advised that a new International Code Council (ICC) building code, with important provisions relating to building accessibility for persons with disabilities, is expected to be adopted by the Virginia HCD Board in July 2003. Senator Mims requested that Work Group member Mr. William D. Dupler, Chesterfield County Building Official, provide the Work Group with such other information regarding the new code as needed further to address the issue.

Susan Scovill, Esquire, HOME's Director of Fair Housing, next provided the Work Group with an overview of the 1998 Review of the Virginia Fair Housing Office by the Joint Legislative Audit and Review Commission (JLARC). Ms. Scovill noted that most of the recommendations advanced in the JLARC report have been addressed by DPOR. Work Group members agreed that the few that have not been addressed could serve as discussion points, with collaboration from DPOR representatives, at their future meetings. Those recommendations include:

- closer cooperation between DPOR and the Office of the Attorney General
- additional training and public education relating to the Fair Housing Law
- the possibility of establishing a state quasi-judicial forum for adjudication of fair housing complaints
- additional fair housing testing.

*Comparison of Fair Housing Law Enforcement Processes In Virginia and Other Jurisdictions*

The second meeting of the Work Group began with a report from Sara K. Pratt, Esquire, a national fair housing consultant with broad experience in state agencies as well as HUD. Ms. Pratt, who reviewed for Work Group members fair housing enforcement procedures and financing in other jurisdictions, provided those present a wealth of information. Of particular interest to Work Group members was Ms. Pratt's observation to the effect that Virginia is the only jurisdiction where the state Fair Housing Office is attached to a regulatory board. Ms. Pratt recommended closer cooperation between DPOR and the Office of the Attorney General in administering the Fair Housing Law.

The Honorable John G. (Chip) Dicks, III, Esquire, an attorney with extensive background in fair housing issues and a former Housing Commission legislative member, next briefed the Work Group on fair housing education and training opportunities. Mr. Dicks noted that real estate licensees regulated by the Virginia Real Estate Board generally receive substantial training on a host of real estate-related issues, including Fair Housing Law provisions. In contrast, he noted, in addition to the fact that most real estate leasing personnel are not real estate licensees, and thus are not regulated, there is high turnover in the leasing portion of the industry, resulting in education and training challenges for leasing agents. (Mr. Dicks pointed out that real estate licensees were not directly associated with those properties where the HOME Fair Housing Law compliance testing that became the genesis for the Housing Commission study was undertaken.) Mr. Dicks also suggested the need for additional training for real property maintenance personnel. Finally, Mr. Dicks observed that "fair housing is about everyone -- we are all protected by the Law."

Ms. Wanda Nieves, HUD Philadelphia Hub Director, next presented recommendations relating to fair housing enforcement in the Commonwealth. Ms. Nieves expressed concerns regarding Virginia testing of its own Law as well as perceptions regarding the need for closer cooperation between DPOR and the Office of the Attorney General. Ms. Lauretta Dixon with HUD headquarters underscored Ms. Nieves' remarks. Senator Mims requested from the HUD officials copies of all complaint letters and records they had received relating to enforcement of the Virginia Law, which information Ms. Nieves subsequently provided.

The final presenter at the meeting, HOME's Ms. Chamberlin, made the following recommendations to increase the effectiveness of Virginia's Law.

- o Create a Fair Housing Board within DPOR to administer and enforce the Law, and have the Fair Housing Office report to that Board rather than the Real Estate Board as is currently the procedure.

- o Provide in-house counsel for the Fair Housing Office.

- o Create an Administrative Law Judge process to provide an alternative to the court system for final rulings and remedies relating to fair housing issues.

Recommendations

At its final meeting, the Work Group considered a host of possible recommendations relating to procedure, education and training, the Virginia Uniform Statewide Building Code (USBC), and availability of affordable, accessible housing.

*Virginia Fair Housing Board*

As previously noted, complaints filed pursuant to the Virginia Fair Housing Law currently are heard by the Virginia Real Estate Board, which is charged with the regulation of the Commonwealth's more than 50,000 real estate licensees and most of whose members are real estate industry professionals. However, also as previously noted, the Fair Housing Law encompasses a far broader scope than real estate transactions governed by licensure provisions.

Given concerns expressed regarding the enforcement of Virginia's Fair Housing Law by a variety of members and presenters throughout Work Group discussions, and given optimism that the Law could be even more effectively administered, those Work Group members present recommended by consensus creation of a new Virginia Fair Housing Board. Although Work Group members generally sketched the purpose, composition, authority, responsibilities, and funding sources for such Board, Senator Mims requested that DPOR Director Ms. Ware provide an outline of her agency's proposed recommendations pursuant to the same. Much of the information provided in Ms. Ware's prompt and thorough response served as the basis for the unanimous recommendation of Housing Commission members present at the Commission's legislative meeting for the creation and capitalization of a new Virginia Fair Housing Board, as outlined below.

The Fair Housing Board, to be in place as of July 1, 2003, would be housed at DPOR and would have responsibility for the administration and enforcement of Virginia's Fair Housing Law. In addition, the new Board would establish, by regulation, an education-based certification or registration program for persons subject to the Fair Housing Law who are involved in the selling or renting of dwellings. Board membership would be comprised not only of licensed real estate professionals but also representatives of the disability community, the property management, mortgage lending, and property casualty insurance industries, consumer advocates, and others.

According to Virginia Fair Housing Office Director Mr. John P. Cancelleri, state records during a recent five-year period indicate that only about five percent of all fair housing complaints in Virginia relate to licensed real estate professionals. The other 95 percent of complaints relate to others (e.g., non-licensed real estate professionals and manufactured home parks). Hence, real estate licensees or their agents or employees would continue to be licensed and regulated by the Real Estate Board. However, it is anticipated that the Real Estate Board and the Fair Housing Board would share staff and other resources, coordinate educational requirements and the adoption of regulations for their respective regulants, and otherwise provide for the consistent application of fair housing law.

Funding for the Fair Housing Board would be provided by the Real Estate Board until the new Board is funded through the implementation of the fair housing education-based certification or registration program. Real Estate Board funding sources would include: 1) ongoing allocations from the state contract with HUD to administer the Fair Housing Law, 2) revenue generated from the certification/registration program, and 3) a portion of licensure fees paid to DPOR by professionals in related fields (e.g., real estate, architecture, and contracting), with the largest percentage of such revenues generated by real estate licensure fees.

*Office of the Attorney General*

The Work Group discussed at length the relationship among the Virginia Fair Housing Office, Real Estate Board, and Office of the Attorney General pursuant to prosecution of Fair Housing Law complaints. Currently, an attorney with the Attorney General's Office, assigned part-time to the Fair Housing Office, makes decisions regarding prosecution of such complaints and also largely handles such prosecutions. As noted, frustration was voiced at Work Group meetings regarding the relatively few such cases prosecuted. Such concerns were strongly rebutted by representatives of the Attorney General. Also as noted, suggestions were made for closer cooperation between the Attorney General's Office and the Fair Housing Office pursuant to Fair Housing Law enforcement. Work Group members debated the desirability of several such suggestions, as follows:

1) providing for in-house Fair Housing Office counsel, provided by the Attorney General's Office

2) providing for in-house Fair Housing Office counsel, provided by an attorney other than a representative of the Attorney General's Office

3) apprising the Attorney General of concerns raised on the issues and requesting that he address the same.

No consensus on the issue was reached by Work Group members present and, accordingly, Housing Commission members present at the Commission's legislative meeting took no action on the same.

*Uniform Statewide Building Code*

As requested by Senator Mims during the first Work Group meeting, Work Group member Mr. William D. Dupler, Chesterfield County Building Official and representative of the Virginia Association of Building Code Officials, provided members additional information on certain fair housing-related Building Code matters. Mr. Dupler reiterated the information provided by DHCD Deputy Director Mr. Jack Proctor to the effect that the HCD Board, the USBC administering agency, is poised to adopt the International Code Commission's (ICC's) 2000 International Building Code, which code includes important provisions relating to building accessibility for persons with disabilities. Mr. Dupler recommended, and Work Group members present unanimously agreed, that the Housing

Commission should be requested to consider recommending that the HCD Board not only adopt such code provisions as soon as reasonably practical, but also that the HCD Board coordinate its training programs in partnership with the ICC, particularly with regard to accessibility issues. Such coordination, Mr. Dupler advised, could serve to improve the uniform understanding and consistency of code enforcement throughout the Commonwealth. Accordingly, Housing Commission members present at the Commission's legislative meeting adopted the Work Group's recommendations relating to the Building Code.

## NEW BUILDING PRODUCTS

### Issue

The Virginia Housing Commission 2002 study of new building products concluded the work of the Commission on point in 2001. Specifically, the Commission was legislatively charged with determining the feasibility and desirability of requiring warranties or other forms of consumer protection for new building products introduced into the housing market.

Over the last two decades, many new and innovative building products have been introduced into housing construction. While most have been durable and cost-effective, some (such as fire-retardant treated plywood, polybutelene pipe, and "synthetic stucco," i.e., exterior insulation and finishing system (EIFS)), have fallen short of their promised benefits. The failure of certain formulations of such products has resulted in multi-millions of dollars in damages paid for repairs and/or replacements by individual homeowners and/or their homeowners' associations. Potential financial recovery by homeowners is complicated by the fact that product manufacturers tend to blame builders for improper installation, builders tend to blame manufacturers for product defects, and the homeowner tends to be blamed by both manufacturer and builder for improper maintenance. These complex issues were the genesis of the Commission study.

Commission Chairman Senator Bill Mims requested that Delegate G. Glenn Oder chair the Commission New Building Products Work Group, to which he also appointed representatives of the homebuilding, design and construction, realty, insurance, and manufacturing industries, consumer advocates, building officials, and key Commonwealth of Virginia government agencies.

### Deliberations

Delegate Oder convened two meetings of the Work Group. At the first meeting, members reviewed key issues identified for further discussion by last year's Work Group. Those issues included the following:

- private building inspectors independent of, but in addition to, the current local government building officials system
- Virginia Uniform Commercial Code amendments separating goods from the structures in which they are incorporated
- required insurance for builders
- required disclosure to homebuyers of the presence of EIFS in a home
- additional consumer protections under homeowner warranty programs
- changes to certain Virginia statutes of limitation and statutes of repose

- issues relating to damages recovery by homeowners living in communities governed by community associations, and particularly in situations where the exterior of individual homes is controlled by the association

- additional authority for the Virginia Board of Housing and Community Development (HCD) to address building products, or formulations of certain such products, identified as problematic.

During the course of discussions, several representatives of builders and manufacturers called for "balance" among consumer protection, market innovation, and affordable housing opportunities. Delegate Drake and others in turn noted that, often, a time gap exists between the point at which problems may present and the point at which the statutes of limitation or repose bar claims for such problems. Delegate Drake observed that "homeowners are caught with no recourse." It was also pointed out that, while balance is important, the playing field is now tilted against recovery. An attorney representing one EIFS manufacturer stated that the product carries with it a seven-year repair and replacement warranty. Delegate Drake responded that, while the repair and replacement warranty is important, it does not address the collateral damage that can result where certain product formulations fail.

To facilitate the deliberative process, Delegate Oder appointed three task forces to address the aforementioned issues identified by the 2001 Work Group and re-affirmed by the 2002 Work Group at its first meeting as ripe for discussion. Delegate Drake chaired the task forces addressing 1) statutes of limitation and repose and Uniform Commercial Code issues and 2) warranties, insurance, and bonds. Delegate Jackie Stump chaired the task force addressing additional authority for the Board of Housing and Community Development. Reports of the task force meetings, as summarized below, subsequently were presented to the Work Group.

*Task Force on Statutes of Limitation and Uniform Commercial Code (UCC)*

Task force Chair Delegate Drake opened the meeting by reiterating concerns that, in certain situations of which she is personally aware, problems with building products have presented after the tolling of the applicable statutes of limitation and that, further, the UCC provisions tend to preclude a hearing on the issues. Task force members fully discussed current applicable such statutes, focusing on: the two-year window for discovery of defects and the one-year window following discovery for filing a related cause of action, the five-year window for new home foundations, and the four-year window pursuant to liability under the UCC. Members also focused on legal strategies available to aggrieved homeowners seeking recovery, the possible extension of the five-year window for new home foundations to the "structure," and differing judicial interpretations under the UCC relating to loss of the identity of "goods" upon their integration into the "structure." Housing Commission member Delegate Brad Marrs summarized the deliberations in noting that, although a number of alternatives were raised, there was no consensus in favor of any one proposal.

*Task Force on Warranties, Insurance, and Bonds*

Task force Chair Delegate Drake opened the meeting by suggesting the possibility that new home warranty provisions be expanded to cover products purchasers now presume already are warrantied. Representatives of building product manufacturers pointed out that manufacturers are not actually installing their own products, and thus manufacturers could unfairly be held liable, under such a proposal, for damages where their products have not been correctly installed by builders or maintained by homeowners. Representatives of the insurance industry and the Virginia State Corporation Commission (SCC) also noted that an extended warranty policy would effect only those companies licensed to offer such policies in the Commonwealth, and not the many companies operating in Virginia but licensed elsewhere. Representatives of the realty industry suggested that the issue revolves around what a consumer should realistically expect in new home warranties, while representatives of the homebulding industry stated that many states have eliminated mandatory warranty extensions.

Concerns were expressed that, as homebuying opportunities become increasingly available to new immigrants and less sophisticated buyers, it may be appropriate to provide in the contract for purchase of new homes disclaimer/disclosure language relating to state Building Code protections and the availability of optional home inspections by private sector inspectors. Draft legislative language for such disclaimer/disclosure subsequently was considered by the full Work Group but was not adopted given recognition of the fact that the home inspection industry is currently unregulated by the Commonwealth of Virginia.

*Task Force on Additional Authority*
*For the Virginia Board of Housing and Community Development (HCD)*

Task force Chair Delegate Jackie Stump opened the meeting by stating that members should determine how best to provide the Virginia HCD Board with requisite additional authority to address in a more timely manner building products identified as problematic and detrimental to the health, safety, and welfare of citizens of the Commonwealth. Delegate Stump noted that while such authority currently is provided under the Uniform Statewide Building Code (USBC), a lag time of several years may pass between the identification of problem products and such time as they are removed from the market. The task force unanimously recommended to the Work Group draft language to close that gap in the interest of consumer protection while also providing protections for notice and an opportunity of a hearing to the known manufacturers of and parties with an interest in products alleged to be problematic. Work Group members present in turn refined the draft and unanimously recommended it for the consideration of the Housing Commission.

Recommendation

In sum, the language proposed by the Work Group, and subsequently adopted unanimously by Housing Commission members present at the Commission's legislative meeting, would amend USBC Section 36-99 to provide that the HCD Board, upon its finding that sufficient allegations exist regarding failures in multiple localities of performance standards by either

building materials, methods, or designs, is authorized to conduct hearings on such allegations if the Board determines that such alleged failures, if proven, would have an adverse impact on the health, safety, and welfare of citizens of the Commonwealth. Further, following such findings and after not less than 21 days written notice of a hearing and opportunity to be heard to the known manufacturers of the subject building material and as many other interested parties, industry representatives, and trade groups as reasonably can be identified, shall convene a hearing to consider such allegations.

Following such hearing, the Board, upon a finding that (i) the current technical or administrative Code provisions allow use of or result in defective or deficient building materials, methods, or designs, and (ii) immediate action is necessary to protect the health, safety, and welfare of citizens of the Commonwealth, may issue amended regulations establishing interim performance standards and Building Code provisions for the installation, application, and use of such building materials, methods, or designs within the Commonwealth, which standards shall become effective upon their publication in the Virginia Register of Regulations.

## PREDATORY LENDING and RENT-TO-OWN CONTRACTS

Issue

Predatory lending was identified by the Virginia Housing Commission in 2001 as the concluding focus of the Commission's study of Homeownership Opportunities for Minorities and New Immigrants. The Commission observed that, while the current lending climate (with its historically low interest rates) and myriad loan products serve to increase purchasing options for minorities and new immigrants, opportunities may exist for Commission recommendations designed to foster their homeownership retention.

In response to a well publicized condemnation case, involving a rent-to-own contract, in his home district of Lynchburg, Delegate L. Preston Bryant, Jr., introduced House Bill 1122 relating to rent-to-own contracts in the 2002 Session of the Virginia General Assembly. The bill was referred to the Housing Commission in the context of the Commission's Predatory Lending study.

Commission Chairman Senator Bill Mims requested that Senator Mary Margaret Whipple and Delegate Bradley P. Marrs co-chair the Commission Predatory Lending/Rent-To-Own Contracts Work Group, to which he also appointed representatives of mortgage lending, initiation, and brokerage concerns, as well as representatives of the secondary mortgage market, realty and homebuilding industries, local governments, nonprofit housing developers, consumer and fair housing advocacy organizations, and the State Corporation Commission's Bureau of Financial Institutions.

Deliberations

Senator Whipple and Delegate Marrs convened four meetings of the Work Group.

***Predatory Lending***

At the first meeting, Susan Scovill, Esquire, Director of Fair Housing at Richmond-based Housing Opportunities Made Equal (HOME), Inc., a nonprofit housing counseling and referral entity, reviewed key terms and broad issues relating to predatory lending. Ms. Scovill noted that, while there are many indicators of lending that is predatory, there is no real definition of the activity. Examples of lending predation include:

- misleading borrowers about loan terms and costs
- inadequate disclosure of the same
- steering a borrower to higher cost loan products when the borrower could qualify for a lower cost loan
- residential mortgages connected to home improvement scams

- o disregard of a borrower's ability to repay the loan
- o excessive prepayment penalties
- o single premium, declining coverage insurance (in some cases)
- o refusal to provide loan pay-off information related to refinancings.

Ms. Scovill also pointed out that predatory lending occurs most often in neighborhoods with large minority populations where traditional credit is often unavailable to poor and unsophisticated borrowers who may have below-average credit histories. Predatory lending victims tend to be elderly, female, African-Americans with substantial equity in their homes. In the course of predatory lending, which typically involves a refinancing or home equity loan, these homeowners often face loss of home equity or the home itself, and/or bankruptcy. The effect of predatory lending, compounded, on the larger neighborhood and community (whether inner city, small town, or rural community) can be depressed property values and community disinvestment.

Following Ms. Scovill's review, the Work Group received from several associates at the Durham, North Carolina-based nonprofit lender, Self-Help, Inc., an update on statistics and responses relating to predatory lending. Self-Help representatives had assisted the Homeownership Opportunities 2001 Work Group and their ongoing participation in the predatory lending study had been requested by several Commission legislative members. Self-Help presenters were: Ms. Janneke Ratcliffe, Program Director, Secondary Markets; and Reginald J. Johnson, Esquire, and Keith Ernst, Esquire, counsel with the organization. With assets in excess of $800 million, Self-Help has, since 1980, provided $1.7 billion in home and small business financing to over 24,000 low-wealth borrowers.

Underscoring Ms. Scovill's concerns regarding the loss of home equity that often results from predatory loans, Ms. Ratcliffe pointed out that home equity comprises over 60 percent of the net worth of minority and low-income families. Equity accumulation allows families to send their children to college, to weather illness or unemployment, and to supplement other savings in retirement.

Mr. Johnson rebutted numerous concerns regarding enactment of policies to address predatory lending. Following are several such concerns and rebuttals.

- o More disclosure will solve the problem.
(Disclosures are often lost in the blizzard of last-minute, trunk-of-a-car closings.)
- o Better enforcement of existing laws will solve the problem.
(Many predatory lending practices are completely legal.)
- o Consumer education will solve the problem.

(While education is important, chances are it cannot address the many "creative" predatory lending practices that continue to emerge.)

- o Federal law preempts state law and will solve the problem. (Federal law may preempt state law relating to some practices in some cases.)

Mr. Ernst summarized for Work Group members lessons learned from other jurisdictions that have enacted anti-predatory lending laws. (Several such states, including North Carolina, did not provide consumer protections currently provided in Virginia prior to codifying their own protections. However, several such jurisdictions, including North Carolina and Georgia, subsequently enacted multiple protections for which there are no analogous protections under Virginia law.) Mr. Ernst's suggestions for Virginia include:

- o Address a full range of issues (such as those outlined by Ms. Scovill).
- o Include all loan types and participants.
- o Provide meaningful remedies.
- o Ensure that responsible lenders are not hampered in their efforts to meet the needs of lower-income borrowers.

Mr. Ernst then reviewed key provisions of the Model Home Loan Act jointly developed by Self-Help's Center for Responsible Lending, the American Association of Retired Persons (AARP), and the National Consumer Law Center, Washington, DC. (To the best of the knowledge of the Commission Executive Director, such draft is the only model statute relating to predatory lending.) Mr. Ernst's commentary focused on five major areas: definitions, protections in all home loans, protections in high-cost home loans, borrowers' remedies and recourse, and lenders' rights to correct errors.

Work Group discussion following Mr. Ernst's presentation clarified that some provisions in the Model Statute already exist in Virginia law. However, there was conflicting understanding as to the covered parties. For example, in some cases regulations applied to mortgage loan lenders and brokers, but not originators, and, in other cases, to some but not all lenders and brokers. It was determined that a comparative analysis should be compiled providing key provisions of the Model, North Carolina, and Georgia statutes.

The chart was, in fact, compiled by Self-Help associates and provided to the Commission Executive Director for review by key officials at the Virginia State Corporation Commission (SCC) Bureau of Financial Institutions (BFI). In lengthy discussion sessions with the Commission Executive Director and several Work Group members, Ms. Susan E. Hancock, BFI Deputy Commissioner, summarized analogous Virginia statutory provisions and also noted those provisions for which no analogous provisions exist under Virginia statutory law.

At the Work Group's second meeting, Mr. David R. Jeffers, Director of the Fannie Mae Northern Virginia Partnership Office, began the discussion with a briefing on Fannie Mae efforts to combat predatory lending. Mr. Jeffers, who characterized predatory lending as "a very big problem caused by a few bad actors," suggested a three-point approach to such predation: 1) education, 2) alternative products that lower loan costs, and 3) strong regulations and statutes to protect consumers.

Mr. Ernst of Self-Help then briefed members on the Predatory Lending panel presentation at the July annual meeting of the National Conference of State Legislatures. He noted that several states in addition to Georgia and North Carolina -- notably Colorado, Ohio, and Pennsylvania -- are addressing predatory lending.

Mr. E. Joseph Face, Jr., Commissioner of the SCC Bureau of Financial Institutions (BFA), next provided Work Group members his observations regarding the Commonwealth's responses to predatory lending. Mr. Face noted that, while "we have a strong [Mortgage Lender and Broker] Act (MLBA) in Virginia, we could make it even stronger." In response to queries from some Work Group members asking for identification of the "bad actors," Mr. Face stated, "They're all shapes and sizes...they run the gamut." He further suggested that it could be helpful to "bring more people under the MLBA umbrella" and noted that mortgage originators are not currently licensed. In response, some Work Group members expressed concern that "bad actors" would not necessarily be affected by additional regulations, while "good actors" would be subject to unnecessary regulations.

Following Mr. Face's remarks, Ms. Hancock provided an overview of the comparative analysis chart, previously referenced, of Virginia, Georgia, and North Carolina predatory lending laws, as well as those included in the Model Act. Ms. Hancock reviewed many such provisions in detail during deliberations of the Work Group at its third meeting. Her review and related discussion continued for the duration of the third meeting of the Group.

Key provisions reviewed include: calculation of annual percentage rate; definitions of *bona fide* discount points, creditor, home loan, and high points and fees, together with thresholds for the latter; financing of single premium credit insurance; encouraging a borrower to default on another loan obligation; "flipping," in which practice borrowers repeatedly finance (or refinance) to the benefit of only the lender; access to account balance information and protections for unreasonable late fees; financing of points and fees; unreasonable prepayment penalties; balloon payments; negative amortization; penalty interest rates; and numerous other practices that, when utilized by sophisticated borrowers, can work to their benefit but, when utilized by unscrupulous lenders or brokers, generally work only to the benefit of the same.

Recommendations

Prior to adjournment of the Work Group's third meeting, Senator Whipple requested that all members identify and submit to the Commission Executive Director three major policy areas where additional consumer protections are most needed and where such protections would most benefit consumers. Following are such policy areas, identified in descending

order of number of responses, the Work Group addressed and for which it crafted recommendations for consideration of the Housing Commission:

- flipping of borrowers
- barring "bad apples"
- banning single premium credit, health, or life insurance
- addressing deceptive mortgage lending/brokering practices
- providing a private cause of action
- regulating activities of small, private lenders
- requesting the SCC's Bureau of Financial Institutions to exercise more fully its current predatory lending-related regulatory authority.

*Flipping of Borrowers*

Flipping occurs when borrowers receive frequently repeated financings that, due to unreasonable fees, terms, or rates, tend to benefit only the lender. While the Virginia Mortgage Lender and Broker Act (VMLBA) Section 6.1-422.1 prohibits lenders from knowingly or intentionally flipping a borrower, Work Group members noted that current language in that section could be amended to strengthen consumer protections. Some Work Group members expressed concerns that because the flipping statute is codified under the VMLBA, neither banks and their affiliates nor non-state regulated entities are so regulated, thus creating an uneven industry playing field. However, prevailing sentiment held that, despite such concerns, flipping is a widespread mortgage lending abuse and, as such, should be addressed, even if specific consumer protections do not apply to lenders across-the-board.

Following is a proposed VMLBA amendment unanimously recommended by Work Group members present and, subsequently, Housing Commission members present at the Commission's legislative meeting. Such language would tighten existing state law relating to flipping by listing six factors to be considered in determining whether refinancing is in a borrower's best interest. In addition, the language would clarify that no mortgage broker shall knowingly or intentionally flip a loan. (Currently the Virginia *Code* is silent on point.)

Section 6.1-422.1. "Flipping" prohibited.

A. As used in this section, "flipping" a mortgage loan means refinancing a mortgage loan within twelve months following the date the refinanced mortgage loan was originated unless the refinancing is in the borrower's best interest. Factors to be considered in determining the same would include but not be limited to whether: 1) the borrower's new monthly payment is lower than the total of all monthly obligations being financed, taking into account the costs and fees; 2) there is a change in the amortization period of the new loan;

3) the borrow receives cash in excess of the costs and fees of refinancing; 4) the borrower's note rate of interest is reduced; 5) there is a change from an adjustable to a fixed rate loan, taking into account costs and fees; or 6) the refinancing is necessary to respond to a bona fide personal need or an order of a court of competent jurisdiction. ~~when the new loan does not result in any benefit to the borrower considering all of the circumstances, including the terms of both the new and refinanced loans, the cost of the new loan, and the borrower's circumstances. A benefit to the borrower occurs in situations including, but not limited to, where (i) the borrower's monthly payment to pay the new consolidated debt will be lower than the total of all monthly obligations being financed, taking into account costs and fees; (ii) there is a change in the duration of the loan (iii) the borrower receives cash in excess of the costs and fees as part of the refinancing; or (iv) there is a change from an adjustable to a fixed rate loan, taking into account costs and "flipping" does not include any mortgage loan made after a borrower has initiated communications with a mortgage lender or broker has not communicated with or solicited such borrower, other than through a general medium, such as television, radio, newspaper or magazine, that does not target a specific borrower, before the time the borrower initiates such communication.~~

B. No mortgage lender or broker shall knowingly or intentionally engage in the act or practice of "flipping" a mortgage loan. This provision shall apply regardless of whether the interest rate, points, fees, and charges paid or payable by the borrower in connection with the refinancing exceed any limitation established pursuant to Article 9 (Section 6.1-330.69 et seq.) of Chapter 7.3 of this title.

C. The Attorney General, the Commission, or any party to a mortgage loan may enforce the provisions of this section~~.~~ and of Section 6.1-422.

D. In any suit instituted by a borrower who alleges that the defendant violated this section~~,~~or Section 6.1-422, the presiding judge may, in the judge's discretion, allow reasonable attorneys' fees to the attorney representing the prevailing party, such attorneys' fees to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that (i) the party charged with the violation has willfully engaged in the act or practice with which he was charged~~, and there was unwarranted refusal by such party to fully resolve the matter that constitutes the basis of such suit~~; or (ii) the party instituting the action knew, or should have known, that the action was frivolous and malicious.

E. The provisions of this section shall be in addition to, and shall not impair, the rights of and remedies available to borrowers in mortgage loans otherwise provided by law.

*Barring "Bad Apples" from the Mortgage Lending Industry*

Representatives of the mortgage lending and brokerage industry and the State Corporation Commission pointed out to the Work Group that, under current Virginia law, the SCC has no jurisdiction over persons convicted of fraud. Even after a conviction, such individuals can immediately continue work in the industry. Ms. Hancock provided members copies of a Tennessee statute that effectively bars from the industry such individuals.

Ms. Hancock also noted that, currently, if criminals convicted of fraud choose to return to work in the industry following a conviction, the SCC has no way of learning of their bad acts, other than by reading of the convictions in trade publications or the general media or "through the grapevine." She provided members copies of an additional Tennessee statute that addresses this SCC dilemma.

Following discussion, Work Group members present unanimously recommended that such language, as amended and provided below, be incorporated in the VMLBA. As one representative of the mortgage lending industry asserted during deliberations, "There is no room for crooks in our industry." Accordingly, Housing Commission members present at the Commission's legislative meeting unanimously adopted the proposed legislative language, recommended by the Work Group and set forth below, relating to industry "bad apples."

Section 6.1-425.1. Bar from industry.

A. The Commission, after providing notice and an opportunity for a hearing, may censure, suspend for a defined period, or bar a person from any position of employment, management or control of any licensee or registrant, if the Commission finds that:

1. The censure, suspension, or bar is in the public interest and that the person has committed or caused a violation of this chapter or any rule, regulation or order of the Commissioner; or

2. The person has been (a) Convicted of or pled guilty to or pled nolo contendere to any crime; or (b) Held liable in any civil action by final judgment, or any administrative judgment by any public agency, if the criminal, civil or administrative judgment involved any offense reasonably related to the qualifications, functions, or duties of a person engaged in the business in accordance with the provisions of this chapter.

B. Persons suspended or barred under this section are prohibited from participating in any business activity or a registrant and from engaging in any business activity on the premises where a registrant is conducting its business. This subsection shall not be construed to prohibit suspended or barred persons from having their personal transactions processed by a registrant.

C. This section shall apply to any violation, conviction, plea, or judgment after July 1, 2003.

Section 6.1-425.2. Filing of written report with Commissioner; events impacting activities of registrant.

Within fifteen days of becoming aware of the occurrence of any of the events listed below, a registrant shall file a written report with the commissioner describing such event and its expected impact on the activities of the registrant in the state:

1. The filing for bankruptcy or reorganization by the registrant;

2. The institution of revocation or suspension proceedings against the registrant by any state or governmental authority;

3. The denial of the opportunity to engage in business by any state or governmental authority;

4. Any felony indictment of the registrant or any of its employees, officers, directors or principals;

5. Any felony conviction of the registrant or any of its employees, officers, directors, or principals; and

6. Such other events as the Commissioner may determine and identify by rule.

*Financing Single-Premium Credit, Health, or Life Insurance*

As the term suggests, single-premium insurance is a product, often offering coverage for a declining term of years, purchased by the borrower for a single, up-front premium financed though the home loan. After that term, often five years, the insurance is no longer in place but the borrower continues to buy the non-existent coverage in monthly mortgage payments. If the loan is refinanced, there is generally no refund for the insurance coverage.

Industry representatives pointed out that such insurance provides valuable coverage to certain borrowers unable to secure other credit insurance. Representatives stated that single premium insurance should not be labeled as an "equity-stripping" product, in that it may prevent foreclosure in the event of illness or death of a borrower without other financial protections intact. Rather than prohibiting the financing of the product, certain industry representatives suggested a mandatory 30-day "look and see" cancellation period, accompanied by a prominent disclosure regarding the nature and terms of the product.

However, consumer advocates asserted that such insurance financing is among the most egregious predatory lending practices because, often, the borrower does not understand or is not aware of the purchase and, further, the borrower continues to pay interest on the non-declining premium. Self-Help's Mr. Johnson noted that borrowers in Georgia and North Carolina, where similar state statutes prohibit, in association with a home loan, the financing of single-premium credit, health, or life insurance, have had no problem in securing credit insurance. It was also noted that Fannie Mae, Freddie Mac, the Federal Reserve Bank, and the Federal Home Loan Bank of Atlanta have identified the abuse potential of associated with single-premium insurance financed in association with a home mortgage.

A majority of Work Group members present (ten) favored recommending that Virginia adopt statutory provisions, such as those adopted by Georgia and North Carolina and included in the AARP Model Home Loan Protection Act, that would 1) as aforenoted, prohibit, in association with a home loan, the financing of single-premium credit, health, or life insurance but 2) specifically permit the financing of such insurance in association with home loans where the insurance premiums are calculated and paid for by the borrower on

a monthly basis. Four Work Group members, including three industry representatives and Work Group Co-Chair Delegate Marrs, opposed the proposal. Housing Commission members present at the Commission's legislative meeting adopted no recommendation relating to single premium insurance, and subsequent attempts to reach a compromise position among consumer advocates and industry representatives were not successful.

*Addressing Deceptive Mortgage Lending/Brokering Practices and Requesting the SCC's Bureau of Financial Institutions More Fully To Exercise Its Current Predatory Lending-Related Regulatory Authority*

Work Group members were apprised by an industry representative that the SCC's Bureau of Financial Institutions currently has authority under VMLBA Section 6.1-421 to adopt rules and regulations to further the purposes of the Act. It was noted that the Act was adopted in 1987 primarily to stop abusive lending practices, and therefore it would be appropriate for the Bureau to take the lead in determining whether additional provisions are needed to protect Virginia consumers from predatory and deceptive mortgage lending/brokering practices and, further, to implement such protections by use of the authority set forth in Section 6.1-421. Work Group members present unanimously agreed and recommended that the Housing Commission request that the BFI consider the material provided and discussed in the course of the Commission's in-depth predatory lending study "with an eye toward promulgating regulations." Housing Commission members present at the Commission's legislative meeting unanimously recommended the same.

*Providing a Private Cause of Action*

The VMLBA Sections 6.1-422 and 6.1-422.1 address predatory lending practices. Work Group members noted that, currently, Virginia consumers alleging injury under such sections have no private cause of action under the same. Rather, only the BFI can take action against wrongdoers. Although the Work Group was unable, due to time considerations, to fully discuss and/or present a recommendation regarding the provision of a private cause of action under these sections, Delegate Marrs requested that the full Commission be provided information on the issue. Certain industry representatives and consumer advocates suggested that it is entirely appropriate to provide such cause of action. However, citing the lack of a Work Group recommendation on point, Housing Commission members present at the Commission's legislative meeting adopted no recommendation relating to such cause of action.

*Regulating Activities of Small, Private Lenders*

Currently, VMLBA Section 6.1-411 exempts from its provisions, among others, 1) lenders making ten or fewer mortgage loans in any period of twelve consecutive months and 2) "persons licensed as attorneys, real estate brokers, or real estate salesmen, not actively and principally engaged in negotiating, placing or finding mortgage loans..." Work Group members present split their votes evenly (7-7) on the issue of whether "seller financiers" should be further regulated. However, members present -- as well as Housing Commission members present at the Commission's legislative meeting -- unanimously agreed that, in the

interest of consumer protection, such Section should be amended to provide for the exemption of lenders making three or fewer loans.

***Rent-To-Own Contracts***

The second meeting of the Work Group also focused on Rent-To-Own Contracts. Delegate Preston Bryant provided an overview of the Lynchburg rent-to-own situation leading to and his rationale for his House Bill 1122, which legislation would require that 1) all rent-to-own contracts, together with any financing statement, be recorded in local land records where the subject property is located and 2) the seller have the property inspected prior to executing a rent-to-own contract and provide the buyer a copy of the report resulting from such inspection.

Delegate Bryant pointed out that, while such contracts (also known as "contracts to deed") can serve as affordable homeownership opportunities, in most rent-to-own scenarios the seller retains ownership of the property while the buyer, until the deed is transferred at the satisfaction of the contract (sometimes fifteen years), assumes most responsibilities related to the property, including maintenance. Where the property is in need of extensive renovation, the buyer can pay far more than the fair market value of the property. Additionally, as in the Lynchburg situation, numerous building code violations can lead to condemnation where the buyer is unaware of problems and unable to finance costly, necessary repairs. In turn, the buyer, as in Lynchburg, can be evicted by the seller and face not only loss of a home but also complete loss of thousands of dollars in accrued equity.

Renae Reed Patrick, Esquire, Managing Director of the Lynchburg office of the Virginia Legal Aid Society, and Laura N. DuPuy, Esquire, formerly an attorney with the Legal Aid office led by Ms. Patrick and currently Executive Director of Lynchburg's Neighborhood Development Foundation, then provided the Work Group with an overview of rent-to-own contacts. They underscored Delegate Bryant's observation that, while such contracts can provide an important opportunity for homeownership for persons unable to access credit in the traditional marketplace, used by unscrupulous sellers they can also be tools for predation on the unsophisticated buyer.

Ms. Patrick and Ms. DuPuy noted that such contracts are used in urban and rural areas, and that the benefits for the seller far outweigh the benefits for the buyer. In sum, they characterized such contracts as "glorified leases" in which a buyer agrees to purchase property in the future for an agreed-upon price, with regular, current monthly payments and no financing, but in which, with one late payment, the buyer may lose all equity, even after fourteen years and eleven months of a fifteen-year contract. Further, pursuant to recordation of such contracts, it was noted during Work Group deliberations that such recordation may be of heightened importance should title insurance no longer be required by lenders.

A Rent-To-Own Contracts Task Force was appointed by Work Group Co-Chair Delegate Marrs to provide specific legislative recommendations. Task Force members attending the meeting convened for that purpose included: Delegate Bryant, Delegate Thelma Drake, Ms.

Pamela P. Day, Ms. Sandra W. Ferebee, Dr. William J. Ernst, Messrs. Martin Johnson and T.K. Somanath, James W. Speer, Esquire, and the Commission Executive Director.

Delegate Drake and Ms. Ferebee pointed out that, in Tidewater, "rent-to-own contracts" are generally: 1) part of a contract for the sale of residential property, 2) relating to the downpayment, 3) for a very limited term, usually two years maximum, and 4) more accurately referred to as "lease-purchase agreements." Ms. Day addressed concerns regarding recordation of such contracts in noting that, in northern Virginia, "rent-to-own contracts" are, in fact, frequently recorded as escrow agreements and a deed from the landlord to the tenant is signed and held by the escrow agent. When the terms of the escrow agreement are met, the agent then records the deed to the property.

Following is a proposed amendment to the *Code of Virginia*, unanimously recommended by the Task Force, crafted to address abuses of rent-to-own contracts. Such language would preserve the important affordable homeownership option such contracts offer. Moreover, the provisions would help to ensure that unsophisticated purchasers are not knowingly or unknowingly saddled with a home rife with building code violations for which such purchasers could become responsible upon execution of a contract for sale. Finally, the language would provide prospective purchasers additional protections by requiring recordation of the contract itself. Work Group members present, with two dissents, including one from Delegate Marrs, in turn recommended that the Housing Commission consider recommending adding the following proposed new subsection to the *Code* Landlord-Tenant Chapter 13 (as distinguished from the less broadly applicable Virginia Residential Landlord and Tenant Act).

Following extensive discussion, Housing Commission members present at the Commission's legislative meeting took no action on such proposed language, but encouraged interested parties to reach a compromise on the same. Such subsequent efforts were unsuccessful.

<u>Section 55-248.52.1.</u> Rent-to-own contracts; recording required.

A. As used in this chapter, unless the context requires otherwise:

"Rent-to-own contract" means any installment contract for the sale or disposition of a dwelling unit whereby the purchaser does not receive a deed conveying the property purchased until part or all installment payments have been made as called for in the contract and record title to said property remains in another pending full performance of the contract. "Rent-to-own contracts" shall not include deeds of trust.

"Dwelling unit" means a structure or part of a structure that is used as a home or residence by one or more persons who maintain a household, including, but not limited to, a manufactured home.

"Escrow agreement" means a document recorded in the city or county where the dwelling unit is located, which document outlines the duties of parties relating to payment of rents,

disposition of titles, recordation of deeds, default remedies, and document compliance provisions.

"Lease purchase agreement" means a sales contract tied to a lease agreement for a period of two years or less.

"Premises" means a dwelling unit and the structure for which it is a part and facilities and appurtenances therein and grounds, areas, and facilities held out for the use of tenants generally or whose use is promised to the tenant.

"Tenant" means a person entitled under a rent-to-own contract to occupy a dwelling unit to the exclusion of others.

B. Every rent-to-own contract for the purchase of a dwelling unit located in Virginia shall contain a legal description of the property offered for sale or disposition, together with the name and address of the seller. Such contract shall also have an escrow agreement companion document.

C. Prior to executing any rent-to-own contract, the owner of the subject dwelling unit shall (i) cause the local building official of the jurisdiction in which such unit is located to inspect the premises for compliance with the Virginia Uniform Statewide Building Code and (ii) provide a copy of the inspection report to the prospective tenant. If, following the inspection, repairs or improvements are required to bring the subject premises into compliance with the Code, such repairs or improvements shall be completed prior to execution of the rent-to-own contract.

*Title Searches*

The Rent-To-Own Contracts Task Force also discussed the importance of title searches in the context of recordation of rent-to-own contracts. It was noted that, currently, a contract for sale generally specifies that "free and clear title" must be provided, but that, because no title search is required by law, the purchaser does not necessarily receive the title "free and clear" when the deed is signed and delivered. Given new "mortgage impairment" products being offered to lenders, in which insurance may be purchased for transactions where the seller signs an affidavit to the effect that title is provided free and clear, the Task Force was particularly concerned about the lack of requirement for title searches. Accordingly, the Task Force unanimously recommended that title searches be required in conjunction with sales of residential real property and that any title defects be reported to the buyer in writing and acknowledged by the buyer in writing prior to closing. However, Work Group members present and, subsequently, Housing Commission members present at the Commission's legislative meeting took no action on the issue of title searches.

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