

VIRGINIA HOUSING COMMISSION

2012 ANNUAL REPORT

Table of Contents

I. Executive Summary	1
II. Full Commission Meeting Summary	
• April 25, 2012	2
• September 5, 2012	9
• November 14, 2012	29
• December 5, 2012	37
III. Housing Affordability and Real Estate Law, and Mortgages	
• May 14, 2012	49
• July 31, 2012	55
• October 9, 2012	64
IV. Housing and Environmental Standards Work Group	
• May 9, 2012	70
• August 22, 2012	81
• November 1, 2012	88
• November 27, 2012	101
V. Common Interest Communities Work Group	
• June 6, 2012	107
VI. Neighborhood Transitions and Residential Land Use Work Group	
• July 31, 2012	114
VII. Timeshare Sub-Work Group	
• August 14, 2012	123
• November 1, 2012	129
X. Continuing Care Communities Sub-Work Group	
• June 14, 2012	133
• September 5, 2012	140
• November 30, 2012	165

Executive Summary

The Virginia Housing Commission (VHC), a state legislative commission, has legislative members and three Governor's appointees, who work throughout the interim to study issues and create and recommend housing-related legislation for passage by the Virginia General Assembly. Topics are chosen for study by the Commission chair with the input of work group chairs, in addition to referred bills from the past General Assembly session. Issues regarding neighborhood stabilization and revitalization, mortgages, affordability of housing, housing and its relation to the environment, and other issues relevant to housing are included in the yearly work plan.

The Commission is divided into four permanent work groups, Affordable Housing and Real Estate Law, Common Interest Communities, Environmental Issues, and Neighborhood Transitions, as well as sub-workgroups as needed for particular intense study and discussion. Sub-workgroups for this interim were Continuing Care Retirement Communities and another, Time-shares. Each workgroup or sub-workgroup is composed of legislators and interested stakeholders. All sides of an issue are represented in discussion in order to work together to form solutions and good compromise legislation in preparation for the legislative session. All work group meeting agendas and summaries are posted to the Virginia Housing Commission website (<http://dls.state.va.us/houscomm.htm>).

The Commission was created by the 1970 Session of the General Assembly "to study the ways and means best designed to utilize existing resources and develop facilities that will provide the Commonwealth's growing population with adequate housing," and became a permanent legislative commission in (HB 1231)2004. The Commission works to fulfill its initial mandate while also expanding its scope of topics to incorporate the changing housing needs of the Commonwealth.

Chaired by Delegate John Cosgrove, with Senator Mamie Locke serving as the vice-chair, the Commission has 11 members: three members of the Virginia Senate, five members of the House of Delegates, and three citizen members appointed by the Governor. All members bring housing expertise to the Commission and have a strong interest in housing concerns.

The Commission held four full Commission meetings throughout the 2012 interim where speakers from the Federal Reserve Bank, Department of Housing and Community Development, and Virginia Housing Development Authority, among other entities, worked to give the Commission members background information on housing trends and best practices in the Commonwealth. All presentations are available on the VHC website. In addition to full Commission meetings, work group meetings were held throughout the interim to provide for a more intensive discussion involving interested parties. All meetings were open to the public, and meeting notices were posted on the General Assembly and VHC websites.

Several pieces of legislation were recommended by the Commission for the 2013 Legislative Session and they include the following: a bill to update the Mortgage loan origination industry; SAFE Act, a time-share bill focusing on the developer control period, and a bill concerning alternative on site sewers. Many other proposed bills were discussed but not recommended by the commission members.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Virginia Housing Commission House Room C, General Assembly Building April 25, 2012 10:00 A.M.

Members present: Delegate Cosgrove, Senator Locke, Senator Watkins, Delegate Dance, Delegate Marshall (via telephone), Mark Flynn

Staff present: Elizabeth Palen, Beth Jamerson, and Laura Perillo

I. Welcome and Call to Order

- **Delegate John Cosgrove; Chair**
 - o The meeting was called to order at 10:03 A.M.

II. Multistate Mortgage Servicer Settlement

- **David B. Irvin; Senior Assistant Attorney General, Office of the Attorney General of Virginia;** provided the Commission with an overview of the National Mortgage Servicing Settlement ("the Settlement") with the five largest mortgage servicers in the United States: Bank of America, J.P. Morgan Chase, Wells Fargo, Citigroup, and Ally Financial (formerly, GMAC) (individually, "the Settling Servicer") (collectively, "the Settling Servicers").
 - o The Settling Servicers make up to 59% of the United States' market of residential mortgage servicing. The next nine servicers in the market make up only about nine percent of the total of market shares. The Settling Servicers own approximately 20% of the loans in the United States. The Settling Servicers, like all servicers, may or may not be the entity that made the mortgage loans in the first place. Rather, a servicer is the entity responsible for collecting the mortgage loan payment(s) and typically deal with foreclosures related to mortgage loans. Thus, the number of loans that the settling servicers own and service is a smaller subset of the total number of loans they deal with in general.
 - o The state's attorney generals from forty-nine states joined the Settlement. Oklahoma signed a similar settlement independently, which was announced the same day as the multi-state Settlement. Oklahoma filed

DELEGATE JOHN A. COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS

MARK K. FLYNN
T.K. SOMANATH
MELANIE S. THOMPSON

their consent judgment in Oklahoma state, where the multi-state Settlement was filed the following day.

- o There are 43 state's banking commissioners involved in the Settlement, including commissioners of: the Virginia State Corporation Commission and the Bureau of Financial Institutes.
- o There were also federal entities involved, including: the United States Department of Justice, the Federal Trade Commission, the Department of the Treasury, and the Department of Housing and Urban Development.
- o The Settlement settles all administrative and civil claims (state and federal) regarding all residential loan servicing, foreclosure services, and loan origination. The Settlement does not settle any criminal, securitization, fair lending, mortgage discrimination, Mortgage Electronic Registry System ("MERS"), or settled claims. The Settlement also does not settle and third party claims--claims that an individual borrower may have against his mortgage lender and/or servicer.
- o The Settlement provides \$294.3 million in federal "menu" benefits to Virginians, though these are not hard dollar amounts. Rather, these are the amounts that the Settling Servicers are credited from taking various actions--sometimes ten cents to the dollar.
 - At least 60% of the benefits provided shall take the form of a first or second lien loan modification where a borrower is either already in default of in imminent risk of being in default. These loan modifications must include some form of principal reduction. A higher amount of credit is given for portfolio loans (loans that the specific Settling Servicer owns and sells).
 - The remaining money, around 40% of it, will provide these types of benefits to home owners that do not fit into the first category (those receiving at least 60% of the benefits).
 - o These benefits include short sale, deed in lieu approvals from which the Settling Servicers will receive credit for taking various actions to increase the likelihood of short sales. This is particularly beneficial for homeowners with a first and second lien on their homes. This is because these homeowners are unable to complete a short sale of their home unless both the first and second lien holders agree. Through these services, second lien holders will be provided some compensation for allowing the short sale to occur which will have a market clearing effect.
 - o These benefits include deficiency waivers. In Virginia, where a home is foreclosed on but the foreclosure does not provide the lender with the amount owed on the mortgage, the former homeowner is still responsible for this unpaid balance (the deficiency). Many lenders agree to waive the deficiency that is due on the loan on the first or second lien. These lenders within the Settling Servicers will get credit

towards the amount to which they committed. This allows Virginians in this situation to avoid large judgments against them.

- These benefits include transitional funds, which will provide Virginians going through foreclosure with money to facilitate the transfer of the property back to the lender, and to help the resident to move out and find other housing. Lenders can receive credit on the amount due by making payments of over \$15,000.
- These benefits include anti-blight actions. Lenders can receive credit for demolishing blighted property, for helping to keep blighted properties off the market, for donating blighted properties, etc.
- The Settlement provides \$31.3 million in hard dollar amounts to Virginian borrowers who have been foreclosed on between January of 2008 and December 31, 2011, whose mortgages have been serviced by the Settling Servicers, and who occupied the property on which the lender has foreclosed.
 - An estimated 15,000 Virginians will benefit from these funds if \$2,000 provided to these homeowners.
 - The homeowner does not need to show legal wrongdoing in order to qualify for this payment, but will have to submit a claim for the payment alleging they are victims of servicing abuse (such as robo-signing, lost paperwork, or dual tracking).
 - Accepting the money does not affect the homeowner's ability to pursue any personal claims they may have with the Settling Servicers.
- The Settlement provides \$84.3 million for interest savings over the life of loans for borrowers who refinance "underwater homes," homes for which the borrower owes more than the home's value.
- The Settlement provides Virginia's Office of the Attorney General with \$66.5 million for the Attorney General's revolving fund. Any amount over \$1.25 million that is unused by the end of the fiscal year (midnight on June 30, 2012) will revert to the general fund. The Settlement provides the State Corporation Commission and the Bureau of Financial Institutions with \$1 million, which should be received soon.
 - The state can only designate 10% of the funds that they receive as a civil penalty. Aside from that, there are no limitations regarding how the state can use the money it receives.
 - The Settlement states that it is preferred that the state spends the funds on foreclosure prevention, counseling, consumer protection efforts geared towards prevention, prosecuting financial fraud, or compensating the state for the losses incurred from the unlawful conduct of the Settling Servicers.
 - The Attorney Generals of other states are distributing the Settlement funds to grants to nonprofits. Virginia's Attorney

- General turned the funds over to the General Assembly to decide how to allocate the money.
- o Within the Settlement, the Settling Servicers agreed to new, fairer "servicing standards" to promote transparency and timeliness. The Settling Servicers agree to promote short sales over foreclosures; and to provide more transparent fees, loan modification processes, and loan time-lines.
 - The Settling Servicers agree to provide homeowners with pre-foreclosure notices including the amount that is owed, the amount needed to reinstate, the terms of the loan, information on mitigation services, an explanation of the homeowner's right to request a copy of the endorsement notes with the name of the investor holding the loan, and an explanation of why the servicer has a right to foreclose.
 - The Settling Servicers agree to provide homeowners with a single point of contact with their company to prevent dual tracking of the foreclosure process.
 - The Settling Servicers agree to the development of loan portals that provide homeowners with a single resource for all of the documents and statuses related to their mortgage loan.
 - o The Settlement allows the Attorney General to bring criminal charges against the Settling Servicers who used robo-signing (automated signing by machinery in lieu of actual trustees) in violation of criminal laws.

III. Current Housing Conditions in Virginia

- **Sonya Waddell**; *Associate Regional Economist, The Federal Reserve Bank of Richmond*, provided the Commission with an update on current housing conditions in Virginia, stating that in general, home sales are slow and house prices are stabilizing, but on a year-to-year basis prices for housing are still falling.
 - o In the fourth quarter of 2011, the inventory of foreclosures in Virginia was 1.8%, translating to over 25,000 loans in foreclosure. In 2001-2003, the years of the highest inventory for foreclosures, there were 9,000 loans in foreclosure. However, things are getting better. In 2009, the highest inventory of foreclosures was over 30,000 loans in foreclosure.
 - o Virginia is doing better than the rest of the country regarding foreclosures, as the inventory of foreclosures in the US was 4.4% for the fourth quarter of 2011. Virginia has the seventh lowest total inventory of foreclosures in the US. In Florida, the foreclosure inventory was as high as 14.3% which translates to over 450,000 loans in the foreclosure process. In Maryland, the foreclosure rate was as high as 4%. It is important to note that these numbers are related to how long loans stay in foreclosure, which is effected by whether the state processes foreclosures through statutes or through the courts. Virginia is a foreclosure by statute state and Florida is a judicial foreclosure state. Additionally Virginia has fewer homes entering foreclosure than many other states.

- Subprime loans make up about seven to eight percent of the mortgage inventory, but account for over a quarter of the foreclosure inventory of the state. Accordingly, subprime loans are still disproportionately represented in the foreclosure pool in Virginia-- although this is similar to the US as a whole.
- There are about 200,000 units in Virginia that are vacant, meaning; unrented, unoccupied, unsold, and generally unused. This number, however, does not include homes that are going through the short sale process.
- Existing home sales in Virginia have not returned to 2004-2005 sales levels. However, the Virginia Realtors Associations are optimistic about home sales-- as they have witnessed the home sales have returned to the levels of the 1990s (though it should be noted there are many more homes since then and more on the market).
- According to the Federal Housing Finance Agency, Virginia house prices increased 1.1% in the third quarter of 2011 and 0.7% in the fourth quarter of 2011. This is the first two quarter increase in house prices in Virginia since the first two quarters of 2007.
- According to CoreLogic's statistics, there was no change for house prices in February. According to CoreLogic estimates that 23% of original homeowners were faced with negative equity and that an additional 6% were facing year-negative equity (less than 5% equity for the house). This is in line with the national average for foreclosures.
- Virginia Beach, Richmond, and Norfolk are currently facing the most foreclosures in Virginia.
- According to a survey of 1,490 realtors (99% of them Virginia realtors), market conditions are getting better, with customer traffic up by more than 50%. Most customers, it was reported, are first time home buyers seeking mid-range and lower end homes. In contrast to the data explained above, 50% of the realtors stated that the inventories were low on homes. The realtors also stated that distressed homes are bringing down prices and borrowers are still having difficulties obtaining financing.
- According to a survey of 101 home builders (mostly from North Carolina), more than 50% of the home builders feel that the outlook for construction is better. However, the home builders agree with the realtors that the distressed home sales seem to be holding down prices and financing is still difficult to obtain for home sales.
 - **Delegate Cosgrove**, asked why only seven percent of the home builders responded to the survey. Ms. Waddell replied that she was not sure, but that she was disappointed with the response rate.
- The unemployment rate in Virginia is now down to 5.6% compared to the 8.2% for the United States as a whole. There was a slight payroll loss of 400 jobs in Virginia. There are still high unemployment rates in the southern most part and southwest Virginia.

IV. Discussion of Work Group Topics for Study and Configurations

- **Delegate Cosgrove**, stated that Delegate Dance will Chair the Neighborhood Transitions and Residential Workgroup. Housing and the Environment by Senator Watkins; Danny Marshall will chair Affordable Housing, Mortgages and Real estate Law and Delegate Cosgrove will chair the Common Interest Communities group.
-
- Delegate Cosgrove stated that there is another single issue that is in need of review this year: (Senator Baker SB49, 2012) dealing with retirement communities' care, for which he will create a special subgroup with the chair yet to be determined.

Senator Watkins asked in addition to the workgroups if the Commission would look at the issue of cash proffers and localities; more specifically if the localities are using the proffers or holding them and for what purpose are they being used.

V. Public Comment

- **Ralston Brook**; *resident of The Hermitage at Cedarfield, a Continuing Care Retirement Community ("CCRC") located in the West End of Richmond*, suggested the creation of a workgroup within the VHC to study CCRCs. Mr. Brook proposed that such a study should be broad in scope and focus on the need for more transparency in providing information regarding cost of care and other financial data to residents at CCRCs.
 - o Mr. Brook explained that CCRCs provide a wide range of amenities and care for senior citizens, including: housing for independent senior citizens, assisted living services, and nursing services.
 - o Mr. Brook stated that residents at Cedarfield pay entry and monthly fees to their governing body, Virginia United Methodist Homes ("VUMH"). Mr. Brook argued that VUHM had not furnished the "extensive financial data, including sufficient information to justify monthly increases" in accordance with their fiduciary duties. Mr. Brook stated that these duties are set out in Section 38.2-4910 of the Code of Virginia.
 - o Mr. Brook stated that other residents of Cedarfield are also willing to assist the VHC in anyway possible to help ensure the governing bodies of CCRCs are acting in accordance with their duties.
- **Sandy Levin**; *President of the Virginia Association of Non-Profit Homes for the Aging, representing all the CCRCs in Virginia*; stated that VHC does not need to study CCRCs by way of a workgroup, because CCRCs are already overseen by the Bureau of Insurance and the State Corporation Commission, which oversees CCRCs financial information.
 - o Ms. Levin stated that the CCRCs disclosure statement is provided each year, noting that for Cedarfield, the statement is made available for all residents to view in the community library. Ms. Levin also stated that the information discussed at monthly meetings between staff and residents is also fully disclosed.
- **George High**; *Vice President of Virginia Continuing Care Residence Association*; stated that the residents at CCRCs are not only concerned with the transparency of the financial information discussed by the governing body. Rather, the residents are seeking representation on these governing bodies, as many of the residents are

capable professionals who would like to understand how the governing bodies function.

VI. Adjourn

- The meeting was adjourned at 11:23 A.M.

SUMMARY
Virginia Housing Commission
House Room C, General Assembly Building
September 5, 2012
10:00 AM

Members Present: Senator Mamie Locke, Senator George Barker, Senator John Watkins, Delegate John Cosgrove, Delegate David Bulova, Delegate Rosalyn Dance, Delegate Barry Knight, and Delegate Daniel Marshall.

Staff Present: Elizabeth Palen

I. Welcome and Call to Order

- **Delegate Cosgrove** called the meeting to order at 10:00 A.M.

II. Update; Virginia Housing Trust Fund

- **Mr. Bill Shelton**, *Director Department of Housing and Community Development*:(refer to the VIRGINIA HOUSING TRUST FUND handout, (see materials)) . I was asked to give you a brief update on the housing trust fund. Many of you are familiar with how we got here. Creating a trust fund in Virginia has been talked about for a long time, but in last year's budget there was an item added into the Department of Housing and Community Development's budget, which was the first installment a seven million dollar deposit into what is called the Virginia Housing Trust Fund. And there was legislative language inserted in the budget that governs exactly how we should structure that fund, at least, give some guidance. Just to touch the high points, I'm sure many of you might be familiar with this, but it will be jointly administered by both the Virginia Housing Development Authority and the Department of Housing and Community Development and specifically it asked that the two agencies collaborate in coming forward with a plan to the monies committees by November 1, 2012 on how we would structure such a program in Virginia.
 - Again, just hitting the highlights, the budget language talks about eighty percent of the fund going for loans. For flexible financing and low interest loans to support affordable housing, it mentions looking at leveraging opportunities. And, as always, when we use the word loans, they are to be repaid to the fund at some time; we could be flexible in structuring the finance, but they are structured as loans.
- **Delegate John Cosgrove**: On that first bullet, it says "loans through eligible organizations" what would define an eligible organization?
 - **Mr. Shelton**: Eligibility is really two issues; what the funds could be used for ;for affordable rental housing, which could either be new construction, rehabilitation, or acquisition. Also talks about down payments for single-family ownership and also references short, medium, and long term loans to reduce the cost of homeownership and rental housing. That gives a fair

amount of flexibility. Guidelines say up to eighty percent what happens to the residual, it says up to twenty percent may be used for grants. We are not required to use it for grants, so we could go above the eighty percent on loans, but no more than twenty percent can be used for grants. And those grants are to be targeted for the reduction of homelessness. And then it gives specific language about what types of uses you might consider and it talks about rental assistance, not to exceed one year, this is an important concept. It talks about housing stabilization services for permanent support of housing, it talks about mortgage foreclosure counseling which has been an issue that has been prominent for a while now since the economic crisis, and then it talks about pre-development assistance for permanent support of housing for homeless populations.

- **Mr. Shelton:** Mr. Chairman, you asked about who is eligible to participate, the language in the budget bill talks about local governments, and housing authorities, regional and statewide housing organizations, which we interpret to be the nonprofits and other regional and local organizations that are engaged in housing development; especially for affordable housing. And then it mentions limited liability companies for the express purpose of owning and operating affordable housing. And this is how we are going to bring in the private sector. Most affordable housing deals are structured as limited liability companies and this captures that and allows for that flexibility to have a variety of partners participating in joint ownership of housing and we will have private sector opportunities, also.
 - As I mentioned, we have this mandate to have a plan back to the General Assembly by November 1, 2012. One of the first steps that we did, is we convened a meeting of stakeholders groups. We pulled folks together and said that this is what we think all this means and how we might think about approaching it; and input was received from a variety of organizations about what they would like to see, which is not so much in content, although there was a fair amount of content discussion, but more about process. And one of the things that I think that there was a pretty strong consensus that we needed to go around the state and give folks a chance to come and tell us what they would like to see us do with this initial installment of this Virginia Housing Trust Fund. And so we have held a series of seven regional sessions across the Commonwealth, and over 250 participants had participated in those, to tell us how they think the fund can be used.
- **Mr. Shelton:** I think that gives us fairly broad sense of what needs are out there. The types of needs folks would like to see addressed and the strong interest and for use of the fund. One other key piece of this is that we know that we have a number of state agencies that have intersect with the whole housing need and there is a huge amount of discussion in a variety of different areas especially in the Health and Human Services arena about the intersection between housing and other state priorities. For example, we have the Department of Justice settlement now that has a strong housing component imbedded in it. We have had the Governor's appointed group looking at the prisoner reentry; housing is a

prominent discussion component in that group. You have the Disability Commission group; where housing is also discussed. Right up and down the line housing is key issue, so, we pulled together a meeting of state agencies to talk about what they see; what kind of resources they had; and how this trust fund can be coordinated. We might fund through the trust fund, or perhaps some of the grant money going to services with the broader services needs for those populations, because, folks cannot operate independently without some level of support, if they are coming out of mental institutions, or out of correctional settings. There needs to be some very targeted case management around those individuals. And that is typically what those agencies do but without the housing component, they won't be so successful reintegrating people into the community. There is a lot of discussion about this and we also, asked for written comments and that closed on August 31, 2012. We received have a variety of written comment and survey responses. So there will be no shortage of information to work on to put the plan together.

- The highpoints, of what we are hearing is that that most all have strongly recommended more affordable rental housing. There are shortages even with the housing prices; it has left the housing at reduced prices available to a lot of single families, but it has also, in many markets, driven up the demand of rental housing and there a struggle to meet especially for these special needs population, which often need those layering of subsidies to be able to solve that there is a need for more rental housing development. We've also seen the need for housing for high need populations, that I've referenced earlier, especially with the disabilities communities, the chronically homeless, veterans, and the very low income, and it, typically, cannot be met by normal market housing.
- **Mr. Shelton:** The state has embarked on a major emphasis on reduction of homelessness. We have put a lot of resources towards that solution. We are hearing that there needs to be more resources allocated to help folks with their efforts to reduce homelessness in their communities. And they somehow see another connection between the trust fund and those efforts. There should be sufficient flexibility to meet a variety of local circumstances. And again, this is a theme that we often hear what the solutions looks like in Fairfax County, may be very different in what they look like somewhere else. So whatever we do, we need to think about a structure which can work in a variety of different settings for a variety of different housing needs, if your needs are very focused on preservation, you'll need a different tool box, than if you were trying to deal with permanently housing the homeless, for example.
 - And then, finally, balancing fund sustainability with loan terms that increase affordability within serving the very low income. This is perhaps our biggest challenge that somehow our loan program envisions return on investment of those funds, at the same time, help the very low income needs. When we had the previous iteration of the Virginia Housing Partnership Fund what was needed was a very patient loan capital subordinated debt, perhaps very preferred interest rates, maybe balloon notes coming due later in a project, to allow for cash flow. We are going

to have to look at all kinds of issues in structuring this, going forward, if we are going to meet those special need populations.

- **Del. Cosgrove:** Isn't that basically, how we got in a lot of trouble that we are in right now? Wouldn't that be like subprime type of program?
 - **Mr. Shelton:** Well, Mr. Chairman, the subprime program is primarily an issue of finance for single-family housing not for multi-family. I think most of my reference may be in that last bullet would be primarily focused on rental housing and structuring assistance to make it more affordable to very low income residents who are not candidates for home ownership. Talking to the realtors and others there is a strong interest in creating those bridges and ladders for folks to get into homeownership. But, they are talking about folks not at very low income but on the moderate income side where they are just at the point where they could perhaps be homeowners, just need minimal assistance, which might be a down payment assistance or something of that nature, but that is a very different population, and they still have to be credit worthy and still be able to qualify for a mortgage.
 - I think with our experience we could be able to address this with VHDA. We have folks who could qualify for VHDA mortgages; but, many times that down payment assistance is something that is a bridge to allow folks to come into that product and be very successful. I think there rates of delinquency and foreclosure are less than market and certainly very favorable. I don't think we have that subprime issue; it is more an issue of bridging a gap to get people into and matched to the right product. But yes, we would be very sensitive as to not put people at risk and I think what we are talking about in that bullet is primarily rental housing.
- **Mr. Shelton:** The key issues that we are going to have to define in this plan, I don't have the answer today, but I will point you a little bit towards what we are struggling with, obviously, seven million dollars and the needs are very diverse around the state, and if you are involved in any way in the developing industry, developing any type of multi-family housing project in Northern Virginia could be a \$25 or 30 million project. It is not hard to figure the matching of seven million dollars, up with the needs, is going to be very difficult, but we are going to do some prioritization and targeting and need to address this issue in terms of what depth of subsidies we will ultimately provide. One thought that we are kind of mirroring several of these things of, in trying to look at state policy priorities, might be to do some demonstrations, pick one of these policy arenas like the Department of Justice settlement, for example, or Prisoner reentry and do a very targeted product to do two or three projects that would demonstrate how that can be done effectively into communities. And then, if they were successful then that would be something we would want to revisit as to whether this was something to be a state priority for funding or whether it could be done through other means.
 - Again, matching assistance to identify needs, same issue you raised about making sure we match those subsidies to rental housing, where folks who can afford ownership but also have an ownership product perhaps, at least, to be able to determine whether those are needs that will be a priority for

this fund. And then, a question that we would need to make a recommendation on is the language in the budget act that calls for the plan. Our plan for how we are going to operate the fund, how to restructure this for going forward; we have the existing Virginia Housing Partnership Fund language, it hasn't gone away, there is some limited amounts of money that come into that periodically, through things like the Real Estate Transaction Fund and a few other so that when we get a balance above a certain level it get deposited to the fund.

- There's also been legislation over the last eight years or so, some of which came out of this Commission, proposing a Virginia Housing Trust Fund many of which took the old partnership fund language and kind of recast that. And so one of the thoughts is, is that we might apply in the plan that we put forward, of how best to structure something going forward. One idea might be just to use that existing partnership fund structure or perhaps amending it, and something I know that this committee would be very interested in, and I would certainly like to work with you on that.
- **Delegate David Bulova:** Getting to that particular issue with respect to taking recommendations and putting them into the Code, so that there is some permanency to it and getting it out of the budget language; what is your timing for looking at that, and how specific do you intend to get within this report? How would you envision this being put into the Code? Or are you going to lay out some principles for us to digest, and then since we just started a budget cycle, is this something that we would visit during next year's Housing Commission cycle?
 - **Mr. Shelton:** My reaction first of the operational side of how this would operate, I think, very much could be this cycle or next, because the partnership fund pretty much has that language in it all ready, it can be tweaked. It already talks about the VHDA payroll, the VHCD and the process for going forward. I think most of those bills that have come out previously the core of that code language pretty much stayed intact. I think that could be done in the future year and given the date, we could perhaps make a deposit this year, and then we could amend the language going forward, if there were additional funds to roll into the fund. What we will do in the plan will also be able to discuss priorities, I would be a little concerned to put in the Code, codify the priorities, because those priorities, as I mentioned earlier, they are diverse and they range from year-to-year.
 - I think what we would like to see is the ability to have outlined in the Code a process for how we arrived at those priorities and, right now, it says the Board of Housing and Community Development will adopt a plan annually with suitable consultation. That is one way to do it, but to make sure there is some way for the public and the constituency to participate in that process, but let that be a living document so that it could more forward by going around where the needs evolve over the years, depending on how the money comes into the fund, what you would do with that would be dictated on how much money was in the fund. The

discussion with realtors, for example, was about seven million dollars, it's kind of hard to see it having a huge impact on the single-family side, just because of the magnitude of the issues that are out there, but if it was a larger fund then perhaps there would be some language that talks about how you would address those needs. These are just examples.

- **Mr. Shelton:** Next steps, in going forward, obviously we've gotten a lot of input, so we are going to be reviewing all of that, very shortly. We have already started that process and we will be drafting a plan that would be submitted to the Secretary and the Governor. It will then be transmitted to the money committees by the November 1, 2012 date, our target. We are going to do everything we can to have that done on time. We are acutely aware that there is also an intervening session. We are keeping in mind that this funding does not flow until July 1, 2013, so that's means there could still be action that may be considered, or other bills that go through the General Assembly may affect the outcomes.
 - We would have to have some process for adjustment if that occurred. Preparation for coordination between the agencies, that is primarily where we have already started the dialogue between VHDA and VHCD, as well as, the other state agencies that have an interest in this, and we are on track to be able to have the program up and running by the first of 2014, fiscal year, which is July 1 of next year.
 - We are pretty much on track, we would be happy to work with you and do a presentation on the content of that plan in the future date, if you should desire.
- **Del. Cosgrove:** You mentioned before about the LLCs being part of the process, have they been part of the process up until now, or will you talk with them if they make this happen?
 - **Mr. Shelton:** They certainly were invited. At various levels we had for-profit developers at the regional meetings. We have received letters from the private sector folks. Altogether, we have only received about sixteen letters and most were from state-wide organizations, but I know, one of the things that has come up is the coordination with this potential fund with the tax credit program, which is a key development program for the private side .
- **Senator John Watkins:** You talked with Social Services, Behavioral Health and Developmental Services, DMAS, are you aware of what the Secretary of Health is doing in conjunction with these agencies concerning dual eligibility and being able to identify those individuals to make sure that they get the adequate assistance, and that everybody recognizes how much assistance they are receiving and from where?
 - **Mr. Shelton:** Through a different vehicle, we are very much involved in that, remember that the Governor had a state housing policy , and one significant component to that was the homeless coordinating activity, and we have been actively meeting with Health and Human Service Secretariat and the various agencies. Talking about they are the lead in that whole system and the question then becomes they are working on developing that system, so then, the question becomes, such thorny issues, such as

because of privacy rules who has the right of access to that sort of thing, in a nonprofit homeless service agency actually gets access to information for making sure that they are doing the appropriate referrals and matching and so, yes, we are definitely, having that dialog.

- I don't know if we have a solution plotted yet, but they're working on state computer contract that essentially provides that vehicle for doing that and we are very much having the dialog. We are not driving the bus, but we are there at the discussion level and very much interested in it. And I think we are following that right now. I don't know where that is going to get to, in terms of its accessibility to data, but I think it will serve the state agencies, well. We are not ones of those who has rights of access to it, nor would it be appropriate. It is really the service providing agencies at the community level that perhaps need access to that information.
- **Sen. Watkins:** But don't you think it would be important that if its state tax payer dollars and appropriation is going into that, that at least, you should be hooked to the bus.
 - **Mr. Shelton:** Absolutely, I think we got to get the vehicle out there and then see what the legalities are and who can have access to it. Perhaps, a different way to think about this, one of the things and we have mentioned a lot of these special needs populations which I think intersects pretty closely to what you are talking about. Typically, there is some service providing organization at the community or regional levels, so, for example, in the mental health community its Community Services Boards, and so it would be obvious that they would be doing the case management, perhaps around that population and they would need the access to make sure that all the services money that was coming to the table. Typically, there is not housing money available to those agencies. One of the things that I know from the housing industry side that if you are in the housing business and someone needs those services and cannot get access to it you would be successful in providing the housing without the individual being able to access the services side.
- **Mr. Shelton:** A lot of discussion around we have been working with the Secretariat on the Department of Justice housing plan that is coming up there. The key issue is identifying those regional organizations or the community organization depending on where it is appropriate, it differs by region and making sure that they have access to that information because they are the ones that are going to be doing the case management wrapped around those individuals to make sure they get the services.
- **Sen. Watkins:** I would point out to the Commission that we had a fairly extensive briefing at DOJ settlement and the subsequent ruling on the part of judges on how that is going to be handled and the housing piece of it is probably one of those most critical pieces for Virginia, because the judge very explicitly stated I am not going to close any state housing for people with disabilities, but you have to put in a plan that provides housing and opportunities for those individuals to come out of those institutions. That's where I think this keys back and we need to make

sure that, that is integrated with Social Services and Behavioral Health and Disabilities Services people.

- **Mr. Shelton:** I would say, Mr. Chairman, that there have been ongoing meetings, all the way back, even before the final plan was signed off on. There has been a housing work group between VHDA and the Social Service agencies involved, basically, looking at the housing component, candidly, the 60 million that the General Assembly put into the trust fund for this purpose. I think there is only 800,000 earmarked for housing specifically. So, that doesn't buy very much housing. The key issue that kind of comes up over and over again, not just in that population, but the issue if you are going to provide a choice for an individual to transition, and they are going to move to wherever they are going to move to, there are kind of two or three components. The biggest one though that enables everything else is probably the ability to finance the housing component but it's the income component, or the rent subsidy which is going to be key.
- **Mr. Shelton:** Where that resource comes from right now the primary rent subsidies are coming through the federal government and they are all spoken for and the waiting list is a mile long. And so we are just adding to that list, and we are trying to work around one of those strategies for bridging across either on a temporary basis; but that makes me very nervous because this says up to one year, so if we did a demonstration and we did it for one year what happens at the end of one year somebody has got to be standing in line to provide that rent subsidy, or else you are in a more difficult situation, which is someone who can't survive at that location without that rent subsidy.
 - That isn't a plan, exactly. We are looking at other federal resources and I think we will likely be pulling out anything that we can provided it can be matched up with resources in the future and that's the only source that we know of right now.
- **Del. Bulova:** Thank you, Mr. Chairman. Building off what Senator Watkins was saying because I think that is really critical, it is great that we have the seven million dollars to get this thing kicked off since most of it will be loans, hypothetically, it's going to regenerate itself. In my neck of the woods, the Northern Virginia training center is scheduled to close in the next couple of years. You have other training centers in other parts of the state that are under this same situation and it is the housing that is going to be the critical part, so I am glad that you are making the connection. I guess my question is in the process that you are going through now you are getting a lot of input on what are the needs, and obviously our ability to fund those are going to be limited, but are you going to be talking about how to fund this in the long term to make sure that it is stable and I guess even more importantly in looking at the DOJ and how that effects it? Are you all going to come up with a recommendation for how much money it is going to take to do that? My fears is that we are walking down this road without a real clear idea of what it is going to cost in the very short term in order to make this DOJ settlement happen especially, with housing and so we have an opportunity here but I want to make sure that we take care of that opportunity and that we are

being honest with ourselves about how much it is going to cost, and if there is a way to make that work.

- **Mr. Shelton:** I would tell you that this plan probably won't address that larger figure. I think it is very difficult for us to meet that need for a couple of reasons. One is the magnitude of it is not thoroughly enumerated in terms of knowing exactly what the depth is of that need, and another key component is one of the things that we are looking at on this depending on how we structure this; we will inform ourselves as to how much it would really take to do that. So I think one of the issues is you are kind of speculative at this point until we actually get out there and actually structure a projects that use existing resources because we are not talking about new money other than the seven million, it is very difficult. So then, it is just rearranging what existing resources are there and I think that is a longer term conversation.
- **Mr. Shelton:** I agree with you whole heartedly and we have certainly looked at that and it is a lot of different sectors because it is not just the DOJ piece of it; we have to look in a broader context for the money follows the person grant and all the people were coming out of institutions that are not DOJ related. It is also prisoner reentry fees; it's also the homeless fees; you can get overwhelmed with this in a hurry. I think that demonstrating successful solutions and breaking this off, how many can you deal with a certain amount of money then you could begin making formed decisions. I think we always get wrapped around when we talk about well this number is so big there's no way we are going to solve it.
 - But, for example, when the DOJ piece, I think we are talking about four thousand individuals. Nine hundred which are actually institutionalized and the other three or four thousand basically are qualified for and eligible and therefore, could be part of the same DOJ settlement agreement and solving that is a pretty big number. And so that one we can kind of begin to enumerate but that isn't going to give you the total answer that you are looking for.
- **Sen. Watkins:** Please keep in mind I think that David Buliva is exactly right. The DOJ piece is four thousand people perhaps, and that does not even address the folks that are on waivers right now and the acuity of their situation in the long term either and what kind of housing is going to be available and where it's going to get funded.
- **T.K.Somanath:** In my day job, I am president of a nonprofit housing corporation called The Better Housing Coalition in the Richmond metro area. We are participating in a program that is sponsored by the VA Administration and we our housing in our communities about forty homeless individuals with some serious mental health issues and physical disabilities; and what it requires is a coordination of services. The VA has stepped up and they have gotten some special allocation funding, and they are coordinating the service part with the housing piece. They've been able to secure the Section 8 rental assistance to help a lot of the homeless merchants to be housed in permanent housing. That is the only way to solve the homeless issues, but on the social side of the issues, it is very hard for groups like us, to secure the funding to do the service component. So the VA has stepped up with their social service infrastructure, so they are

coordinating not only the housing piece, for example, of your housing almost forty of them in a facility using the VHDA federal low income tax credit. We can keep the rents low being able to secure those Section 8 certificates, which Bill eluded to, is the key component to subsidize the tenants rents along with the services being provided by the VA.

- **Mr. Shelton:** I think that there is maybe some lessons learned; in looking on how they are facilitating this, as well as, some cost structure and still with all of this there are some gaps. And since we are providing the housing piece we still have to raise monies from the local funds to fill some of those areas not being covered by the VA.
- **Del. Cosgrove:** Thank you, Mr. Shelton, very much. Next on the agenda are reports from our different working groups. If the Chairs are here, we will ask them to report what's happening in their groups. First on the list is Delegate Daniel Marshall, who Chairs the Affordability, Real Estate Law & Mortgages Work Group.

III. Work Group Reports

- **Delegate Bob Marshall:** The work group met twice May 14 and July 31 and we have also scheduled a meeting for October 11. The May meeting was dedicated to discussing whether or not a thirty- day requirement is relevant for an apartment hotel or motel room to become a dwelling unit thereby having to behave in accordance with a the VRLT and comply with the requirements of the landlord tenant law. This stemmed from Sen. Locke's SB 35, 2012. Tom Lisk outlined the differences between a hotelier and a landlord. Then, RL Dunn and Chip Dicks said, an agreement needs to be reached, so a draft is to be presented and maybe Chip can give us an update. Is there anything new to report on that?
 - **Mr. Chip Dicks:** Work in progress on the draft; no consensus as of now.
- **Del. Marshall:** Additionally on July 31, at the meeting, there was discussion of false advertising; liability of real estate brokers and salespersons; exemptions stemming from HB 724 by Del. Yancey, 2012. Steve Pearson with the Virginia Trial Lawyers Association was unable to be here so Chip Dicks, again, made the presentation. The issue will be continued to be discussed at our October 11 meeting. Also a presentation by our industry people led by Debra Allen from Virginia Land Title Association, and Myrna Keplinger of the Virginia Land Title Association took place. We will meet next meeting is October 11, 2012.
- **Sen. Watkins:** Mr. Chairman, before you go on, I would like to ask Delegate Marshall have we gotten any follow up on the SCC and the Bureau of Financial Institutions on the mortgage licensing. Have they given us a progress report this year?
 - **Del. Marshall:** Yes, the SCC presented this early in the interim, we will send it to the other members.
- **Sen. Watkins:** It would seem to me before we get to the end of the year we need to start preparing legislation to inquire: i) if there is further refinement that needs to be done, and ii) what is the status of the licensing?

- **Del. Marshall:** Agreed, every year since we put that bill in, back in '08, we had to evaluate and up-date every year. So, I don't think anything would be different this year.
- **Del. Cosgrove:** Elizabeth, let's make sure it's part of the full Housing Commission meeting in Roanoke this year. Next, is Housing and Environmental Standards that is chaired by Senator Watkins.
- **Sen. Watkins:** Thank you, Mr. Chairman. We had two meetings, as well. One was on May 9 and the other August 22. On the May 9 meeting, we deliberated and talked about the grandfathering of certain kitchens, this was a piece of legislation that Delegate Spruill had submitted with regard to churches. It became a little difficult to adequately define exactly how something like that would be placed in the State wide Fire Code. So the subgroup suggested that he may want to revisit that piece of legislation that in its current form we were not in a position to recommend it to the full committee.
- **Del. Cosgrove:** Was somebody there from the Fire Code to speak?
- **Sen. Watkins:** Certainly there were several people, both from the state and from the Fire industry present at the meeting. We also looked at Delegate Hugo's bill Alternative Onsite Sewage Systems and we got a brief overview of that. It talked about certain exemptions being allowed for requirement for operation. As a result of that, the August 22 meeting, was dedicated almost entirely to looking at two former bills: HB 942 Delegate Lingamfelter's bill, and HB 1071, Delegate Hugo's bill.
 - Delegate Lingamfelter put together sort of an ad hoc group that is looking at particular problems that are associated with Fauquier County. We had input from Loudoun County. We had input from Allen Knapp with the Department of Health and we also had input from Eldon James who spoke on behalf of Delegate Lingamfelter; specifically about the Fauquier County situation. The Commission, nor the subgroup did not have any recommendation.
- **Sen. Watkins:** We are going to meet one more time and we will consider it a little bit further; but it presents some unique problems, because when you are using these alternative systems to not have some mechanism for inspection, you are creating a liability that particularly when you get into rental housing and, you can have big legal problems associated with it, even with the individuals, it becomes, if you look at the economics of it, and you look what the cost would be if you had a municipal system connected, even a monthly basis verses these alternative systems cost to have inspected and please keep in mind we are trying to keep the inspection in the private sector.
 - The Department of Health has put in place a registration system where they are beginning to track all of these alternative systems. I asked that they revisit their questionnaires with regard to the information and criteria that's been required to put in there and that they track the fees associated with these inspections and post the fees so that the public has a full breadth of knowledge of what people are charging where and what becomes affordable and how to compare that with the cost of a traditional systems or a municipal system.

- **Del. Marshall:** The only thing that I would like to add is that Delegate Knight and I serve on Counties, Cities and Towns in the committee that I Chair this bill has come before us three years, in a row; and the problem is in rural areas the cost of inspection is pretty high.
- **Sen. Watkins:** We recognized that and we are hoping that by saying to the Health Department if you are going to track these things the information that will, at least, keep it competitive, in particular, in the rural area because we recognized that, that is a problem.
- **Del. Knight:** Senator, I remember distinctly when I was at that last meeting and we saw a range of roughly \$200 to up to \$1,500 to \$2,000 with your recommendation that the Department of Health track the costs. Typically, it was about \$350 and if that is to be spread out every year, and if a builder would pick up the cost for the first two years, and it was 350 a year, that isn't too bad.
- **Sen. Watkins:** Fifteen hundred to two thousand dollars per inspection, is exorbitant. And we want to send the message that we are going to post that number out there, and if that is what you are charging, you are going to have to stretch it a long way. You can say that, but even at \$1500, when you compare what you pay for a connection fee and what you would pay for usage on a monthly basis it is not as exorbitant as it seems, but it's when you get a single bill for \$1500, that's a lot.
 - But, anyway, we intend to finalize discussions, hopefully, Delegate Lingamfelter's ad hoc group will make a final play, if you would at the next meeting and finally, have a recommendation on that. I would also comment that the Housing and Environmental Standards Work Group is waiting in great anticipation for a certain report dealing with cash proffers and where they have taken us and what they are doing to us.
- **Del. Bulova:** Just to add something real quick to the issue with the alternative on-site systems. Not to make it even more complicated then I know it is, but I think one of the interesting issues is a relationship of that with the Chesapeake Bay TMDL , in meeting those, it was representative by the gentleman of the Department of Health, and also, Angie Jenkins from DEQ that our current plan our watershed implementation plan does rely on full implementation of the inspection schedule that is currently a state regulation.
 - The question I asked, because it is important to me, was if we were to change that would that cause them to have to go back and modify our plan for meeting the Chesapeake Bay TMDL and they thought that it would. And so, again, I think with more competition the problem kind of solves itself, but even if we didn't change it, it simply does require us to go back and look at allocation of who's reducing what and that might not be something we want to open back up.
- **Mr. Mark Flynn:** One comment about the reports we received on the AOSS's in August; what was really of interest to me, is that some of this, at least in Loudoun County, the serious problems that were identified through an inspection a lot of times were not problems related to the age of the system. Instead, we heard, the problems were related specifically to what happens when commercial lawn services in Loudoun County use mowers and knock the pipes and cause discharge

on the surface. One of the issues, has been, is it possible to extend out the time between inspections? That information indicated to me that extending that out may not work to the benefit of the public health. I had figured, that the when equipment got old, and when it gets worn out then problems occur; but it turned out that is not the experience, at least, in Loudoun.

- **Del. Cosgrove:** The next thing on the agenda is the Common Interest Communities, and I Chair that work group. We have had three bills that we have been studying. The first bill was the Condominium and Property Owners' Association Act; the posting of documents on the associations website. We are working on some language and it's not clear as to what documents need to be posted on the website. I think this bill will probably be ready for prime time by the full commission meeting. It just needs a little bit of tweaking and Elizabeth is working on doing that with the draft.
 - The second bill is from Delegate Scott it's basically, adopting an enforcement of rules of property owner's association. At this point and time, we will still discuss it, if he still cares to but it doesn't look good. It doesn't appear to be going anywhere. The other bill that we looked at was a bill that removes the cap on charges a unit owners association may assess; and that is not really met with a lot of favorable action, either. When you remove caps and you and I will explore what these fees may be it is pretty scary for anybody who has a condominium or is part of a homeowners association. So those are the three bills that we dealt with, so far, in that working group.
- **Del. Cosgrove:** I also Chaired the Time-share Work Group and last year we had a very, very lengthy time share bill that basically gutted most of the development community parts of that bill and implemented more consumer protection parts of that bill full disclosure requirements and what the property associations must do and how they have to provide that information, in a timely manner.
 - This year we are working with the other half of the bill dealing with the developers and the developer control period, and the time share bill has not been worked on since 1984. It is time to take a look at how the whole timeshare industry operates.
 - Right now, every time share that is built or will be built must be turned over to a homeowners association at some point in time. We need to be looking at the market and seeing if that is indeed what should be happening now. We listened to timeshare builders who are in the industry and these buildings, especially the ones on the coast, take a beating and after about twenty years they live out their useful economically viable life, however, the developer can't say I am going to buy everybody's interest back unless they consent to it, because that is the way the contract is written. I don't think we could change that but I think we need to be looking forward to see if there are things that we can do in the timeshare instruments that will allow develop control to be exactly that and the perpetuity of the timeshare, as long as it is agreeable to the person that is purchasing the timeshare, at that time. So it is a fairly complex and drastic change from the way that the timeshare has been done in the past but

looking at the market right now in the way other states are doing that is something that we are working on very hard. We will have at least, one or two more meetings to deal with the Timeshare Act revisions; and we are very fortunate to have some really good folks working on that working group. Delegate Knight has joined in; there are quite a few timeshare places in and around his district. So we will continue in working on that.

- Delegate Dance is not here and Elizabeth Palen will give the report for Neighborhood Transitions and Residential Land Use.
- **Ms. Elizabeth Palen:** The group met at the end of July and had a discussing regarding two issues. The first issue involved Stafford County. The locality was releasing the bonds from developers without the roads within housing developments, being accepted into the state road system. The locality had been releasing the bonds, evidently, too soon because there were not adequate funds available to bring the roads up to par to have those roads accepted into the system.
 - A representative from the homebuilders association also spoke and his feeling was that it was an issue that was just a Stafford County issue and that most developers would wish to finish the roads to keep their good reputations as developers.
 - The localities opinion on that was that they were dealing with developers, that because of the economy, were disappearing from the area, and then the locality didn't have any way to recoup those funds to get the roads up to speed. The group discussed it and felt that maybe this was not a bill that should affect all localities in the Commonwealth and did not vote for it to go forward to the full Commission.
- **Ms. Palen:** The other issue this group looked at was the inclusion of green factors on house appraisals. Last year during the Legislative Session, there was interest in having a study on appraisal practices, because currently when housing appraisers access homes, they don't look at factors such as solar power or any green factors in assessing a house. Two bills were put in during session; Delegate Tata's and Senator Wagner's and neither passed; but, because of that, DPOR began a study to look at incorporating those factors into appraisal practices, but they have to take there clue from what's being done on a national level. Mark Courtney, of DPOR, will report to us, in November, to let us know what is being done on a National level and with the appraisals in Virginia.
- **Del. Cosgrove:** Senator Barker would you like to tell us how your CCRC work group is doing?
 - **Senator George Barker:** We've had one meeting of the sub work group. I think it was a very good, open meeting. We had a large number of panelists who participated, including a number of resident of retirement communities. There were roughly three dozen or so continuing care communities around the Commonwealth and we are looking at a variety of different issues that have arisen there and what types of actions may or may not be appropriate to be considered in the future.
 - At the first meeting, we had a very good discussion and we are going to follow up with a second meeting this afternoon to begin to hone in on

issues and there maybe have one more meeting after that, too, to finalize some recommendations. There are two majors issues that we are wrestling with; first, trying to make sure that we have proper safe guards and protections in place for the resident who made financial investments in these communities. To that effect, at the meeting this afternoon we are going to have representatives from SCC come talk about the information in their over site role. The talk will center on, what type of information is collected and what type is not collected and how we might address the issues to make sure that residents investments in those communities are safe guarded.

- **Sen. Barker:** The second issue is the role of residents in governance. There has been tension on that issue between the residence and some of the facilities. There are a large number of the facilities around the Commonwealth that do have residents on the governing boards and there are other facilities who don't have residents' on the governing boards, so there are some issues there as to how we make sure that there is a voice for residents in that but we do it in a way that is appropriate and protect the interest of the operators of the facility as well. And so those are sort of the two major issues we are looking at and we do hope to be coming forward with some recommendations for the full housing commission to consider on that issue.
- **Del.Cosgrove:** Now for the presentation on Winchester Greens.

IV. Winchester Greens Presentation

- **Mr. Bob Newman:** Thank you, Mr. Chairman. I am the Vice-President and Chief Operating Officer of Better Housing Coalition, which is a nonprofit community organization that works in Central Virginia and has been doing so for close to twenty –five years. I was asked to make a presentation about one of our developments Winchester Greens, which is located on Route 1 in Chesterfield County off of Jefferson Davis Highway.
 - Better Housing Coalition, as I mentioned, has been active in the Central Virginia area for close to twenty-five years. Over that time, we have developed a number of communities in Richmond, Henrico, Chesterfield and Petersburg. In terms of developments that we have developed now total about 1500 residential units that we manage, as well. Winchester Greens is a community development that was formerly known as Park Lee Apartments; a community that was a project based subsidy community with some project HUD subsidies. It was foreclosed on by HUD, in 1996, I believe, and subsequently acquired by Better Housing Coalition, in 1997. The property was managed by absentee managers, by absentee landlords. It was approximately, fifty percent vacant at the time of foreclosure despite having some project based rental subsidies available to residence. It was a hot bed of crime and criminal activity. It was a very high concentration of poverty. In fact, the profile of the residence was very similar to a public housing community. This was not technically public housing, but the average income was about \$6,500 per year, ninety-eight

percent of the household setting comes below \$10,000, and a hundred percent incomes below \$20,000 dollars.

- **Mr. Newman:** The community was built in the 1960s and it was really a very obsolete design. All apartments were two bedroom apartments, that were about 600 sq. ft., very small, not very functional apartments. They were designed with interior corridors. A lot of vandalism occurred in these corridors that were basically, semi-private spaces, and very energy inefficient. I mentioned before that there was a lot of criminal activity in this community some was, I think, the result of this kind of design with a lot of publicly, semi-private spaces that were not really owned by anybody but some of it was also because of the high concentration of poverty and absentee landlords.
 - There were, in fact, the quarter that we acquired the property there were 300 police calls, in the previous quarter, in other words, and average of 1,200 police call to this address prior to our acquiring the property. This gives us some visuals of what the property looked like. There were potholes, which doesn't even begin to describe the condition of the area. There were dumpsters in the front doors of properties. There was a lot of no- man- land where a lot of the criminal activity accrued. Our involvement with the property, was at the invitation of Chesterfield County and VHDA. It was at the invitation of those parties for us to come and look at redeveloping this community in a way that could transform it from its historic problem state into a much more vibrant community.
 - And so we approached it by inviting residents of the community and stakeholders to provide input into the planning process which I think was a key component to the ultimate success of the development. We developed to the property using new herbalist principals. You will later see some images of the new community; but the original apartment community was redeveloped into 240 townhomes, and subsequently added 174 senior apartments. There's a state of the art child day care center that provides services up to 140 children. There are recreational pocket parks in the community. There is a community center that's locust of a lot of our social work programs then after school programs things of that type that are of great benefit and has led to some of the great results that we have had in this community. There is a recreational area like swimming pools. There's subsequently assembled some property that allows us to have done some commercial development on the highway frontage, and we have plans for a single-family subdivision that we hope to be developing soon.
- **Mr. Newman:** The redeveloped community is composed of two and three bedroom townhomes that rent for, basically, market rate rents. I mentioned before that there were a lot of very low income residents living in this community the fact that it was a fifty percent vacant at the time we had acquired the property gave us an opportunity to redevelop this in a way that allowed us to commit to those residents that if you wanted to continue to live in this community you could do so. I mentioned before that this use to be a project based assisted community and it's no longer a rent assisted community, in that sense, although the original

residence that were very low income that were living there were given a tenant based voucher so many of them choose to continue to live in the community many of them 15 years later still live in the community and have a much better situation.

- Again, using new urbanist principals, we were sensitive to architectural design, attractive and functional and safe spaces were created. There is a lot of engagement with sidewalk networks, pedestrian networks throughout the community front porches which are crucial to creating eyes on the street and a safe community, much improved lighting. The lighting of the community is tremendous and creates a lot of safe space where it used to be dark and inviting of criminal activity. There is a child day care in the community operated by the Greater Richmond YMCA. There are office buildings that we have development in the community.
- The original development had a development cost of about \$21 million which included the 240 new townhomes and the thirteen thousand five hundred foot daycare center. There has been subsequent development phases since then added to that. We had a lot of collaboration with different providers of services in the community the Chesterfield County library and a lot of other county programs. There have been Bon Secours Health Systems, boy scouts, 4H program, church groups working in the community a variety of adult literacy, financial literacy programs, afterschool programs, and etcetera. There is a community garden and the residents were active in planning and developing.
- **Mr. Newman:** A key component to our success over these years in our active management in this community have been the fact that one we are the property managers of the community and so we are where there used to be absentee landlords; we are very prominently present on-site every day and that is crucial and in conjunction with that we basically have changed the expected level of behavior in the community, so that the formally dysfunctional behaviors that were commonplace and excepted in the community were no longer acceptable. And during a transition period, the norms of behavior in the community had changed.
 - : The other key component to our success in the community is our ongoing investment in what we call community social work programs. And we talked about some of those the afterschool programs, the adult literacy programs. In our senior communities which were subsequently developed there's a lot of assistance to help the seniors in the community with specialists that are genecology nurses but this has been what has allowed some of the amazing outcomes that we have achieved. For example, I mentioned before that before we bought the property there was an average of 1,200 police calls to the property that went down very dramatically and very quickly as we redeveloped the property and it has stabilized at a level that is more than ninety percent below that level ever since then and actually the nature of the calls use to be rape, drug dealing, prostitution, arson, child abuse. All the things that you would not want to see in a healthy community, the few calls that still exist are much more benign in nature. You know reporting somebody speeding through the

property or suspicious character, a domestic dispute or something like that, but no more than any other residential community.

- I mentioned before that there were some subsequent development phases but most of those were adding some senior apartments in three separate phases. These were financed through VHDA using debt and low income tax credits through VHDA, but we provide now 174 very affordable senior apartments in this community that have a full array of services that I described before and those services by the way are provided to our residence at no cost to them.
- **Mr. Newman:** Some of the other developments that we have done subsequent to the original development has been commercial development that has provided, not only retail outlets and options for our residence, but employment opportunities, and basically some conveniences and amenities to the community. In addition, to retail there are some office buildings that we developed; Chesterfield County is our prime tenant and one of them is with some of their mental health programs. I mentioned that we have plans for a single family subdivision on property assembled after our original development and this is planned to be developed with our low impact development principals which really are focused on water conservation, preservation of existing stands of trees, etcetera that not only is more economical but more friendly to the environment and by preserving the big stands of trees leads for a more attractive development and new trees will be planted.
 - The community over the years had acclaim, a lot of national recognition, it's received a lot of awards from foundations and other entities, as well as, it's received Governor Housing Awards, etcetera. I wanted to focus on some of the reasons, some of the things that I attribute to being the keys to the success of this community over the last 15 years. Basically, I think it starts with the fact that we have approached this with a holistic approach to community development meaning that we knew that it was very important to involve residents in the planning. That was one key component to hear what the residents wanted in the community and translate that into some viable development plans. To be very sensitive to design and you know this is a mixed income development; it used to be a project based rental assisted community with very low incomes. Now, it has great diversity of incomes in this community and while still serving some of the original residents of the former community. The design to making it a community that anyone would want to live was a key to making the mix income component possible.
 - Also some of the financing that we were able to use here, a lot of times financing is restrictive about the kinds of incomes you could serve. We were fortunate to be able to use some financing that allowed a mix of incomes which has been really a key to the long term sustainable success of this community. We had great support from the local government from Chesterfield County among other things they assisted us in getting some bond financing through their industrial development authority to help finance some of this work, and also, helped us to facilitate some of the

zoning changes that we needed for the subsequent development that I described. I mentioned before and I can't stress enough the prominent onsite management. We are engaged and present and very prominently present in the community on a daily basis as owners and managers to the property. I think that is the key success to any kind of development as opposed to disengagement by the managers.

- Not to be understated at all we were fortunate to have adequate capitalization of the development here. I think that that is some that has allowed us to sustain our success over 15 years and for the foreseeable future. It has not been undercapitalized, it has not been overcapitalized. It's been adequate capitalization that has allowed us to keep this development moving forward on a day to day basis without having to make compromises that are counterproductive compromises and skimping on things. So the adequate capitalization of a development from the beginning is a crucial component to a successful operation over time and sustaining that over time.
- **Mr. Newman:** I want to end this with, I think, a key to the success of this community if the mission of the Better Housing Coalition. Our mission is to change lives and transform communities through high quality affordable housing and when we approach any development we approach it through that lens of that mission and I think that's different from approaching it with how can I maximize my profit on this? How can I get in and get out quickly? That is not what we are about; we are about staying committed to the communities we work in and truly changing lives.
- **Del. Bulova:** This is very impressive what you were able to accomplish and I commend you very much for it and I wish we could replicate it that in a lot more places. One of the questions I have, is how much did you solve the problem as opposed to shift the problem? I am curious what your thoughts are on that and, I guess, part of that is the original people who were in the original projects, how many of them ultimately wound up staying in the new development and were able to enjoy that 90 percent low crime rate vs. how many of them simply packed up and moved somewhere else?
 - **Mr. Newman:** I am really glad that you asked that question because that is one of the things that I am most proud of the approach that we took in our development. Often in a redevelopment and privatization of public housing communities the approach is to tear everything down, move everybody out, build something new. If some of those people come back fine, if not, I wouldn't say it's fine, but some people would say fine, because we now have a new community.
 - The thing that I am most proud of in our approach to this community is that we made a commitment to the residence of this community. If they wanted to continue to live there, they were able to do that. However, residents have to abide to the term of the lease and have to live up to these new community standards of behavior. Also, we had this opportunity with the fact that it was 50 percent vacant, which allowed us to redevelop this in a way, so we did it in phases, so that we didn't have to move anybody

off site during the redevelopment. It created some logistical problems during the redevelopment and extra cost moving people around. In some cases but the logistics of that it allowed us to basically say you live here you continue to abide by the terms lease and if you want to continue living here you can.

- **Mr. Newman:** So there were about 240 people living in the households at the time we acquired it. There were more than 180 of those ended up being residents that were initial residents of the community and 15 years later of those 180 there is still probably more than 50 of those families that are still living in the communities.
- **Sen. Watkins:** Bob, when did you all first acquire the property?
 - **Mr. Newman:** April of 1997 and it was foreclosed in the Fall of 1996.
- **Sen. Watkins:** When I was young and in the House of Delegates, I would do ride-alongs with the Chesterfield County police, and I visited that area on numerous occasions in the early mid 90s; he is not exaggerating at all. That was one rough place and what they have done is absolutely amazing. It really is it is a stellar example of how things can be done.
- **Mr. Newman:** I would like to emphasize we have taken similar approaches with other developments around this is not the only example of the work that we have done in this region. This was a way we could bring all elements together that are the keys to our success and approach everything in a sustainable way and have the healthy communities survive well into the future.
- **Del. Cosgrove:** Thank you very much. Okay, we are now in the part of agenda for public comments, if anybody in the audience would like to address the housing commission on any issue now would be the time. Okay, with that being said any other commission members have any other comments they would like to make before we adjourn.
- There was no public comment and the meeting was adjourned at 12:30 PM.

SUMMARY
Virginia Housing Commission
Governor's Housing Conference
Hotel Roanoke and Conference Center
November 14, 2012
1:00 PM

Members Present: Delegate John Cosgrove, Delegate David Bulova, Delegate Barry Knight, and Delegate Daniel Marshall.

Staff Present: Elizabeth Palen

I. Welcome and Call to Order

- **Delegate John Cosgrove**, *Chair* called the meeting to order at 1:00PM.

II. Neighborhood Transitions Work Group

- **Mr. Mark Courtney:** *Deputy Director for Licensing and Regulations; Department of Professional and Occupational Regulations:* At the last session of the General Assembly, we discussed legislation on assessments. We have been working on this for the past year and will give a summary of our recommendations.
- **Real Estate Appraiser Board:** Earlier this year, the Governor signed legislation that requires the Real Estate Appraiser Board to evaluate the continuation of education curriculum for appraiser licensees. The Board reported its findings, and we are here to answer any questions you may have on the report. According to McGraw Hill Construction's 2012 report, new and remodeled green homes are transforming the residential market, and green buildings are one of the fastest growing segments in the housing industry, creating new opportunities for those in the housing industry. Energy efficient green homes provide tangible and economic benefits to all in the Commonwealth.
 - General appraisal textbooks and classes do not provide extensive guidance for the evaluation of green homes, but the availability of green courses and green certification is growing. The Board has concluded that existing continuing education resources and opportunities are adequate on a voluntary basis to meet the needs of its licensees and ultimately their clients in the appraisal of green homes. The Board recommends against the development of additional Virginia specific continuing education coursework because existing curricula appears to be sufficient.
- **Del. Cosgrove:** Already twenty CE hours are required every two year term, plus seven mandatory (USBAP) course hours.
 - Yes, that is the federal requirement.
- **Del. Cosgrove:** Twenty-one elective hours are also required.
 - That is correct and is required every seven years.

- **Del Cosgrove:** looking at the language of the bill, saying non-income producing residents. Do rentals not count?
 - Correct.
- **Chip Dicks:** *Realtors Association:* weighed on a builder perspective. His opinion was that if green features have been incorporated into the building, then it should be reflected in the assessment. The issues lies with Fanny Mae, Freddy Mac, that and the federal government, and the face they do not recognize the addition of green feature. What needs to be included in an assessment needs to be changed on a national level. The continuing education already includes some of those issues, but this will not be solved this year.
- **Del. Bulova:** If we are not pursuing it in the General Assembly, is the federal government pursuing this?
 - **Mr. Dicks:** I believe the DODD-Frank Act is addressing this and that it is on the federal agenda. To this point in time, the federal underwriting requirements have not been changed to include green features.
- **Del. Cosgrove:** could a developer take some LEED, and get continuing education credit.
 - **Mr. Courtney:** Yes.
- **Del. Cosgrove:** Inquired if there were any other issues that this workgroup tackled.
- **Ms. Elizabeth Palen:** Yes, Delegate Dudenhefer's issue (HB 731, Dudenhefer, Performance Guarantees, street construction, 2012) regarding dedicating the roads to the state, It was decided it was a Stafford County issue. After considerable discussion on the topic, it was decided that no action would be taken to propose legislation at this time.

III. Common Interest Communities Work Group

- **Del. John Cosgrove:** This issue was whether it be required or suggested that Common Interest Groups post their declarations or other information on internet sites. After much discussion, there was no consensus on legislation going forward.
 - Regarding (HB 979, Scott 2012)and (HB 213, Scott 2012), one deals enforcement of rules of home owners association act. Other removes cap that an owner's association may asses. Common Interest Communities work group voted for this legislation not go forward. Full Commission was in agreement.
 - Del. Cosgrove explained that a considerable amount of discussion took place on each proposed issue including speakers that represented each side of the issues.
- **Del. Cosgrove** explained that no senators are present at this meeting due to the Senate Finance Retreat, which is being held simultaneously to today's meeting.

IV. Housing and Environmental Standards Work Group

- **Mr. Edward Mullen:** *Reed Smith Law Firm:* He gave a synopsis of the three Attorney General's opinions and the effect on AOSS legislation being studied by the Commission.

- Since 2009, there have been more stringent local government requirements than state requirements. (Please see attached opinions). One opinion had to do with local exception to the zoning ordinance, and if it was prohibited by 15.2C of the Code of Virginia. The AG said that it requires special exception legislation and effectively gives that to the local governing body. The first opinion in of itself makes sense.
- The second question had to do with if maintenance bonds for AOSS's were permissible. And construction standards, could they exceed that of what the state required. 2157(D) of the code of Virginia clearly prohibits greater requirements for maintenance bonds as long as it doesn't exceed the state standard. He noted that this is only when there are sewer and sewer systems in the locality.
- The third opinion has to do with can a locality have more stringent requirement than the Department of Health if that would mean that the AOSS would not be allowed.
- Reading the three opinions together, we conclude that locality may never adopt requirements that exceed those of the state.
- **Mr. Mark Flynn:** *Virginia Municipal League*, did not agree with Mr. Mullin's interpretation. Instead, he felt that the AG's opinions were in conflict with one another, and localities were not explicitly prohibited from the exceeding the Department of Health regulations.
- **Mr. Eldon James** (representing Del. Lingamfelter): Proposed legislation address system failure for two groups: low-income families and bad actors, that refuse to make repairs. Del. Lingamfelter has asked just to go forward with the first part of the proposed legislation. (Betterment Loans) can be used for AOSS or conventional sewers. The bill directs Board of Health to use the Indemnity Fund to provide for the Betterment Loans. People with older systems with lower income are not in a position to fix the failed AOSS. The stakeholder group came up with this recommendation. A section of the proposed legislation increases the fee from \$10 to \$25 because the amount going to the Indemnity Fund has not changed.
- **Del. Marshall:** Is this the original fee paid when you file for an AOSS?
 - **Mr. James:** Yes.
- **Mr. James:** Emerging technology is ahead of the law, so need to update legislation. Del. Lingamfelter, would like to put in a study resolution on the AOSS issue.
- **Del Marshall:** Del. Knight and I have heard this at the last meeting. We want to know how many systems are out there and where they are. This is not just an issue in Northern Virginia. This is a problem for the entire Commonwealth.
- **Mike Toalson,** *Home Builders Association:* pointed out that there are many places in the state where there are not conventional sewers and AOSS are needed. Home Builders Association would be interested in working with local government to work on local regulation to design systems and how they are regulated. The State Department of Heath requires their maintenance on an annual basis, which is a good thing.

- **Chip Dicks:** The Virginia Association of Realtors has no concerns about the betterment loan. We submitted a piece of legislation that made clear that localities did not have the authority to impose a cash bond or other financial obligation, with the exception of maintenance.
- **Del. Bulova:** Are you asking that we develop a study around what we've been studying, or do we pass legislation and have a study?
- **Chip Dicks:** requested to add language saying that the locality can charge a cash bond.
- **Ted McCormack, Virginia Association of Counties:** We should not forget that we also looked at Del. Hugo's bill. It is important that these maintenance regulations for AOSS stay in place.
- **Del. Bulova:** has concern about funding for the Betterment Fund, as the funds are already stretched.
- **Mr. James:** Del. Lingamfelter will put forth a budget amendment.
- **Del. Knight:** It can cost anywhere from \$200-1500 for an annual inspection. I thought a list would be provided of inspectors available in each location in order that there be viable competition in the market place.
- **Mark Flynn:** I passed out an amendment that is no longer necessary now that we are only dealing with the Betterment Loan.
- **Del. Cosgrove:** I think this is a good thing for the workgroup to study, but we will defer the decision to a later date. Let's have the Housing Commission study this next year.
- **Del. Marshall:** I recommend Sen. Watkins convene another Housing and Environmental Standards Workgroup meeting.
- A decision was made to have Sen. Watkins request another meeting.

V. Continuing Care Retirement Communities Sub-Work Group

- **Ms. Palen:** The subcommittee has met three times and will meet again on Nov. 30. Some resident of CCRC wanted to be placed on the boards of the CCRC. This has changed over the course of studying the issues. Sen. Barker met with the insurance Bureau of the SCC.
 - The most likely scenario, is the SCC will adjust what they ask or in their annual audits to include a separate report from each entity under the umbrella organization. That they will also put out a post-it list for each facility before sign your CCRC residence contract.
- **Del. Cosgrove:** suggested that, similar to time-shares, a sheet is given to consumers with a readable font and in a concise manner.

VI. Affordability, Real Estate Law, and Mortgages Work Group

- **Delegate Danny Marshall:** We met three times this year, and we don't yet have consensus on the issues.
- **Chip Dick:** The versions you are looking at is version number seven. We have discussed the issue in a number of meetings. We have consensus on all the issues except for one facet. Last year at this meeting, legislation passed but this piece on

unlawful detainer was held because we did not have a consensus. When you have a hotel/motel and people are staying for extended periods of time, at what point do they become tenants. Does that premise become a dwelling unit, and under that process you would have to go court and use the landlord eviction process. At what stage would those circumstances be under the Innkeeper Statutes, which would allow somebody to change the lock on the door?

- This is not an issue for those who have separate permanent addresses, nor for the facilities such as a Courtyard Marriott. Innkeeper law is not by statute. It is case law. The question is whether the traditional hotels would have to go through the eviction process for non-payment in court. We worked with the Hotel/Motel Hospitality Association to exempt them. The language before you looks at the two Landlord Tenant Acts in Virginia: Virginia Residential Landlord Tenant Act and the Virginia Landlord Tenant Act. The language is very similar in the two acts, and takes out the traditional hotels where guests have a legal domicile elsewhere.
- People who do not have another primary residence are often not model citizens who do not have credit. People renting to them are not doing credit check or background checks, and allow people to pay week to week by money order. We want to be sure that portion of the population continues to be housed.
- However, if there is an issue of non-payment, the owner has the right to evict the tenant after a five day timeframe. Permanent residents who stay for more than ninety days are covered by one of the Landlord Tenant Acts. Our perspective, you are either under the Landlord Tenant Act or not. I support both aspects of this legislation. Ms. Marra's position is that you should be under the Landlord Tenant Acts for all other violations, not just non-payment.
- **Christe Marra, Poverty Law Center:** I want to remind you of two additional pieces of information (1) issue of people living in hotel/motels who are current on their rent and who the owner wants to evict for another through self-help eviction. If these were there for fewer than ninety days, that they should be covered by the tenant laws.
 - (2) Traditionally, people living in hotel/motels have been treated as tenants after thirty days, and changing the period to ninety days is a significant change. With the language regarding the five day notice, it should be applicable to everyone and not just those being evicted for nonpayment
- **Chip Dicks:** I disagree with the statement on the previous law. If you lived in a hotel/motel and not a dwelling unit, and thus not covered under the Landlord Tenant Act regardless of length of stay. We thought we had consensus three weeks ago. We will continue to work on this issue.
- A full discussion of the issue ensued.
- **Del. Marshall:** asked if another meeting was needed or would they be ready by the December 5 meeting.
- **Chip Dicks:** That's not necessary. We will work this out with all concerned parties.
- **Del. Marshall:** Our work group also dealt with the issue of false advertising, the Liability of Real Estate Brokers and Sales Person Exemption. (HB 724, Yansey 2012). Chip Dicks and Steve Pearson with the Trial Lawyers Association worked

on this bill and gave presentation to the work group. I don't think we're going forward on this issue, but Mr. Dicks will give an overview.

- **Chip Dicks:** It deals with the circumstance of a real estate agency that may be acting in capacity with respect to an apartment or condominium community. Chip described a particular case in Newport News where the plaintiff defamed the defendant by alleging criminal fraud without there being a criminal charge. I requested the bill be withdrawn, so we could take it to the Courts Committee.
- **Del. Marshall:** suggested we move on to (HB 566, D. Marshall 2012) regarding rental inspection districts.
- **Chip Dicks:** The rental inspection ordinance will be adopted on December 27. The issues that lead to the lawsuit and disagreement and the legislation have all been resolved in an amicable fashion through City Council. I've seen the (draft staff report) for that ordinance amendment, and it is to be presented on December 27 for final adoption. We think that disagreement between the realtors and city of Fairfax was closed. We greatly appreciate Del. Bulova's involvement, and would also like to thank the city council and city staff for working with us.
- **Del. Cosgrove:** Del. Marshall, any action?
- **Del. Marshall:** No action
- **Maureen Stinger,** *Office of General Council; State Corporation Commission*

VII. Time-Share Sub-Work Group

- **Del. Cosgrove:** I worked along with Del. Knight on the Time-share sub-work group dealing with changes to the Time-Share Act. The first changes were made last year that had been made since 1984. Last year, we added protections to time-share owners, requiring a particular form to be signed in large font that made clear that time-shares are not considered an investment so there is no guarantee of a sale. Other minor things were added to consumer protection.
 - This year, we were working on the developer side. We did two things: (1) developer control period. Under the existing act, the developer must turn over control to a Home Owner's Association when 90% of the units have been sold. The time-share industry has changed drastically since 1984. In many cases some of the owner managed associations don't have the same drive to maintain time-shares as a developer or management company would.
 - An owner's association can hire a management company, but often they do not and it turns into a glorified civic league and gets many maintenance fees and people are not happy later on.
 - Developers now are carrying a lot of the debt of those time-shares. In many cases, the developers are carrying the paper on that time-share. We looked at the liability the developer would have if he had to turn over management to a Home Owners Association where he still owned on paper a great deal of the time-share.
 - Last year's legislation, said that the developer can keep control of the management of said properties if he held 10% or more of the paper. We have

changed that now to 20%. That would allow the developer to maintain management until that time where 90% is sold, or they have less than 20% of paper. This is a very small change. Or has completely all the promised common elements. We had a number of people from both sides of the issue discuss the topic with us, with the exception of one individual, the working subgroup unanimously recommended that this proposed legislation be endorsed by the Housing Commission. I will ask that we wait to do this until December 5 at our next meeting.

- **Del. Bulova:** What was the concern of the one person who didn't like the idea
 - **Del. Cosgrove:** He thought the developers had too much of an advantage as it is now, and he also wanted to be sure that all the common elements promised were there.
- **Del. Cosgrove:** On the other bill, last year as part of the protections for the home owner's association. They had to advertise in the newspapers all the foreclosures, including all the variety of information on every unit. We changed the \$45 fee to the Commissioner of Accounts last year, which is costing the Time-share Association up to \$125 for each foreclosure. These are done on a batch basis, and costs the Time-Share Owner' up to \$50,000 more than it costs to advertise foreclosures.
 - **Del. Cosgrove:** These time-share foreclosures do not have to go through Commission of Accounts. The Time-Share Owners Association; I will bring this to the Full Commission on December 5.

VIII. Mortgage Loan Originator Act (SAFE Act)

- **Maureen Stinger, Office of General Council; State Corporation Commission:** I come to with piece of legislation pertaining to the Federal SAFE Act. This is small and technical. In 2008, following the subprime mortgage crisis, the most states had already regulated mortgage lenders and broker, which were generally the lenders with funding for loans, brokers who could be a company or an individual who were providing loans.
 - Because so many mortgages were subprime, the federal government stepped in and asked the states to start regulating individual people who provide their mortgages to them to be sure they properly educated in order to be licensed to originate loans. They passed the Secure and Fair Enforcement Mortgages Act (SAFE act), which gives the state a time period to enact legislation to license these individuals at the state level.
 - Since then, the federal government has put forth regulations interpreting the SAFE Act, which occurred concurrently with the States' enacting legislation. Final regulations came out in 2011, and then were transferred Consumer Financial Protection Bureau (CFPB). Because of all of the new regulations, we came before the Housing Commission last year with some technical changes to bring our act into compliance. Since the CFPB regulations came out in late 2011, we had not had a chance to be sure out act was in compliance.
 - You have before you a piece of legislation that details the new changes. Interestingly, there items in the federal regulations that do not match the federal act, which has created some confusion. We feel it more prudent to follow the

agency. We have changed some definitions, and some definitions were eliminated, as some exemptions in the federal regulations were removing making the definitions unnecessary. Some additional definitions were shored up. All of this was done for the legislation be in compliance with the federal regulations.

- A discussion ensued regarding the fact that Virginia was the first state to adopt the SAFE Act.
- **Del. Marshall:** Has this been distributed the members of the former work group? If not, Elizabeth, can you sent this out to everyone to see if they have any questions or concerns?
 - **Elizabeth Palen:** Absolutely.
- **Del: Marshall:** I would suggest that we not take action on this until we have responses from the members of the former workgroup. Then, if necessary, we can hold another meeting to discuss this further. We should give this to Sen. Watkins as well, as he is carrying the bill through the Senate.

IX. Public Comment

- **Del Cosgrove:** Yesterday, the city of Chesapeake took a vote on proffers, which I believe will cause some discontent within the General Assembly. The vote was to allow localities to use proffers for school maintenance instead of school construction and for uses other than construction of new homes. They also reduced the amount of proffers they were asking for because proffers are voluntary in the Commonwealth. I wanted to make everyone aware of this issue.

X. Adjourn

- As there was no more public comment, the meeting was adjourned at 3:15 PM

SUMMARY
Virginia Housing Commission
House Room C, General Assembly Building
December 5, 2012
10:00 AM

I. Welcome and Call to Order

- **Delegate John Cosgrove, Chair**
 - the meeting was called to order at 10:00 AM.

II. Proffers: Chesapeake/Update on Use of Proffer Funding

- **Del. Cosgrove:** Let us begin with an update from the city of Chesapeake regarding proffers. Before we start this, please understand that the way the housing commission works, is we study bills during the year and make recommendations on those bills whether they come from the General Assembly to the Housing Commission or from Housing Commission members. We have had no bills dealing with proffers so basically Chesapeake is just going to tell us what they are doing with proffers. We have no action to take at this time, since there is no bill that I know of regarding proffers. Mayor Krasnoff, welcome.
- **Mayor Alan Krasnoff:** First of all let me thank you for all you have done for Chesapeake in the past, whether it's our education needs, transportation needs, our social welfare needs, you've always been there on both sides of the aisle, so we appreciate you so much for what you have done.
 - We just recently passed a law, a text amendment to the proffers, which allows the city to use the proffers in a timely manner. I want to first say this which is extremely important: we did it because we believed it was legal, and we took it from the advice of our city attorneys as well as other jurisdictions in the commonwealth. Please appreciate, and I hope you can appreciate also the fact that education is indeed a core function, and we want to ensure the quality of education because when you do that, you then guarantee an educated and a qualified workforce.
 - Our proffer policy incorporates renovations, it incorporates also maintenance. Please appreciate, when we say the word maintenance we are talking about capital projects. Within a five year plan it is \$137,000,000. Within renovations, again we have already spent \$32,000,000 on Western Branch, which is in our city, a high school as well as another high school within Indian River of almost \$42,000,000. We just recently used the proffers for a CSIP building to help those young people of \$1,200,000 so we appreciate the tool that you have given us. It has been extremely helpful, and allows us to indeed continue to help fund the capital projects that are generated from these projects, so I thank you for the introduction. We do have Mr. Ron Holman here, as well as Mr. Grady Palmer representing our city attorneys, if you have, if indeed the process is to ask questions. So again, we thank you Delegate Cosgrove and everyone else here for the opportunity.

- **Mr. Ron Hallman, City Attorney; City of Chesapeake** :I was asked by Mark Flynn to attend, and we are happy to be here, as the mayor stated. I think the issue to be addressed basically relates to maintenance and renovations and repair of facilities. The City of Chesapeake for a long time has used proffer funds we think it's within the (ambit?) of the statute to use it for that purpose, and as the mayor emphasized, we are not talking about minor painting of walls or insulation of windows. We are talking about major renovation as a capital project and as you know the statute permits the use of cash proffers for renovation, repair and maintenance of public facilities provided they are included in the approved capital improvement plan, which they are in Chesapeake. The project is consistent with the compliance plan, which they are, and third, the work is carried out on a public facility that will serve the residents generated by the rezoning, and that's more the core purposes or requirements of the proffers. And as we stated, the key here is we're not using cash proffers for routine maintenance. It would be major capital projects, included in the capital improvement plan.
 - It is notable to set forth that section 15.2-22.96 of the state code in defining the purposes of conditional zoning, contains the following language: "It is the purpose of these statutes to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zonings whereby zoning classification may be allowed subject to certain conditions. The exercise of authority shall not be construed to limit or restrict powers otherwise granted to the locality." The statutory purpose is flexibility.
- **Mr. Hallman:** In closing, I would state that this opinion has been consistent through the years, and I know of no local government attorneys who hold a contrary opinion. We feel that routine maintenance is for the purpose of preserving a capital asset, and if you have a school building, for instance, it is important to ensure that it remains functional for its intended purpose. So therefore we believe that it is within the purpose and intent of the legislation for this purpose. At this point I would like to call Assistant City Attorney Grady Palmer who has additional comments.
- **Mr. Grady Palmer, Assistant City Attorney; City of Chesapeake:** I just wanted to make one point here. The zoning statutes and the zoning ordinances that are adopted pursuant of those statutes really authorize localities flexibility and local discretion, and so that flavored Mr. Holman's opinion. Part of my contribution to him and to others was to explain that the intent of the legislation was to give local governments the ability to address local issues. In Chesapeake, there is need for capital projects and large-scale maintenance projects, with over &100,000,000 in outstanding projects.
 - **Mr. TK Somanath:** Do you have any proactive policies to have inclusive zoning to increase offers to build affordable housing closer to jobs?
- **Mr. Palmer:** With affordable housing, we do not even have a proffer policy. We allow those to happen because we understand the need to be closer to the job. We have something called Workforce Housing. So if you have something to come in front of us that deals with affordable or workforce housing, you are exempt from the proffer policy.
- **Delegate David Bulova:** I'm trying to understand why you imposed the proffer which is supposed to be driven by stresses and demands and pressures placed by new residents coming into the city, and then the maintenance and repairs. Certainly, you can make that case depending on exactly what kind of repair or maintenance you're talking about, or it could be a way to simply backfill or catch up on maintenance that ought to have been done over the years from existing users of those facilities. Can you talk some more about why it's

appropriate to do this via proffers as opposed to another mechanism. How many other localities do it that way?

- Prince William, Loudon, (Chesterfield is mentioned as well but omitted later 16:40) use that approach. The statute requires that the facility must serve the residents generated by the rezoning, so the rationale is, maintenance preserves those existing facilities so you don't have to buy new ones. It addresses the statutory purpose of proffers which is to alleviate the fiscal stress on localities that have to build facilities, not only schools but roads and other types of improvements to serve new residents. If you can maintain a building through major capital improvements, like renovating it or putting a roof on it and making it more functional, bringing it up-to-date with technology, etc., then you are meeting the needs generated by the new residents.
- **Mr. Michael Toalson**, *Chief Executive Officer of the Homebuilders Association of Virginia*: As you all know for the last 10 years the HBAV has maintained that the current proffer system is unbridled, out of control, and lacks accountability. I think this is another step to confirm that in fact is the case. HBAV, members of the General Assembly and most localities have long understood that a rational nexus is required in conjunction with a rezoning and a proffer itself. In fact, if you look at the proffer statement that is included in the Chesapeake application for rezoning it "acknowledges that the proposed rezoning itself gives rise to the need for the condition that such conditions have reasonable relation to the rezoning, and that such conditions are in conformity with the city's comprehensive plan." That is from the Chesapeake rezoning application I have if you care to look at it today.
 - Once again demonstrating the need for that rational nexus, and in fact, if you read further in the Code of Virginia you'll see in 15.2.22.97 and 15.2.22.98, that there is a fundamental requirement in the Code of Virginia that the rezoning itself must give rise to the need for the conditions. The conditions shall have a reasonable relation to the rezoning. Now how that can be construed to mean that new residents of a community and a new subdivision should be required to pay for maintenance and repairs, whatever degree they may be, for existing facilities is beyond me. HBAV and their attorney do not see how Chesapeake can justify their use of proffers for the construction of new facilities generated by the subdivision or development itself for the repair and maintenance of existing facilities. This is further evidence of this unbridled proffer system in Virginia. The responsibility for maintenance of existing facilities should belong to the residents who have been using the facilities. Expansion of an existing facility to accommodate new residents is a reasonable use of proffers. Local governments should not be allowed to fund routine maintenance and repairs using proffers. Funding this is the responsibility of the current residents, not new neighbors who have not used the facilities and did not cause the conditions of the facilities.
- **Del. Bulova**: Compared to Loudon and Prince William Counties, how does Chesapeake interpret the existing code to provide proffers?
 - **Mr. Toalson**: Chesterfield County does not use proffers for maintenance. I looked at the commission on local government's receipts of cash proffers and expenditures in Chesapeake. I found between (2007 and 2008), they have received \$7,279,869, and disbursed during that same period \$3,839,778. According to these records, they have over \$3 million sitting in a proffer

account that was contributed for the expansion of new facilities created by demand.

- We do have a provision in the Code of Virginia that allows flexibility for that, but only after a certain period of time, and the fund must be used same type of facilities in the vicinity of where those proffers were contributed. Chesapeake should not use funds to repair and maintain facilities that have been “worn out” by current residents. Current residents ought to pay for the repairs, not the new residents.
- **Mr. Roger Wiley** (*Loudon County*): I take issue with Mr. Toalson’s statement that cash proffers are unbridled and out of control, Loudon County’s process is anything but. Loudon County’s targeted and organized usage of proffers has been used to build 27 schools in the last decade, and they anticipate continuing at a pace of 2-3 schools per year into the foreseeable future, due to the continuing population growth. Because of this demand, it is unlikely funds were spend on maintenance. The issue If renovation or maintenance will prevent a locality from having to build a new facility to accommodate new residents, then it is a justified use of proffers. However, I also agree that routine maintenance is not a proper use of proffer funds.
- **Del. Cosgrove**: Commission has taken no action this year. This meeting is information only. However, I imagine that during session a bill will be put forward

III. Proposed Legislation

- **Mr. Eldon James**, *Public Policy Consultant: Fauquier County*: Delegate Lingamfelter an ad hoc group has been working on proposed legislation to clarify definition of betterment loans, that they can be used for alternative on-site systems, as well as alternative discharging and for conventional systems. The bill would authorize the Board of Health to make up to 25% of the Indemnification Fund available for betterment loans or guaranteeing betterment loans to serve low-income households that might be faced with failing alternative system. It would increase the portion of the application fee paid to the Health Department on AOSS permits, to be set aside into the Indemnification Fund, to keep pace with the general increase in funds that has occurred over the last several years. The Code spells out the fee. It’s \$75, but the budget bill has raised that fee to \$225 if submitting with an engineer or an on-site evaluator, to \$425 if submitted by an individual, and as high as \$1400 if it’s as high as a thousand gallons per day or larger. The set-aside for the Indemnification Fund has remained at \$10. The bill would also authorize the Commissioner of Health and the Attorney General to work to develop policies for providing those guarantees for the betterment loans.
- **Del. Bulova**: How do we pay for this? Raising the amount that goes to the betterment fund from \$10 to \$25 means that the Department of Health has a shortfall of \$300,000. I understand Del. Lingamfelter is willing to put in a budget amendment. My concern is that this would be done through the general fund, meaning that everyone would be paying for maintaining systems that are more appropriately dealt with using a user fee system. Can you give me a status of what Del. Lingamfelter is thinking? However, I have a hard time supporting this concept if the funding means that the Department of Health will be short \$300,000.
 - **Mr. James**: Delegate Lingamfelter is committed to a budget amendment. He has not determined whether he is going to ask to replace that \$300,000 with

general funds or with a \$15 fee increase or a potential percentage increase, which becomes complicated. He is still working through the best way to approach to amendment.

- **Delegate Barry Knight:** Delegate Bulova talked about a user fee for people who have septic tanks. A lot of people in my area have septic tanks and I believe we have been paying as general taxpayers for the upgrades to the Hampton Roads sanitation district.
- **Del. Cosgrove:** Are there any further comments on the AOSS Betterment Loans. Is there a motion to endorse this piece of legislation. It has been moved and seconded that the Housing Commission endorse this Bill. (Delegate Bulova abstained)
 - *(The bill was properly moved and seconded, all were in favor except Del. Bulova , who abstained, and the bill received endorsement by the Commission.*
- **Del. Cosgrove:** Delegate Marshall could not be here today. Here to talk about the SAFE Act is Maureen Stinger.
- **Ms. Maureen Stinger, General Counsel's Office at the State Corporation Commission:** This legislation is part of the Virginia framework to regulate mortgage loan originators which came out of federal legislation enacted in 2008, known as the Secure and Fair Enforcement for Mortgage Licensing Act (SAFE Act). Federal government Congress decided to require states to start regulating not just mortgage lenders or brokers but also the individual human beings who work with people to explain their mortgages to them, offer those mortgages to them, negotiate those mortgages for them, to make sure those individuals had enough training, education, and kept up with that education so that they knew enough about the mortgage products, that they were of good character, that they had financial responsibility was another step to prevent another mortgage crisis like we faced in the late 2000's. Virginia enacted its framework in 2009. (Ch 17.6.2.)
 - The changes to legislation over the past few years occurred due to changing regulations of the federal government. This year's changes are mostly technical. There are some changes to definitions, shoring them up against federal definitions. Some changes pertain to the exemptions that are needed. This legislation will make all of Virginia's exemptions identical to those under Federal Law. Handout that explains all changes in draft legislation, and is available under the "Materials" section.
 - One other change needs to be made that Department of Housing Community Development found . In lines 22-25, because depository institution changed into covered financial institution, the definition of registered mortgage loan originator was changed; From that change, we also struck the definition of federal banking agency, so lines 22-25 can be stricken as well. I would be happy to answer and questions.
- **Ms. Elizabeth Palen, Executive Director of VHC:** If indeed the Commission decides to endorse this bill, Senator Watkins and Delegate Marshall have agreed to carry it.
- **Del. Cosgrove:** Are there any further questions about the bill? Hearing none is there a motion to pass the bill from the Housing Commission? Moved and seconded to endorse SAFE Act (which will be carried by Sen. Watkins/ and Del. Marshall) (motion passed.)
 - *The bill was properly moved and seconded, all were in favor, and the bill received endorsement by the Commission. The bill will be carried by Sen. Watkins and Del. Marshall.*

- **Del Cosgrove:** Moving on to the proposed legislation dealing with hotel / motel extended stay. We had a long discussion between Chip Dicks and Christie Marra. Has anything changed since last time?
- **Mr. Chip Dicks, Virginia Association of Realtors:** We have since reviewed the draft we discussed in Roanoke, and we have consensus on that draft among all stakeholders. I'm happy to briefly review it. The bill deals with a segment of the population that live in hotel/motel boarding house situations that are questionably not uncovered under the two (Landlord Tenant) laws and questionably not covered by the Innkeeper Statutes. The real question was what rights to people have under those circumstances. We tried to not dispossess those people of housing, because now those owners of properties do not do credit checks and do not have long term leases, and do background checks. As a result, we want to be able to house those people.
 - The balance we ended up striking was that for the first 90 days in a hotel/motel boarding house, an occupant can stay and they don't have to get credit checks, or give security deposits. They would not be treated as tenants, except for in the event that they did not make a monetary payment for their weekly room rent, that the owner of the property would agree to give a prior five day written notice that said I will change the lock on the door if you do not pay for your overnight accommodation by a given date. Other than that, the language makes it clear that there is no landlord tenant relationship in the first 90 days. After the 90th day, that by operation of law those occupant would automatically become tenants under law and would be treated as either as under the Virginia Landlord Tenant Act for single family houses or under the Residential Landlord Tenant Act for multifamily depending on circumstance.
- **Ms. Christy Marra, Virginia Poverty Law Center** As Mr. Dicks said, this does reflect the compromise reached by the stakeholders. That provision regarding those living in hotel/motel lodging for more than 90 days are covered under the (VRLTA and the VLTA's) critical as is the five day written notice not non-payment issues prior to that 90 day period. The draft does reflect that an owner of the property dealing with someone living there for fewer than 90 days can use self-help, i.e. changing locks, etc., providing the 5 day notice and lack of payment in full received by the date listed on the notice. It's pretty tight in stating the agreed upon language.
- In the first 90 days, if there is an issue not related to non-payment but related to the rules of the hotels, can the occupant be kicked out?
 - **Mr. Dicks:** Yes. For example, if someone is charged with distribution of drugs then the owner can simply change the lock.
- Then the 90th day of occupancy, all of the provisions of the Landlord Tenant Act are invoked.
 - **Mr. Dicks:** On the 91st day, all the provision of the Landlord Tenant Act would be by operation of law applicable to that relationship regardless to whether they had a written lease or not
 - **Ms. Marra:** Also, if someone is residing in this type of lodging less that 90 days but has a written lease that gives them the right to be there more than 90 days, then those people are also covered under the (VRLTA and the VLTA).
- **Del Cosgrove:** Sen. Locke will carry the bill on the Senate side, and Del. Dance will carry it on the House side. Endorsement of this legislation was moved and seconded. (The proposed legislation passed)

- *The bill was properly moved and seconded, all were in favor, and the bill received endorsement by the Commission. The bill will be carried by Sen. Lock and Del. Dance.)*
- **Del. Cosgrove:** The next piece of proposed legislation deals with Time-Shares. We have made a couple of minor changes to the larger of the two bills. Last year, it was suggested we take out the reference to \$45 to the Commissioner of Accounts and use the scale used by the Supreme Court. However, we were not aware of the huge number of foreclosures on time-shares. The fee went from \$45 per transaction to almost \$200 in some cases, costing the Homeowner's Associations in these time-share groups hundreds of thousands of dollars. I would like to fix this by putting the \$45 back in. that or if it goes through committee, I'm not sure these bulk transactions need to go through the Commissioner of Accounts at all. I'm trying to fix this.
 - The one page bill changes the definition of the developer control period. When the time share act was first passed, it said that the developer shall turn over to the Homeowner's Association either on a certain date or when 90% of unites were sold. Time-shares have morphed from what they used to be. Now, time-shares have gone into point systems, usage systems, and other instruments that were not used when the original bill was passed. This bill will allows developer to maintain control as long as they were carrying at least 20% of the time-share loans. As a time-share owner, the last thing I want is a Homeowner's association taking care of all the common elements. I think this is a reasonable change to the Time-Share Act.
- **Del. Cosgrove:** if there are no questions, is there a motion to endorse these two bills? Moved and seconded for the Housing Commission to endorse the bills. (The Bill passed)
 - *The bill was properly moved and seconded, all were in favor, and the bill received endorsement by the Commission.*

IV. Update: Virginia Housing Trust Fund

- **Bill Shelton, Director; Department of Housing & Community Development:** Gave his presentation entitled "Virginia Housing Trust Fund Update," which can be found under "Materials".
- Have you had any assurances from the Secretary of Health to piggyback the services money with this? Otherwise it is impossible to produce the outcomes.
 - **Mr. Shelton:** Sure, we have had a housing work group because of the (DOJ) issue. As well as others. This work group, a number of health and human resources agencies have been very active in meeting and considering how those systems are to be in place. Each having very specific populations. What would be the linkage at the community level to ensure that there was an individual ready to move into a rental unit. And how would the services money be assured, as well as reliable case management. The Plan is due to Department of Justice (DOJ) in early spring. Similarly, we may apply for HUD 811 program if it opens up. Workgroup is looking into how to structure such an application.
- Are they on the same schedule?
 - **Mr. Shelton:** Each of these is on a different timeline. We will move forward on projects as they become available. The \$800,000 allocation for housing

from the DOJ plan will have to be coordinated, and we are working on that now.

- **Delegate Rosalyn Dance:** If we love this plan, what happens after July 1, 2013?
 - **Mr. Shelton:** The legislature appropriated \$7 million in funds last year in session. But for the 2014 budget on July 1, 2013, the \$7 million in cash will be available to implement. (two year budget.) Our objects successfully implement the funds, and hopefully, there will be a legislative decision to continue the program in the future.
- **Del. Dance:** So there will not be a need for budget change in this session, but the next session?
 - **Mr. Shelton:** Yes, with discussion of the next (biannual) budget, there will likely be opinion on whether to move forward with appropriations.
 - **Del. Cosgrove:** The money is there in this biannual budget. What's next is the governor's budget before he leaves office.
- **Del. Dance:** So this is one to watch, Mr. Chair, if we like this program, to make sure it goes in the governor's budget before he leaves office?
 - **Del. Cosgrove:** Governor McDonnell has been supportive of affordable housing and has worked with a lot of people to make the best use of this type of program.
- **Del. Dance:** So you are saying we are guardians of this. It should be safe?
 - **Del. Cosgrove:** Yes, I hope so.
- **Ms. Lafayette:** With the foreclosure, do you anticipate that that is going to be focused primarily on single family purchases? Would there be an opportunity for a non-profit for example to make a multi-family purchase if it suited their mission?
 - **Mr. Shelton:** The way it is structured right now it is envisioned as single family. I'm not sure we really thought of that. We have done some federally financed programs like neighborhood stabilization. We would certainly be willing to look at that. Most of what we are hearing in the high foreclosure areas has been the single-family homes, which are more readily addressable with the amount of money we have. We may be able to do those with another mechanism.

V. Forecast on Housing Trends

- **Ms. Sonya Waddell:** (*Regional Economist; Federal Reserve Bank*): Presented her report as listed in attached documents under "materials" entitled "Current Housing Conditions in Virginia." Improvements of residential real estate conditions in the context of where we've been. Mortgage summary report is in front of you, but will be available on website within a week.
 - Rate of mortgages in foreclosure is declining, not at 1.65% of mortgages that are in the mortgage foreclosure inventory. That translates to roughly 23,000 loans in foreclosure process. Inventory of foreclosures have been falling steadily since the peak in 2009. The Virginian foreclosure inventory is relatively low compared to other states. We are 45th in country. Florida has 14% of loans in foreclosure. Maryland has 5% of loans in the foreclosure process, increase in Maryland has to do with the increased time a home spends in foreclosure.

- It is also important to consider the flow of loans into foreclosure. Current foreclosure starts rates of 0.64% are also down from the peak in 2009. There were 8800 new foreclosure in the last quarter, which is down from 13,000 in the 2nd quarter of 2009. However, the previous peak in 2002 had 4,000 new foreclosures, so we are in a anomalous period of high foreclosure rate.
- **Del. Bulova:** What happened with Maryland that they spiked like that?
 - **Ms. Waddell:** Maryland had a simultaneous drop in the number of loans in the 90 day delinquency. I have not looked into what was happening in Maryland legislature at the time, but they have had a number of proposal that have gone through that have stopped lenders, for a brief period, from starting the foreclosure process before they knew what they knew what the new requirements were. That is directly correlated with the drop in 90 day delinquencies, so I believe this is a function of the regulatory making process, not the data.
- **Ms. Waddell:** Prime loans still make up most of loans in foreclosure. About 47% of loans are in the prime market. By 2009, the economy had deteriorated, and we began to see many more prime mortgage holders entering foreclosure. The prime share has fallen steadily since 2009, you could think we are heading towards what was considered normal before the housing boom and the housing bust. Subprime loans are still disproportionally represented in the foreclosure pool in Virginia and the US. As we move into the future, subprime will continue make up a higher share of the mortgage inventory than it does the foreclosure inventory.
 - Delinquency rates have also declined between 2009 and 2012, which leads to a decline in the shadow inventory. We saw a US year over year growth of existing home sales of 10.9% in October, and new home sales grew almost 17%.
- **Del. Cosgrove:** Do you have Virginia numbers?
 - **Ms. Waddell:** According to Virginia Association of Realtors October report, home sales in Virginia grew roughly 12% from October 2011 to October 2012.
- **Del. Cosgrove:** Do you know if that is in mostly northern Virginia?
 - **Ms. Waddell:** I do not know, but I am sure someone from the Virginia Association of Realtors can provide that information.
- Growth varies from region to region. We are up 14% in Richmond. Northern Virginia is up double digits as well. However, there is less growth elsewhere.
- **Ms. Waddell:** Home sale levels are still much lower than what they were even in 2000. We have also seen improvements in housing starts, to what extent will an improvement in the shadow inventory and in home sales lead to an increase in construction. Our contacts at the Federal Reserve are indicating an improvement in residential and nonresidential construction. We are seeing indicators of improvement in that area, but we have not seen a turnaround in construction employment. We anticipate some improvement, but we have also been about difficulties getting construction employees form our contact across the districts. We are also seeing some stabilization in house prices, particularly in sales excluding sales of distressed properties.
 - In the beginning we saw strong concentrations of owner-occupied total loans in foreclosure or (REO: Virginia). This concentration then shifted further south, and now we see a map not too dissimilar from what we may have seen in 2006

or 2007. The numbers are higher, but the distribution is similar. Looking at the state as a whole, we no longer have large areas of concentrated foreclosures, the 90 day delinquency has a similar story.

- Going back a couple of slides to the house prices by region, the y-axis is for single family detached ? is that inventory?
 - **Ms. Waddell:** These are single family homes. That is correct.
- **Ms. Waddell:** The labor market, which is very closely tied to the housing market, is also improving. In the past year, we have seen an average increase of about 3000 jobs per month in the state of Virginia. The map of unemployment distribution in Virginia is based the distribution of data at that time, so past presentations will show a very similar map. By 2011, we began to see some counties decrease in unemployment, and that is the current situation.
 - Residential real estate condition improvement. We have seen house price stabilization, or even sustained improvement, evidence of a pick-up in construction, although construction employment has not improved, and stabilizing or declining foreclosure and delinquency rates. The Virginia labor market is also picking up.
 - On the other hand, we have a long way to go to regain the losses of the past few years, and we still have a historically high level of problem loans to work through in Virginia and in the nation.
- **Sen. Barker:** I represent part of Prince William County, which along with Manassas and Manassas Park was where we had the largest issues in Virginia related to foreclosures. We had a traumatic period of time in Prince William where over 10% of homes in some zip codes were in foreclosure in a single year, and it is good to see that no one in Virginia is at that level right now. We had a number of factors that clearly affected us. One was that we had a lot of new homes that had been built. We had the second largest population growth anywhere in the state, over 40% in the last decade. Thus, there were many new homes built.
 - So you therefore had a lot of people who were very highly leveraged and did not have significant equity. They had not had a lot of time to pay down their mortgages, and we had a decrease in average value of about 50%. In the city of Manassas, the assessed value of the average townhouse went down over 62% in a three year period. You end up with a majority of the population actually underwater on their mortgages. This combined with a lot of other things created a lot of problems.
 - It has been very good news in the last few years. I think we're starting to come out of that. Things have stabilized. I think the foreclosure rate is down dramatically from what it was previously. In the Prince William area, our inventory is down significantly. The problem loans have mostly moved through the market, which helping stabilize things. We are seeing a slight increase in prices. A lot of people who have retired and moved to North Carolina are still holding on to their homes because they figure that prices are going to go up a little more, so there is at least some optimism there.
- **Sen. Barker:** We have had some major lenders step forward in some very positive ways to help address the situation realizing the severity of it there. Bank of America in particular has put a lot of investment into the community. They worked with the community and also with individual lenders in effect writing off portions of mortgages in many of the instances where people were way underwater and were having difficulty paying, and I think it has been a very

positive thing for the community at large. It has helped a lot of people get in positions where they can keep their mortgages and keep their homes, and it's also helped Bank of America not have to figure out what to do with all of these homes that we got that we had to foreclose on.

- Some other lenders are also participating in some of those programs. We have seen a partnership between the community and the individuals who were suffering with the lenders. That is making a huge difference in terms of stabilizing the whole real estate market. We have been through a bad time, but we are at least heading in the right direction. I am pleased to be able to report that.
- **Sonya Waddell:** That is what we've been seeing as well.

VI. Continuing Care Retirement Communities (CCRCs)

- **Sen. Barker:** I have a report from our workgroup. We had our last meeting on Friday. This is the first time in about 20 years that we have made a major effort to look at Continuing Care Retirement Communities (CCRCs). Most of our discussion this year focused financial stability and transparency for the residents within these facilities and for the facilities themselves and governance issues, in particular the issue of residents having a seat at the table as it related to governance and communication. We worked with the Bureau of Insurance and with the State Corporation Commission and came forward with four recommendations. They are working on implementing those without introducing new legislation.
 - We are getting some simplified financial information so it is more understandable to residents and prospective residents, in addition to the regular financial statement. The regular financial statement would still be there. The industry has indicated that they are willing to do this. They just want a template to fill out and they will fill in the numbers. The bureau also is preparing a consumer information guide to help residents and prospective residents understand what the issues are, what they are getting into, and what their rights and responsibilities are and also understand the role of the State Corporation Commission and oversight and how they can contact them. Then also do an administrative letter to the facilities talking about the new simplified financial reporting information, and also reminding them of other responsibilities of the facilities that have been issues in the past.
- **Sen. Barker:** On the governance side, one of the major issues is a desire of the residents in many instances to have a resident representative on the Board of Directors. There has been a significant increase in that over time and we are up to about 60% of the facilities now that do have a resident now. Some of them are voting, some are not voting, and even facilities that do not have a resident on the board will still have a resident sitting on committees. I think we are making significant progress in the role of the resident.
 - We are proposing and request information from each of the facilities regarding their status so far as having a resident on the board. If they have a resident, we will ask them how is that resident selected, and to consider revising their policy if they do not have a voting resident on the board. The industry represented through the Virginia Association for Nonprofit Homes for the Aging

(VANHA), of which most of the CCRCs are members, has offered to help out with that. I've suggested is that we do this as a joint request from the Housing Commission and from VANHA. The hope is that the industry group and the resident group will come to an agreement about some things. We would also like to continue the study for one more year to finish it up.

- I would make a motion to accept and approve this report and proceed further.
- The motion was seconded by Del Dance, concerning looking at the two action items under governance and also that we continue the study for another year. All were in favor and the motion was endorsed by the Commission.

VII. Election of VHC Chair

- **Del. Cosgrove:** Thanked and praised the commission, and then opened the floor for nominations.
- **The Commission endorsed Sen. Locke as the new Chair of the Housing Commission.))**
 - **Del. Marshall will serve as Vice Chair of the Commission.**

VIII. Public Comment

- **Del. Bulova:** I realize I not a member of the public, but I had a point I wanted to bring up. At the last Housing and Environmental Standards meeting, Eldon James brought forth a proposed study bill to look at some of our alternative septic system language dealing with the appropriate balance of local discretion versus state discretion, enforcement, and authority. This was precipitated by three different interpretations of the Attorney General on aspects of that particular code.
 - Mr. James put in a suggestion for a legislative study that would look into those issues, and possibly come up with a model ordinance for localities to use as a template with respect to alternative on-site systems. It was our recommendation, not to move forward with a formal study; but because there was enough interest in the subcommittee, we may incorporate that into our work plan for next year and see if we can work towards tweaks in language of the Code, and see if can get the stakeholders together to look at what a strqwm model ordinance might look like. This was the recommendation of the subcommittee.

IX. Adjourn

- Hearing no further comment, **Del. Cosgrove** adjourned the meeting at 12:30 P.M.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Affordability Real Estate Law and Mortgages

May 14, 2012

10:00 A.M.

House Room D

I. Welcome and call to order:

- **Delegate Danny Marshall, Chair**, called the meeting to order at 10:07 a.m.

II. Hotel/Motel Extended Stay (SB 35, 2012, M. Locke)

- **Mr. Chip Dicks**, stated that where a person lives in a dwelling unit, the tenant's landlord may dispossess a person who has failed to pay rent by changing the lock, so long as the landlord does not breach the peace. However, where a person is living in a hotel or motel, the hotelier is not able to do the same.
 - **Mr. Dicks** explained that he and Christie Marra discussed what to do regarding housing held out for transients. Under VRLT, if a person stays in an apartment, hotel room, or motel room for more than 30 days, the unit becomes a "dwelling unit." He explained that VHC recommended that this 30 day period be deleted from VRLT to avoid hoteliers from moving persons staying with them from room to room to avoid becoming a landlord in accordance with VRLT. Additionally, Mr. Dicks indicated concern that "slumlords" might call their housing "motels" instead of "apartments" to similarly avoid this designation. Mr. Dicks stated that the main issue is whether the 30 day requirement is still relevant.
- **Mr. Mark Flynn**; stated that there are inevitably zoning implications for local governments. Where a motel or hotel starts to function as a boarding house, this constitutes a changed use under the zoning regulations. Additionally, boarding houses may not be permitted in all the areas where the motels and hotels are located. Accordingly, where a hotel or motel becomes a boarding house in an area where zoning prohibits this, the extended stay use is illegal.
- **Ms. Christie Marra, Virginia Poverty Law Center**; explained that Lucinda Jones (who was on the agenda to speak) could not attend the workgroup meeting because of car problems. Ms. Marra explained that persons living in extended stay

DELEGATE JOHN A COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS

MARK K. FLYNN
T.K. SOMANATH
MELANIE S. THOMPSON

motels and hotels have been treated as tenants under the law for many years. She further explained that there are two distinct groups of extended stay hotels and motels that could be treated differently: extended stay facilities that cater to the business community, and extended state facilities that cater to individuals who rent by the week or the month who may live there for years. Ms. Marra explained that persons living in this second group of extended stay facilities do so as a last resort. In fact, approximately 6% of people that were added to the homeless count in Virginia last year came directly from hotels motels. Part of the reason is that this second group of extended stay facilities does not require criminal background checks, while many traditional landlords do. Additionally, these facilities are important because there is a general lack of low-income housing.

- **Del. Danny Marshall**, asked whether people move into these extended stay facilities initially announcing their intention to stay for months or years.
- **Ms. Marra**, replied that it depends on the billing structure of the facility whether the company knows the intended extent of an individual's stay at that facility.
- **Mr. Tom Lisk, Counsel to Virginia Motel and Lodging Association**; stated that there are several concerns regarding hoteliers landlords with dwelling units. Mr. Lisk stated that he does not believe that hoteliers should be held to the same standards as landlords, because the relationship between the hotelier and their guest is drastically different from the landlord tenant relationship. First, Mr. Lisk stated that hoteliers do not want to provide permanent residence. Mr. Lisk explained that in northern Virginia there are a lot of "mainline" hotels that cater to guests seeking daily, weekly and monthly stays. While some of these guests know the length of their stay upon check-in, often times they do not. Second, while apartments are usually rented on a flat rate per month, hotel rates differ month to month and day to day. Third, hotel guest have option of extending their stay and hoteliers are generally required to allow them to stay. And most hoteliers have to deal with a larger number of customers than landlords do, resulting in more transactions. This is problematic considering it is not economical for hoteliers to conduct background checks on their guests-- especially considering hoteliers are often uncertain of the length of an individual's extended stay. In order to protect themselves, hoteliers providing extended stay options will likely be forced to do background checks and require security deposits. Additionally, there is a sales tax on renting hotel rooms and not on leasing apartments. Mr. Lisk believes that hoteliers are held to a higher standard regarding the safety of guests, as is indicated by the need for health permits, annual permit fees, and annual inspections. Mr. Lisk noted that there are no similar requirements for landlords. According to 12 BAC 5-31, hoteliers must provide sheets and towels for hotel guests; but necessary for landlords. He stated that hoteliers are prohibited from evicting guests and are required to provide services whether or not the guest pays. In order to evict a hotel guest, the hoteliers are required to seek the courts permission. In general, the customer-client relationship between a hotelier and a hotel guest is inconsistent with the landlord tenant relationship. He suggested that the workgroup look at the definition of a dwelling unit and perhaps amend it to

distinguish between temporary guests who have permanent housing elsewhere and those are using hotels or another dwelling as transient housing and do not have housing elsewhere. Mr. Lisk suggested that this would be a logical solution so that hoteliers were not burdened and people could use hotels as their residence when circumstances deem it necessary.

- **Mr. R. L. Dunn, Virginia Apartment and Management Association**; identified himself as a community volunteer, a graduate of Old Dominion University, a landlord for several single family homes, and an owner of several older hotels that are used as transient housing. Mr. Dunn stated that he provides housing for a population who would otherwise be forced to live in their cars or on the streets because of a lack of funds for a security deposit, bad credit, or various other reasons. Mr. Dunn estimated that of his tenants and extended stay guests, 84% of them are nice, good, hardworking people in need of a helping hand. In order to help these people build credit and move them out of the hotels and into a single family apartment, Mr. Dunn stated that he requires guests to live in one of his hotels for an extended stay of six months. During this time, Mr. Dunn stated that he reminds his guests to save their money so that they can build their credit, allowing him the security to move them into a single family apartment or home and become a tenant.
 - **Mr. Dunn** stated that in order to evict a guest of his extended stay hotels, he has to go through the court system which takes about 45 days. As a result, Mr. Dunn explained, this process causes him to lose a lot of money because there is no security deposit. Mr. Dunn stated that recently he has started to require \$20 security deposit which increases by \$20 each month that the person continues to live in his facility. Mr. Dunn explained that by the end of six months, he will have about \$600 dollars from the guest as a security deposit
 - **Mr. Dunn** expressed that his main concern about transforming his role as an hotelier for his extended stay residence is that he would need to collect more substantial security deposits in the outset of his dealing with extended stay guests and take on the cost of conducting credit and background checks. Mr. Dunn explained that because many of his extended stay guests do not have money for a security deposit or good credit, these people would likely become homeless.
- **Del. Marshall** asked Mr. Dunn if he bills weekly and whether he accepts check or cash.
 - **Mr. Dunn** replied that he accepts checks, credit, or cash. Mr. Dunn stated that he charges \$150 per week for a room.
- **Del. Marshall** asked Mr. Dunn to describe the residents that live at his facility and how they find his facilities.
 - **Mr. Dunn** explained that his residents range from 18 to 81 years of age and stated that they are a diverse group of people. Mr. Dunn added that his hotels are located in Colonial Heights and in Chesterfield County. Mr. Dunn explained that residents generally see the sign for his housing on Route 1, come to his facility, fill out a small application, and can start living there that same day.

- **Ms. Kelly King Horne, *Executive Director of Homeward***; asked whether Mr. Dunn's residents are mostly single people, families, or both. Mr. Dunn responded that some of his residents are single people, but that most are families with three or more people living in a one bedroom hotel room. Mr. Dunn stated that after six months, many of these families build up enough credit for him to move them into a two bedroom single family home-- a reality he believes they would not have reached but for his services.
- **Mr. T. K. Somanath, *President and CEO, Better Housing Coalition***, asked whether there is affordable housing in the areas in which Mr. Dunn operates, if people are coming to Mr. Dunn's facilities as a last resort.
 - **Mr. Dunn** responded that the population he serves does not have money for security deposits on other housing or security deposits for utilities. Mr. Dunn explained that money for rent is the only money a lot of his residents have, so there are no other options for them.
- **Mr. Somanath** asked if there is a resistance in the area towards affordable housing.
 - **Mr. Dunn** responded that as a result of the cost of proffers, which he estimates to be around \$20,000 to \$30,000, it is difficult to build anything in the area. Mr. Dunn stated that he builds single family homes that he is able to rent out.
- **Mr. Somanath** reiterated the point that Mr. Dunn is serving a population that has no voice.
 - **Mr. Dunn** agreed, stating that he includes utilities and cable television in the cost of rent so that his residents can feel comfortable.
 - **Mr. R. Schaefer Oglesby, *VAR***; asked whether Mr. Dunn furnished his residents with sheets or towels. Mr. Dunn replied that he did not.
- **Mr. Somanath** asked whether Mr. Dunn has many residents who are immigrants.
 - **Mr. Dunn** responded that he serves a very small immigrant population; he estimates that immigrants represent 10-15% of his residents. Mr. Dunn explained that the population at his facilities goes in waves-- sometimes there are many immigrants and sometime there are almost none.
- **Mr. Somanath** explained that he emigrated from India and lived in a hotel for \$3 per night for two or three months while he was going to job interviews and trying to make a life in the United States. Mr. Somanath commended Mr. Dunn for serving a community in need.
- **Mr. Ron Clements, *Virginia Code Officials Association***; stated that there are several zoning issues regarding hotels and motels versus apartments. Mr. Clements explained that a person living in a single place for 30 days or less is using the premises as "transient housing" according to the Code of Virginia. These generally include hotels and motels. Mr. Clements continued, by stating that a person living in a single place for more than 30 days is using the premises as "non-transient boarding." These generally include apartments and houses. Mr. Clements explained that there are some similarities between these two types of housing in the Building Code. For instance, both require sprinkler systems,

accessibility to units, fire alarms, and various other safety features. However, there are minor distinctions between the two types of housing regarding the specifics of these requirements. According to Mr. Clements, where a person seeks to change a hotel or motel into a non-transient housing unit, there are some changes that inevitably will be needed, such as updating or installing a special sprinkler system and fire alarms with different wattage.

- **Ms. King Horne** asked whether a Courtyard Marriot would be required to change anything in order to become a non-transient housing provider.
- **Mr. Clements** stated that Courtyard Marriotts and other similar hotels and motels were designed to accommodate all codes and thus, are unlikely to need alteration if utilized as extended stay facilities.
- **Ms. Deb W. Reed, *Educational Specialist and McKinney-Vento Liaison Henrico County Public Schools***; identified herself as the homeless education liaison. Ms. Reed explained that under the McKinney-Vento Federal mandate, all school systems are required to provide stability in school where children do not have stability in housing. According to Ms. Reed, homelessness is a substantial problem facing the youth of Virginia. Ms. Reed stated that over the last seven years, shelter housing has dramatically diminished and two year stays were lowered to one year. Further, Ms. Reed stated, there is a shortage of low priced homes and no dependable public transportation. She stated that last year, 16,420 people in 132 localities identified themselves as homeless; 2,200 of those people were living in hotels. Ms. Reed stated that most of the people living in these hotels are single parents with children that are school aged or younger. Ms. Reed explained that there are often three to seven people living in one room without a kitchen or other amenities.
 - **Ms. Reed** explained that as a result of this new reality, schools are trying to make sure that these students have access to education regardless of their documentation of residency. Traditionally, Ms. Reed explained, a person has to live in a locality in order to attend school there. However, Ms. Reed stated, where a child has lost housing and is forced into a circumstance where they are living on the street, with friends, in a shelter, or in hotels, school systems are required to provide these children with unfunded transportation to their former school where practicable. Ms. Reed explained that the liaisons for the various school districts make a decision to either transport the displaced child to his former school or to have the child attend a new school closer to his current residence based on the best interest of the child. In order to determine what is best for the child, Ms. Reed stated that liaisons consider the length of the commute (time and mileage), the age of the child, time left in the school year, and various other factors.
- **Del. Marshall** clarified that the school system pays for a child who is living outside of the school district to be transported to schools within the school district.
 - **Ms. Reed** stated that Del. Marshall was correct. Ms. Reed added that where a child loses housing, the school district is required to provide transportation where it is practicable and in the best interest of the child. However, she explained that a family who moves a child on their own

volition has not "lost" housing and are ineligible for this service. Ms. Reed stated that Henrico has transported a child from as far away as 40 miles. Ms. Reed stated that where she decides against transporting the child, she must document specific reasons why and must reevaluate each student every year.

- **Mr. Somanath** thanked Ms. Reed for sharing her knowledge of this problem. Mr. Somanath stated that this is a serious problem if it is affecting a wealthy area like Henrico. He continued, by stating that it is an uphill struggle to get zoning and proffers approved for low income housing. He added that unless the counties change their outlook on low income housing, it seems this problem will persist.
- **Mr. Dicks** stated that he thinks the workgroup should distinguish between hotels like Courtyard Marriott and more traditional non-transient housing hotels that tend to be lower end. He suggested that they remove the taxation element from the provision and organize a draft bill to distinguish between the different classes of hotels and motels. Mr. Dicks added that if all extended stay motel owners were like Mr. Dunn there would be no problem.
 - **Mr. Somanath** replied that if they change the laws to differentiate between the rich and poor hotels, the workgroup does not solve the bigger problem of transportation and land-use regarding low income housing.
 - **Ms. King Horne** added that there is more than one definition of homeless. Ms. Kelly stated that she agrees that there is a need to address the general problems with housing, but that in the meantime it is important for the workgroup to solve this problem for people who cannot afford traditional housing and low-income housing projects are not being built.
 - **Mr. Dicks** stated that the workgroup should look to solve the broader housing problems by figuring out how to work on the legislation the workgroup was given regarding homelessness and low income housing. Mr. Dicks stated that he would like to discuss the goals of the broader problems with housing at the next workgroup meeting.
- **Mr. Brian Gordon, Apartment and Office Building Association of Metro Washington**; added that he is interested in working on this and feels that the workgroup's critical role is ensuring that hoteliers are not forced to change their business model, while still allowing hoteliers to provide transient and non-transient housing for persons in need. Mr. Gordon stated that he does not want to make this type of housing impractical.
- **Mr. Dicks** stated, on behalf of Del. Marshall, that the Chair's intention is to send out a draft for the bill.
- **Ms. Marra** stated that she thinks differentiating between the different classes of hotels and motels regarding extended stay would help to balance the protections afforded to these different businesses.

III. Public Comment and adjourn

- **Mr. Chip Dicks, as temporary replacement for Danny Marshall as Chair**, adjourned the meeting at 11:07a.m.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Affordability, Real Estate Law and Mortgages Work Group

July 31, 2012

1:30 PM

House Room C

I. Welcome and Call to Order

- **Delegate Danny Marshall, Chair**; called the meeting to order at 1:30 PM.
 - In addition to the invited speakers the following Work Group members were in attendance:
 - **Workgroup Members:** Del. Marshall, *Chair*; Delegate Rosalyn R. Dance
 - Mark Flynn, *Virginia Municipal League*; T. K. Somanath, *Better Housing Coalition*; Robert N. Bradshaw, *Independent Insurance Agents of Virginia*; Tyler Craddock, *Manufactured and Modular Housing Association*; Chip Dicks, *Virginia Association of Realtors*; Brian Gordon, *Apartment and Office Building Association*; Kelly Harris-Braxton, *Virginia First Cities*; Kelly King Horne, *Homeward*; Alexander Macauley, *Citigroup*; Judson McKellar, *Virginia Housing Development Authority*; R. Schaefer Oglesby, *Virginia Association of Realtors*; Michael Toalson, *Home Builders Association of Virginia*; and Michele Watson, *Virginia Housing Development Authority*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*; and Laura Perillo, *VHC Legal Intern*

II. False Advertising; liability of real estate brokers and salespersons; exemption (HB 724, Del. D. Yancey, 2012) *Brown v. Labelle*

- **Ms. Laura Perillo, VHC Staff**; explained the facts surrounding *Brown v. Labelle*.
 - **Ms. Perillo** stated that the first owner of the home in question started but never completed converting her 540-square-foot garage into livable space. Ms. Perillo continued, stating that the first owner listed the home and did not include the garage as livable space, due to the incomplete nature of the project. Ms. Perillo explained that the first owner sold the house to the second

owner, a real estate broker and professional house-flipper named Labelle. Ms. Perillo stated that Labelle remodeled the garage space to include a bathroom, second kitchen, a bedroom, and a den without the proper permits and in violation of code requirements. Ms. Perillo stated that Labelle then listed the home through the Prosperity Realty, for which he was an agent. That listing included pictures illustrating the completed conversion of the garage and stated that the renovation was completed by professionals.

- **Ms. Perillo** explained that Brown entered into contract to purchase the home from Labelle on August 29, 2009. Ms. Perillo stated that on November 4, 2009 Brown entered a settlement and obtained legal title to the home and the right to enter it. Ms. Perillo continued, stating that weeks after Brown moved into the home several experts told him: (1) the garage would have to be demolished and rebuild in order to comply with code, (2) that this renovation would cost no less than \$45,000, and (3) that the oven could not be included in the rebuild. Ms. Perillo explained that Brown sued Labelle, Prosperity Realty, and Prosperity Realty's insurance company on September 23, 2011 for false advertising, among other things.
 - **Ms. Perillo** stated that to recover for false advertising in Virginia, a plaintiff must prove: (1) the defendant intended to sell or otherwise dispose of the home or merchandise at issue; (2) the defendant caused to be made an advertisement of any sort regarding the home; (3) the advertisement contained a promise, assertion, representation, or statement of fact that was untrue, deceptive, or misleading, and (4) the plaintiff suffered a loss as a result. The Prosperity Realty moved for a Plea in Bar, because they claimed that the 2-year statute of limitations had run. In its opinion, the circuit court stated that the statute of limitations period begins to run from the date of the injury to a person or property, and not when the resulting damage is discovered. In its opinion, the court stated that the first three elements of the cause of action were present before the parties entered into the contract to sell the home. The court found that the cause of action accrued when Brown took legal title of the home at settlement, on or about November 4, 2009. This is because Brown had the right to enter the property, make repairs, and bring suit seeking damages only after the sale was completed. Thus, the action was filed within the two year statute of limitations allowed by the Code. The Court overruled Prosperity Realty's Plea in Bar.
- **Mr. Chip Dicks**, *Virginia Association of Realtors*; stated that he and Mr. Steve Pearson who represents Trial Lawyers, have been redrafting a bill regarding liability of real estate brokers and salespersons. Mr. Dicks stated that Mr. Pearson was unable to attend the work group meeting due to a vacation scheduled prior to the meeting. Mr. Dicks provided a review of HB 724 and his proposed redraft.
 - **Mr. Dicks** stated that a bill was passed in 1995 that requires real estate agents that represent a seller, buyer, landowner, tenant or property manager to represent their clients to the best of their ability. Mr. Dicks explained that included in this bill are standards for compliance with that requirement. Mr. Dicks further explained that two years ago, Del. Jackson Miller edited tthe

former bill to include sections that provide realtors and real estate licensees with immunity from liability in certain circumstances. Mr. Dicks described some of those circumstances by way of examples:

- **Mr. Dicks** stated that if he were a real estate agent and he looked at the tax records in Newport News, he could rely on those tax records. Mr. Dicks explained that if the tax records he relied on happened to be incorrect, he would not be liable as a real estate licensee.
 - **Mr. Dicks** stated that if he were a real estate licensee and he went to the surveyor that the property-owner hired, reviewed the survey, found that the survey made sense and relied on the survey, then the real estate licensee cannot be sued over the survey.
 - **Mr. Dicks** stated that if he were a real estate licensee and the seller-owner of a home tells him that there has never been a leak in the house and Mr. Dicks has no reason to believe otherwise, then he can rely on the seller-owner's statement as being truthful without repercussion.
 - **Mr. Dicks** also explained that real estate brokers and licensees were immune from liability where they relied on official information from a government enterprise (such as tax revenue information) or a non-governmental enterprise that obtained the information from a government entity.
- **Mr. Dicks** stated that during a case he dealt with in Newport News in which a real estate licensee was sued, the plaintiff's attorney stated that the real estate licensee committed criminal false advertising under §18.2.216. Mr. Dicks explained that in order to be convicted of a crime, one must have criminal intent. Mr. Dicks stated that the fact that there is a negligent or innocent misstatement in an advertisement should not make the real estate licensee responsible for the advertisement criminally liable. Mr. Dicks explained that Delegate Yancey wanted to prevent plaintiff's attorneys from threatening criminal offenses against real estate licensees for false advertising during civil cases.
 - **Mr. Dicks** explained that a federal court has found that in order to file suit against a real estate licensee under the circumstances described above, a civil conviction of a criminal law may occur without a criminal conviction of that same law. Mr. Dicks further stated that §59.1-68.3 states that to sue civilly on the basis of a criminal law, one must sue for damages. Mr. Dicks explained that one of the problems he has encountered is that attorneys suing under the aforementioned circumstances are failing to sue for damages. Mr. Dicks stated that that is one of the reasons that he and Mr. Pearson want to explicitly add that a plaintiff in these instances must have suffered an actual loss.
 - **Mr. Dicks** stated that Delegate Yancey was informed that plaintiffs' attorneys were alleging violations of the Consumer Protection Act and violations of the Home Solicitation Act, which have enhanced civil penalties. Mr. Dick stated that the Consumer Protection Act expressly excludes real estate licensees unless there is some intentional or fraudulent act committed. Mr. Dicks stated that the Home Solicitation Act is not applicable to those situations where the property is not the primary residence of the owner.

- **Mr. Dicks** explained that trial lawyers have several concerns: (1) they want to make sure that they can continue to sue real estate licensees when there has been false advertising, and (2) they want to make sure that there is no requirement that a criminal conviction be had in order to be able to sue under a criminal act. Mr. Dicks stated that the trial lawyers agree that it is improper for an attorney to threaten a criminal action against a litigant which is affectively what has been happening.
- **Mr. Dicks** explained that this is a complex issue and that it is not the type of problem that usually comes before the Housing Commission, but that it has gotten to the Commission because it deals with real estate liability.
- **Mr. Mark Flynn**, *Governor Appointee*; stated that as the law is written, it seems that a realtor or real estate company could only be subject to civil action after it had been convicted of a criminal action.
 - **Mr. Dicks** stated a criminal conviction is not necessary for a loss to be suffered. Mr. Dicks stated that if the General Assembly meant to say "conviction" the law would have included that language and that a federal judge has said so in *Rehabilitation Specialists v. Augustine Medical*.
 - **Mr. Flynn** stated that he still thinks that a violation of a criminal law means a conviction and that this may be confusing for others as well.
 - **Mr. Dicks** agreed that it is confusing but that case law supports his interpretation.
- **Mr. Michael Toalson**, *Home Builders Association of Virginia*; asked whether this issue is another consequence of the economic downturn. Mr. Toalson asked whether this issue has gotten more common since people have started to see "good deals" turn into "bad deals" over time.
 - **Mr. Dicks** stated that real estate agents are responsible to the real estate board even in their activities as landlords, developers, etc. Mr. Dicks continued, stating that when people want to get out of their property transactions then lawyers look at ways to get out of the transaction-- including looking for a criminal offense.
- **Mr. Robert N. Bradshaw**, *Independent Insurance Agents of Virginia*; asked Mr. Dicks to explain the strike out in line one of the bill draft.
 - **Mr. Dicks** stated that the purpose of the strikeout in line one is to ensure the immunity is not applying to real estate law.
- **Mr. Bradshaw** asked if the bill draft became a law as it is written, would there have been a different outcome in *Brown v. Labelle*.
 - **Mr. Dicks** stated that *Brown v. Labelle* would have been different in that there would not be an allegation of a criminal offense unless there was a specific damage claim arising from that criminal law. Mr. Dicks explained that the bill, if passed as written, would require the criminal conviction to occur before an individual would have the ability to file civil cause of action. Mr. Dicks explained that an attorney cannot threaten a criminal offense during a civil offense under this new bill. This will then affect errors and omissions insurance as to whether or not a policy covers intentional acts; however, it does not preclude or protect the errors and omissions insurance carrier from defending over these particular issues.

III. Licensing Title Agents; licensure requirement for title examiners and title settlement agents

- **Ms. Deborah Allen**, *Virginia Land Title Association (VLTA): Bridge Trust Title Group*; **and Ms. Myrna Lou Keplinger**, *VLTA: The Settlement Group*; collectively gave the Commission some background information on title examiners and title settlement agents - what they do and how their work benefits the general population:
 - **Ms. Allen** explained that in order to close on real property, the following must occur: (1) the title is examined by title examiner, (2) the title examiner produces a title report which describes any adverse matter in the record title that must be addressed and submits it to a title insurance provider (which are licensed and regulated by the state), and (3) when all title issues are addressed, the closing or settlement occurs.
 - **Ms. Allen** defined title examiners as individuals who physically travel to the Circuit Court Clerk's office to access the land records needed to conduct a title examination or accesses those land records via remote access electronically. These individuals may be independent contractors, may work for one or more title insurance producers, or may be direct employees of a title insurance provider.
 - **Ms. Keplinger** defined title settlement agents as individuals who prepare the documents and conduct the closing transactions.
 - **Ms. Kiplinger** stated that accordingly, the land title industry insures that people have clear ownership rights to their homes and other properties. Ms. Kiplinger stated that because of the land title industry: (1) Americans close on their loans in about 30 days which is much faster than in any other country, (2) \$1.75 billion is collected per year in back income taxes, (3) \$3 billion is collected per year in delinquent real estate taxes, and (4) \$325 million is collected per year in delinquent child support payments. Ms. Kiplinger also stated that the land title industry spends \$225 million per year to correct errors in the public property records that would lead to serious impairment to the property rights of millions of people and pays \$170 million per year to purchase copies of recorded documents for local governments.
 - **Ms. Allen** explained that in the past, title examiners would work for an attorney, title agent, or title underwriter. Ms. Allen explained that at that time, the professionals for whom the title examiners worked for would train the title examiners on how to examine titles. Ms. Allen explained that in recent years, however, many title examiners are "freelance" or independent contractors. Ms. Allen explained that these title examiners receive little education on how to examine titles.
 - **Ms. Kiplinger** explained that title insurance is different from other types of insurance because: (1) people pay for their owner's policy once and the policy never expires, and (2) the title insurers work to eliminate the risk upfront through title examinations.

- **Ms. Allen** stated that the Code of Virginia provides guidance regarding who may provide escrow, closing, and settlement services for real property located in the Commonwealth, but does not contain any provisions for qualifications, education or licensure of those who provide said services.
- **Ms. Allen and Ms. Keplinger** explained the various problems that have arisen in the land title industry.
 - **Ms. Allen** explained that where a problem arises regarding the title, this
 - are due to title search errors. Ms. Kiplinger stated that in 2011 losses in claims were in excess of \$19.4 million.
 - **Ms. Kiplinger** explained that the annual title insurance underwriter audits do not universally identify bad habits. Ms. Kiplinger stated that the \$250,000 minimum requirement for errors and omissions and/or malpractice insurance does not always cover the cost of a claim. Ms. Kiplinger also stated that the \$100,000 blanket fidelity bond or employee dishonesty insurance can be waived if the title settlement agent has no employees outside of the owners, partners and shareholders.
- **Ms. Allen and Ms. Keplinger** explained their proposed regulations and licensing requirements for title examiners and title settlement agents.
 - **Ms. Allen** explained that VLTA envisions the licensing process of title examiners and title settlement agents to mirror existing licensing requirements for title insurance agents. Ms. Allen stated that the current certification programs for these professionals would be increased to a 16-hour pre licensing study course-- the content and instructors of which must be approved by the Virginia Insurance Continuing Education Board. Ms. Allen stated that these professionals would have to pass their TE or TSA examination within one year of completing the pre licensing course. Ms. Allen also stated that these professionals would be required to complete 16 hours of continuing education every two years with 50% of the credits to be provided by the VLTA.
 - **Ms. Kiplinger** explained the types of regulations VLTA and the Bureau of Insurance have considered with regard to title agents.
 - Ms. Kiplinger stated that licensing could require title agents to have uniform basic education for searching titles, credible standards for title searches and real estate settlement practices, and ethics training.
 - **Ms. Kiplinger** stated that the aforementioned requirements would reduce the problems that consumers and insurance providers encounter which may lead to claims.
- **Mr. Bradshaw** asked Ms. Allen whether VLTA had a bill they wanted the Commission to look at.
 - **Ms. Allen** explained that VLTA was told to present their position to the Commission and that the Commission would draft a bill if they agreed with VLTA's position.
- **Mr. Bradshaw** asked whether Ms. Allen was aware of any other state that licenses title settlement agents and/or title examiners.
 - **Ms. Allen** stated that Utah's code includes a three-prong license which includes a license as a title insurance agent, a title settlement agent (which Utah's code refers to as "title escrow officer"), and a title examiner.

- **Mr. Bradshaw** stated that in the past, the Code of Virginia required insurance agents to complete 42 hours of pre licensing study before individuals were eligible to sit for the exam. Mr. Bradshaw explained that this requirement was repealed, because if an individual could study on his own and still pass the exam the state did not want to require that person to spend the time or money on an organized class. Mr. Bradshaw explained that he foresees a problem with the 16 hours of pre licensing study. Mr. Bradshaw also explained that while he agrees that 50% of continuing education requirements should be provided by VLTA, he thinks VLTA will have a problem getting the code to state that title agents will have to go to a certain association to fulfill a continuing education requirement.
 - **Ms. Allen** explained that VLTA was instrumental in getting legislation passed which required 16 hours of pre licensing study for title insurance. Ms. Allen explained that VLTA was attempting to mirror the legislation and requirements for title examiners and title settlement agents.
- **Mr. Oglesby** asked whether VLTA was aware of any states that have a licensing scheme similar to the one VLTA is proposing.
 - **Ms. Allen** stated that she is not aware of any states that do. Ms. Allen explained that VLTA has been working with the American Land Title Association which is a national association, and that through her work with ALTA she has realized many states have certification programs like Virginia. Ms. Allen explained that although the certification program is a great idea, it is optional because there is nothing in place mandating that title examiners or title settlement agents must be certified. Ms. Allen explained that consequently, few title settlement agents and title examiners have completed certification.
- **Mr. Oglesby** stated that during his 43 years in the real estate business he has been involved in hundreds of transactions. Mr. Oglesby stated that generally he has not had any problems with title examiners or title settlement agents from within the Commonwealth. Mr. Oglesby stated that one of the only problems he has ever had with the land title industry occurred during one real estate transaction which involved title examiners and title settlement agents from California and Georgia. Mr. Oglesby stated that that particular transaction took 6 months to get the deed recorded after closing and that it was, in short, a nightmare. Mr. Oglesby asked how a regulatory scheme for Virginia's land title industry would affect people that operate outside of Virginia.
 - **Ms. Allen** stated that VLTA thinks that if the land is in Virginia then the title settlement agent or title examiner for that particular transaction must meet the licensing requirements in Virginia.
- **Del. Marshall** asked what percentage of the title examiners and title settlement agents (currently in business in Virginia) does VLTA represent.
 - **Ms. Kiplinger** stated 25%.
- **Del. Marshall** asked whether VLTA backs this idea.
 - **Ms. Allen** stated that VLTA backs the idea to license title examiners and title settlement agents. Ms. Allen explained that whether or not people in the land title industry join VLTA, they get the benefits of everything VLTA does. Ms. Allen stated that many of the title examiners and title settlement agents have said "why should I join the VLTA when I am already getting the benefits of membership without paying dues?"

- **Del. Marshall** stated that of the 75% of the industry that are unrepresented in VLTA, there are probably people who are opposed to the idea.
- **Ms. Allen** stated that since the certification program has begun, more and more people have joined VLTA. Ms. Allen added that VLTA's website includes information about their goal to get title examiners and title settlement agents licensed.
- **Del. Marshall** asked how many title examiners are in VLTA.
 - **Ms. Allen** stated from 350 to 400.
- **Del. Marshall** asked how many title settlement agents are in VLTA.
 - **Ms. Kiplinger** stated about 3,000.
- **Ms. Harris-Braxton** asked who opposes VLTA's idea to license these professionals.
 - **Ms. Allen** explained that no one has come forth with outright opposition for their idea; however, some have complained "if it ain't broke, don't fix it."
- **Mr. Dicks** clarified that 20 years ago, law firms employed title examiners and title settlement agents on a full-time basis. Mr. Dicks clarified that within the last 20 years, law firms have stopped hiring full-time title examiners and title settlement agents or paralegals required to do similar jobs and the individuals in the industry have evolved into unregulated independent contractors.
 - **Ms. Allen** further explained that the title examiners and title settlement agents used to be registered with the Bar but are now registered with the Bureau of Insurance. Ms. Allen explained that the Bureau of Insurance receives complaints from consumers that they are being "ripped off." Ms. Allen explained that this is VLTA's attempt at a solution.
- **Ms. Allen** further explained the problem that the evolution of the industry has caused. Ms. Allen explained that in the old model, title agents were covered under the law firm's corporate license. Ms. Allen explained that now, title agents are completely unlicensed and virtually unregulated so there is no way to assure the quality of their work and there is little recourse available to consumers who have problems resulting from faulty title agents' work.
- **Del. Marshall** asked whether VLTA has talked to anyone from the General Assembly about making this bill a law before.
 - **Ms. Allen** stated that she was informed by her lobbyist to approach the Virginia Housing Commission about it first.
 - **Mr. Toalson** stated that Ms. Allen and Ms. Kiplinger should talk with a specific legislator about their idea and work with the Division of Legislative Services to draft a bill that would meet their needs.
 - **Del. Marshall** stated that that is generally the way things work-- that the workgroup would be unable to recommend an idea to the Commission without seeing a bill.
- **Mr. Mark Courtney**, *Deputy Director for Licensing and Regulations, Department of Professional and Occupational Regulation*; stated that a lot of this issue is related to the SCC and the Bureau of Insurance. Ms. Courtney explained that he is not connected to either of these organizations. Mr. Courtney explained that Virginia's general policy regarding regulating industries is that it is a last resort-- meaning that the state will regulate industries where all other measures have failed to adequately protect the consumer.

- **Del. Dance** stated that she would like to work with Del. Marshall on this issue and figure out whether it should become a bill or whether the Commission will need to perform a study.

V. Public Comment

- Del. Marshall opened the floor for public comment.

VI. Adjourn

- Hearing no other comments, Del. Marshall adjourned the meeting at 2:50 PM.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Affordability, Real Estate Law and Mortgages

October 9, 2012

10 AM

House Room C

I. Welcome and call to order:

- Delegate Danny W. Marshall, III, *Chair*; called the meeting to order at 10:05 AM.
 - In addition to the invited speakers the following Work Group members were in attendance:
 - **Workgroup Members:** Del. Marshall, *Chair*; Senator George Barker; Mark Flynn, *Virginia Municipal League*; Robert N. Bradshaw, *Independent Insurance Agents of Virginia*; Chip Dicks, *Virginia Association of Realtors*; Brian Gordon, *Apartment and Office Building Association*; Kelly King Horne, *Homeward*; Alexander Macauley, *Citigroup*; Michael Toalson, *Home Builders Association of Virginia*; and Michele Watson, *Virginia Housing Development Authority*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*; and Laura Perillo, *VHC Legal Intern*; Iris Fuentes, *Administrative Assistant*

II. False advertising; liability of real estate brokers and salespersons; exemption (HB 724, Yancey, 2012)

- **Mr. Chip Dicks**, *Virginia Association of Realtors*; stated that there is existing law since 1995 that states if a real estate licensee uses information from a reliable source (an architect, a tax assessor, or various other professionals) in their advertisement for the sale of a home, that the real estate licensee is exempt from being sued for false advertisement. Mr. Dicks explained that in 2010 Legislative Services suggested that the five separate provisions of the code that described these exemptions be consolidated into one section of the code, and so they were consolidated. Mr. Dicks explained that the new legislation is problematic because the current language limits the exemptions to real estate agents, which according to Mr. Dicks was not the initial intent of the legislation passed in 1995.

DELEGATE JOHN A COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE BARRY D. KNIGHT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

MARK K. FLYNN
LAURA D. LAFAYETTE
T.K. SOMANATH

- **Mr. Dicks** stated that real estate licensees have dealt with several problems related to the consolidated form of the current legislation. Mr. Dicks explained that plaintiffs will allege in their pleadings that a real estate licensee is unworthy and incompetent and also allege that the real estate licensee is a criminal under the criminal false advertising statute. Mr. Dicks explained that these accusations could lead real estate licensees to have their licenses revoked or suspended.
- **Mr. Dicks** stated that he seeks to remove the availability for plaintiffs to allege that a real estate licensee is a criminal in their civil law suit and to remove the ability to claim that the real estate licensee is unworthy or incompetent.
- **Mr. Dicks** explained that lawyers who make false allegations, such as claiming that a real estate licensee who has not been criminally convicted is a criminal, face the possibility of sanctions. Mr. Dicks stated that the problem is that in a federal case from the Norfolk area, the court found that the term "criminal violation" does not mean "criminal conviction." According to Mr. Dicks, the court claimed that if the General Assembly intended the phrase "criminal violation" to mean "criminal conviction" it would have used the term "criminal conviction" instead.
- **Mr. Steven Pearson**, *Trial Lawyers Association*; stated that he and his constituents will not agree to Mr. Dicks request that a criminal conviction be obtained against a real estate licensee prior to plaintiffs bringing a civil claim for false advertising. Mr. Pearson stated that the code already includes sanctions for lawyers who make false statements and claims in their pleadings and that limiting attorney's abilities or preventing possible improper pleadings should not be taken on by the legislature. Mr. Pearson explained that attorneys may be sanctioned by the judiciary after making improper pleadings, but should not be prevented from stating a claim in their pleading due to a possibility of abuse.
 - **Mr. Dicks** stated that his constituents have told him that plaintiffs' lawyers are including references to criminal codes and stating that real estate licensees are unworthy and incompetent in their pleadings, but are not stating that the defendant violated anything. Mr. Dicks explained that as a result the attorneys can avoid sanctions because they did not make any real allegations. Mr. Dicks explained that attorneys and plaintiffs are then going to the local representatives in their communities and showing them the pleadings or expressing the contents of the pleadings that stated that the real estate licensees was a criminal, unworthy and incompetent. Mr. Dicks explained that this is negatively affecting the business reputation for these real estate licensees even when there is no legitimate claim or allegation asserted.
- **Mr. Dicks** explained that there are three problems that he sees with the current legislation. First, Mr. Dicks wants to make sure that the immunity described above is not limited to real estate agency

but agency law in general. Second, Mr. Dicks wants to determine what exactly is a cause of action for which sue real estate licensees may be sued. Third, Mr. Dicks wants the plaintiffs' lawyers in these types of suits to be prohibited from alleging a criminal offense of one of the other offenses until they claim damages as a result of the particular criminal offense they are alleging. Mr. Dicks stated that on his third objective he and Mr. Pearson disagree.

- **Mr. Pearson** clarified that he and Mr. Dicks have only spoken about the false advertisement claims, not criminal offenses in general. Mr. Pearson stated that he and Mr. Dicks agree as to Mr. Dicks first two observations of the existing law.
- **Mr. Pearson** stated that he objects to Mr. Dicks' third point because nothing else in the Code of Virginia includes limitations or explicit requirements for what an attorney can or must put in their pleadings. Mr. Pearson stated that nothing else in the code requires lawyers to plead for any specific request for relief. Mr. Pearson explained that if you plead a certain fact, you may be entitled to relief in a variety of different ways. Mr. Pearson explained that pleadings are privileged and that limiting what an attorney can say in a pleading is unprecedented. Mr. Pearson explained that an attorney can state in pleadings that a real estate licensee committed tortious interference with client's contracts due to misleading advertisements. Mr. Pearson stated that when you try to force words on paper into conclusions, you are telling trial lawyers how to think and the code cannot do that.
- **Mr. Dicks** stated that though he and Mr. Pearson have gone through six separate redrafts of the bill and they have been unable to come to a consensus thus far.
 - **Mr. Pearson** stated that he does not think the Virginia Housing Commission is the proper venue for this bill to be discussed.
 - **Mr. Dicks** stated that he agrees that the bill should be discussed in the Courts Commission.
- **Del. Marshall** stated that he will take Mr. Dicks and Mr. Pearson's suggestions and request that the issue be moved to the Courts of Justice Committee.

III. **Hotel/Motel Extended Stay language (SB 35, Locke, 2012) (draft)**

- **Ms. Christy Marra**, *Poverty Law Center*; stated that currently many impoverished people throughout the Commonwealth are living in hotels and motels for extended periods of time. Ms. Marra explained that many of these people pay by the week and stay there for weeks, months and in some cases even years. Ms. Marra stated that as a result of these extended stay guests, hotel and motel owners are put in a situation where they become quasi-landlords, despite being innkeepers.
- **Mr. Chip Dicks**, *Virginia Association of Realtors*; explained that despite proposed legislation regarding this issue, the hotel and motel industry (collectively, "hotels") has problems regarding extended stay guests. Mr. Dicks explained that under the current law, hotels are covered under the Innkeeper laws until a guest has resided in their establishment for 30 days, after which the hotels are controlled by the

Residential Landlord Tenant laws. Mr. Dicks explained the problems with this current procedure:

- **Mr. Dicks** stated that under the landlord tenant laws, hotels are required to go through a court process in order to evict a tenant and that self-help eviction (i.e., changing the locks on the door to the hotel room where the guest has not paid) is unavailable to the hotels after the guest has been residing at the hotel for more than 30 days.
- **Mr. Dicks** stated that Ms. Christy Marra raised some concerns with the current law: including that boarding houses could claim to be hotels in order to evict residents without going through the court processes.
- **Mr. Dicks** stated that another concern is that hotels will force their extended stay guests to move from one hotel room to another room every 30 days, or ask their extended stay guests to stay at another establishment on their 30th night, to avoid falling under the landlord tenant laws.
- **Mr. Dicks** stated that Mr. R. L. Dunn, an owner of a hotel that is used by extended stay guests, stated that he does not do background checks on and does not require upfront security deposits from his extended stay residents. (See Virginia Housing Commission's Affordability, Real Estate Law and Mortgages Workgroup meeting on May 14, 2012). Mr. Dicks stated that if the hotels were required to go through the courts in order to evict a tenant, they could not afford to provide housing to their clients; because they would need to collect a security deposit and do a background check.
 - **Ms. Marra** added that Mr. Dunn is running a transitional housing business and that the Commonwealth as well as her constituents have an interest in allowing Mr. Dunn's business (and businesses similar to Mr. Dunn's) to continue to operate.
- **Ms. Marra** stated that some hotels are changing the locks on tenants who have been staying with them for months, are keeping the tenant's possessions, and are making these tenant's homeless. Ms. Marra stated that under the current law the extended stay guests have no protection: there is no required notice period for eviction and there is no standard of reasonable reasons for eviction. Ms. Marra stated that the Commonwealth has an interest in helping extended stay guests from unfair treatment in order to prevent homelessness.
- **Senator George Barker** clarified that Mr. Dicks and Ms. Marra are attempting to balance the need for these extended stay hotels, while protecting the guests and the hotel owners from being treated unfairly.
- **Mr. Dicks** stated that he and Ms. Marra have been drafting a bill that they both can agree on and that would address their diverse concerns. Mr. Dicks referred to their most recent draft (included in "Materials," entitled "Proposed Legislation to Exempt Hotel/Motel Guests from VRLTA"). Mr. Dicks stated that Ms. Marra and he agree on everything in the bill except for section iv on page 2. Mr. Dicks stated that the draft of the bill shows Ms. Marra's strikeout to section iv. Mr. Dicks stated that he does not agree with the strikeout, but that he, Ms. Marra and Mr. Dunn are attempting to come up with a draft that addresses all of their collective concerns.

- **Mr. Marra** stated that she and Mr. Dicks agree hotels' obligations as landlords should not "kick in" until the guest has been staying at the hotel for more than 30 days, but less than 12 months. Ms. Marra stated that perhaps after 4 or 5 months, these obligations could start.
- **Mr. Mark Flynn**, *Virginia Municipal League*; asked what "duly licensed" means in the draft.
 - **Mr. Dicks** stated that "duly licensed" collectively means all of the licenses that a hotel needs to run: licenses from the locality, from the zoning board, from the ABC board, etc.
 - **Mr. Flynn** suggested that Ms. Marra and Mr. Dicks define "duly licensed" in the redraft.
- **Mr. Flynn** suggested that Ms. Marra and Mr. Dicks include a test and/or definition for what constitutes a "domiciliary residence" in their redraft.
 - **Ms. Marra** stated that she thinks this test would be better for the courts to develop and that asking hotels to get involved in that test would be ineffective. Ms. Marra stated this would have to be more of a case by case assessment.
 - **Mr. Dicks** stated that it would not be efficient for hotels to have to determine whether every guest they have in their hotel had to prove their domicile.
 - **Mr. Flynn** stated that currently hotels look at guests' licenses and that asking them to confirm each guests' residence would not be too burdensome.
 - **Mr. Dicks** stated that hotels do not make copies of the licenses or use services to confirm whether a person's address is their legal domicile.
- **Del. Marshall** asked whether the draft could include the size of the unit as a means of determining whether the landlord tenant laws or the innkeeper laws apply.
 - **Ms. Marra** stated that she and Mr. Dicks have considered implementing a unit size-based test. Ms. Marra stated that they have also considered a unit cost-based test.
- **Mr. Michael Toalson**, *Home Builders Association of Virginia*; asked whether the hotels are using self-help eviction.
 - **Ms. Marra** stated that some hotels are using self-help eviction despite the 30 day issue. Ms. Marra stated that she thinks everyone will "be on the same page" if the bill elongates the period during which hotels could use self-help. Ms. Marra stated that unless the self-help period is elongated, hotels are not going to want to rent rooms to people without a security deposit for fear that they will have to bring a legal action in order to evict them.
- **Ms. Kelly King Horne**, *Homeward*; stated that many people exiting homelessness have legal issues that make them not necessarily the best candidates for normal landlord tenant relationships. Ms. Horne asked whether Ms. Marra or Mr. Dicks think their version of the bill will affect a person's ability to use a hotel as a legal residence.
 - **Mr. Dicks** stated that transitional folks with bad records and bad credit are included in section iv of their bill. Mr. Dicks stated that there are a lot of

zoning issues regarding using a hotel as a legal residence. Mr. Dicks stated that he and Ms. Marra do not want to allow hotels to find a way out of being landlords by moving people into different rooms or requiring them to leave for a night prior to the landlord obligations kicking in. Mr. Dicks stated that they are concerned that extended stay guest may not know their own rights.

- **Ms. Marra** stated that it is a difficult task to draft this bill because they do not want to make extended stay hotels inoperable and they also do not want to control others' businesses.
- **Mr. Flynn** asked whether a hotel that is being used in part as a boarding house and in part as a hotel be included in section iv.
 - **Ms. Marra** stated that they are attempting to draft the bill clearly enough that people will be able to clarify between a boarding house and a hotel. Ms. Marra stated that the hybrid situations that Mr. Flynn references are going to be difficult to address, but that ultimately she wants those hybrid businesses to be included in section iv.
- **Del. Marshall** stated that this appears to be a work in progress.
 - **Mr. Dicks** agreed and stated that he and Ms. Marra want to leave the legal domicile and the duly licensed portion as they are, but will add a section v.
- **Del. Marshall** stated that this issue definitely can carry some unintended consequences regarding homelessness and derelict structures. Del. Marshall stated that he is confident that Mr. Dicks and Ms. Marra will address these concerns in their redraft.

IV. Rental Inspections (HB 566, Marshall, D., 2012)

- **Chip Dicks**, *Virginia Association of Realtors*; stated that he has been working on this issue with Fairfax County for a little less than five years and that he is happy to say that this particular issue has been resolved. Mr. Dicks formally requested that Del. Marshall withdraw the proposed legislation.
- **Del. Marshall acquiesced.**

V. Public comment

- **Del. Marshall** opened the floor for public comment.
- **Mr. Toalson** invited the members of the commission and all other interested persons to attend Rally for Homeownership on Thursday October 11 at 12:00 at Richmond CenterStage 601 E. Grace St.; back lot between 6th and 7th streets.

VI. Adjourn

- Hearing no other comments, Del. Marshall adjourned the meeting at 11:15 AM.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Housing and the Environment Workgroup

May 9, 2012

10:00 A.M.

House Room D

I. Welcome and call to order:

- **Senator John Watkins, Chair**; called the meeting to order at 10:06 a.m.
- In addition to the invited speakers the following Workgroup members were in attendance:
 - **Legislators:** Senator John Watkins, Delegate John Cosgrove (VHC Chair), Delegate David Bulova, Mark Flynn, *Governor's Appointee*
 - **Citizen Members:** Ron Clements, *Virginia Building and Code Officials Association*; Tyler Craddock, *Virginia Manufactured and Modular Housing Association*; Chip Dicks, *FutureLaw*; Art Lipscomb, *Virginia Professional Fire Fighters*; Ted McCormack, *VACO*; R. Schaefer Oglesby, *Realtors' Association*; Shaun Pharr, *AOBA*; Ed Rhodes, *Virginia Fire Chiefs Association*; Emory Rodgers, *DHCD*; Michael L. Toalson, *Home Builders Association of Virginia*; Cal Whitehead, *Whitehead Consulting*; Jerry M. Wright, *CAI*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*; Laura Perillo, *VHC Staff*

II. HB 1071; Alternative Onsite Sewage Systems (Hugo, 2012)

- **Delegate Tim Hugo**; initially discussed exempting certain Alternative Onsite Sewage System ("AOSS") owners from annual inspections for operation and maintenance, concluding that a better solution would be to require inspections once every two years for AOSSs that pass inspection.
 - AOSS regulating legislation in Virginia now requires all AOSSs to be inspected annually. These inspections may be costly as a result of a lack of competition between inspectors in certain areas throughout Virginia.

DELEGATE JOHN A COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS

MARK K. FLYNN
T.K. SOMANATH
MELANIE S. THOMPSON

- According to Delegate Hugo, AOSSs are needed to allow construction in areas where the house plumbing cannot be connected to a traditional sewer or septic system, while still protecting the environment. Accordingly, there are many people in rural areas who use AOSSs to clean the sewage coming from their homes. While people who have installed AOSSs since the legislation requiring annual inspections understood the financial consequences of their installation, those who installed the AOSSs prior to this legislation may be unprepared for the financial burden associated with these inspections.
- **Senator Watkins**, asked if Delegate Hugo knew how many AOSSs were installed and in use throughout the Commonwealth.
 - **Del. Hugo** responded that there are thousands of AOSSs around the Commonwealth and that AOSSs have propagated more and more recently. According to Del. Hugo, AOSS owners in urban areas may not have problems paying for these annual inspections, but persons in rural areas likely will find it financially difficult to pay. Del. Hugo stated that AOSS owners in Fairfax County were sent fliers that advertised \$1000 for the cost of AOSS inspection.
- **Del. David Bulova** stated that these inspections act as an insurance policy to make sure that AOSSs are functioning properly and to catch problems early. Del. Bulova stated that where problems are not detected early on, the effects are generally more costly to correct. He continued that despite this, he understands that persons with functioning systems may be troubled by the cost associated with these inspections and that he agrees with Del. Hugo's objective of making it easier for these people. Del. Bulova asked Del. Hugo what the regulations specified regarding the inspections.
 - **Del. Hugo** responded that the final regulation requires an annual inspection. Del. Hugo continued that he understands there is legitimate concern regarding early detection of problems with AOSSs, but also is concerned about the cost of AOSS owners whose systems are functioning perfectly. Consequently, Del. Hugo proposed his bill (2012 Session) to change the annual inspections to inspections once every two years.
- **Del. Bulova** asked why Del. Hugo has distinguished churches from other properties regarding AOSSs and asked what the impact on the environment would be where AOSSs do not function correctly.
 - **Del. Hugo** responded that he distinguished between churches and other properties because there are a lot of churches in Fairfax that use AOSSs
- **Mr. Michael Toalson** stated that legislation in 2008 was designed to reinforce the fact that the health department and not the individual were required to ensure that buildings met maintenance requirements. Mr. Toalson further stated that this regulation reminds him of annual car inspections, and the reaction to that legislation. Mr. Toalson admitted that he does not know the solution to this problem, but that legislation required new AOSS owners to be informed and adhere to maintenance regulations and inspections. Mr. Toalson further stated AOSSs are clearly unlike conditional systems that needs to be pumped out every five years, but that it was foreseeable and understandable that these systems

would need to be maintained and there will be cost associated with that maintenance.

- **Del. Hugo** stated that this inspection was mandated state-wide because certain counties were shutting down construction with AOSSs.
- **Mr. Ted McCormack** stated that there are about 60,000 AOSSs in use state-wide and that these systems are installed only in areas where no other sewage system can be built. Accordingly, Mr. McCormack explained, AOSSs are sometimes installed underwater and next to bodies of water. Thus, there is legitimate state concern regarding maintenance. The regulations regarding AOSSs are minimal. Additionally, Mr. McCormack stated that "grandfathering" in older systems to be exempt from annual inspections is counterintuitive considering the oldest AOSSs are the systems that are most in need of regulation because they are most at risk for functioning improperly. Mr. McCormack stated that Del. Hugo's former bill would create two separate regulations geared towards two separate groups of AOSS-- those that were installed prior to the annual inspection requirement and those that were installed after. Mr. McCormack acknowledged that most things cost more in northern Virginia than in other parts of the state, but that based on AOSS maintainer's testimony the annual inspections will likely cost less than annual inspection for the systems. Further, Mr. McCormack stated that the cost of the inspections is designed to decrease with competition.
 - **Del. Hugo** clarified that his bill does not "grandfather" in all AOSS owners; rather, his former bill changed the annual inspections to inspections once every two years.
- **Mr. McCormack** added that the regulations regarding the AOSSs were developed over a 10- year- period.
- **Mr. Chip Dicks** stated that annual inspections versus inspections once every two years makes a difference to those renting out properties and those inspecting AOSSs. Mr. Dicks suggested that perhaps after the initial inspection is completed and a particular AOSS passes the inspection, there could be a four-year hiatus until the government would require an inspection for that individual AOSS. Mr. Dicks continued, stating if there was a problem with an AOSS then the homeowner would need to know and correct the problem early on, to avoid contaminating the surrounding environment and additional costs.
- **Mr. Shaun Pharr** asked Del. Hugo about a particular segment of the population located in Northern Virginia and what his vision is for Foreign Service persons stationed out of the country or other such rental owners in the area.
 - **Del. Hugo** responded that he is open to suggestions and that he personally owns rental properties and understands the challenges associated with that aspect of his bill.
- **Mr. Allen Knapp**, *Virginia Health Department ("VHD")*; introduced himself.
 - **Senator Watkins** asked how the legislation has gotten to its current state in the workgroup where it was developed.
- **Mr. Knapp** responded that there have been multiple workgroups regarding emergency regulations for AOSSs, permanent regulations of AOSSs, and public participation requirements associated with these regulations. Mr. Knapp stated that the workgroups and he did as much as they could by involving stakeholders,

listening to individuals' opinions, and researching regulations in other states. Some people felt that inspecting the AOSSs once every five years would be sufficient; others felt that the inspections should occur two- to- four times per year. Accordingly, Mr. Knapp explained, the decision to mandate an annual inspection was a compromise that sought to address the valid concerns regarding the environment, public health, and AOSS owner's inconvenience. Mr. Knapp explained that most AOSSs use pumps, blowers, and timers to treat sewage. Where any of these mechanisms does not function properly, raw sewage may be released into the environment which is obviously dangerous to public health. As the law stands now, an AOSS may release raw sewage into the environment for an entire year before the inspector realizes it is being released.

- **Del. Bulova** asked what the general cost of these inspections is and whether the cost varies greatly from region to region. Del. Bulova also asked if there were any statistics regarding the status of competition regarding inspections and whether there is a monopoly in this business. Finally, Del. Bulova asked whether Mr. Knapp had any thoughts on how to deal with the issues surrounding the cost of inspections.
 - **Mr. Knapp** responded that he did not have data about the price and competition, but that he has anecdotal information. Mr. Knapp explained that there are certain areas where people will complete the inspection for \$100; however, Mr. Knapp also explained that in Lynchburg he could not find a single person who could complete the inspection at all. In Lynchburg, Mr. Knapp worked with the local health department and was able to set up an inspection service for that area that cost around \$200 per inspection. In northern Virginia, Mr. Knapp continued, the inspections tend to cost more money. Mr. Knapp stated that with regards to general competition for these inspecting services, there are about 600 to 800 licensed inspectors in the state, though they are irregularly distributed with more inspectors in the center of the state (where most of the population is located) and almost none in the western regions.
- **Mr. Tolson** asked whether the Department of Professional and Occupational Regulations ("DPOR") regulates these inspectors.
 - **Mr. Knapp** responded that DPOR regulates the operators under the legislation that was adopted a few years ago by requiring sight and soil evaluations of the AOSS.
- **Mr. Mark Flynn** asked how quickly the problem of raw sewage can arise.
 - **Mr. Knapp** responded that with the web-based recording system to file reports regarding AOSSs with VDH, the local health departments should be notified quickly regarding raw sewage problems. Depending on the severity of the problem, the local health department will respond.
- **Mr. Ron Clements** asked whether there was any data regarding the frequency at which AOSSs fail.
 - **Mr. Knapp** replied that he had no data speaking to Mr. Clements' question. Mr. Knapp stated that there was a "famous" study from Loudoun (the "Loudoun Study") a couple years ago that used a slightly different rubric to evaluate reports from operators. Of the 1300 AOSSs evaluated in

- that report, about one third experienced problems. The study categorized the problematic AOSSs as experiencing minor, moderate, or major problems. There were only 25-30 AOSSs that were reported as experiencing major problems (meaning they were outright failing). The rest of the AOSSs reported were experiencing minor or moderate problems that required minimal attention to fix. After the second round of inspections, the systems were in much better shape as the owners made the necessary repairs.
- **Del. Cosgrove** asked whether VDH knows where the AOSSs are being installed prior to their being installed, because property owners seeking to install AOSSs are required to get a permit prior to installation.
 - **Mr. Knapp** replied that Del. Cosgrove was correct about the property owners needing a permit prior to installation and that VDH knows where the AOSSs are installed as a result of this permit.
 - **Del. Cosgrove** asked whether VDH keeps a record of the people applying for the permit and location of the AOSS.
 - **Mr. Knapp** replied that VDH is trying to compile a record with that information, but that it is challenging because DPOR issues the permits to the operators, but does not have an easily accessible record of the operators' contact information. As the AOSS operators register with VDH, VDH plans to take the operators' contact information and make it public on a website.
 - **Mr. Dicks** asked what Mr. Knapp's observations are regarding the fact that the Loudoun Study showed that upon the second inspection, the AOSSs appeared to be operating fine. Mr. Dicks asked whether Mr. Knapp felt that annual inspections were necessary if this pattern appeared to be true throughout the state. Mr. Dicks also asked whether Mr. Knapp felt that the annual inspection would be necessary for AOSSs where the initial inspection indicates that the AOSS is fully functioning. Mr. Dicks added that Del. Hugo's bill seeks to ease the financial burden on the AOSS owners regarding annual inspections where the AOSS is functioning. Mr. Dicks asked whether Mr. Knapp thought that the annual inspection could be extended to an inspection once every two years.
 - **Mr. Knapp** replied that he is an advocate for database decision making. Accordingly, Mr. Knapp stated that in order to best respond to Mr. Dicks' questions, VDH must gain more data through the web-based program. Mr. Knapp continued by stating that currently the Board of Health determined that one year is the appropriate time frame for AOSS inspection. If the data shows that as a matter of public policy annual testing is unnecessary, Mr. Knapp stated that the legislation should respond accordingly.
 - **Mr. Dicks** stated that he agrees that based on the data collected by VDH taking into account public policy and environmental concerns, that one year is necessary. Mr. Dicks asked whether it would be a good idea to give AOSS operators an extended certificate exempting them from the following year's inspection where an annual inspection indicates that there are no problems with the AOSS.
 - **Mr. Clement** added that he thinks AOSSs should be subject to an initial detailed inspection, followed by a broader inspection.

- **Mr. McCormack** asked Mr. Knapp what constitutes a failing AOSS and how VDH determines an AOSS is failing.
 - **Mr. Knapp** replied that before AOSS were in use; a septic or sewer system failed where there was "sewage on top of the ground or backing up in the fixtures of the house." Before AOSSs, there was a prohibition on contaminating groundwater, but there were no numbers indicating contaminated levels so this prohibition was never enforced. With the current regulation, there are performance based regulations for the first time in Virginia. This current regulation requires a certain outcome and sets expectations regarding AOSSs. Under the current regulation, if an AOSS operator fails performance requirements, their AOSS fails the inspection. Where someone has failed, VDH plans to respond appropriately depending on the severity of the problem.
- **Del. Bulova** asked if there is a way to determine that an AOSS is failing by way of technology without requiring the actual inspection. Del. Bulova asked whether this type of technology could be developed to help AOSS operators avoid yearly inspections.
 - **Mr. Knapp** responded that Del. Bulova's idea is reflected in the regulations and that certain types of AOSSs (especially those installed in water) require remote monitoring. However, Mr. Knapp explained that there are limitations of this monitoring: there is only one AOSS device that equips systems for telemetry. Thus, Mr. Knapp stated that regulating remote monitoring would likely add cost for AOSS operators.
- **Sen. Watkins** stated that there are inspection systems for approval of occupancy building permits. Sen. Watkins continued, stating that AOSS operators would not start using the AOSS before determining whether the AOSS was functional. Sen. Watkins added that it seems likely that AOSSs would likely have some sort of warranty and that it would seem unfair to charge operators for an inspection during the life of the warranty.
 - **Mr. Knapp** stated that the regulation considers those factors. Mr. Knapp stated that most of the AOSSs must be tested by the National Sanitation Foundation before they are permitted for use. In 2008, the law changed so that AOSSs that have an engineer's seal may be used without testing by the National Sanitation Foundation.
- **Del. Hugo** thanked Mr. Knapp and VDH for their help and input on the AOSSs. Del. Hugo stated that Loudoun showed one third of their Oases to have problems, but that Fairfax is known to be one of the most aggressive and progressive counties. Del. Hugo stated that when people in Fairfax received the fliers regarding the cost of annual inspection, 150 people came together to complain about the cost. Del. Hugo stated that it's necessary to see how many of these AOSS really fail; otherwise, he feels that the annual inspections serve to bill people for a problem that might not really be a problem.
- **Sen. Watkins** stated that the workgroup is not prepared to make a final decision regarding Del. Hugo's proposed changes, but that he would like to have another meeting and receive information regarding the system reports and performance requirements.

- **Mr. Knapp** responded that VDH has some of that information county by county.
- **Mr. Mark Courtney, DPOR Deputy Director of Licensing and Registration** stated that licensing of AOSSs was transferred to DPOR a few years ago. Mr. Courtney stated that he worked with VDH in creating regulations that included different classes of operators. Mr. Courtney stated that according to recently collected data, there are 450 licensed AOSS operators statewide; however the data only includes the city and state for residential AOSS use and complete addresses for businesses using AOSSs
- **Mr. Toalson** asked a question regarding the difference between an engineer that can inspect AOSSs and other persons who are licensed to inspect AOSSs.
 - **Mr. Knapp** replied that in order for a person to be an AOSS inspector, they must have a specific license. Where engineers are permitted to inspect AOSSs, they have the same license as other persons licensed to inspect AOSSs.
- **Sen. Watkins** asked how many engineers have this license.
 - **Mr. Courtney** replied that there are approximately 450 people licensed to inspect AOSSs. Mr. Courtney continued by stating that of these 450, 415 are conventional operators.
- **Del. Bulova** asked whether the decisions regarding this regulation and bill will affect the Chesapeake Bay Restoration Fund ("CBRF").
 - **Angela Jenkins, Department of Environmental Quality ("DEQ") Policy Director** stated that she will ask people at DEQ to determine whether this will affect CBRF.
 - **Del. Cosgrove** added that the only way the regulation of AOSSs would impact CBRF is if there is a large amount of fluid escaping into the environment.
- **Sen. Watkins** added that when you start doing AOSS inspections in the rural parts of Virginia, these inspections will end up costing AOSS owners \$1000 or more because there are not many inspectors available there to perform the inspection. This issue will have to be taken into consideration as the issue is discussed further by the Housing Commission,

III. **HB 1292; Statewide Fire Prevention Code (Spruill, 2012)**

- **Delegate Lionel Spruill**; explained a problem that several churches are facing in Chesapeake regarding fire inspections. Del. Spruill stated that churches whose kitchens pass the VDH inspection and have not made any changes or improvements to their kitchens have been inspected by the local fire departments under newer versions of the building codes and instructed that they need to make changes. When this issue was brought to Del. Spruill's attention, he contacted the fire department and stated that the churches have a right to appeal this decision and that such a right did not appear on the forms the churches were given. As a result, the forms were amended and now include information regarding the appeal process. However, Del. Spruill explained that many of these churches that received the forms prior to the addition of appeal information did not appeal and instead made the changes that were required according to the fire inspection or

did not make the changes and the time for appeal lapsed. Del. Spruill explained that as a result, these churches that received the failed fire inspection and did not appeal, are now required to adhere to the new fire code. Del. Spruill stated that he is seeking the workgroup's assistance in "grandfathering" in these churches so that they are not required to adhere to the regulations of the new fire code as a result of failing to appeal, due to the fact that the churches were unaware of their right to an appeal.

- **Del. Cosgrove** stated that there are a lot of little churches with small congregations in Virginia, and that the cost of renovating their kitchens could cause many of these churches to close.
- **Mr. Emory Rodgers**, *Deputy Director of Building and Fire Regulation for the Department of Housing and Community Development*, stated that the Uniform State Liability Code and Fire Prevention Code clearly state that the building must maintain the standards as they were set out in at the time the building was built, unless there were renovations or changes made to the premises. There is nothing in the law that requires churches to update their facilities so long as they adhere to the code that applies to their premises. Rather, properties must be maintained according to the regulations when the buildings were constructed, unless the building was changed in some way. When the fire inspector issues a notice of violation, the notice should include language indicating the violator's right to appeal.
 - **Mr. Charles E. Altizer**, *Virginia's Fire Marshal* added that there has never been a law that permitted fire officials to require changes in building to meet new standards where the building has passed inspection, unless other changes were made to the building.
- **Del. Cosgrove** responded that unfortunately, it appears that that is what is happening in Chesapeake. Del. Cosgrove continued by stating that the fire inspectors should be aware of the duties under the various codes. Del. Cosgrove asked whether there was a way to clarify the fire inspectors' roles.
 - **Mr. Altizer** responded that the instructors for the fire department training emphasize the Fire Prevention Code. Additionally, Mr. Altizer stated that when he receives a call regarding similar situations, he always informs the caller of their right to appeal the violation. Mr. Altizer also has informed local fire officials that they are not permitted to require updates in building that have not had any changes to them since they were first built, provided they adhere to the code from when the building was originally constructed. Mr. Altizer assured the workgroup that the information regarding the fire official's duties and limitations is out there and the fire officials should know about it, but that he is unsure what else can be done to ensure the fire officials abide by the code.
- **Del. Cosgrove** asked whether Mr. Altizer felt it would help if the workgroup added language to the code.
 - **Mr. Altizer** replied that he does not know how adding anything to the Code of Virginia would solve the problem, given the fact that the guidelines are clearly stated in the Fire Prevention Code.

- **Mr. Ron Clements** stated that the Fire Marshal's office does not spend time researching the statutes; rather, they look to the regulations. Mr. Clements stated that if the regulations are the same as the language added to the code, the restatement would be unnecessary. Mr. Clements stated that the real problem is leadership, and no alteration of the Code of Virginia can solve that problem.
- **Del. Spruill** stated that Mr. Altizer and the Fire Chief were on the phone with the fire inspectors who were responsible for some of the problems we have discussed here today. Del. Spruill stated that even after Mr. Altizer, the Fire Marshal, told the fire inspector of their error and explained the Fire Prevention Code, the fire inspector did not respond in the manner suggested by the leadership. Del. Spruill asked the workgroup what he should do to solve this problem for the churches in his area.
 - **Del. Cosgrove** clarified that the specific provision at issue is in the regulations, not the code.
 - **Sen. Watkins** further explained that the code is built around the regulations. Sen. Watkins stated that it sounds like the fire inspectors are being overzealous and going beyond their authority. Sen. Watkins continued, stating that he would consider adding Del. Spruill's proposal into the Code of Virginia, but it would affect very few people. Sen. Watkins suggested that perhaps it would be better to invite the fire officials from Del. Spruill's area to come to a workgroup meeting to discuss why the fire officials should not be requiring older buildings to comply with new regulations and help define their duties.
- **Mr. R. Schaefer Oglesby** stated that it would be a mistake to add these regulations to the Code of Virginia because people would expect it to be in the Building Code regulations. Mr. Oglesby stated that property managers have a hard time finding the smoke detector law because they look for it in the Building Code, but it is actually in the Code of Virginia.
- **Mr. Ed Rhodes**, *Virginia Fire Chiefs Association*, stated that he worked with the fire marshal and explained the regulations to the fire officials. Mr. Rhodes stated that despite their input, the fire officials did not agree with his explanation. Mr. Rhodes stated that a retired fire chief, who is also an attorney, tried to instigate the bills because his church was cited as a violator. Mr. Rhodes stated that if a fire inspector thinks there is an issue with a building, it is general practice to explain this to the building official and suggest that they further inspect the issue. Mr. Rhodes stated that the fire inspectors are not certified to require property owners to make changes to their building. Mr. Rhodes added that he agrees that the regulations should not be added to the Code of Virginia, but that the issue should be further discussed in the fire training classroom to ensure that it does not occur in the future.
- **Del. Spruill** asked what he should tell the churches to do about the situation.
 - **Sen. Watkins** responded that Del. Spruill should tell the churches to appeal. Sen. Watkins then asked Mr. Rodgers whether replacing a stove would constitute a renovation to the building.
 - **Mr. Rodgers** replied that in some instances, replacing a stove in a building would require a permit. However, in other instances the change

would be allowed by the Building Code without a permit. Mr. Rodgers offered to speak with Del. Spruill's constituents to educate them on their rights and limitations.

- **Mr. Altizer** reiterated that when a fire inspector inspects a building they are required to verify that the building conforms with the code it was built under provided there are no changes to the building.
 - **Mr. Clements** stated that if a church changed their stove to a new stove, the code applied to the building would not change; but if the church changed a four burner stove to a six burner stove, or propane stove to a gas stove, the code applied to the building would change.
 - **Sen. Watkins** added that there is a fine line between change that requires an inspection under a new code and a change that does not. Sen. Watkins stated that he is concerned about the ambiguity of the language of the bill.
- **Mr. Toalson** stated that the Fire Code will be updated this year. Mr. Toalson stated that he is disappointed that the fire inspectors did not follow protocol and expressed his opinion that it was a very basic thing for these people to confuse. Mr. Toalson also stated that he is disappointed that this could not have been handled at a more local level and that the churches' only recourse is through the appeal process.
- **Del. Spruill** will let the Workgroup know if he needs any additional help concerning this issue.

IV. Public Comment and adjourn

- **Mr. Mark Flynn** stated that in response to the former request from Senator Watkins, a group of people assembled, including Susan Williams and Zack Robbins of DHCD, Roger Wiley, Ted McCormick and Elizabeth Palen to assess a number of issues concerning the cash proffer system in Virginia.
- The group is researching how cash proffers are collected, how much of the money is being held by localities and municipalities, and why or if this money is being held instead of spent by the locality. Mr. Flynn stated that the reporting provision in the Code of Virginia for cash proffers does not require the locality or municipality to state how long the money has been, is, or is going to be held. Additionally, Mr. Flynn noted to Senator Watkins, that Chesterfield reports these statistics independently.
 - **Mr. Flynn** stated that he is interested in seeing what localities and municipalities that have a large receipt of cash proffers does with this money. Mr. Flynn suggested that a supplementary survey be sent to collect this information when they send out the mandatory survey so localities will be likely to respond.
- **Mr. Toalson** asked when collecting proffers started. Mr. Toalson continued, stating that Virginia has a "money in, money out" record for localities and municipalities since 2003. Mr. Toalson asked whether they could figure out the amount of money that the localities are holding and for how long it has been held

by going through these records. Mr. Toalson explained that the money is contributed with an expectation of the homeowners that specific things are going to be constructed. He continued, stating that the money should be spent in a timely matter for the purpose for which it was contributed.

- **Sen. Watkins** stated that there is an expectation of the people donating the money and the consumer of new homes that some of what they are paying is for the purpose of developing an infrastructure. Sen. Watkins continued, stating that when these people do not get what they were promised, there is a problem. Sen. Watkins acknowledged the economic troubles that developed throughout the past four to five years, stating that development is a critical step in re-stabilizing the economy. Sen. Watkins stated that an impediment to growth is the cost of a new home, especially when you have cash proffers that exceed \$10,000-\$15,000. Sen. Watkins explained that this large amount distorts the housing values because it is artificial inflation that ends up being discriminatory regarding affordability.
- **Mr. McCormack** stated that looking at the data since 2000, the most significant service proffers have been spent on transportation. Mr. McCormack explained that the shares have gone up while state shares have decreased. Mr. McCormack stated that it takes a long time to build the necessary proffers to build a facility.
 - **Mr. Toalson** responded by saying that for most local governments, cash proffers makes up less than 5 % of the total budget. Mr. Toalson asked why people are paying so much money for cash proffers per house, when it is such a small part of the budget for these projects. When you compare pricing in central Virginia from 2007 to 2011, the decline is shocking. According to Mr. Toalson, if people today have to pay cash proffers, no one can build new developments.
 - **Sen. Watkins** stated that cash proffers may undermine the revenue stream for local government, because people cannot afford to build. Sen. Watkins continued, stating that the workgroup needs to wait until November in order to get the surveys back from localities around the state in order to get the information asked for, in order to make informed decisions and to access if there is a need to make changes regarding the proffer system.
- **Senator John Watkins** asked if those in the audience had any other comments or concerns. Hearing none, the meeting was adjourned at 11:42 a.m.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

AGENDA

Housing and Environmental Standards Workgroup

August 22, 2012

10:00 AM

General Assembly Building
Senate Room B

I. Welcome and call to order:

- **Senator John Watkins**, *Chair* called the meeting to order at 10:08 a.m.
- In addition to the invited speakers the following Workgroup members were in attendance:
 - **Workgroup Members:** Delegate David Bulova; Delegate Barry D. Knight; and Senator John Watkins; Brian Buniva, *LeClair Ryan Law Firm*; Ron Clements, *Virginia Building & Code Officials Association*; Tyler Craddock, *Manufactured & Modular Housing Association*; Chip Dicks, *Virginia Association of Realtors*; Sean P. Farrell, *Virginia Building & Code Officials Association*; Mark Flynn, *Governor Appointee*; John Hastings, *Virginia Housing Development Authority*; John H. Jordan, *Manufactured Housing Communities of Virginia*; Art Lipscomb, *Virginia Professional Fire Fighters*; R. Schaefer Oglesby, *Virginia Association of Realtors*; Ed Rhodes, *Virginia Fire Chiefs Association*; Neal Rogers, *Virginia Housing Development Authority*; Michael T. Toalson, *Home Builders Association of Virginia*; and Cal Whitehead, *Whitehead Consulting*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC* and Laura Perillo, *VHC Legal Intern*

II. Alternative Onsite Sewage Systems (HB 942; Lingamfelter, 2012) (HB 1071; Hugo, 2012)

- **Sen. Watkins** explained that the purpose of the workgroup is to consider the pros and cons surrounding environmental standards for housing. Sen. Watkins explained that this particular meeting is focused on legislation regarding Alternative Onsite Sewage

DELEGATE JOHN A COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE BARRY D. KNIGHT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

MARK K. FLYNN
LAURA D. LAFAYETTE
T.K. SOMANATH

- Systems (AOSSs). Sen. Watkins asked the workgroup if they had any questions prior to hearing the presentations. Hearing none, Sen. Watkins introduced the speakers.
- **Mr. Jeffrey S. Gore**; *Hefty & Wiley, P.C., Loudoun County AOSS Program*; stated that in the early 2000s, AOSSs were a newer technology and Loudoun County's Board was concerned about the reliability of AOSSs and feared having to clean up after failing systems in the event that homeowners could not afford to do so. Mr. Gore stated that in 2005 the General Assembly passed legislation that allowed localities to regulate AOSSs by setting up a local program for inspection, monitoring, reporting, and fining for violations of the systems. Mr. Gore explained that in 2008 or 2009 the statute was amended in light of a new state regulatory scheme and localities' powers to regulate AOSSs under their local programs was restricted. Mr. Gore stated that both HB 942 and HB 1071 seek to modify this legislation in subpart B, because the current legislation has caused problems in Loudoun County.
 - **Mr. Gore** explained Loudoun's unique position regarding AOSSs due largely to its recent growth. Mr. Gore stated that Loudoun is the fastest growing county in the United States. Mr. Gore stated that the County has grown from 188,000 to 327,000 between 2001 and 2012. Mr. Gore further stated that the number of school aged children in the county has grown from 31,000 to 66,000 during this same time. Mr. Gore stated that the county has built 22 schools since 1998 and have averaged over 4,000 residential building permits during that period per year, with a peak at about 7,000 apartments per year.
 - **Mr. Gore** stated that currently, a little over 1,400 homes in Loudoun County use AOSSs. Mr. Gore explained that the technology has certainly improved in recent years and that people are more aware of the risks and the maintenance of AOSSs. Mr. Gore stressed the fact that AOSSs must be maintained in order for the improved technology to properly function.
 - **Mr. Jack McClelland**; *Environmental Health Manager for Loudoun County Health Department*; stated that he has held his current position for about one year, and introduced his predecessor, Mr. Allen Brewer who is now the Energy and Environmental Program Policy Administrator for Loudoun County. Mr. McClelland also introduced Mr. Jerry Franklin, Mr. McClelland's supervisor who oversees Loudoun County's AOSS Inspection and Community Outreach Program.
 - **Mr. McClelland** explained Loudoun's local program via his PowerPoint presentation entitled "Loudoun County Alternative Onsite Sewage System (AOSS) Inspection and Community Outreach Programs." (Available as "Materials").
 - **Mr. McClelland** clarified that 111 AOSSs were deficient out of the 1096 systems tested in 2009.
 - **Mr. Chip Dicks**, *Virginia Association of Realtors*; asked Mr. McClelland whether it is necessary to inspect the 985 AOSSs that were recorded as having no deficiencies in 2009 annually.
 - **Mr. McClelland** stated that approximately one third of the AOSSs that were classified as having no deficiencies (and thus put into "Category 1") one year were classified as having deficiencies (and thus, put into "Category 3" or "Category 4") within the next year.
 - **Mr. Michael Toalson**, *Home Builders Association of Virginia*; asked what the health department classifies as a minor problem.

- **Mr. Franklin** stated that a minor problem, or a "Category 2" violation, would include a missing screw on an AOSS cover or something else that would not hinder the AOSS from treating sewage.
- **Mr. Dicks** stated that when someone's dwelling unit is inspected and there are no problems with the unit according to the state-wide building code, then that unit gets a four-year exemption from annual inspections. Mr. Dicks explained to Mr. McClelland that in past meetings, the workgroup has considered whether it would make sense to amend the legislation so that AOSSs only needed to be inspected once every two years or less, rather than inspected annually. Mr. Dicks asked Mr. McClelland if there was any way to predict which systems would be in functioning order for longer than a year and therefore not need to be checked annually.
 - **Mr. McClelland** said that there is no real way to determine whether an AOSS that is working one year will continue to be working correctly the next year.
- **Mr. Mark Flynn, *Governors Appointee***; stated that he was confused by the numbers indicated on the pie charts for 2009 "Category 4" AOSSs (AOSSs that failed their inspection for major violations). Mr. Flynn stated that the pie chart indicates that 24 AOSSs were classified as "Category 4", then 0, then 11.
 - **Mr. Franklin** stated that he was concerned about those numbers as well and determined that 10 out of the 11 "Category 4" AOSSs failed due to damage resulting from lawn mowers. Mr. Franklin explained that many homeowners in Northern Virginia hire landscapers to mow their lawns over large properties and are completely unaware of the problems with their AOSSs until the AOSSs are inspected. Mr. Franklin stated that luckily, those types of repairs are easy and cheap.
- **Mr. Toalson** asked if the inspections were completed by the private sector.
 - **Mr. Franklin** stated that the inspections in Loudoun are completed by the private sector.
- **Mr. Toalson** asked what is the average cost of an AOSS inspection.
 - **Mr. Gore** stated that the average cost is \$300-350 annually in Loudoun, though that is a better question to direct towards the operators and persons in the industry.
- **Mr. Dicks** stated that he appreciates Loudoun's well run county program. Mr. Dicks stated that the bulk of Mr. McClelland's presentation dealt with residential AOSSs. Mr. Dicks stated that AOSS development is also a huge part of commercial development where traditional sewage systems are unavailable.
 - **Mr. Franklin** stated that there are some uses in the commercial arena but that the majority of their studies are re: residential.
- **Mr. Toalson** stated that maintenance of AOSSs can be expensive, but that usually it is less than what people would pay for sewer costs throughout the year. Mr. Toalson stated that the annual cost of checking an AOSS is often substantially less than what people pay for sewer maintenance/costs in other localities.
 - **Mr. Dicks** stated that he agrees with that assertion. Mr. Dicks stated that in Fairfax County people were being sent out estimates regarding AOSS inspection that cost \$1000 or more. Mr. Dicks stated that where the cost exceeds \$350 per year and upwards of \$1000 there is a new concern.

- **Mr. Flynn** asked whether more serious problems occur with older systems.
 - **Mr. McClelland** stated that many of the AOSSs in use are four to five years old. Mr. McClelland stated that he does not have information separating old AOSSs from new AOSSs regarding the problems they experience. Mr. McClelland stated that although he does not have data regarding this question, his knowledge of AOSSs generally supports the idea that the older the AOSS get, the more likely it is to have problems. Mr. McClelland stated that this is part of the reason that he supports the annual AOSS inspection requirement.
 - **Mr. Toalson** stated that Loudoun County prohibited AOSSs for a certain amount of time and that his association considered this a prohibition on development. Mr. Toalson explained that the legislation was passed to prohibit local governments from prohibiting AOSS use, to allow continued development, and to set in place a procedure for checking on AOSS functioning.
- **Sen. Watkins** asked how many of the AOSSs in Loudoun County are used in commercial buildings or for multifamily housing.
 - **Mr. McClelland** stated that he has not recorded that information but that he can get him the answer.
- **Sen. Watkins** asked what problems Loudoun County has noticed regarding low pressure systems installed in the early and late 1990s.
 - **Mr. Franklin** stated that the low pressure systems commonly become clogged with solids in the valves, as well as problems with the pumps. Mr. Franklin stated that to fix these problems often times owners must flush the lines out.
- **Sen. Watkins** asked how many septic tanks that are gravity dependent are used in Loudoun County and what the inspection requirements are for those tanks.
 - **Mr. McClelland** answered that there are about 1,300 septic tanks and that they are only required to be cleared out annually.
- **Mr. Allen Knapp**; *Virginia Department of Health*; presented his PowerPoint presentation entitled "Virginia Department of Health: Office of Environmental Health Services." (It is available on the VHC web-site.)
 - **Mr. Knapp** discussed his handout entitled "Minimum Operator Visit Frequency and Minimum Sampling Frequency for Small AOSS." Mr. Knapp stated that unlike septic tanks, AOSSs have sewage treatment goals. Mr. Knapp stated that there is a concern with reducing nitrogen effluent from AOSSs and that this concern changes the focus of the discussion of failure of these systems. Mr. Knapp stated that AOSS failure manifests itself as effluent coming from the ground or sewage backing up in the house. Mr. Knapp explained that the Board of health has created other requirements. Mr. Knapp defined failure as any failure to meet any one or more of performance standards.
- **Mr. Toalson** asked whether this presentation regards commercial systems or just residential systems.
 - **Mr. Knapp** stated it is regarding residential AOSSs.
- **Mr. Toalson** asked when the regulations went into effect regarding AOSSs.

- **Mr. Knapp** stated that the regulations have been in place for less than one year.
- **Mr. Knapp** stated that Virginia Department of Health's goal is to complete the inventory by 2014. Mr. Knapp stated that when one considers the 5.6% statewide, one must keep in mind that the data is heavily skewed because only relatively new systems are registered. Mr. Knapp explained that newer AOSSs have some sort of performance agreement with the AOSS installation companies. Mr. Knapp stated that his department suspects that the more AOSSs that are registered, the worse the statistics of compliance will be at that time.
- **Del. Bulova** stated that in order to comply with the Clean Water Act, bodies of water must comply with water quality standards. Del. Bulova explained that in order to do so, bodies of water must not receive more than their Total Maximum Daily Load of pollutants. Del. Bulova explained that if AOSSs are not managed the way they should be and they add more pollutants than expected, then that excess is going to have to be made up somewhere else. Del. Bulova explained that solving these sort of problems can easily get expensive.
- **Del. Bulova** asked how many registered AOSSs fail as a result of a health threat such as sewage on the ground. Del. Bulova also asked how many registered AOSSs fail due to things that the owner cannot see.
 - **Mr. Knapp** stated that he does not have that information. Mr. Knapp stated that the database does not record the specific violations; rather, the database records the category under which the violation is grouped.
 - **Mr. McClelland** stated that Loudoun is not testing the effluent that is coming out.
- **Del. Bulova** asked how sensitive the inspections were expected to get for the testing for Nitrogen. Del. Bulova asked what the effect would be if the amount of time between inspections was extended.
 - **Mr. Knapp** stated that he was unsure. Mr. Knapp stated that the EPA would have to "weigh in" regarding the change because the AOSS inspections are part of the Chesapeake Watershed Act.
- **Del. Bulova** asked whether Virginia would have to reopen its plan with the EPA regarding the Chesapeake Watershed Act if any changes were made regarding AOSS inspections.
 - **Mr. Knapp** stated that Virginia would have to reopen its plan with the EPA for the Chesapeake Watershed Act if changed were made to AOSS inspections.
- **Mr. Toalson** stated that conventional systems do not have the ability to reduce the amount of nitrogen in effluents. Mr. Toalson stated that more data would be available if the Virginia Department of Health was adequately funded.
- **Sen. Watkins** asked what Mr. Knapp thought about the cost of inspections.
 - **Mr. Knapp** stated that the inspections are filed online, but that the database does not collect information regarding the cost of inspections.
- **Sen. Watkins** stated that he thinks the Health Department should ask users how much they are paying for inspections. Sen. Watkins stated that this would make the costs public and get a little more competition in the inspection business which would eventually drive down the cost of the inspections.

- **Mr. Toalson** stated that its important to consider the fact that these AOSSs are likely the future of water treatment for development.
- **Mr. Eldon James**; *Public Policy Consultant; Fauquier County*; explained his handout entitled "AOSS Ad Hoc Work Group--Summary of Activities To Date and List of Participants."
 - **Mr. James** stated that there are some major problems in Fauquier County regarding sewers and sewage.
 - **Mr. James** stated that regulations have inadequately addressed what happens to a failing AOSS and its owner. Mr. James stated that Fauquier does not have data regarding the failures of older systems.
 - **Mr. James** asked what happens when a home buyer does not have the money to replace or maintain an AOSS that was installed prior to their purchasing the property. Mr. James asked what happens when a "bad actor" does not even try to keep their AOSS in accordance with proper standards.
 - **Mr. James** stated that Fauquier created regulations for bonding AOSSs, but this failed because 1) no one would issue the bonds and 2) an AG opinion stated that the locality could not create regulations regarding bonds.
 - **Del. Bulova** stated that he has an issue with a means tested system with no nexus to the services being provided. Del. Bulova asked whether this fee could be charged under the current legislation and system.
 - **Sen. Watkins** asked how many instances of these particular set of circumstances have there been throughout the state.
 - **Mr. James** stated that he has worked in four different lower income communities where AOSSs had to be installed to replace conventional systems and old AOSSs. Mr. James stated that it is difficult to figure out how many failed systems there are due to under reporting. Mr. James explained that if a person does not have the means to fix the problem with their AOSS then the health department will condemn the home. Mr. James explained that as a result people may choose not to report a problem with the AOSS in an effort to stay in their home.
 - **Sen. Watkins** asked whether or not this is a local issue.
 - **Mr. James** stated that this is a local issue, but that the type of grant funds that have existed historically for traditional sewers do not exist for AOSSs.
 - **Sen. Watkins** asked how many low income housing AOSSs have failed.
 - **Mr. James** stated that he does not have that information.
 - **Mr. Toalson** stated that he thinks the Workgroup should wait for the respective agencies to collect data regarding failing AOSSs before there are any changes made to the inspections of AOSSs. Mr. Toalson stated that as the information stands, it is difficult to determine whether a problem really exists.
 - **Sen. Watkins** stated that neither portion of the legislation in front of them is dealing with what Mr. James is discussing.
 - **Del. Bulova** asked whether the group discussed by Mr. James has considered using an authority type system in which anyone who owned AOSS became part of an authority to which they pay fees. Del. Bulova further explained that the

authority could operate like an insurance association and that the association would pay for the repairs where needed. Del. Bulova stated that Fairfax County considered this.

- **Mr. James** stated that it is a valid approach but the Fauquier is very conservative and unlikely to adopt an authority-type approach.
- **Sen. Watkins** asked whether there is a real estate requirement for someone to tell a homeowner if the house has an AOSS. Sen. Watkins also asked whether AOSSs have to be inspected prior to the sale of a property using an AOSS.
 - **Mr. Dicks** stated that there was recently legislation regarding both of these questions. Mr. Dicks stated that the challenge with these AOSSs and residential real estate is trying to find a way to resolve the problems with AOSSs without displacing families.
 - **Mr. Toalson** stated that maintenance requirements could be recorded as a part of the legislation that passed which prohibited local governments from prohibiting AOSSs. Mr. Toalson pointed out that there are no such maintenance recordation requirements for conventional systems.
 - **Mr. Dicks** stated that there are several properties that are not covered in the title provisions referenced by Mr. Toalson
- **Sen. Watkins** suggested that the texts of the legislation discussed in this meeting be provided at the next meeting.

III. Public comment

- **Sen. Watkins** asked if anyone of the public had comments.

IV. Adjourn

- Hearing no public comment, **Sen. Watkins** adjourned the meeting at 12:00 PM.

SUMMARY
Virginia Housing Commission
Housing and Environmental Standards Workgroup
Senate Room A, General Assembly Building
November 1, 2012
10:00 AM

I. Welcome and Call to Order

- **Senator John Watkins**, *Chair* called the meeting to order at 10:00AM
- In addition to the invited speakers the following Workgroup members were in attendance:
 - **Workgroup Members:** Delegate David Bulova; Delegate Barry D. Knight; and Senator John Watkins; Brian Buniva, *LeClair Ryan Law Firm*; Ron Clements, *Virginia Building & Code Officials Association*; Tyler Craddock, *Manufactured & Modular Housing Association*; Chip Dicks, *Virginia Association of Realtors*; Sean P. Farrell, *Virginia Building & Code Officials Association*; Mark Flynn, *Governor Appointee*; John Hastings, *Virginia Housing Development Authority*; John H. Jordan, *Manufactured Housing Communities of Virginia*; Art Lipscomb, *Virginia Professional Fire Fighters*; R. Schaefer Oglesby, *Virginia Association of Realtors*; Ed Rhodes, *Virginia Fire Chiefs Association*; Neal Rogers, *Virginia Housing Development Authority*; Michael T. Toalson, *Home Builders Association of Virginia*; and Cal Whitehead, *Whitehead Consulting*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*

II. Proffers

- **Mr. Zach Robbins**, *Department of Housing and Community Development; Commission on Local Government, Senior Policy Analyst* gave an overview of this year's annual report on local government cash proffer revenues and expenditures in his presentation entitled *Cash Proffers: Revenues and Expenditures* (which is located under "Materials").
- Cash proffers are voluntary offers made by a landowner in the rezoning process. Proffers impose additional requirements to those required by the underlying zoning regulations, usually to mitigate an impact related to the proposed rezoning. Proffers result in conditional zoning as additional restrictions are conditions attached to the specific property. Cash proffers are payments voluntarily offered in writing to offset impacts on general facilities that are generated by rezoning property to permit additional density.
- Sections of code (see attached documents) governs use of cash proffers once the locality has collected them, which are applied to proffers pledged after July 1, 2005. Within localities the statute states that after 7 years of full payment of any cash proffers associated with a zoning case, the locality must advance to those capital improvements outlined in the proffer. However, code states that if seven years pass with no progress towards completing capital projects, the

locality shall forward the unused funds for allocation to that locality's urban or secondary construction.

- The statute also states that unless prohibited by proffers, the locality can use funds for alternative improvements of the same category if they are also in the same vicinity of the original area. The procedure for these alternative improvements relies on public hearing and findings of local government. Additionally, unless prohibited by proffers, the locality can use funds specifically proffered for road or transportation improvements as matching funds for VDOT revenue sharing program.
- Beginning with fiscal year 2007, there were additional transparency requirements. Capital Improvement programs for the localities must include all proffered payments received during the most recent fiscal year, and capital budgets must include the amount of proffered cash payments projected to be used for the budget year. Additionally, localities with population greater than 3500 are required to record any proffers collection or proffer expenditures to the (commisional) local government on an annual basis.
- For this year's annual survey, they received a 100% response rate, giving a complete data set. Last year's survey results show that 7 cities, 26 counties, and 5 towns having reported some cash proffer activity. Statewide, \$61 million were collected in cash proffer payment, and \$44 million were expended. Revenues and expenditures of proffers were significantly higher in 2012 as opposed to prior fiscal year. Proffers were also categorized, with the largest expenditure in the library category, followed by transportation and schools. 36% of cities and counties over the 12 years have collected proffers. 59% of Virginia's 2010 population collected cash proffers. 87% of the state's 2000-2010 population growth occurred in localities that collect cash proffers.
- **Mr. Robbins:** Eight localities collected over one million dollars in proffer revenue or expenditures in the past five years; and in response to the Housing Commission's request, supplemental information was requested from these eight localities. These areas were asked to provide annual proffer revenue and expenditure data for FY00-FY12, FY12 end of year balance for proffer funds, and copies of cash proffer policies. All eight counties but James City and Fairfax counties responded, and previous proffer report data was substituted for those jurisdictions. The past twelve years have seen a marked decrease in building permits, and increase in proffer balance.
 - Proffers are voluntary offers, and how often these offers are not accepted?
- **Mr. Robbins:** I do not have that information, but the Planning Office for the specific localities may have it.
 - How do localities determine an amount of money to be volunteered as a cash proffer?
- **Mr. Robbins:** Each locality has a cash proffer policy, which outlines how an amount is derived. This process involved a lengthy calculation which analyses things like the impact on schools, base amount per dwelling unit, and in-kind improvements made by the developer. Each locality has a different formula for volunteering proffers.
 - I had a question regarding building permits. Is the development of a piece of property related to the increasing proffer balance, and not linked to the number of building permits?
- **Mr. Robbins:** The number of building permits is an indicator of development. However, not every (building permit is a proffer paid on.), only if it is on a building permit on property where there was a cash proffer involved.

- **Delegate David Bulova:** This appears to be business decision for developer. One could choose to develop an area without entering into a proffer, or make the decision to trade a proffer for a higher amount of zoning density. What does it say in the code about those policies, and to what degree does it lays out what is required to be on the local policy? What flexibility does a locality have?
- **Mr. Robbins** explained that code is pretty (salient?) regarding cash proffer policy. Some language in the code ties it to capital facilities, but nothing details what is required of a policy of a locality.
 - **Del. Bulova:** If there is more development and put more houses in a project, the locality is the winner. More property tax will be collected with more houses developed in the area.
 - Some localities are not on the list, especially those in Northern Virginia who accept proffers. Did these localities respond?
- **Mr. Robbins:** Yes, they did respond. However, they did not make the cut of \$1 million of proffer activity.
 - In the amount collected, proffers make up 50 permits or less on high rise buildings and density. Is permit activity a good gauge for how the proffers work?
- **Mr. Robbins:** The data specifies units in data permits, and that data did not clarify.
 - When building houses, you bring more revenue. However, there breaking point, which varies by locality, of when residential units do bring in more revenues than they cost in services and infrastructure. Building of work-force housing is a net loss to the locality, and someone has to pay for infrastructure. If they didn't have cash proffers system, Prince William County would have a 3.3 cent real estate tax rate, and Loudon County would 4 cent tax rate. If we did not have people moving in paying some extra share of the cost, then the people living there all their lives would have to pay. In Loudon County talk, the amount of immigration into the area will further be discussed.
 - When you publish the annual report, will that extra information, like the locality's proffer policies, be included in an appendix?
- **Mr. Robbins:** No, the report will be as it normally stands with the current year information
 - **Sen. Watkins:** Will you make these requested policies available online?
- **Mr. Robbins:** Yes, we can do that. However, the Commission publishes the report and governs the format.
 - **Delegate Marshall:** The city of Danville has a program called Reimbursable Agreement, which works with a developer as he develops a piece of property. For example, once a development has 30 lots, and 15 are sold, the developer will be reimbursed for the cost of the construction of the street, curb, gutter, water, sewer, and gas lines. It is very controversial, but it seemingly pays back to the city.
 - Since 2007 when the fallout began, have any of the eight jurisdictions reduces their proffer request?
- **Mr. Robbins:** I do not have that history. We just ask for the current year cash proffer policies, and do not know what they were asking for prior to the recession. We have profiles showing the activity that shows an aggregate for what happened at each locality, but do not have individual ask amounts.
 - Do we know if the total assessed values of residential properties in those jurisdictions dropped in value during that time?

- **Mr. Robbins:** I can go back and take a look at the data.
 - I was around when voluntary proffers were made legal, and we seem to have gotten beyond the original intent. Originally, proffers were to be a tool for high growth areas that were facing extensive capital needs to keep up with growth. Is that still how it is being used? Is there enough classrooms and classroom space that would demand that this level of cash proffer to be maintained? It seems we have allowed this tool to be abused as a revenue stream, and that it currently is resulting in the stagnation of growth. This proffer system seems to be discriminatory against low cost, affordable housing. Do you have provisions with that policy to provide a mechanism that a board can furnish some relief for proffers for housing that is affordable?
 - Can you tell us what the assessed values of housing are, and also provide an indication with regard to lowering of proffers? We are exacerbating the problem by ignoring the financial side. It is frightening to see where we are with some cash balances, versus where the billing permits are. Even with multifamily housing, each unit is a tick on the clock for cash proffers of \$20,000-40,000 apiece. This seems unfathomable. How will we provide housing for these people if we let this continue?
 - **Del. Bulova:** We need to focus of information needs with respect to impacts on affordable housing. Proffer system has helped with affordable housing situation. In my area without the proffer system and a means to facilitate extra zoning, the very dense development, like condominiums and apartment, would be developed as single homes in the \$500,000-700,000 range. Having this mechanism that provides flexibility for the localities and offsets extra cost provides a transition to affordable housing.
- However, I could not say that for certain. I am interested in seeing policies on local level, as they play differently in different areas. In my jurisdiction, the proffer system is not abused. Fairfax high school has a thousand more students than it was designed to handle, and they require the proffer system to develop an infill to keep up with the increasing student body. Where the breaking point for this system lies ought to be asses. However, there is a reason developers supported the proffer system, and I would hate to see it go away. We might take a look at policies and be sure they have unintended consequences.
 - **Laura Lafayette:** In Chesterfield County, the bank had taken back twelve lots, with infrastructures and roads already built. The banks ruled to sell each lot for \$25,000 each, with a \$19,000 proffer on each lot. This development would be an excellent location for affordable work force housing, but not possible that a (for-profit) will touch the development given the proffers. It is impossible build and bring to market a price point that is not well beyond the assessed values for that area. It is important to look at waiver possibilities in the policy, as there must be other examples where the infrastructure is already in place. There must be exceptions if we are going to have price point that accommodates a variety of wage earners.
 - **Sen. Watkins:** I agree with Del. David Buliva that Fairfax is a unique area. This calls into question to the state-wide applicability of this program. What is affordable in Fairfax may not be affordable in other areas. To accommodate needs across the state, we need to provide a degree of flexibility.

- In last year's report, there is a map of the localities that were not eligible for proffers.
- **Ms. Susan Williams**, *Department of Housing and Community Development; Commission on Local Government, Senior Policy Analyst*: I would be glad to provide the cash proffer policies that have already been collected, and can to seek out that additional information.

III. Concerning Loudoun Cash Proffer Program

- **Mr. Charles Yudd**, *Deputy County Administrator*: Introduced his associate (Mr. Dan Sismar), *Capital Budget Manager*, and gave his presentation entitled "Proffer Utilization in Loudon County" (found under "Materials"). Even in a situation where global downturn in economy, our population continues to increase and continue to have strong building permit activity. In response to the discussion of affordable housing, I wanted to add that we do have exemptions built into policies that exclude affordable dwelling units.
- Most of the current cash proffer balance is encumbered, or programmed for particular project. We have active plans for the unencumbered funds that examine particular proffers that are on the books, their cash value and what they can be spent on. These come in by development applications, accrue slowly, and depend what type of capital project that can be spent on. Loudon County has exceeded state and national averages for new residential building permits. Between 2000 and 2010, Loudon County's population has increased 84%, compared to a 13% increase in state population. During this period, the population increase from 188,000 to 327,000, which is comparable to adding the population of the city of Hampton to the county.
- In our dramatic growth, we have a natural increase from those residences from the younger demographic in working and child-bearing years. The county is also very attractive to people coming from other jurisdictions. Population increase of 23% from natural increase, and 61% from migration. Taking the average over past ten years, this population increase equates roughly to adding the population of Madison County, every year. From this, we feel pressure in terms of development activity and population increase, and feel pressure to develop capital facilities needed.
- As growth comes faster, we need to learn how to deal with it faster. Facility development needs to occur before proffer contributions can accumulate to a usable balance. We need to figure out how to get something built and then have proffers offset the costs.
- A remarkable number of facilities have been built since 2001. Facilities like schools, sheriff substation, libraries, parks, community and recreation centers, and group homes have all been built, each of which costing millions of dollars. The proffer system is a tool used to pay for these facilities.
 - In your system, do you also pay for roads?
- **Mr. Yudd**: The per unit cost is for capital facilities, and does not include transportation. Of the schools that have opened since 2001, nineteen where new elementary schools, costing \$20-25 million, eight where middle schools, costing \$40-45 million, and seven where high schools, costing \$100 million. These projects quickly add up to a gigantic amount of money.
 - Capital facility contributions are paid on a per unit basis. There is a lag time between when contribution is made and when it can be spent, which is determined by the (1)time required to build sufficient balance, (2) time required to program into the CIP, and

(3) use restrictions that narrow scope of projects that contributions can be used for.

- **Mr. Yudd:** Expenditure review process begins when the Capital Budget Staff, and the proffer is then reviewed by the Zoning Administrator and Finance Committee. The Proffer Fund is ultimately approved by the Board of Supervisors. To determine number to charge on per unit basis, we rely on guidance of a Fiscal Impact Committee, which stakeholders group whose members include developers, interest groups, local school representatives, and citizens all appointed by the Board of Supervisors. This group recommends capital facility contribution standards that are approved by the Board of Supervisors.
- Depending on the area of the County, there is a range of Capital Facility Contributions available multi-family (\$17,000-23,000), single family attached (\$30,000-40,000) and single family detached housing (\$45,000-59,000). However, many exemptions reduce the amount proffered to the County. Base Density Units and ADU's are excluded. Proffers are reduced for land and in-kind proffers dedicated to the County, and cash proffer contribution are reduced for regional road improvements provided by the developer.
- A series of questions were asked of Mr. Yudd.
 - Concerning affordable dwelling units, do you embody in the conditional zoning a price point on those units?
- **Mr. Yudd:** No, we are saying that housing units would be provided for people of various income levels. Evaluate and come up with a certain number of units
 - How do you monitor that into the future?
- **Mr. Yudd:** As the application moves forward, a particular number of ADU units are identified. They will either show up on a subdivision plat as an ADU unit lot or in a total number of units in a particular building.
 - If years later, a family occupying the ADU doubles their income, how does that affect the market?
- **Mr. Yudd:** This after the fact situation causes some problems in the ADU program, but does not create difficulties in the application process of the capital facility proffer. This activity is hard to monitor, but the family certainly would not be kicked out of their home. Just to be clear, we do not apply capital facility proffers to ADU units.
 - Is there a threshold goal of percentage of affordable units authorized?
- **Mr. Yudd:** With any development project over fifty units, you are obligated to meet the ADU requirement.
 - Do you monitor that on the front end, year after year?
- **Mr. Yudd:** An ADU unit is an ADU unit, and we make sure that carries forward. You would have to amend the development application to change
 - So ADU's are deed restricted?
- **Mr. Yudd:** Yes.
 - Is there an automatic trigger that if you develop over fifty units you must provide ADU's, or is it a density bonus? Is that the incentive?
- **Mr. Yudd:** Both. If you develop over fifty units, you must provide ADU's. However, there are also provisions for density bonuses, where the more affordable housing you provide, the higher you may be able to pump up the over-all density.

- Do you see developments that are not including ADU's? In order to get the density they need to get the project to work, are they going to offer up ADU's to get greater density?
- **Mr. Yudd:** Overall, we see interest in providing ADU's. We also see interest in providing affordable units beyond ADU requirements, which are based on income. By policy, there are no regulations to require Work-Force Units for those who make too much for ADU's but not enough for what is on the market. However, we are encouraging the development of such units, as a typical house in Loudon County will cost roughly \$590,000. There guidelines in place to make housing available for those people who cannot afford housing on the market.
- **Mr. Yudd:** There are more exemptions available on proffers, depending on the application. The capital facility contribution on per unit basis does not include transportation .for 6 year program of CIP, 572\$ million transportation project. Reaction to not getting much at the state level. How to program transportation improvements. No per unit transportation proffer policy. Proffers only provide 3% of the County's CIP.
 - **Mr. Ed Rhoads:** Concerning the number of constructed fire stations listed in the presentation, does that include the number currently under construction?
- **Mr. Yudd:** Yes, they are all built.
- **Mr. Dan Sismar** *Capital Budget Manager:* There are three more fire stations currently under construction .
 - **Mr. Rhoads:** Are these new or renovated?
- **Mr. Yudd:** They are new.
 - **Mr. Rhoads:** Do these new stations improve the fire squad's response time?
- **Mr. Yudd:** Yes, the new stations help. Extensive planning goes in to assessing the necessary response times needed to serve the population coming into various developments. You may notice that the new stations are built in areas of recent population increase and development, where faster response times via closer stations are able to serve the population.
 - **Del. Danny Marshall:** What is the average household income in Loudon County?
- **Mr. Yudd:** Very high. Loudon County has highest median income in the nation. I do not have that information, but can find it.
 - **Del. Marshall:** Is it higher than \$100,000?
- **Mr. Yudd:** Yes
 - What's your property tax rate?
- **Mr. Yudd:** \$1.23 per 100\$ of assessed value
 - **Del. Bulova:** The Fiscal Impact Committee structure seems like a good practice. Is Loudon County unique in this, or is it a feature commonly included in other locality's proffer systems?
- **Mr. Yudd:** I have no knowledge of other localities, I just know that Loudon has one in place.
 - **Del. Bulova:** Within those policies in the eight localities, is it a relatively common practice?
- **Mr. Yudd:** We found it to be very valuable, as stakeholders are users of facilities and members include people in the development committee The input gauges the number of facilities needed and a ratio of this type of facility to this population number.
 - **Mr. Ted McCormick, Virginia Association of Counties:** What does slide 24 show? Does this equate to a proffer per unit paid?

- **Mr. Yudd:** The slide depicts the total value of what we received in those years of the per unit capital facility contribution in the aggregate that came in that year.
 - Despite having the poster child for worst proffer policy in the state, in 2012, overall average was less than \$10,000.
- **Mr Sismar:** Yes, all cash proffers received in 2012 by the county divided by number of units was less than \$10,000
 - **Sen. Watkins:** I had a question regarding slide 17. Range of cash proffers does not get below \$10,000 although the average proffer was less than that amount.
- **Mr. Yudd:** This is due to the intricacy of the program. All of the exemptions have not been netted out yet.
 - Is transportation included in slide 24?
- **Mr. Yudd:** No.
 - Regarding slide 17, the point of the program lies in the fact that although a single family unit can start at \$59,000, the actual amount paid is much less.
 - **Ms. Lafayette:** However, the average \$10,000 does not include the cash value of other contributions the developer made. Including the cash value of other proffers and developer improvements, what would that number look like?
- **Mr. Sismar:** The number would be higher, but I cannot estimate at this point
 - On slide 24, what percentage are proffered lots and what percentage are non-proffered lots, pulling that average down? Would that number rise when more lots coming through zoning with a higher proffer number was in place?
- **Mr. Yudd:** We agree that the number would rise with increased proffer usage, but cannot tell you exact numbers
 - **Sen. Watkins:** How many blighted units are already zoned in the county?
- **Mr. Yudd:** We can get that information on the development potential of blighted units.
 - When you developed your policy on proffers did you collaborate with any other localities?
- **Mr. Yudd:** In 2000-2001, while grappling with how to revise comprehensive plan and long-range land use plan, we did look into other jurisdictions, and saw a wide range of policies. Some were rather prescriptive, and others more flexible. We decided to create a policy somewhere in between.
 - Regarding Affordable Dwelling Units and Work-Force Housing, what are the categories of area median income that you require? Are there percentages?
- **Mr. Yudd:** Yes, there are areas of percentage area median income. If you fall into that percentage, you qualify for an ADU. Many do not qualify for an ADU, but still find it difficult to find a house. I cannot quote percentages, but I can make them available.
 - I believe I know the percentages. For those who fall below 30% of the median income qualify for rental ADU. Those in the range of 30-70% of median income are eligible to own an ADU. Those in the range on 70-100% median income are eligible for Work-Force Housing. Would developers be given a credit on a proffer for providing the Work-Force Housing units?
- **Mr. Yudd:** No, work force is completely separate, therefore, we need to increase opportunity for those people in that income range.
 - Would a developer get credit for regional road improvements?
- **Mr. Yudd:** We would look at value of road improvement; and if you provide something beyond the mitigation impact of your development application, you should get credit.

- Other than internal roads, which are the responsibility of developer, is there any instance where you would accept a voluntary cash proffer for road improvements?
- **Mr. Yudd:** There are situations where an agreement is reached to provide the cash equivalency of what an improvement had cost. Can be problematic because once the contribution is given, the money can be held in(esker). We would advocate that the improvement built, or to apply the cash to other funds and get the improvement done.

IV. Alternative On-Site Sewers

- **Mr. Eldon James, Public Policy Consultant; Fauquier County:** gave his presentation entitled “Alternative On-Site Sewers” (available under “Material”). He outlined the purposes of his presentation which were to address Group 1, low income household who cannot afford repair a failing system, and Group 2, bad actor that refuses to make repair.
- Group 1 is addressed through revisions to the betterment loan and onsite sewage indemnification fund statute. Group 2 is addressed by clarifying current local civil penalties authority and providing additional authority to local government after all other options have been exhausted to make repairs and place a lien on the property to recover the costs in the same way localities can address nuisances in (15.2-1115). Previously discussed draft changes are laid out in the attached document.
- Changes to lines 131-134 add needed clarification related to concern of a locality lacking a good inventory of the systems. It has been a challenge to get in inventory of all systems into the state-wide dataset.
 - We don’t know how many systems are out there?
- **Mr. James:** I suggest looking to the Health Department, who can give an estimate. They working hard to get all systems into the database, but are not complete yet. .
 - If I get a building permit for a sewage system, do I have to designate that it is an AOSS?
- **Mr. James:** If you put in an alternative system, it will be documented. The problem is the taking inventory older systems that predate much of code changes over the years and put those in the database.
 - How many years to these go back?
- **Mr. James:** I couldn’t give an exact number, but they go back many years.
- **Mr. Allen Knapp, Division Director, Department of Health:** The state-wide database began in 2005. Thus, as of 2005, we began capture all the new system. The uncertainty in those installed prior those date. Local health departments have records of permits and installations. We do not have all the systems in the database yet, but it is an ongoing effort
 - **Mr. McCormack:** For purposes of discussion, there approximately 60,000 AOSS system throughout the state?
- **Mr. Knapp:** Yes that is the current estimate.
 - How many systems are in the database?
 - **Mr. Knapp:** Upwards of 10,000 , but can get that information
 - all over Virginia or mostly in one area (northern Virginia)
- Yes, both, predominantly in northern and eastern VA and all over. Distribution is equal to the population distribution, more in northern and eastern regions that southwest

- **Mr. James:** This is related to important for changed proposed on lines 131-134. There was concern that if a locality did not have a complete inventory and went ahead with a local civil penalties program, they would be challenged in court because it didn't meet (Bi). This clarifies that this would not be a reason to dismantle the program in court. The locality cannot take action against someone who has not been notified, and cannot take action against someone not in the database.
 - **Del. Bulova:** Going back to lines 32-32 lines, which states that you cannot issue summons if someone has not been notified, was the time between being notified and being fined for issued a summoned addressed in the document?
- **Mr. James:** They have to initiate repairs within 60 days, as stated in line 143.
 - Before buying a house, does a new property owner need to be notified of the AOSS?
- **Mr. James:** That is not addressed here. Currently, if you were to build a house with an AOSS, it would be recorded in the land records. If a transfer takes place that would come up in a title search.
 - When buying a new home, does the real estate agent or someone need to make you aware of the presence of an AOSS in the home.
- **Mr. James:** That is not addressed here, but no, I do not believe that is a requirement. Continuing on to the new sections detail that if all else has failed the locality can make the repairs and place a lien on the property, which closely follows code for nuisances.
 - **Mr. Mark Flynn:** Raw sewage out in the open is an imminent threat to public health and safety. The sixty day time limit to fix the system after notice strikes me as a long time for that to go uncorrected.
- **Mr. James:** We would have appreciated more opinions in our discussion, but the sixty day limit was the compromise we reached.
 - How long has the civil schedule of penalty been afforded to the health department for enforcement on a local level?
- **Mr. James:** Three years.
 - Is Loudon County the only area that uses this tool?
- **Mr. James:** Yes, correct. Other counties have discussed it. However, they feared that they would be sued, and program would be dismantled because they don't have 100% of systems in their database
 - Because Loudon County has a concentrated number of AOSS, they have taken an active role in inspecting and maintain the systems. That is why they have such a robust program.
 - **Del. Marshall:** Since this is coming to my legislative committee, could I get a map of where the 60,000 known systems are in the state?
- **Mr. James:** I will work with the Health Department to give you what we can do.
 - **Sen. Watkins:** requested that the communication from Chip Dicks be read.
- **Ms. Elizabeth Palen, Executive Director of VHC:** "I want to convey the position of the Virginia Association of Realtors on alternative septic system legislation. VAR's board of directors adopted a position to support the attached legislation which is limited to clarifying that localities do not have the authority to impose cash bonds on owners of properties with an AOSS. VAR's board of directors further adopted to (oppose) any further change to the AOSS statutes."

- **Mr. James:** Yes, I am also familiar with the email. We did communicate this to Mr. Dicks, and his representative also participated in work group meetings.
- **Mark Flynn:** Going back to the sixty day term for imminent threat, the code (in line 136) describes the general civil penalty for any kind of violation, one that is not an imminent threat to public safety. They also have a sixty day term. (In Subsection F. I didn't see a definition of "imminent threat to public health and safety" I didn't see one in the context)
- **Sen. Watkins:** Is there a definition of an imminent threat to public safety?
- **Mr. Mark Flynn:** I would asked committee to look into shortening the time, particularly as it comes to the full Housing Committee.
- **Sen. Watkins:** As a work-group, do we recommend this to the full Housing Commission? If we do not, is there something else recommended? I would like to hear from the health department. How do you see implementing this within the context of local governments?
- **Mr. Alan Knapp:** The proposal is divided into two pieces. One piece is directed at localities. From state perspective, do not see much involvement or burden. Authority is assigned to the local government to make repairs or apply liens.
- **Sen. Watkins:** My concern is that we do not know where places are in many of the jurisdictions. To notify people in local government of the issue, we must have a complete inventory.
- **Mr. Knapp:** Perhaps I overstated the case earlier. The local health departments have relatively complete inventory of the systems. From state perspective, the problem is getting this information into state-wide database.
 - **Sen. Watkins:** We are discussing changing state law to enhance enforcement. However, we do not know who we are enforcing that state law on, as there are a lot of people not on the database. If there is an appeal from a local government decision, it comes to the state level; and becomes an issue of enforcing state law. We need to enhance the requirement regarding perfecting the database at the state level. The only way to do that is to ensure that the Localities have the entire list and turn it over to the state. After this, I would say go ahead with the state enforcement.
 - The problem is that the localities do not have the data. It is in the health department. One must go to local health department, which is a state agency, to get permit for AOSS. The inventory, whether it is at the local level or aggregated to state database, is really state information.
 - **Sen. Watkins:** It seems to me that a local building official is going to get called in the middle to issue a notice of violation. This puts the state local government in a bad position. We need to do more research before we can pass a law with detailing these time limits and fines. We should only give authority to local government that has perfected that list, so state has all of them.
 - The state must perfect list, because they have the permits.
 - What trigger will be is a problem on that property. So whether the property is in the database or not, a failure will produce sewage on surface. Then, a notice violation will follow, which starts proceeding on the property. Its existence in the database or not is not the real issue.
 - This is existing law

- We have two full meetings between now and the end of the year, don't we?
 - **Ms. Palen:** There is one at Hotel Roanoke on November 14 and one meeting to be held on December 5, 2012.
 - **Sen. Watkins:** meeting on the 14th conflicts with the Senate Finance Committee
 - Between the 14th or December 5th can you contact each locality to check inventory and report back to us?
- **Mr. James:** Yes, I can have that to you by November 14.
 - What is the percentage of failure on an annual basis?
- **Mr. Knapp:** This question has multiple answers. Getting that information for all systems across the state is difficult because no surveillance exists, except for that on alternative systems. With respect to alternative systems, failure rate is low. Initial set of data showed 30% of systems having a problem; but when these were investigated, most problems were minor, and did not constitute failure status. The failure rate was around 5%, which is low overall. The problem is that when a system fails, it becomes an acute problem. I can include that data as well
 - **Sen. Watkins:** There are many citizens that installed these systems before 2005, who are completely unaware they have an AOSS. We need to provide a means of notification, so they can be aware and be attentive of problems with these systems.
 - **Mr. James:** I agree this is a huge concern. That is why the safety valve was put in detailing that no enforcement can happen to someone who has not been notified. This is a protection, so someone unaware of their AOSS is not blind sighted.
- Concerning the Loudon study, 30% problem versus 5% failure rate, the problem lies with the problem rate. If you have a minor problem, but do not fix it, the problem exacerbates.
 - **Mr. Ron Clements:** The civil penalties at locality level, assuming they have a robust list, are not being utilized except for Loudon County, why?
- **Mr. James:** That authority hasn't existed very long. Loudon has the largest number of AOSS, and was, thus, the first to begin the programs. At the county attorney level, the concern was getting sued on it and it gets thrown out. The county attorney cautioned others not to move too fast. This legislation will open the door for new localities to use the program.
 - **Sen. Watkins:** We need the database complete.
 - **Mr. James:** On one hand, we have the need to deal with issue, and it is becoming more imminent. On the other hand, we must ensure protection of the property owner, which is provided as the system must be put in the database and notified before enforced can occur.
 - **Del. Bulova:** On line 127, we have already discussed that use of the enforcement provisions must provide notice to owner. The new language on lines 131-34 provides specificity as with what needs to happen to provide the notification. My confusions lied in that the document then refers to section F, which describes when you have an imminent threat on the ground. How does that turn into an initial notification requirement, and how those two things match up together? I just wanted to bring that to your attention.
- **Mr. Flynn:** My recommendation is to pick up some of the appropriate language in Subsection F and copy it into lines 133-34.
 - Under B, the system to notify property owner of their maintenance responsibility for AOSS systems is detailed. If you fail to get your system inspected, then you

will be fined a civil penalty() 126; but if system failed and sewage on the ground then F kicks in.

- **Sen. Watkins:** We will delay action on the legislation. Doesn't there need to be action if this has been referred to this sub group?
- A member of this commission is not going to put this bill in, Delegate Lingenfelter will put the bill in, correct?
- **Sen. Watkins:** Is everyone satisfied with that approach? With regard to the draft Mr. Dicks forwarded, is there any action desired on that?
- I believe attorney general has already opined that cash deferments are illegal. This just codifies that.
- **Sen. Watkins:** Are there any further comments regarding AOSS?
- **Del. Bulova:** Regarding line 59, we did not discuss the raise of the contribution from \$10 to \$25, I'd like more information. That extra 15\$ would come out of existing charge without increasing charge, shifting money from one place to another. Is that okay with the department of health or whoever is losing that money?
- **Mr. James** This would come out of existing fee, and take out some of operating cost money that health department has. The Delegate will put in a budget amendment to make up for that shortfall.
 - **Sen. Watkins:** Thank you.

V. Public Comment

- **Sen. Watkins** asked if anyone of the public had comments.

VI. Adjourn

- Hearing no public comment, **Sen. Watkins** adjourned the meeting at 12:30 P.M.

SUMMARY
Virginia Housing Commission
Housing and Environmental Standards Workgroup
Senate Room A, General Assembly Building
November 27, 2012
2:00 PM

I. Welcome and Call to order

- **Senator John Watkins, Chair** called the meeting to order at 2:00 PM
 - In addition to the invited speakers the following Workgroup members were in attendance:
 - **Workgroup Members:** Delegate David Bulova; Delegate Barry D. Knight; and Senator John Watkins; Brian Buniva, *LeClair Ryan Law Firm*; Ron Clements, *Virginia Building & Code Officials Association*; Tyler Craddock, *Manufactured & Modular Housing Association*; Chip Dicks, *Virginia Association of Realtors*; Sean P. Farrell, *Virginia Building & Code Officials Association*; Mark Flynn, *Governor Appointee*; John Hastings, *Virginia Housing Development Authority*; John H. Jordan, *Manufactured Housing Communities of Virginia*; Art Lipscomb, *Virginia Professional Fire Fighters*; R. Schaefer Oglesby, *Virginia Association of Realtors*; Ed Rhodes, *Virginia Fire Chiefs Association*; Neal Rogers, *Virginia Housing Development Authority*; Michael T. Toalson, *Home Builders Association of Virginia*; and Cal Whitehead, *Whitehead Consulting*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*

II. Discussion of Proposed AOSS Legislation

- **Mr. Eldon James, Public Policy Consultant; Fauquier County** stated that Delegate Lingamfelter put together a working group, which included all stakeholders from industry and local government, to develop consensus recommendations. Two pieces of legislation were discussed: the bill and then the resolution.
 - bill deals with sewage systems and (betterment) loans. The changes in state code were to dealing with Alternative On-site Sewage System failures for low income households. These systems are more expensive to install, maintain and repair than conventional systems. This addressed through revision of betterment loan and on-site sewage indemnifications fund sections of the code. On Line 17 of attached files (found under “Materials”), definition of betterment load, makes clear the loan can be used for conventional on-site and alternative on-site or alternative discharging systems.

- Line 71-72, the sentence struck deals with on-site sewage indemnification fund has not been utilized since 2008, which was identified from the working group’s discussion. The consensus was if it had not been used, to move on and focus resources they are needed. However, if someone needs to use it, no one in the group would lose sleep. The addition of line 73-75, which authorizes board of health to make up to 25% of the indemnification fund available for betterment loans or to guarantee betterment loans. The 25% refers to the balance of fund at July 1.
- Line 76 attempts to update the portion of the fee that goes to the indemnification fund. The \$10 is being struck and replaced with \$25. When the \$10 was put in the code, the total application fee was \$75. Today the application fee ranges from \$225 if you have an on-site evaluator or engineer submitting the application; to \$425 if you have a “bare application” where owner submits it themselves; or up to \$1400 if it is for a system over one thousand gallons a day. This is an attempt to update the set aside into the indemnification fund.
- : Line 120 this change provides for authorization for the commissioner of the health department and the attorney general to develop actuarially sound policies for providing or guaranteeing betterment loans. The rest of changes deal with (32.1-164.12), and clarifies that betterment can be used for failing or conventional on-site, alternative on-site, or alternative discharge systems. Funds from the on-site sewage indemnity fund can be used for such loans or such guarantees. These changes are on lines 131-133, 136, 139-140, 146-147, 153-154, 160 of the bill.
- **Delegate David Bulova:** My concern comes down to the funding mechanism, specifically on line 76. Those fees gone up from \$75 to \$225 to \$1600 or more depending on the complexity of the system. Of our staff, how much of their salaries are now being paid by this fee, and how much will be taken away by removing \$15 away from them?
 - **Mr. James:** The initial move of the sub group was to increase the fee, but this was met with pushback. A \$15 increase was agreed to come out of existing funds. These moneys come against those user fees that go now to support operation of state office. Allen Knapp is here ,and I will give some numbers based on a conversation we had previously. I invite him to correct me, but I believe that \$15 would equate to \$300,000 annually
 - **(Mr. Allen Knapp, health department):** (let me think about that)
 - **Mr. James:** Delegate Lingamfelter said he would put in a budget amendment to address that change.
- **Del. Bulova:** The money must come from somewhere. The way it is laid out now, it is user fee. Those using the system pay for this almost the way you pay for a utility. If Del. Lingamfelter were to put in a budget amendment, that would invariably come out of a general fund, which means that everyone actually are paying for the upkeep and maintenance of those systems, shifting the cost burden from those who actually benefit from those systems to everyone else. Do you agree that’s a concern?

- **Sen. Watkins:** I'm not sure that's what occurs. I believe that Del. Lingamfelter will submit Amendment within a non general fund category that merely allocates a part of that revenue stream from the health department to the betterment fund.
- **Del. Bulova:** That alleviates the one concern involving user fee versus general fund. However, it comes back to the question to Mr. Knapp, which is can you absorb a loss of \$300,00 and still do your job?
 - **Allen Knapp, Virginia Department of Health:** Right now, we are taking somewhere between 8,000-10,000 applications each year. Each of those paying into the indemnification fund at a rate of \$10 apiece. Through successive years and budget tightening, general funds have been replaced by fee revenue. If we siphon off more of the fee, it will reduce available funds for agency. If you take 10,000 applications and multiply it by \$15 fee, we end up with a \$150,000 figure. However, as the economy improves, more applications may come, and those numbers can change. I think looking at a figure between \$150,000-300,000.
- **Sen. Watkins:** Can you absorb that kind of loss? that looks like losing a person or two each year
 - **Mr. Knapp:** I want to say that it would be significant, given that we have already lost staff due to reductions. I am uncomfortable saying we could handle that loss.
- **Sen. Watkins:** if the fee structure was established by regulation?
 - **Mr. Knapp:** The fee structure was originally established in the code, since then the number in the code have been changed successive years through the budget bill.
- **Sen. Watkins:** I agree that it would seem inappropriate that the moneys come from the general fund. It would seem prudent that if it becomes that difficult, you might suggest to Del. Lingamfelter that he put in two budget amendments: one to adjust fee structure, and one to adjust the percentage going to the betterment fund.
- **Mr. James:** I will relay the message back to the Del. Lingamfelter and draft any budget amendment the Delegate asks of me.
- **Del. Watkins:** any other questions? Comments from audience? Do we recommend this to the full commission?
- **Del. Bulova:** I do not know if I am ready to recommend to full commission with so many what-if in terms of how we deal with it from a budget standpoint.
- **Sen. Watkins:** I favor the bill as a chance that accomplishes a need we have, particularly in an underserved community with regard to repairing facilities that go bad. Whether or not it passes will remain contingent on whether they get the budget amendments
 - With one exception, it appears everyone feels we should go forward and let Del. Lingamfelter deal with it before the full commission, and put the appropriate budget amendments in. Secondly, Mr. James, we have a recommendation that we have a study put in place.
- **Mr. James:** We have a House Joint Resolution that addresses the study. This is clearly an emerging technology. The capabilities have dramatically changed in the

past decade. In the case of some local ordinances, possibly including this one, that the technology ahead of law. This is an important tool for property owners, especially those with previously undevelopable land with conventional systems. It is a vitally important system to our Virginia Watershed Implementation plan. If done correctly, it can be a big help for local government. If done wrong, it can be a nightmare.

- Management of systems requires a different approach from what we traditionally faced with traditional systems at the state and local level. We have had a variety of regulations across the state. (15.22157) has been amended multiple times since 2005, which has caused some confusion that has led to three different (HG's) opinions. Talking to different attorneys, you will get different opinions as to whether those are all consistent, in line, or if they conflict.
- The working group felt it was a good time to take a legislative look at this code section and bring together necessary party to look at that section and determine if it is doing its job in terms of properly balancing state and local authority and protecting public health, property interest, and water quality.
- One of the things Del. Lingamfelter would really like to see is the development of a model local ordinance. There other things that were mentioned that we may want to incorporate into draft, like identify best practices and policies—possibly with an emphasis on policy because with emerging technology, we are in the situation where law may not be keeping up with technology and so policy examination may be more valuable than practices--A look at evaluating state databases system and other databases how they integrate.
- On line 35, you asked for the recommendation no later than the 1st day of 2014 session. Why would you not want something back sooner in case you needed to do something in the 2014 session?
 - **Mr. James:** This was not a detail he focused on in the drafting of the resolution, and is certainly not fixed in concrete.
- I was part the stakeholder group that initially met about this study, and it AOSS professionals. All the professionals were originally opposed to any local regulation of AOSS, which was prior to recent opinion of Attorney General. It was suggested some unique aspects in certain areas of the state, and that certain local requirements that may need to be addressed in state regulations or state statutes. That was one of the reasons they felt a study was needed to see if any could be identified. There is also a concern regarding the localities in Chesapeake Bay Watershed that are subject to the Chesapeake Bay Act on upcoming EPA regulations dealing with the Watershed Implementation Plans and how all on-site systems will be affected by that, too.
- **Sen. Watkins:** anyone from building code officials have comments?
- I do not see any problem with it.
- **Del. Bulova:** I am a fan of model ordinances, just as a template. I am not saying go ahead and use it; Somewhere between line 27-30, can we mention the Chesapeake Bay (TMDL whip). I know original concern was the frequency of

inspections. I want to be sure do not backtrack on that aspect because that would require us to redo the whip and change the playing field with respect to what the EPA was approved. I want to be sure we have specific language in there that acknowledging that this needs to comply with the existing whip.

- **Mr. Edward Mullen, Reed Smith Law Firm** I am representing homeowners. Mr. Tolson, could not be here but sent him in his stead. I skimmed resolution and heard the discussion of the Full Commission meeting in Roanoke. He understood that Study that would replicate the Loudon program. From our perspective, the law is pretty clear, and what (24 56) means is clear. We had an Attorney General's opinion that confused the issue a bit because of the way it was worded and the way the question was asked. We had one opinion a few years ago that was crystal clear, and another opinion a few weeks ago that was perfectly clear and reiterated the first. Then there was an opinion in the Spring that was confusing. While appreciating the sentiment behind it, I do not think it is necessary to clarify the requirements. I believe one handout entitles "Attorney general Opinions Regarding Local Regulation of Alternative On-site Septic Systems" makes an attempt to distill the rule after this. Sets forth what (15.22157 C and D) mean for local regulation of these systems. From our perspective, that aspect of study is unnecessary.
- **Mr. James:** I will not respond to the previous comments because any response I would give would be hearsay. There was some significant discussion in the working group with regard to the Chesapeake Bay (DMDL) Watershed Implementation Program phase 2, which implies some obligations on local government although it is not specific. It is pretty clear to those involved that that is coming.
 - The working group did acknowledge that there exists some confusion between local government responsibility and local government authority. With failed AOSS systems in the current environment, both regulatory and statutory, does not allow the health department to act as swiftly as one might like. Subsequently, there is pressure put on local governing authority, and exists question exists as to whether the cost will fall to local government. If we have a failed system that can be repaired, whoever is paying for repair deals with the problem. However, if is system is polluting downstream, then it becomes the responsibly of local government not so much to fix AOSS system but to offset that aided nutrient pollution. It is far more expensive to fix pollution downstream than to fix at source. The local government is fearful where we have mismatched responsibility and authority . This one of the reason for us to look at this statute to confirm where we have assigned all responsibility.
- **Sen. Watkins** After years of study, I am concerned we are not making the progress necessary on this topic. I agree with Del. Bulova that it would be helpful to have a model ordinance for local government to work from, but the question remains of whether this is a state or local government responsibility. I think it is a state responsibility. Alan, are we making progress on the inventory system?
 - **Mr. Knapp:** Yes, I believe progress is being made. When we polled the district health departments, they reported they had roughly 19,000

alternative systems that are logged in local databases. That is compared with nearly 17,000 AOSS's in the state-wide database. This is a gap of less than 3,000 systems that need to migrate to the state-wide system. Although we have seen great improvement over the summer, the job still is not finished.

- **Sen. Watkins:** I do not think another study with this workgroup is helpful. I think it would be preferable to request the housing commission appoint a stakeholder group made up of professionals, interested parties, housing side, local parties, and state regulatory side. I would recommend the appointment of 6-10 people to the stakeholder group and task them with looking at a model ordinance, the responsibilities, and the language of (15.2-2057). We will ask them to report back no later than Dec. 1 of next year.
- **Sen. Watkins:** are there any further comments?
- **Mr. Ed Rhoads:** Do you want to take care of Del. Spruill's issue and move it to the full commission?
- **Sen. Watkins:** There has been no action recommended. It is my understanding that there is a regulatory piece not yet settled. I would recommend to Full Commission that it not be reported. If Delegate Spruill wished to further pursue this topic, he would need to introduce new legislation in 2014.

III. Public Comment

- **Sen. Watkins** asked if those in the audience had any other thought or concerns.

IV. Adjourn

- Upon hearing none, **Sen. Watkins** adjourned the meeting at 2:30 PM

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Common Interest Communities Work Group House Room C, General Assembly Building June 6, 2012; 10:00 a.m.

Legislators present: Delegate John A. Cosgrove and Senator George Barker

Citizen members present: Janice Burgess, *Virginia Housing Development Authority*; Pamela Coerse, *Virginia Resort Development Association*; Tyler Craddock, *Manufactured & Modular Housing Association*; Chip Dicks, *Future Law*; Heather Gillespie, *Common Interest Communities Ombudsman*; Dale Goodman, *Virginia Resort Development Association*; Trisha Henshaw, *Common Interest Communities Board*; Ronald P. Kirby, *Virginia Association of Community Managers*; Chandler Scarborough, *Green Run Homes Association*; Melanie Thompson, *Citizen Member*; Michael Toalson, *Home Builders Association of Virginia*; Pia Trigiani, *Common Interest Communities Board*; and Jerry Wright, *Community Associations Institute*

VHC staff present: Elizabeth Palen, *Director of Virginia Housing Commission*; Iris Fuentes; and Laura Perillo

I. Welcome and Call to Order

- **Delegate Cosgrove, Chair**, called the meeting to order at 10:15 am.

II. Condominium and Property Owners' Association Acts; posting of documents on association's website (HB 668)

- **Del. Cosgrove** asked Ms. Elizabeth Palen to explain HB 668 due to Delegate S. Surovell's absence.
 - **Ms. Elizabeth Palen, Director of Virginia Housing Commission**; stated that HB 668 was introduced during the 2012 Session, but was not passed. Ms. Palen stated that perhaps the bill did not pass as a result of unclear wording. Ms. Palen explained that if the bill was passed as written, it would require the board of directors of Condominium Owners' Associations with existing websites to post a copy of the declaration, any articles of incorporation, and all rules and regulations adopted by the board of directors.

DELEGATE DAVID L. BULOVA
DELEGATE JOHN A. COSGROVE
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE BARRY D. KNIGHT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

MARK K. FLYNN
T.K. SOMANATH
MELANIE S. THOMPSON

- **Mr. Dale Goodman**, *Virginia Resort Development Association*; explained the limitations of this sort of bill related to technological problems regarding certain firewalls and password-only access to websites. He stated that many of the condominium associations have two websites: one that is private and one that is public. Mr. Goodman stated that as the bill is written, it would allow condominium associations to post their by-laws on their private websites and fulfill their obligation. Mr. Goodman pointed out that this would not accomplish the purpose of the bill: to allow purchasers to know the by-laws prior to purchasing a unit. He also responded to Del. Cosgrove's concern about the cost of programs that convert paper documents into pdfs, by stating that there are several inexpensive programs available to these condominium associations.
- **Mr. Michael Toalson**, *Home Builders Association of Virginia*; added that perhaps there should be a timeline specified in the bill that indicates when an Association must make these updates to their website.
 - **Del. Cosgrove** stated he agreed that any changes made to the original Association agreements and regulations would have to be published on the website according to some timeline. Del. Cosgrove added that he thought 90 days is enough time.
 - **Ms. Pia Trigiani**, *Common Interest Communities Board*; stated that she disagrees with adding a timeline to the bill, because she thinks that associations will know that the most recent versions of their declaration, articles of incorporation, and all adopted rules and regulations must be posted within a reasonable time.
- **Ms. Trigiani** stated that there are redundant clauses in the bill, namely Sections A through D.
- **Mr. Chandler Scarborough**, *Green Run Homes Association*; stated that larger associations will have a websites, but that smaller associations may not have an accessible website. Mr. Scarborough suggested that those smaller associations that do not have websites could be required to send their information to the state and that the state could be required to post this information on the state's website.
 - **Del. Cosgrove** stated that Mr. Scarborough's suggestion is outside the scope of this bill. Del. Cosgrove continued, stating that the bill does not require associations to make websites; rather, it requires associations that already have websites to add the pertinent information.
 - **Mr. Jerry Wright**, *Community Associations Institute*; asked whether timing was an issue for new associations.
 - **Del. Cosgrove** replied, stating that he thinks the 90 day comment was directed to changes in the rules, not that an association would have to create a website in that time.
- **Del. Cosgrove** asked if anyone in the audience had any comments or questions regarding this bill. Hearing none, Del. Cosgrove moved on, stating that the Workgroup would share their suggestions for change with Del. Surovell.

III. Virginia Property Owners' Association Act; adopting and enforcement of rules (HB 979)

- **Del. Cosgrove** asked Ms. Elizabeth Palen to explain HB 979 due to Delegate J. M. Scott's absence.
 - **Ms. Palen** stated that the VHC looked at HB 979 last year. Ms. Palen explained that Del. Scott wanted the bill to allow the board of a Property Owners' Association to go into a unit, make necessary changes, and charge the owner for the changes where the owner is not complying with the association's regulations.
- **Del. Cosgrove** asked if anyone on the Workgroup had comments regarding the bill.
- **Ms. Heather Gillespie**, *Common Interest Communities Ombudsman*; stated that DPOR has no opinion on this bill. Ms. Gillespie continued, stating that personally, she feels that the bill assumes that the boards of these associations are knowledgeable and efficient. Ms. Gillespie further stated that some of the boards of these associations are not equipped to undertake the sort of action this proposed bill allows.
- **Ms. Trigiani** stated that she worked closely with Del. Scott on the bill, and that the original bill said something completely different than the current version. Ms. Trigiani further stated that in condominium associations where the units are located one on top of the other, the associations' documents allow the boards to enter the units to make necessary repairs at the owners' expense. This is because there are various issues that can affect the property value and safety of the units below and above the problematic unit. Ms. Trigiani explained that this bill was an attempt by Del. Scott to codify the self-help powers that many associations' documents already give to the boards. Ms. Trigiani stated that when a unit reaches a particular condition it affects the neighboring units and prohibits unit owners from enjoying and/or selling their property. Ms. Trigiani explained that Del. Scott's constituent for this bill lived in McLean next to a person who had abandoned their property and moved overseas. Ms. Trigiani continued, stating that the unit fell into disrepair and many of the surrounding property owners were concerned. Ms. Trigiani explained that the bill would allow an association with proper notice to go on the lot, take measures to correct the problems and any costs of that repair would be pushed on to the owner. Ms. Trigiani continued, stating that even where associations currently have documents allowing this type of procedure, there are contractors who will not go into a property without a court order. Ms. Trigiani finished by stating that people need to know they have the power and authority to do this.
- **Mr. Toalson** stated that there are many examples of overzealous homeowner's associations. Mr. Toalson asked whether the Workgroup wanted to vest the boards of directors with the authority to enter and change someone else's property. Mr. Toalson continued acknowledging Ms. Trigiani's statement about some associations already having documents asserting this type of authority. Mr. Toalson commented on Ms. Trigiani's statement, claiming that the bill did not indicate these rights already existed. Mr. Toalson finished by stating that he would have a problem with this bill, as a member of a homeowners' association that leaves you a note if your empty garbage can is outside for more than ten minutes after the trash is collected.
 - **Ms. Trigiani** replied, stating that there are some overzealous associations, but many are only trying to enforce the rules and regulations to which the homeowner agreed.

- **Mr. Tyler Craddock**, *Manufactured & Modular Housing Association*; asked if there is any way that a Property Association could be held accountable for taking improper action within this bill. Mr. Craddock continued, asking how the association would be held accountable for improperly entering and changing a property owner's unit.
 - **Ms. Trigiani** stated that a homeowner who felt their unit was entered and changed improperly could file a complaint with their association, could appeal a decision from the association, and could file a complaint with an Ombudsman. Ms. Trigiani stated that another option for a homeowner is bringing suit for breach of fiduciary duty for taking action that exceeded the authority of the board.
- **Mr. Scarborough** stated that he has personally been on both sides of this dispute. Mr. Scarborough stated that in Virginia Beach, the city usually attempts to locate the homeowners before allowing the board to enter the unit. Mr. Scarborough continued, stating that neighbors are put in a bind because they have to wait around for the owner to be located.
- **Mr. Matt Bruni**, *Virginia Banker's Association*, stated that there are problems with the vague wording of the bill. Mr. Bruni stated that it might be difficult for associations and courts to define under what circumstances entering and repairing another's unit is reasonably necessary and what constitutes reasonable notice. Mr. Bruni continued, stating that where real estate will eventually be owned by the bank (e.g., foreclosure), the bank is prohibited from entering the property until they technically own the property. According to Mr. Bruni, it currently takes a year to foreclose a property. Mr. Bruni explained that the banks do not want to get charged for the cost of repairs if they are unable to enter the property to make the repairs themselves.

IV. Virginia Condominium Act; removes cap on charges that unit owner's associations may assess (HB 1213)

- **Del. Cosgrove** asked Ms. Elizabeth Palen to explain HB 1213 due to Delegate J. M. Scott's absence.
 - **Ms. Palen** stated that HB 1213 was filed in the 2012 session. Ms. Palen explained that the discussion during committee was whether the caps on charges could be removed. Ms. Palen explained that opponents of this bill stated that when a person entered into a contract with the unit owner's association they agreed to certain rules and regulations and to change them now would be unfair. Ms. Palen also explained that the committee discussed whether or not a person could file a lien for the unpaid assessments.
- **Del. Cosgrove** asked Mr. Chip Dicks if this bill would be something that is possible for the General Assembly to require.
 - **Mr. Chip Dicks**, *Future Law*; responded stating that it is always problematic to consider whether legislation can change an existing covenant. Mr. Dicks continued stating that there are certain associations that believe their documents trump pieces of legislation that the General Assembly has passed that contradict or otherwise change their pre-existing

agreements. Mr. Dicks explained that it would depend on the documents and the association whether the legislation could change existing contracts. Mr. Dicks concluded stating that it is clear that the General Assembly cannot abrogate an existing contract, but the question remains whether the board of directors of an association can alter the costs association with restrictions without amending the restrictions.

- **Mr. Toalson** asked who votes on amendments to the associations' instruments.
 - **Ms. Trigiani** stated that the members of the association, not the board of directors, votes on amendments to their instruments. Ms. Trigiani added that most association documents do not state an amount for the charge. Ms. Trigiani stated that the association cannot assess a charge without first having a hearing in order to preserve due process.
- **Ms. Trigiani** stated that the original intent of the General Assembly was to fill the void: when the bill was initially enacted there was no limitation on the length of the charge. Ms. Trigiani explained that the charge was limited to ten dollars a day or 50 dollars for a single offense, but there was no 90 day cap regarding these charges. Ms. Trigiani stated that the author of the legislation added that cap. As a result of the cap, Ms. Trigiani explained, that this 90 cap removes the impetus for unit owners to comply with the rules. Ms. Trigiani stated that the Supreme Court of Virginia heard a case regarding the application of the authority to assess charges and that there is a split in the circuits regarding the constitutionality of this where the law conflicts with the associations' documents. According to Ms. Trigiani, the Fairfax Circuit stated that the documents must include the charge and the Loudoun Circuit has stated that it does not need to be in the documents. Ms. Trigiani stated that she does not think there is a constitutional issue; however the issue remains whether the General Assembly believes associations can assess a reasonable charge.
 - **Del. Cosgrove** responded, stating that if the monetary limits were removed from the bill, the associations could easily charge \$1,000.
 - **Ms. Trigiani** stated that she does not think it would be a wise choice to take the monetary limitations out. Ms. Trigiani stated that if the violation is of a continuing nature, the unit owners do not have a reason to comply with the rule so long as they can afford the charge for 90 days.
- **Mr. Scarborough** stated that his experience has been the same as Ms. Trigiani's: the association documents do not generally state a monetary amount to be charged. According to Mr. Scarborough, the issue is that the \$50 and \$10 charges have not been increased in 15 years, despite the value of that money and of the properties changing drastically. Mr. Scarborough also stated that its problematic that a person who has committed a minor offense will likely be charged the same amount as someone who has committed a major offense. Mr. Scarborough stated that he is uncertain how to fix these problems, but suggested that a flexible cap might be added to the bill depending on what is reasonable according to the circumstances of the offense. Mr. Scarborough suggested there might be a lien for the charges and a lien procedure.
 - **Ms. Trigiani** stated that she does not like the idea of adding a lien part to the bill because it "muddies the water" regarding who has the authority to

enforce the lien. Ms. Trigiani agreed with Mr. Scarborough that the current assessment is not a deterrent.

- **Del. Barker** asked the commission as a whole whether anyone was aware of time where the \$50 and \$10 charges were inefficient in deterring persons who did not comply with the association's rules and regulations.
 - **Ms. Trigiani** replied, stating that 25 to 30 years ago, a woman moved into an association's community that did not allow pets. Ms. Trigiani stated that despite agreeing to not have pets, the woman purchased a cat and cared for it. Ms. Trigiani stated that when the association approached the woman and asked her to get rid of her cat, she refused and instead wrote the association a check for the full amount of the charges for 90 days. Ms. Trigiani stated that where the offender is willing to pay the 90 days worth of charges, there is no deterrent nature to this law. Ms. Trigiani also stated that these charges should not be a penalty; rather they should be a means to get persons who agreed to rules and regulations to comply with those rules and regulations. Ms. Trigiani finished by stating that this law should not be considered a way for associations to make money, it should be a way for associations to get their members to follow the rules.
- **Del. Barker** asked whether a two-tiered structure should be added to the bill so that repeat offenders are required to pay more, in an effort to create a deterrent.
 - **Ms. Trigiani** stated that she would be comfortable with the addition of a two-tiered system, provided it is drafted to be an effective deterrent.
 - **Del. Cosgrove** added that what may be a monetary deterrent to association members in Fairfax may be absolutely crushing to association members in Southwest Virginia. Del. Cosgrove continued, stating that he did not think the commission was equipped to geographically disperse or assess what is reasonable throughout the state.
 - **Mr. Dicks** stated that he thinks the caps should remain and that the two-tiered cap for violations is a good idea. Mr. Dicks stated that minor and major violations should not be treated the same and that the bill should delineate between safety and health issues and other issues. Mr. Dicks suggested that the bill could provide higher charges for more serious violations. Mr. Dicks stated that he agreed with Ms. Trigiani's suggestion about injunctions, but thinks there should be some sort of solution short of going to court.
- **Mr. Toalson** asked whether anyone was concerned about removing the 90 day limitation. Mr. Toalson reiterated Mr. Dick's suggestion about the tiered charging method and asked whether the charges would continue to increase indefinitely.
- **Del. Cosgrove** asked how appropriate it would be to file a lien for future assessments.
 - Several members of the commission, including **Ms. Trigiani** and **Ms. Palen**, responded that the language discussing that was flawed, as a lien for future assessments is not a legally viable option.

V. Public Comment and adjournment

- **Mr. Dicks** stated that he would like to discuss another bill regarding lender information at the next workgroup meeting with the bankers, realtors, community managers, and CRI.
- **Del. Cosgrove** asked if those in the audience had any other comments or concerns.
- Hearing none, the meeting was adjourned at 11:03 a.m.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Neighborhood Transitions and Residential Land Use Work Group

July 31, 2012

10:00 AM

House Room C

I. Welcome and call to order:

- **Delegate Rosalyn R. Dance, Chair**, called the meeting to order at 10:01 AM.
 - In addition to the invited speakers the following Workgroup members were in attendance:
 - **Legislators:** Delegate David Bulova; Delegate Rosalyn R. Dance; Senator Mamie Locke; Delegate Danny Marshall
 - **Non-Legislator Workgroup Members:** Mark Flynn, *Virginia Municipal League*; Tyler Craddock, *Manufactured and Modular Housing Association*; Chip Dicks, *Virginia Association of Realtors*; Bill Ernst, *Department of Housing and Community Development*; Brian Gordon, *Apartment and Office Building Association*; Kelly Harris-Braxton, *Virginia First Cities*; Ted McCormack, *Virginia Association of Counties*; Barry Merchant, *Virginia Housing Development Authority*; and Michael Toalson, *Home Builders Association of Virginia*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*; Iris Fuentes, *Administrative Assistant*; Laura Perillo, *legal intern*.

II. Performance Guarantees; street construction (HB 731, Del. L. M. Dudenhefer, 2012)

- **Del. Dance** stated that Delegate L. M. Dudenhefer was not available to discuss his bill, but that Mr. Patrick Cushing and Mr. Michael Smith are speaking in favor of Del. Dudenhefer's bill regarding performance guarantees for street construction.
- **Mr. Patrick Cushing, Representing Stafford County; Williams Mullen**, explained that §15.2-22-45 currently allows localities to adopt ordinances that require performance guarantees from developers for projects in subdivisions, including streets. Mr. Cushing stated that according to the current procedure, when a developer completes 30% of the street, he can ask the local government for partial release of 30% of the performance

DELEGATE JOHN A. COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE BARRY D. KNIGHT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

MARK K. FLYNN
LAURA D. LAFAYETTE
T.K. SOMANATH

guarantee. Mr. Cushing explained that developers can ask the local government for partial release three times during one project and that new releases can be made as a partial release up to 90% of the performance guarantee. Mr. Cushing stated that the final 10% of the performance guarantee is not released to the developer until the street is accepted into the state system or approved and accepted into the local government system.

- **Mr. Cushing** stated that as a result of §15.2-22-45 as it is currently written, Stafford released 90% of performance guarantees to developers for subdivision road projects, the roads have deteriorated and are not up to state standards, and the developer is no longer there to improve the roads. According to Mr. Cushing, as a result of this, the county and the respective home owners associations are left to complete the subdivisions' streets and bring the streets up to state standards.
- **Mr. Cushing** stated that HB 731 sought to introduce a solution to deteriorating streets where the homeowners' association, development, or locality is left to pay for the repairs to the street. As it was introduced in 2012, HB 731 sought to remove the release provision from §15.2-22-45 and require that when a subdivision street performance guarantee is entered, it cannot be released partially or in full until the subdivision street has been accepted into the state or local system. Mr. Cushing explained that HB 731 included many provisions that he and his constituents later realized were not essential to solve Stafford's problem with the performance guarantees, such as provisions prohibiting an occupancy permit or a building plan to be approved by the county if a developer had faulty security on the books. Mr. Cushing explained that these provisions should be deleted from any new bill that is drafted to solve the performance guarantee problem.
- **Mr. Cushing** continued, stating that he and his constituents spoke with developers about amending §15.2-22-45 to release up to 50% of the performance guarantee to developers, thereby allowing the locality to keep 50% of the performance guarantee to cover the cost of street completion and repair. Mr. Cushing stated that he and his constituents have not drafted a bill including the 50% language discussed with the developers and that the developers ultimately did not agree with that amount.
- **Delegate Danny Marshall** stated that the reason HB 731 is before the Neighborhood Transitions and Residential Land Use Work Group is because Stafford, only one locality, gave the developer monies from their performance guarantee and were left to repair and complete subdivision roads at its own cost. Del. Marshall asked Mr. Cushing whether there were or are any other localities facing this problem and whether this happened as a result of the economic downturn.
 - **Mr. Cushing** stated that the outer rim of Northern Virginia experienced a huge housing boom and a huge housing crash as a result of the economic downturn. Mr. Cushing continued, stating that as a result there are many subdivisions in this area that have not been and are not being completed according to the original performance guarantees that were entered prior to the housing crash. According to Mr. Cushing, HB 731 is seeking to address this situation and prevent performance guarantees from being released prematurely in the future.
- **Del. Marshall** asked whether the localities have an opportunity to negotiate the release percentages when the developer is making draws regarding the subdivision.
 - **Mr. Cushing** stated that localities have an opportunity to negotiate the release percentages when they are negotiating the performance agreement with developers

- regarding the subdivision. Mr. Cushing stated that in the case of a partial release, releases are not initiated until at least 30% completion of the project.
- **Mr. Michael Toalson**, *Home Builders Association of Virginia*; stated that there are already provisions in place that protect the localities and home owners associations from the problem Stafford is experiencing.
 - **Mr. Toalson** stated that another provision of the statute ensures that local governments are given the authority to dictate their own performance agreements with developers. Mr. Toalson explained that a performance agreement generally contains provisions which state that a developer will build an agreed upon extension for public improvement in accordance with a certain standard. Mr. Toalson explained that localities demand a performance bond from developers prior to starting construction to guarantee that the developer builds the extensions in accordance with the localities standards. Mr. Toalson also stated that it is business custom that developers must sign a performance agreement prior to starting the construction project. Mr. Toalson stated that this ensures that the local governments have the ability to dictate the schedule of their performance bond releases to the developer.
 - **Mr. Toalson** stated that the performance bonds that are now causing Stafford problems were posted prior to 2009. Mr. Toalson explained that prior to 2009, developers posted performance bonds for the amount equal to the amount estimated for the quality of improvements plus at least 25%. Mr. Toalson explained that the bonds causing problems in Stafford were for amounts equal to at least 125% of the anticipated cost of construction for the given subdivisions. Mr. Toalson stated that where a developer receives a release when he has finished 90% of the project, the developer received 35% less than the amount posted. Mr. Toalson stated that the developers leave the localities with 35% of the anticipated cost of the project after the developer receives its 90% release. According to Mr. Toalson, 35% of the anticipated cost of the project is more than enough money to complete and/or maintain the roads.
 - **Mr. Toalson** added that in 2009 the percentage of the anticipated cost of construction for the performance bonds was reduced to 110% by legislation introduced by Del. Marshall. Mr. Toalson stated that this legislation was introduced to aid the home building industry until 2017, when it will expire and the amount will return to 125%.
 - **Mr. Cushing** stated that the cost that Stafford and the home owners' associations in Stafford are incurring to complete the roads in accordance with the local and/or state standards is not being covered by the amount of money left by the developer in the performance bonds after the 90% release. Mr. Cushing stated that after the 90% release, the localities are left with an amount that could not reasonably cover the cost of completing the deteriorating roads.
 - **Mr. Toalson** asked where the fault should lie that the amount of money left by the performance bond is insufficient to maintain the project.
 - **Mr. Cushing** answered that he did not know whether the problem is anyone's fault, but that he remains focused on finding a solution for the taxpayers and home owner association members in Stafford.
 - **Mr. Toalson** stated that the fault lies with the localities because the local governments establish the performance agreement, dictate the performance bond amount, set the performance bond release schedule, and release the performance bond amounts.

- **Mr. Cushing** stated that he believes the problem is that §15.2-22-45 mandates performance bond releases to 90%. Mr. Cushing explained that when a developer completes 90% of a project and requests release, the locality releases 90% of the anticipated cost of construction from the bond. Mr. Cushing explained that in Stafford, several developers have abandoned their projects after receiving their 90% releases. Mr. Cushing explained that due to a lack of funding, the roads in these subdivisions have remained incomplete for 10 years. Mr. Cushing stated that as a result of the years of deterioration, the cost to complete the roads and get them up to the state standard often costs 50-80% of the anticipated cost of construction for the road-- and is not covered by the remaining 10%.
- **Mr. Michael T. Smith**, *Director, Department of Public Works, Stafford County*; stated that over the past 5 years, Stafford County has been forced to pay nearly \$1.8 million in county funds to complete roads in 12 subdivisions where the amount left from the performance bonds were insufficient to complete the projects.
 - **Mr. Smith** explained how this problem has come about in Stafford. Mr. Smith started by stating that many times developers complete the roads during the first phase of construction of a subdivision, and then build homes in the second phase. Mr. Smith explained that construction crews and residents use the roads of the subdivision and cause deterioration even prior to the subdivisions completion. Mr. Smith explained that it can take up to ten years for a subdivision to be completed. Mr. Smith stated that many developers complete the projects without a problem, but where a developer abandons a subdivision project the locality or the home owners association is left to repair the roads.
 - **Mr. Smith** explained that Stafford does not need to secure more money from developers for the performance bonds; rather, Stafford needs to keep a larger percentage of the performance bonds until the roads are accepted into the system of the locality or the state.
- **Del. Marshall** asked how many subdivision roads Stafford County had to complete prior to the economic downturn.
 - **Mr. Smith** stated that he is new to the director position and that he is uncertain how many times this issue occurred prior to the economic downturn. Mr. Smith stated that when the economy was good, the securities were not taken care of quite as carefully as they are now.
- **Del. Marshall** asked whether the counties surrounding Stafford have experienced any of the same problems and whether counties throughout the state have suffered similar issues.
 - **Mr. Roger Wiley**, *Representing Loudon County among other localities; Hefty & Wiley, P.C.*; stated that Loudon County has experienced similar problems to Stafford County. Mr. Wiley stated that he was also personally involved in a problem similar to Stafford's in Amelia. Mr. Wiley stated that the problem in Amelia was resolved by involving the developer and the local bank that held the loan. Mr. Wiley stated that the problem in Amelia was difficult to work out. Mr. Wiley stated that the longer a locality is permitted to hold on to the performance bond money, the better off the locality is in trying to maintain roads until they are entered into the state's system.
 - **Del. Marshall** asked whether this problem started as a result of the economic downturn in 2008.

- **Mr. Wiley** responded that there were cases of a similar problem before the recession started, but that the problem has become more widespread as a result of the recession. Mr. Wiley explained that the problem has tended to occur in larger counties where a lot of development projects were being built at the same time. Mr. Wiley explained that when the market turned downward, those counties suffered the most because of the cumulative amounts needed to pay for completing various subdivisions' roads.
- **Mr. Toalson** stated that trying to get a release from a bond is very often a difficult, arduous process for developers and typically involves local government, experienced engineers, the construction company, Virginia Department of Transportation inspectors, and the developer.
 - **Mr. Smith** stated that he agreed with Mr. Toalson's representation of the issue.
- **Mr. Smith** explained that at the time the localities agreed to release at 90% completion, the localities and the developers were unaware of how long completing the subdivisions would take and how much the streets would deteriorate during the completion of the subdivision. Mr. Smith explained that the state will not accept roads into its system until the developer, locality, or the home owners' association completes the needed repairs to the roads. Mr. Smith stated that oftentimes the roads are left to deteriorate for 5 to 10 years without anyone maintaining them.
- **Mr. Toalson** asked whether Mr. Smith was responsible for this in other counties.
 - **Mr. Smith** answered that he has not been responsible for this in any other places.
- **Mr. Toalson** stated that in his work experience developers will accept less than a 90% release of their performance bond from a locality despite the state code, where the locality tells the developer that "things are slow [and] who knows how long [it will take for] . . . the houses [to be] built."
 - **Mr. Smith** stated that he and Stafford generally try to abide by the state code.
- **Mr. Toalson** stated that he has been asked by **Mr. Matt Bernie** to share *The Virginia Bankers Association's* opposition to HB 731. Mr. Toalson stated that most of the performance bonds are unsecured letters of credit. Mr. Toalson further explained, stating that financial institutions are under tremendous pressure from federal regulators regarding unsecured credit. Mr. Toalson stated that placing a longer holding period for the unsecured credit will mean more pressure from federal regulators.
- **Del. Bulova** expressed his preference that localities follow the code as it is written, as Mr. Smith has done. Del. Bulova also stated that he does not want localities to be faced with the decision to either not follow the code or put themselves in financial jeopardy. Del. Bulova asked Mr. Toalson whether he could envision a way that §15.2-22-45 could be tweaked without being rewritten to account for situations where a locality may want to give an 80% release, rather than a 90% release.
 - **Mr. Toalson** responded that he is convinced that the statute is well drafted and that it does not need to be tweaked or amended. Mr. Toalson stated that when the economy turns around and housing returns to its normal levels that this problem will fade away.
 - **Del. Bulova** stated that he appreciates that this problem is likely due to the economic downturn and is thus temporary. Del. Bulova stated that he also appreciates that this problem not widespread. Accordingly, Del. Bulova stated that he thinks it is unlikely that the statute needs to be rewritten. Del. Bulova also stated that despite these things, he does not want Stafford and other affected areas to be left paying \$1.8 million. Del.

Bulova stated that he would like the Work Group to craft some sort of a solution for affected areas.

- **Mr. Toalson** responded that the legislation currently allows localities to demand a performance bond for 10% more than the anticipated cost of construction and that prior to 2009 and likely after 2017, the localities will be permitted to demand a performance bond for 25% -35% more than the anticipated cost of construction. Mr. Toalson explained that these amounts are added to the performance bond to prevent this type of problem from occurring and that the problem is not with the current statute, but with Stafford's execution.
- **Mr. Mark Flynn**, *Virginia Municipal League*; expressed his confusion regarding how the statute currently works. Mr. Flynn stated that the law currently requires localities to complete partial releases unless it receives a non-receipt of approval by the Virginia Department of Transportation (VDOT). Mr. Flynn stated that he does not understand why the localities do not wait to make the releases until the roads are approved 90% completed by VDOT.
 - **Mr. Smith** responded, stating that VDOT and the locality inspect the roads to ensure that the roads are the correct percentage complete before the locality releases that same percentage of the performance bond. Mr. Smith explained that despite being approved as 90% complete by VDOT, VDOT will not accept a road into its system until it is 100% complete and up to VDOT standards. Mr. Smith explained that the road might have been 90% complete upon the 90% release, but may now have deteriorated to the point that it requires more than the remaining 10% performance guarantee to be completed and entered into the state system.
- **Mr. John Napolitano**, *Home Builders Association of Virginia; Sr. Vice President, Napolitano Homes, Virginia Beach*; explained that he has not experienced the problems that Mr. Cushing and Mr. Smith described where he develops in Virginia Beach.
 - **Mr. Napolitano** explained that under the current law developers have interests in completing projects quickly and in accordance with their performance agreement. Mr. Napolitano stated that most developers complete projects in phases and that each phase has independent bonds. Mr. Napolitano explained that in addition to receiving partial releases throughout the project, when a developer completes 100% of a certain phase of a project, the developer receives 100% of the bonds back that are associated with that phase. Mr. Napolitano stated that as a result of wanting their credit to apply towards bonds for new projects or new phases of the same project, most developers want to complete each phase quickly and make sure their inspectors and workers are doing their jobs. Mr. Napolitano stated that the longer performance bonds are held, the longer developers' credit is tied up and the more difficult it is for developers to continue to develop new homes.
 - **Mr. Brian Gordon**, *Apartment and Office Building Association*; stated that though multifamily and commercial developments are also subject to performance bonds, he has not heard of any problems like Stafford's in any of those developments. Mr. Gordon stated that he agrees with Mr. Napolitano: that holding performance bonds for a longer period of time will greatly impede developer's ability to complete other phases of the same project or new projects.
 - **Mr. Napolitano** explained that where developers do their jobs correctly, the counties should not be left to complete roads under the current laws. Mr. Napolitano stated that

roads are bound to deteriorate if they are left incomplete for years, but that he does not know of any developers that leave roads in a subdivision incomplete for 5-10 years. Mr. Napolitano explained that bonds for roads include lighting, parks, walks, drainage, landscaping, as well as the road itself. Mr. Napolitano stated that he currently has two bonds for roads in subdivisions; one bond is for \$256,000 and the other is for \$495,000. Mr. Napolitano stated that he and other developers work to get their developments' roads accepted by VDOT as quickly as possible in order to be released from the bond for roads. Mr. Napolitano explained that in order to ensure projects are completed in accordance with performance agreements and in a timely fashion, he and many other developers monitors sites through the use of cameras. Mr. Napolitano explained that he does this to ensure quality and to complete his projects quickly.

- **Mr. Napolitano** asked whether the proposed bill would allow localities to keep 100% of the bonds for the roads (which, as indicated above include the costs of lighting, parks, walks, drainage, and landscaping) or whether it would allow localities to keep only the percentage of the bond that is associated with asphalt.
- **Del. Dance** asked whether there were any other comments regarding HB 731 and explained the purpose and importance of hearing both sides of the debate regarding HB 731.
 - **Mr. Ted McCormack**, *Virginia Association of Counties*; stated that he recommends that HB 731 be adopted, but that it expire in 2017 when the 10% hold back returns to 25% or greater.
 - **Del. Marshall** motioned that HB 731 be gently laid on the table.
 - **Del. Dance** seconded Del. Marshall's motion and asked for the Work Group to vote on the motion. Two Work Group members opposed the motion, and all others approved. HB 731 was gently laid on the table.

III. Appraisals Study; assessments with environmentally sound construction (HB 433, Del. Robert Tata, 2012; SB 507, Sen. Frank W. Wagner, 2012)

- **Mr. Mark Courtney**, *Deputy Director, Licensing and Regulations, Department of Professional and Occupational Regulations*; introduced Mr. Kevin Heff to the Work Group.
- **Mr. Kevin Heff**, *Education and Board Administrators of the Virginia Real Estate Appraising Board*; stated that earlier in 2012, Governor McDonnell signed into law companion bills HB 433 and SB 507 which require that the Virginia Real Estate Appraising Boards evaluate the development of a continuing education curriculum for appraiser licensees. Mr. Heff explained that such continuing education includes the effects and use of energy efficient and renewable energy equipment on the determination of their fair market value and the appraisal of non-income producing residential Real Estate. Mr. Heff stated that the board is required to report its findings to VHC by November 1, 2012 and that it has conducted research on this subject to assist in preparing the draft report for consideration at the Board's August 14, 2012 meeting.
 - **Mr. Heff** provided the Work Group with an update on the status of the Virginia Real Estate Appraising Board's evaluation. Mr. Heff stated that the Board invited public comment on continuing education for appraiser licensees from June 4, 2012 until July 5, 2012 by posting a notice in the Virginia Register. Mr. Heff stated that according to McGraw Hill's 2012 report, new and remodeled green houses are transforming the residential marketplace: green building is one of the fastest growing segments in the

housing industry. Mr. Heff stated that proponents of energy-efficient, green homes argue the increased use of renewable energy sources will provide tangible environmental and economic benefits for all citizens of the Commonwealth, not just those who buy or remodel their home using green principles. Mr. Heff explained that any proliferation of green homes may present new business opportunities and that as a result, appraisers (and other regulated professionals such as architects, engineers, contractors, real estate brokers, and home inspectors) may want to attend training to help tap into these business opportunities. Mr. Heff stated that it is also important to remember that even as the green housing industry is gaining popularity, not all architects will design green homes, not all contractors will build green homes, and not all brokers will market green homes.

- **Mr. Heff** stated the Board now must decide whether existing appraisal continuing education courses offer adequate opportunity for appraisal licensees to learn the proper method of techniques to value such homes. Mr. Heff stated that the Board has included in its report a summary of green evaluation education resources in its report and its findings regarding changes in the continuing education requirements for appraisers. Mr. Heff stated that although general appraisal textbooks and courses do not yet provide extensive guidance regarding evaluating green homes, the specialized education in this field appears to be developing rapidly.
 - **Mr. Heff** stated that the number of special purpose textbooks and courses addressing green housing valuation standards is quickly growing. Mr. Heff stated that professional organizations sponsor (such as the Appraisal Institute) and proprietary schools (such as McKissok, Earth Advantage Institute, and PorterWork, Inc.) offer green courses and green certifications.
 - **Mr. Heff** added that there are many articles on the subject that have been published in appraisal journals and other trade publications.
 - **Mr. Heff** stated that the Qualification Board, which establishes national standards for appraisal licensees' continuing education added green evaluation components to its core curriculum starting January 1, 2015.
 - **Mr. Heff** stated that the recently established Appraisal Practices Board is charged with identifying their recognized methods and techniques of evaluating green homes.
- **Mr. Heff** stated that current legislation requires the Board to submit their report to the General Assembly by November 1, 2012. Mr. Heff explained that the report will include all of the Board's recommendations and their informational bases. Mr. Heff stated that because the Board is already in the process of considering whether appraisal licensees need continuing education regarding valuating green homes and the resulting report will be made available to the Workgroup on November 1, 2012, that the Workgroup does not need to conduct its own study on this topic.
 - **Del. Dance** stated that there are members of the Workgroup that would like to contribute their input prior to the Workgroup making its final decision.
 - **Mr. Heff** stated that there will be a public comment period during which anyone will be able to comment on this topic and the Board's study.
- **Del. Marshall** asked for what the legislation called regarding the Workgroup's role in the study.

- **Mr. Courtney** stated that currently, appraisal licensees are required to complete 28 hours of continuing education over 2 years. Mr. Courtney stated that the Board and the appraising industry want to make sure that adding green building valuation methods as part of the required continued education will not cause problems for the industry.
- **Del. Bulova** clarified with Mr. Courtney that the appraisal licensing industry already has the power to implement regulations requiring green housing valuation methods be part of appraisal licensees' continued education, and that the study is for the purposes of getting the General Assembly's input. **Mr. Courtney** agreed.
- **Mr. Toalson** apologized for missing the public comment period for this regulation. Mr. Toalson stated that he is involved in EarthCraft Housing Program, the most successful single-family state-wide green building program in the nation. Mr. Toalson stated that one of the frustrations that he and his partners face in building green homes is that the appraisals often do not reflect the amount of money that was spent on making the home energy efficient.
- **Mr. Chip Dicks**, *Virginia Association of Realtors*; stated that the problem with changing the appraisal licensee's education to include green housing valuation methods is that the resulting values might not be accepted by Fannie and Freddie and FHA. Mr. Dicks explained that appraisers are required to adhere to the USPAP standards and that the current USPAP standards do not allow increases in values of properties as a result of green features.
 - **Del. Dance** asked Mr. Dicks whether he has given his input regarding changing the Virginia appraisers' standards.
 - **Mr. Dicks** stated that he has not submitted a formal opinion but that he has engaged in discussion about this topic with appraisers and member of the community of appraiser serving on the appraisal board.

IV. Public comment and Adjournments

- **Del. Dance** asked if anyone in the public had any comments to add. Hearing none, Del. Dance adjourned the meeting at 11:05 AM.

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

Time-Share Sub-Work Group

August 14, 2012

10 AM

General Assembly Building
House Room C

I. Welcome and call to order

- **Delegate John A. Cosgrove**, *Chair* called the meeting to order at 10:03 a.m.
 - In addition to the invited speakers the following Workgroup members were in attendance:
 - **Legislators:** Delegate John A. Cosgrove, *Chair*; Delegate Barry D. Knight
 - **Non-Legislator Workgroup Members:** Pam Coerse, *Virginia Resort Development Association*; Bill Ernst, *Dept. of Housing & Community Development*; Heather Gillespie, *DPOR*; Rob Hagerty, *Trisha Henshaw, CIC Executive Director*; Michael Levinson; Joseph Mayes, *Williams Mullen*; Lori Overholt, *VSA Resorts; McGuire Woods*; Philip Richardson, *Eck, Collins & Richardson*; Jackie Riggs, *Executive Director of Goldkey Resorts*
 - **Staff:** Elizabeth Palen, *Executive Director of VHC*; Iris Fuentes, *VHS Staff*; Laura Perillo, *VHC Staff*

II. Time Share Act; developer control period (H.B. 233, Del. Cosgrove, 2012)

- **Del. Cosgrove** explained that during the 2012 session, the General Assembly passed the consumer protection parts of a bill that was fairly complex and lengthy regarding timeshares. Del. Cosgrove stated that the Virginia Housing Commission was given the task of developing a bill, considering the technical issues and working on what the members will recommend to the General Assembly in January. Del. Cosgrove stated that the topic to be focused on during this meeting is the Developer Control Period.

DELEGATE JOHN A COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE BARRY D. KNIGHT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

MARK K. FLYNN
LAURA D. LAFAYETTE
T.K. SOMANATH

- **Del. Cosgrove** explained that the Virginia Constitution prohibits the General Assembly's ability to alter existing contracts. Del. Cosgrove explained that whatever changes the workgroup makes will affect only future contracts.
- **Del. Cosgrove** stated that the Commissioner of Accounts listed \$45 as the foreclosure cost for timeshares, but that the opponents suggested that the cost be in accordance with the Supreme Court rates. Del. Cosgrove explained that he and other members of the General Assembly agreed to the Supreme Court rates, without realizing that the cost was substantially higher. Del. Cosgrove stated that as a result of this misstep, the cost of foreclosure for a timeshare is now \$125. Del. Cosgrove stated that as a result of this issue, homeowners associations that are going through the foreclosure process will be forced to spend hundreds of thousands of dollars throughout the Commonwealth.
- **Mr. Philip Richardson, Eck, Collins & Richardson on behalf of Virginia Resort Developers Association**; stated that the Virginia Resort Developers Association (VRDA) supports amending Virginia Code § 55-369(B) which terminates the developer control period in timeshares upon 90% sell out of a timeshare project. Mr. Richardson also mentioned that the timeshare industry has evolved over the years and that some of the legislation which governs it has not been amended to support the evolving needs of those involved in the industry. Mr. Richardson explained his memo addressed to members of the Virginia House of Delegates and the Virginia Senate dated June 14, 2012 regarding modifying or eliminating the termination of developer control period from the Code. Mr. Richardson explained that when the developer control period ends, the developer is compelled to transfer all common elements of the project to the timeshare association free of all liens. Mr. Richardson explained that timeshare developers, unlike condominium developers, strive to remain integrally involved in the operation of the timeshare project and do not wish to terminate their control at 90% sell out. Mr. Richardson explained that timeshare developers provide financing for the vast majority of its sales transactions, which means that even at 90% sell out developers are far from 90% out of the project.
 - According to **Mr. Richardson**, timeshare developers are invested in keeping maintenance fees down and property conditions at a first class condition at 90% sell out, because the developer (1) may hold outstanding mortgages on up to 40% of the timeshare estates within the resort and its receivables portfolio may exceed \$100 million, (2) is still most likely in active sales, and (3) is usually well into the development of its next resort for which the marketing plan generally includes selling to its existing owners from other timeshare resorts. Mr. Richardson also explained that timeshare developers consider timeshare owners an important asset due to the possibility of resale of timeshares within a project, either by upgrading existing owners within the project or into the developer's next project. Mr. Richardson explained that developers

are thus committed to maintain the condition of the resort and the happiness of their owners.

- According to **Mr. Richardson**, condominium ownership and governance is much different from timeshare ownership and governance. Mr. Richardson explained that generally timeshare owners, unlike condominium owners, do not desire "self-rule" within their timeshare project, because (1) owners invest much less money into timeshares, (2) timeshares are viewed as prepaid vacations as opposed to a residences, and (3) owners generally do not live near their timeshare. Additionally, Mr. Richardson noted that most timeshare owners do not have the expertise necessary to manage and maintain the timeshare project. Beyond this, Mr. Richardson explained that conveyances of timeshare estates do not include conveyances of an undivided interest in the common elements of the resort project. Rather, Mr. Richardson stated, the common elements remain the property of the timeshare developer until transferred to the association.
- **Mr. Richardson** explained that modifying the developer control period to continue after 90% sell out of a timeshare project would not promote developer abuse. Mr. Richardson explained that timeshare developers are subject to common law fiduciary obligations and are prohibited from self-dealing. Additionally, Mr. Richardson explained that timeshare developers and associations are subject to oversight by the Virginia Common Interest Community Board, which protects owners from potential abuse of control by the developer.
- **Mr. Samuel Sadler**, *Timeshare Owners*; stated that he represents about one hundred individuals who own shares in time shares and are unhappy with their ownership. Mr. Sadler stated that he is concerned with reselling timeshares. Mr. Sadler stated that with the point system that most timeshares have implemented, he is concerned about the legitimacy of selling points. Ms. Sadler asked how the 10% requirement would affect the hypothecation of the note if the note is transferred.
 - **Mr. Richardson** stated that the statute refers to 10% of the beneficial interest. Mr. Richardson stated that the law uses that language because in most timeshare qualification loans, the timeshare developer is required to replace any loan that defaults. Mr. Richardson further explained that under the financing agreements, the timeshare developer has obligations to replace those notes as people default. Mr. Richardson stated that consequently, the developer has a beneficial interest in the deed of trust.
- **Mr. Sadler** stated that most modern timeshares operate under a points or undivided interest (UDI) system. Mr. Sadler asked how those aspects of the timeshare would be dealt with in the event of a resale. Mr. Sadler clarified his question, asking how the law will differentiate between points and UDI timeshares so that a consumer could tell whether the timeshare is an original sale or resale of properties.

- **Mr. Richardson** stated that whether the timeshare is run on a points or UDI system, the way one would tell whether the timeshare is an original sale or a resale is by the deed-- whether the deed is from the developer or from a third party purchaser back to the developer.
- **Mr. Sadler** stated that many deeds that go back to the developer have deeds in terms of foreclosures or deeds in lieu, but also deeds for trades. Mr. Sadler explained that the most expensive aspect of timeshare ownership is the cost of marketing. Mr. Sadler stated that sales marketing in timeshares run between 40-60% of the gross, which is approximately 8-10 times as much as you would reasonably expect to pay if you were selling a house. Mr. Sadler stated that the cheapest way to sell a timeshare is to a person who already owns a timeshare and trades to upgrade. Mr. Sadler stated that he does not understand how to sell a resale of points.
 - **Mr. Joseph Mayes**, *Williams Mullen*; stated that points will be computed based upon the owner's timeshare interest in the units themselves with the interest being put into a trust or some other type of arrangement. Mr. Mayes continued stating that based upon that computation, one can issue a certain number of points considering the 90% calculation.
- **Mr. Sadler** stated that in the Wyndham timeshare resort in old town Alexandria, the timeshares themselves were deeded. Mr. Sadler stated that if the statute is only discussing original sales and not the sales that go back, how is one supposed to calculate.
 - **Mr. Mayes** stated that the statute has always stated that it is 90% of the original sale.
- **Mr. Sadler** stated that during a hearing several years ago, the CIC board refused to take jurisdiction over a resident's complaint against Creekside (timeshare) Village because the person was jilted by the developer during a resale of a timeshare.
 - **Del. Cosgrove** thanked Mr. Sadler for bringing this issue to the panel's attention and assured Mr. Sadler that his concerns will be addressed.
- **Mr. Richardson** stated that unlike condominium owners, timeshare owners do not want to be on the board of directors for their community. Mr. Richardson stated that this difference is due to the fact that timeshare communities are vacation resorts. Thus, according to Mr. Richardson, timeshare owners do not want to be in charge of large management positions. Mr. Richardson stated that most timeshare resorts are managed by professional organizations that are affiliated with the developer. Mr. Richardson explained that developers have a vested interest in keeping the property up to a standard that people are willing to pay their fees. Mr. Richardson further explained that if timeshare owners do not pay their fees, they will default on their deeds of trust.
 - **Mr. Mayes** added that people buy timeshares and condominiums for different reasons: one is purchased as a prepaid vacation and the other as a home.
- **Mr. Mayes** explained the initial problems he faced regarding timeshares. Mr. Mayes stated that when the Timeshare Act went into effect in 1984, portions of

the act were patterned after the Condominium Act. Mr. Mayes stated that people did not know how to deal with timeshares, so they attempted to treat them like condominiums. Mr. Mayes explained that he was responsible for the first timeshare that was registered under the Act. Mr. Mayes explained that in order to get the information necessary to understand timeshares, he asked national timeshare experts about 20 questions-- none of which the experts could answer.

- **Mr. Mayes** explained that there are many differences between what a condominium developer does and what a timeshare developer does. Mr. Mayes stated that one difference is that a condominium developer does not offer financing, while timeshare developers do. Mr. Mayes explained that at the end of the sales period for condominium developments, the developer has no continued interest in the development. Mr. Mayes stated that developers of a timeshare resort might have a portfolio of receivables over \$100,000,000 at the end of the sales period. Mr. Mayes stated that this gives timeshare developers a substantial interest in making sure the timeshare resort is maintained at a first class level.
- **Mr. Mayes** explained that the developer control period attempts to balance the interests of the owners and the developers. Mr. Mayes expanded by stating that the state does not allow developers to have an unfair advantage and make "sweetheart" deals to determine who provides what and who does what. Mr. Mayes stated that when the developer control period ends, the contracts that the association has with others are terminated.
 - **Del. Barry D. Knight** stated that he is somewhat unfamiliar with timeshares but that his understanding was that people could trade their timeshare uses with other timeshare owners in different locations so owners have an interest in keeping their timeshare community nice so that others will want to trade that are from nice timeshare communities.
 - **Del. Cosgrove** stated that he is a timeshare owner and that Del. Knight is correct that if Del. Cosgrove wanted to go to a nice timeshare in the Bahamas he must have a nice timeshare that would appeal to someone with that timeshare in the Bahamas.
 - **Mr. Richardson** added that where people are not happy with their timeshare community they will not pay their deeds of trust and will default. Mr. Richardson stated that if timeshare owners are unhappy and properties are not maintained there is no ability to entice timeshare owners from other resorts to want to trade with the owners at the unmaintained resort.
- **Del. Cosgrove** asked if anyone on the workgroup had any other comments or questions. Hearing none, Del. Cosgrove invited public comment.

III. Public comment

- **Mr. Sadler** stated timeshare developers have reasons besides maintaining the property to keep control of the association. Mr. Sadler explained that there are 4 ways in which timeshare developers can make money: (1) sales, (2) note

hypothecation, (3) management, (4) rentals of unused time shares. Mr. Sadler stated that controlling these aspects of the timeshare resort is also of interest to the timeshare developers and that giving timeshare developers an extended period of control provides them the opportunity to fraudulently profit from their control. Mr. Sadler provided examples of timeshare resorts where the current legislation is not working due to fraudulent timeshare developers:

- **Mr. Sadler** stated that the developer of Creekside Village timeshare resort oversold 1741 nonexistent timeshares. Mr. Sadler further explained that the developer collected 54% management fees despite the budgeting for only 4.5% management fees.
- **Mr. Sadler** stated that the developer of Colonial Crossings timeshare resort sold all 24 units by September 2006, but the developer has remained in control of the timeshare development through the developer control period. Mr. Sadler stated that during the developer control period the resort was foreclosed upon and the lender sold the project to a new owner (English Garden LV) when the project could and should have been turned over to the owners of the units in 2006. The new owner is a title owner and has title interest but is not registered with the CIC Board, is not selling anything and cannot develop.
- **Mr. Sadler** stated that the developer of Presidential Resort in Chancellorsville decided to sell cabin timeshares for one week every five years. Mr. Sadler stated that the developer should have only sold 260 units (5 years x 52 weeks per year = 260 weekly stays for timeshare owners), but sold much more. Additionally, the developer charged timeshare owners an assessment of \$399, which was much higher than the cost of the actual property assessments (260 weekly stays x \$399 = \$103,740 which is much greater than the \$55,000 assessment cost of the cabin and the additional management fees). Mr. Sadler stated that through the discovery process, he knows that Presidential Resort was spending timeshare owners' assessments to pay costs not part of the timeshare project, such as campers in the adjacent camping park and gas for other vehicles.
- **Mr. Sadler** stated that the deed of Williamsburg Plantation states that the developer will maintain control, without any other limitation. Mr. Sadler stated that under the current law, the developer control period is a time when the developer controls all aspects of a timeshare and ignores the limitations of their role.
- **Del. Cosgrove** thanked Mr. Sadler for his comments and invited any other public comment.

IV. Adjourn

- Hearing no other comments, **Del. Cosgrove** adjourned the meeting at 10:44 A.M.

SUMMARY
Virginia Housing Commission
Timeshare Sub-Workgroup
House Room C, General Assembly Building
November 1, 2012
1:30 PM

I. Welcome and Call to Order

- **Delegate John A. Cosgrove**, *Chair* called the meeting to order at 1:30PM.
 - In addition to the invited speakers the following Workgroup members were in attendance:
 - Legislators: Delegate John A. Cosgrove, *Chair*; Delegate Barry D. Knight
 - Non-Legislator Workgroup Members: Pam Coerse, *Virginia Resort Development Association*; Bill Ernst, *Dept. of Housing & Community Development*; Heather Gillespie, *DPOR*; Rob Hagerty, Trisha Henshaw, *CIC Executive Director*; Michael Levinson; Joseph Mayes, Williams Mullen; Lori Overholt, *VSA Resorts*; McGuire Woods; Philip Richardson, *Eck, Collins & Richardson*; Jackie Riggs, *Executive Director of Goldkey Resorts*
 - Staff: Elizabeth Palen, *Executive Director of VHC*

II. Commissioner of Accounts/Fee Increases

- **Amigo Wade**: *Legislative Services*: stated that wanted to two issues. Firstly, he wanted to be sure that bill does not violate the Impairment of Contracts provision of the Virginia Constitution. On line 32 of attached legislation, (trying to capture that time share estates and time share uses,) provision gives the developer an option to go either way if it's a time share use program. This new provision is retroactive such that it does not conflict with the contract documents. He stated that the language will remain the same, but the percentage will be raised from 10% to 20%.

III. Developer Control Period

- **Mr. Wade**: This bill gives an option (for a situation where common elements go over) to the member association. Line 2 of the Enactment Clause (of attached legislation) clarifies legislative intent for the provision to be retroactive. He added that unless the contract notes expressly otherwise, this third option of developer control would occur.
- **Del. Cosgrove**: 90% of timeshares exclude requisitions by the developer.
- **Michael Levinson**, *VSA Resorts*: Termination of development control applies to time share estate programs. This is an example of shaping a time share concept around a condominium concept to the extent that this legislation is curative. This reflects the fact that at 90% sell-out a time share developer is significantly invested in the project, unlike condominium investors.

Time share developers offer owner financing, and the large majority of time-share purchasers take advantage of that financing. At 90% sellout, the development may own up to 40% of the notes secured by time share interest in the project.

- This legislation is to recognize that interest, as retaining the developer in the project is in the interest of the consumer. The developer wants to control the product, and not subject it to the vicissitudes of an owner base or Time-Share Owner's Association that may not have the desire or expertise to manage the project. That was the impetus for legislative change.
- This portion of the act was modeled after the condominium act. The common areas of the project conveyed to owner's association just like it occurs in condominium project. The problem remains that with condominium project, you are dealing with people who live there permanently. Time share owners, however, only occupy the space for a short period of time, if at all, and, thus, do not have same ownership interest. However, the developer does have that interest to protect their financial investment and keep the area in prime condition.. This was the motivation behind the change of the statute
- **Mr. Stuart Sadler:** I understand the justification for new language in line 32, but I am not sure that it is necessary since anything that was against the law would be void already under (55.365.1) of the existing Time Share Act. The concern I have with respect to the language would it be possible to draft a time share instrument to further extend the period of developer control.
 - There is issue related to line 37, where word promised was added. I found it interesting to allow sale of timeshare before they are completed if they are bonded. Why would promise be necessary if they were bonded? There are several concerns about the language. Problem with language in Line 42-43; we find examples when time share developers may refuse to give up control of the association.
 - This would give a developer a substantially longer period where they could take advantage of their position controlling the association. Developers do not just make money selling condominiums or selling notes, they also make money in managing condominiums and renting condominiums. With way things are currently done with most developers, they take all the revenue and expenses have shifted on to owner. Useful for current exemption for management of timeshare association were subject to CIC Board review. However, currently it is not.
 - When providing an extended developer control period there is functionally no way for time share owners to interact easily. If you take a look at what the condominium act in (55-7975:1) there is a requirement that could easily be applied to timeshares that would allow an easy way to communicate with each other.
 - Concerning the language added on page 2, it very common for developers in this (state?) not to give up control under the current law. Is it your intention to authorize and ratify that illegal activity at this time?
- **Mr. Wade:** We could rectify that. The new provision to be able to be used if it is not in conflict with the instruments. When this passes, although we have used this language for other things with common interest communities, it could be read that the other two instances

currently there could be changed. One way of dealing would be to take the “except to the extent” language and put that in the enactment clause so that the intent would be clear. (The legislative intent that to the extent that purchase contractor or time share instruments.)To the extent that they do not say otherwise then the provision of this act would provide an additional option. That may be a way to prevent a situation that someone used it to extend the other two provisions.

- In last year’s Virginia Resort Development Association package of legislation, there was a specific amendment to (55-370). VRDA thought it made sense for the developer, the association, and the consumer, since the consumer ultimately pays the (freight). Concerning, Owner’s Association foreclosing on timeshare. Often the amount of money involved is diminimus because we are dealing with foreclosure on unpaid assessments. The owner does not want timeshare anymore, and the association needs he timeshare back so it can recycle the time-share and fine a fee paying member of the association, since they need fees to pay their expenses.
 - The only people profiting from this requirement were the commissioners of accounts. However, after speaking to the commissioners of accounts, they were also unhappy with the process. This legislation was to eliminate the requirement that the accountings be held for a year but not required to go through the process presenting to the commissioner of accounts for his review and to record these. This requirement imposed because time share estates are real estate. If foreclosing on a time share use or club membership, they would be more in the line with personal property, and whole different methodology would be required and would not require the review. That is the impetus for this legislation that should be imposed because they are times share estates are treated like condominium estates when they are not.
- This provision only relates to lien foreclosure, not relate to developer deed of trust foreclosures. Ultimately, the association and owners who pay for the foreclosure. Last year, we tried to cut cost by reducing the advertising requirements. Unfortunately through this happenstance, we now increased the foreclosure costs, because we increased the commissioner’s fee. That’s what we’re trying to correct this year.
- **Mr. Levinson:** If you look at this from the perspective of the commissioner of accounts, you would perform this review on a batch basis, with 100-200 foreclosures on the same day at the same time. This is done to streamline the process and have it make economic sense When all of this sent to commissioner of accounts, they look at the batch of packages, which only differ from each other by unit number and name of owner. I do not see any reason for submission of accounting to commissioner in this situation anyway, and I heartily agree with notion of an obligation to prepare the accountings.
 - There should also be some measure for those to be available for inspection, but I do not see any reason for a fee to be associated. In my experience, I found that commissioners of accounts think the process is a pain.
- **Del. Cosgrove:** Is that fee applied to each individual foreclosure and not as a package?
- This change increased the cost of a typical foreclosure by \$30,000-40,000.
- **Delegate Knight:** In committee, we will be looking at some options. If they do not really think we are doing the public any favors doing this or commissioner of accounts, then all we

are doing is making some extra money for lawyers; If we strike it, and if its legal, you know how we will vote on committee

- **Del. Cosgrove:** I think Del. Knight know's our position on this, and it is best to strike commissioner of account requirement; Mr. Wade can have a draft ready for November?
- **Mr. Wade:** I would be happy to work with you on that.

IV. Public Comment

- **Del. Cosgrove** invited those from the public to comment.

V. Adjourn

- Hearing no other comments, **Del. Cosgrove** adjourned the meeting at 2:15

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

SUMMARY

**Continuing Care Retirement Communities
Sub-Work Group
Senate Room A, General Assembly Building
June 14, 2012; 10:00 A.M.**

Legislators present: Senator George L. Barker, *Chair*; Senator Mamie Locke, *VHC Vice Chair*

Citizen members present: Bill Axselle, *Erickson Retirement Community*; Mary Lynne Bailey, *Virginia Health Care Association*; Al daCosta, *Virginia Baptist Homes Foundation Resident*; Chip Dicks, *Realtor Association*; Daryl Hepler, *State Corporation Commission, Bureau of Insurance*; Ron Herring, *Glebe Resident*; George High, *Westminster Resident*; H. Donald Nelson, *Windsor Meade Resident*; Dana Parsons, *Virginia Association Nonprofit Homes for the Aging*; Jim Rothrock, *Dept. of Rehabilitation Services*; A. Prescott Rowe, *Cedarfield Resident*; Peter T. Straub, *Greenspring Retirement Community*; Pia Trigiani, *Common Interest Communities Management Fund*; and Amy Marschean, *Department of Rehabilitation Services*

DLS staff present: Elizabeth Palen, *VHC Director*; Iris Fuentes; Laura Perillo

I. Welcome and Call to Order

- **Senator George Barker**, *Chair* called the meeting to order at 10:01 A.M.

II. Explanation of Sub-Work Group's Purpose

- **Sen. Barker** stated that during the 2012 Session, some legislation was proposed regarding fiscal responsibility and financial transparency of Continuing Care Retirement Communities ("CCRCs,") but was ultimately rejected. Sen. Barker explained that he and the other legislators would ideally like all CCRC stakeholders to be in agreement about the prevailing issues by the end of the workgroup--whether or not the workgroup's efforts result in the creation legislation. Sen. Barker explained that at the very least, the purpose of the CCRC workgroup is to educate stakeholders of the various perspectives on the issues and to make all stakeholders aware of the various options available to solve the issues. Sen. Barker explained that the Virginia Housing Commission is conducting this study because it deals with related and similar issues regularly, such as those affecting Virginia's common interest communities. He explained that the objective for this first workgroup meeting is to

DELEGATE JOHN A COSGROVE
DELEGATE DAVID L. BULOVA
DELEGATE ROSALYN R. DANCE
DELEGATE DANIEL W. MARSHALL, III
DELEGATE BARRY D. KNIGHT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR GEORGE L. BARKER

MARK K. FLYNN
T.K. SOMANATH
MELANIE S. THOMPSON

"flesh out the issues," to figure out what similar workgroups have studied in the past, and determine what legislation, if anything, the workgroup will submit to the VHC (and potentially to the General Assembly). Sen. Barker explained that the members of the workgroup were selected for their diverse perspectives. Sen. Barker encouraged the members of the workgroup and public to share their suggestions regarding on what topics the workgroup should focus.

III. Fiduciary Responsibilities of Continuing Care Retirement Communities; role of residents in protection of contractual obligations provided to the residents

- **Sen. Barker** asked the resident-members of the workgroup to state what issues they would like to discuss during and research for the forthcoming meetings.
 - **Mr. H. Donald Nelson**, *Windsor Meade Resident*; volunteered that living in a CCRC adds years to people's lives and that there are various wonderful things about CCRCs. Mr. Nelson continued, stating that he has three issues: (1) a lack of transparency regarding financial stability, (2) denial for resident on the board of directors, and (3) deficiencies in management of the board of directors.
 - **Mr. A. Prescott Rowe**, *Cedarfield Resident*; volunteered that he is concerned about his CCRC's (1) financial viability and (2) disclosures of financial information. Mr. Rowe claimed that his CCRC has not properly disclosed financial information to its residents. Mr. Rowe further indicated that Cedarfield is unique because they are organized under the corporate umbrella.
 - **Ms. Dana Parsons**, *Virginia Association of Nonprofit Homes for the Aging*; replied that disclosure requirements are clearly outline in the law and that CCRCs comply with that law. Additionally, Ms. Parsons explained that CCRCs are legally required to provide annual disclosure statements, and that they do so. Ms. Parsons stated that residents agree to these terms in their contract and are encouraged to bring an attorney when they sign their documents to enter a CCRC. Ms. Parsons stated that she is unsure what is broken regarding the CCRCs regulation and what the workgroup is attempting to fix.
 - **Sen. Barker** replied that he thinks it is important to hear all the issues and then decide on which issues regarding CCRC's the workgroup is going to focus its energies toward resolving.
 - **Mr. Nelson** stated that his CCRC's fiscal year ends in May and in August, residents sign for a book at the concierge desk that has a fiscal outline. Mr. Nelson explained that unless a resident is a lawyer or a CPA, it is unlikely that they understand or could understand the outline. Mr. Nelson stated he would like to know who in Richmond is reading the outlines and making sure everything is appropriate and complete. Mr. Nelson continued, stating that the quarterly meetings are a good idea, but only if they are implemented by the facility.
 - **Sen. Barker** answered that in future meetings the workgroup will discuss who is reading the fiscal disclosures and ensuring they are appropriate regarding both timeliness and comprehensiveness.

- **Mr. Ron Herring, *Glebe Resident***; stated that as a result of the recession, the context is different regarding what are the most important CCRC issues. Mr. Herring stated that he is concerned about how entry fees are used because there are no restrictions. Mr. Herring stated that currently, there is no way one can eliminate the risk of the entry fee being used without having direct benefit to the resident. Mr. Herring stated that currently, entry fees can be attached in a bankruptcy settlement, which is what The Glebe (Mr. Herring's residence) did. Mr. Herring asked whether there should be regulations regarding how the entry fees are used. Mr. Herring explained that the current process leaves the resident out of any negotiation and without protections regarding the money they pay into the community. Mr. Herring also stated that another issue is properly implementing any legislation in place currently or in the future. Mr. Herring cautioned the workgroup members that if they produce law, they must make sure that it is enforceable.
 - **Sen. Barker** stated that the workgroup will be explained the procedure of the review process in the future.
 - **Ms. Parsons** stated that while there may be concerns regarding the use of entry fees, no CCRC resident in Virginia has ever been asked to leave their CCRC based on financial concerns.
 - **Mr. Peter T. Straub, *Greenspring Retirement Community***; stated that there are two general ways to deal with the entry costs depending on who assumes the risk. Mr. Straub explained that because the CCRC is established and the residents are entering an established organization, it makes sense that the residents would assume the risk. Mr. Straub stated that if the CCRC would assume the risk, the entry fees could be used to create a trust and pay out to residents' heirs upon death. However, Mr. Straub acknowledged that since most residents will not found their own CCRC the preference is to put the risk on the residents. Given the fact that the systems in place put the risk on the residents, Mr. Straub stated that it would be nearly impossible to switch over the risk to the organization.
- **Sen. Barker** asked the applicable workgroup members to explain the various procedures and regulations set in place for CCRCs and other concerns regarding further regulating CCRCs.
 - **Mr. Straub** stated that is difficult to talk about CCRCs collectively, because they are very diverse communities. Mr. Straub stated that even within a single CCRC, there is much diversity as a result of its various components: independent living, assisted living, and nursing care. Mr. Straub explained that most of the studies regarding CCRCs that have already been conducted focus on the "nursing home concept." Mr. Straub stated that aside from the fact that CCRC members put money into the community; CCRCs are vastly different from nursing homes.
 - **Sen. Barker** replied stating that the studies were mostly on the nursing home component of CCRCs and that there are many more regulations on nursing homes. Sen. Barker stated that this workgroup should focus

- on CCRCs holistically, including all of its components. Sen. Barker explained that the workgroup is unique in its focus on CCRCs.
- **Mr. Al daCosta**, *Virginia Baptist Homes Foundation Resident*; explained his concerns regarding the parameters of the workgroup. Mr. daCosta cautioned the members of the workgroup from thinking in a partisan manner or passing legislation that might result in higher regulation and higher costs to residents. Mr. daCosta explained that many members of CCRCs live on a fixed income and that increasing costs could jeopardize membership. Furthermore, Mr. daCosta stated that individual CCRCs are extremely different from one another and that it would be very difficult to pass any legislation that properly address this diversity.
 - **Sen. Barker** replied that Mr. daCosta raised interesting points regarding the fiscal issues as well as the reality that not all laws will fit the diverse needs of every CCRC.
 - **Mr. Bill Axselle** stated that prior to a CCRC beginning operation, it must follow a specific procedure which includes providing disclosure agreements and various other documents to promote transparency. Mr. Axselle posited that perhaps the issue is not the initial disclosure but the CCRCs ongoing disclosures. Mr. Axselle explained that each year CCRCs are required to file statements and make these statements available by residents' written notice at no cost. Mr. Axselle stated that the statements should discuss changes from the previous year to the coming year and have a general overview of the CCRCs plan. Mr. Axselle stated that the statement must be amended during the year if something changes. According to Mr. Axselle, where a CCRC does not file the correct and current statement, the State Corporation Commission may take legal action with penalties such as fines and injunctions. Mr. Axselle explained that the Commission looks at the financial stability of the CCRC and determines whether the CCRC is doing well. Mr. Axselle continued stating that the Commission has the ability to make appropriate action on behalf of residents. Mr. Axselle also explained that residents are permitted to organize themselves if they choose and that the board of directors must hold meetings at least quarterly where the residents are represented as elected by the residents. Mr. Axselle stated that where these issues include expenditures, residents are entitled to seven days' notice prior to the meeting. Mr. Axselle proposed that the law may be adequate but that the system is not working.
 - **Sen. Barker** stated that he agrees with Mr. Axelle's assessment. Sen. Barker stated that because CCRCs are regulated in a lot of different ways, the workgroup should look at the law and see if the problem lies there or elsewhere. Sen. Barker stated that perhaps the law is sufficient, and the problem lies with how the facilities are being run. Sen. Barker stated that the workgroup should remain collaborative and cooperative and try to determine at what level the solution lies.
 - **Ms. Pia Trigiani**, *Common Interest Communities Board*; stated that CCRCs are currently regulated regarding disclosures, but that the Real Estate Division is responsible for these regulations, not the Common Interest Communities (“CIC”) Board. Ms. Trigiani stated that CIC has minimal oversight regarding

enforcing CCRC operations, because CCRCs' governing bodies have developed a variety of formats. Accordingly, Ms. Trigiani stated that these different formats and their resulting procedures make universally applicable regulations difficult to create. Ms. Trigiani stated that people need to be aware of and fully understand what they are buying when they buy into a CCRC or other CIC.

- **Ms. Daryl Hepler**, *State Corporation Commission, Bureau of Insurance*; stated that the Bureau of Insurance reviews CCRCs' disclosure statements to make sure the applicable code sections are clearly set forth therein. Ms. Hepler stated that the Bureau looks at the financial aspects of the disclosure statements and ensures that they are complete and properly calculated. Ms. Hepler stated that the Bureau's financial regulation over CCRCs is limited to temporary injunctions and restraining orders.
- **Sen. Barker** asked whether any other members of the workgroup had issues. Hearing none, Sen. Barker stated that given his experience working with CCRCs, he knows there are a lot of great aspects of CCRCs in Virginia. Sen. Barker encouraged the workgroup to remain positive so that the workgroup can move towards improving the aspects of CCRCs that are not working. Sen. Barker also stated that the workgroup may decide not to change anything, but that the members must first be educated.

IV. Atlantic Shores Cooperative Retirement Community; role of residents in the Cooperative community and ways management upholds Fiduciary Duties to residents

- **Ms. Alison McKee**, *Kaufman & Canoles Senior Housing and Care Team*; stated that she represents Atlantic Shores Cooperative Retirement Community and that she hopes to provide the workgroup members with a means of comparison between a cooperative and CCRC. Ms. McKee stated that unlike CCRCs, Atlantic Shores is not regulated by the Bureau of Insurance. Ms. McKee stated that Atlantic Shores was developed under an act that is based on the Model Real Estate Cooperative Act, which was enacted largely to accommodate the development of Atlantic Shores. Ms. McKee explained that unlike CCRCs, when a person buys a unit at Atlantic Shores they get a share of stock in the association, a proprietary lease which gives them the right to occupy their unit, and a service agreement.

Ms. McKee explained that the association is governed by a board of directors with five to nine members, and the bylaws require that the majority of the board members are owners. Ms. McKee further stated that the nonresident members, "the independent directors" must have background knowledge of elder housing. Ms. McKee stated that as a result of the specifications, it has been difficult to fill the independent directors' positions. Ms. McKee stated that at Atlantic Shores, the board has public meetings once a month and calls special meeting in between when issues come up. Ms. McKee stated that sometimes there are executive sessions regarding financial hardship or special requests, but that the goal is to be as transparent as possible.

Ms. McKee stated that Atlantic Shores has an active residents' counsel that advises the board of directors. She explained that the counsel's financial committee meetings are well attended. Ms. McKee further stated that the association is required to keep detailed financial records that "shall be made reasonably available to residents and designated agents." Ms. McKee stated that in the late summer, the association must present budgets to the finance committee for its comments. Ms. McKee explained that after the finance committee comments on the budget, it may recommend it to the residents' council or changes may be suggested. Following this, Ms. McKee stated that the residents' council may either change the budget or recommends it to the board. Ms. McKee explained that after the budget is approved by the board, the budget must be presented to the membership as a summary, though the full budget is available to anyone who would like to review it. Ms. McKee stated that where none of the members of the association object, the budget is ratified. Ms. McKee stated that most of the residents of Atlantic Shores are happy with the aforementioned procedure.

- **Sen. Barker** reiterated that Ms. McKee does not represent a CCRC, but a cooperative named Atlantic Shores. Sen. Barker added that understanding cooperatives is important because their governing body and procedure may provide solutions for CCRC problems.
- **Mr. Herring** stated that it would be interesting to see the differences in the laws governing CCRCs and cooperatives and see what about the cooperatives could be implemented for CCRCs.
- **Mr. Nelson** asked Ms. McKee what percentage of the cooperative is owned by developer.
 - **Ms. McKee** stated she is uncertain of the exact number, but estimated that about 20% of the cooperative is still owned by the developer.
- **Mr. Nelson** asked what the difference is between cooperatives and condominium associations.
 - **Ms. McKee** stated that cooperative owners own a fee simple title and a proprietary lease in cooperative ownership, unlike condominium ownership.
- **Mr. Straub** suggested that the workgroup should look at additional forms of common interest communities. Mr. Straub continued, stating that the perhaps some of the other CICs' rules and procedures could be implemented by CCRCs.
 - **Sen. Barker** stated that it is important to remember that there is no ideal model of a CIC and that every model has its own problems.

V. Public Comment

- **Sen. Barker** asked if any of the workgroup members had further comments or questions. Hearing none, Sen. Barker asked for public comment from members of the audience.
- **Ms. Sandy Levin**, *Virginia Association Nonprofit Homes for the Aging*; stated that she does not know whether it is necessary for the workgroup to address all of the issues presented in the meeting, noting that there are many opportunities for residents to discuss their issues with the CCRC boards. Ms. Levin also asked Mr. Rowe what

information about the CCRC's financial decisions he was given that he found to be insufficient. Ms. Levin asked Mr. Rowe and the other resident-members of the workgroup what information they expected to receive from their respective CCRCs that they did not receive.

- **Mr. Rowe** stated that the residents of his CCRC, Cedarfield, only get partial information regarding its operations. Mr. Rowe explained that he along with many of the residents understand how the fees are determined and what the expenses are. However, Mr. Rowe stated, the residents do not seem to be getting the information they ask for regarding other financial issues, such as how the fees are being spent.
- **Sen. Barker** assured Mr. Rowe and Ms. Levin that the workgroup will discuss what CCRCs are required to disclose and what specific information the residents are seeking to obtain.
- **Mr. Meade A. Spotts**, *Virginia United Methodist Homes, Inc.*; provided the workgroup with an example of the budget documents Virginia United Methodist Homes provides its residents. Mr. Spotts explained that the cumbersome documents are provided to residents in order to comply with regulations. Mr. Spotts asked the workgroup members if they had any suggestions on how to improve the current procedure regarding disclosing budget documents.
 - **Mr. Straub** stated that he believes the language in the budget documents must be clearer and more readable.
 - **Mr. Herring** stated that about 80% of his fellow CCRC residents do not understand the disclosure documents. Mr. Herring continued, stating that many of them would require a CPA or attorney to explain the documents to them, but ask these professionals for their assistance. Mr. Herring finished, stating that the budget disclosure documents are very complex, and it would be helpful if the workgroup could help to reduce the disclosures to concise and complete consumer language.
 - **Mr. Spotts** stated that he agrees that there is a need for simplification so that the residents can understand all the information with which they are presented. Mr. Spotts stated that perhaps the Virginia Housing Commission could provide CCRCs with a template for budget summaries using simpler language so that the communities can comply with disclosure laws and regulations without having to provide large volumes of documents.

VI. Adjourn

- **Sen. Barker** stated that the next meeting will be in August or September and that he expects to have one or two more meetings. Sen. Barker assured the workgroup and audience that he will work with staff to figure out what information they all need to know about CCRCs to best craft a solution. Sen. Barker asked if anyone else had comments or questions.
- Hearing none, Sen. Barker adjourned the meeting at 11:15 A.M.

SUMMARY
Virginia Housing Commission
Continuing Care Retirement Communities Sub-Workgroup
Senate Room A, General Assembly Building
September 5, 2012
1:30 PM

- **Senator George Barker**, *chair* called the meeting to order at 1:30 PM
- In addition to the invited speakers the following workgroup members were in attendance:
- **Workgroup members:** Senator George L. Barker, Chair; Senator Mamie Locke, VHC Vice Chair; Bill Axelle, *Erickson Retirement Community*; Mary Lynne Bailey, *Virginia Health Care Association*; Al daCosta, *Virginia Baptist Homes Foundation Resident*; Chip Dicks, *Realtor Association*; Daryl Hepler, *State Corporation Commission, Bureau of Insurance*; Ron Herring, *Glebe Resident*; George High, *Westminster Resident*; H. Donald Nelson, *Windsor Meade Resident*; Dana Parsons, *Virginia Association Nonprofit Homes for the Aging*; Jim Rothrock, *Dept. of Rehabilitation Services*; A. Prescott Rowe, *Cedarfield Resident*; Peter T. Straub, *Greenspring Retirement Community*; Pia Trigiani, *Common Interest Communities Management Fund*; and Amy Marschean, *Department of Rehabilitation Services*
- **Staff:** Elizabeth Palen, *VHC Director*

I. Welcome and Call to Order

- **Senator George Barker**, *Chair* called the meeting to order at 1:30PM
- **Sen. Barker:** This is the second meeting of the retirement community sub work group of the Housing Commission. We had a meeting in June, where we got issues out on the table and we discussed a number of things; and we decided we would have a second meeting today; we will probably have a third meeting, probably sometime in October. The full Housing Commission is meeting in the middle of November and we want to present something to them, at that point. That is the timeframe that we are looking at in terms of coming up with suggestions and recommendations.
 - At the last meeting, there were two major themes; (1) one deals with information available in terms of the financial side of things and making sure that assets, are protected. The SCC will be presenting on how finances are looked at and what types of information is disclosed and reported at this particular time.

- And then the second issue was the major issue that we dealt with was related to (2) governance issues, and in particular to the role of residents in governance matters as it relates to the CCRC. We will have a presentation today from a couple of members of the sub-work group on their perspectives as residents and how it relates to these issues. Mr. Herring and Mr. High will make presentations. We had hoped to have someone from the CCRC industry would add their perspective, but we were unable to have someone here at this particular meeting, and so we will hear them in October.

II. SCC Oversight

- **Mr. H Donald Nelson, Windsor Meade Resident:** I would welcome the opportunity to just review. At the last meeting I gave a brief summary of the issues for consideration for Windsor Meade and I think you have articulated those two; governance and finances. Our number one issue is still the same, no positive action has been taken to have a resident at Windsor Meade on the Board of Directors. A letter has been sent and it is in your folders today, it is to Ms. Palen from one of our residents. Also at the last meeting, a big white binder was handed out. It was a substantial binder. I hope you all took it home and read it cover to cover. It suggested that the communications between management and the residents at Windsor Meade is excellent. That is not a resident's perspective. Filing to the State of Virginia, for the fiscal year of May 31, 2011, were including in that activity and later this month, in September, the other filing for the last fiscal year of May 31, 2012, will be submitted to the State. And I think we are going to be hearing from some of those people today.
 - The residents of Windsor Meade will have access to this past financial information, in October. Updated preliminary financial information's, in a very summary form, for the fiscal year of May 31, 2012, have been received by the finance committee of Windsor Meade Resident Association. Just quickly in summary, our operating expenses exceed our operating revenue, our liabilities exceed our assets, and our cash is low. No explanation on how the bonds will be repaid is shown or known. Cumulative losses from operations and we started up in a tough time 2007 until now, that is \$36 million. The complete filing will be made to the State by 9:30 and I think we are going to hear today who looks at those and analysis those. That's great!
 - A letter in late August to Senator Barker, Senator Locke and Ms. Palen with the subject Financial Structure that is also in our folder today, I think that will give you some insight to both our interest and our concerns. This letter outlined the documentation and action and legislation Windsor

Meade residents and probably residents of other CCRCs in Virginia want and need to be protected. I personally encourage the committee to strive to take legislative action to protect independent living as they have done in assisted living and nursing care residents in the State of Virginia and I have this for your file.

- **Senator Barker:** Thank you, any other comments or questions at this time? All right, then let's proceed to the presentation from the SCC and Ed Buyalos will be presenting, first.
- **Mr. Ed Buyalos, Chief Financial Auditor:** REFER TO THE SCC/BUREAU OF INSURANCE HANDOUT - I am Ed Buyalos with the Bureau of Insurance it is a pleasure to be here today. I am the Chief Financial Auditor at the Bureau of Insurance and my responsibilities include the licensing and registration of the companies that operate in Virginia. In addition, to monitoring those companies once they are in and all the financial analysis that is preform on those companies. I am happy to say I have with me Toni Janoski and Daryl Hepler who have the responsibility for the day to day oversight of CCRCs that operate in Virginia, between the two of them they have 29 years of experience working at the CCRCs. So, hopefully, between the three of us we will be able to answer your questions.
 - The SCC Bureau of Insurance has regulated CCRCs in Virginia since July 1, 1985. The statute that applies for regulatory over site for CCRCs by the Bureau of Insurance is Chapter 49 of Title 38.2 and since Chapter 49 was adopted in 1985, there have been very few changes to Chapter 49. I guess, the most substantial coming last year with a community based continuing care as the section that allows for services to be provided for individuals in the individuals own residents. Over sight in Virginia is primarily that of insuring proper disclosures by the CCRC, as well as monitoring the CCRCs financial condition.
 - There are currently 55 CCRCs registered in Virginia and as of today, all 55 are in good standing. There are no restrictions on any of our CCRCs currently.
 - Reviewing top of page 2 in the handout titled Regulation of CCRCs in Other States.
 - Reviewing chart at the bottom of page 2 titled Requirements in 38 States and the District of Columbia that Regulate CCRCs, which discusses the documents that are required to be disclosed in 38 states, as well as, in Virginia, with the primary document being the disclosure statement.
 - Virginia requires the disclosure statement, financial report, escrow of fees, resident's right to organize in an association, and resident's right to meet with management. It's a brief over view of what we have seen in various states that regulate CCRCs.

- **Mr. Toni Janoski, Senior Insurance Financial Analyst:** My name is Toni Janoski. And I am with the Virginia Bureau of Insurance. I have been reviewing CCRCs for approximately 12 years. I am going to go through, hopefully briefly, the list of the disclosure statement requirements, the resident's contract requirements. Chapter 49 of the Code of Virginia states what filings are required by the CCRC to be made to the SCC. The disclosure statement is to be prepared by the provider for the use and consideration of the residents and the perspective residents of the continuing care facility. I am going to begin with an overview of the types of filings that are made to the SCC.
 - Continuing with the SCC handout on top of page 3 titled: CCRC Filing Requirements in Virginia. It explains each filing requirement: i) Initial Registration; ii) Annual Disclosure Statement Filing; and iii) Amended Filings.
 - Proceeding to the bottom of page 3 titled: Composition of a Disclosure Statement. The body of the Disclosure Statement includes information required in 38.2-4902 in the Code of Virginia. A composition of a disclosure statement in Section A. Narrative requires: Information on the Continuing Care Provider; Ownership of property and buildings; Location and description of property; Affiliation with religious, charitable, or nonprofit organizations and information on tax exemptions; Description of services provided under continuing care contracts; Fees required of residents; Reserve funding; Admission of residents; Access to facility by nonresidents; and Information required for facilities under construction.
 - Composition of a Disclosure Statement continues on the top of page 4. Section B. Resident's Contract: 38.3-4905 requires the following items to be included in each continuing care contract: Continuing care provided to each resident; Details of values of property transferred by or for residents; Specific details of services to be provided to residents; Description of health and financial condition that may require resident to relinquish space; Description of health and financial condition required to continue as resident; Current fees if resident marries and terms concerning spouse's entry into facility; Description of good cause provision for cancellation of contract; Details of refund provisions; Terms for contract cancellation by death; Terms for a least 30 days advance notice before any changes in fees or services; Residents rights to rescind the contract; and the residents rights prior to occupying the facility.
 - Also including in the disclosure is the: Section C. Audited Financial Statements and Section D. Current Pro forma Income Statement. Daryl Hepler will go over the Financial Monitoring on the bottom of page 4.

- **Bill Axelle, *Erickson Retirement Community***: The disclosure statement to which you made reference cover the initial disclosure statement and also does it cover the annual update of that disclosure statement?
 - So every year, four months after the fiscal year, that is also updated and provided to you and by law to be provided to the residents.
 - **Mr. Janoski**: Exactly, it has to be provided by written notice to the resident at the same time.
- **Mr. Axelle**: And each of those documents dealing with the financial aspect are in a fashion that the accounting profession uses and has the information plus, has an opinion letter from the CPA?
 - **Mr. Janoski**: Yes, that is required to be with the filing.
- **Mr. Axelle**: That's part of filing the disclosure and what's made available to residents.
 - **Mr. Janoski**: Yes, it's in the initial filing, the annual filing it's open for public viewing in our office for us and for anyone else, and then all the residents are required to have access to this information.
- **Sen. Barker**: Just a quick follow up on one of the questions that Mr. Axelle asked. When information on the annual audit is received by the facility often there's a management letter or other types of things are those part of what is shared with the residents or is it just sort of a cover letter type of thing or all the documents?
 - **Mr. Janoski**: I have not seen where the management letter is filed with the disclosure statement. It is not a requirement.
- **Daryl Hepler, *Virginia Bureau of Insurance***: I have been working with the SCC for 22 years. Seventeen years I have been working on CCRCs among other company types, so that is why Toni and I have a total of like 29 years together. I am going to be talking about Financial Monitoring which is on the bottom of page. The following items were discussed: A. SCC Authority; B. Orders and Penalties; and C. Examples.
 - Last matter is regarding Resident's Rights on the top of page 5, which discusses i) Residents have a right of self-organization, ii) Copies of submissions, iii) Quarterly meetings, iv) Free discussion of issues relating to the facility, and v) Change in chief executive officer or management firm. That concludes our presentation any questions?
- **Bill Axelle**: Am I correct in looking at the document that there are 55 CCRCs registered, in Virginia, and that started in 1985.
 - **Ms. Hepler**: Yes.
- **Bill Axelle**: Is it fair to conclude that there have been only for those 55 entities since 1985 there have only been the two instances where the SCC took the action that was described in your presentation.

- Daryl Hepler: They are the only two known cases of bankruptcy. The second case we did not issue an order.
- **Mr. Axselle:** Do you know of any instance in which a resident has had their contract rescinded because of financial instability of the CCRC?
 - **Ms. Hepler:** No, not in Virginia.
- **Sen. Barker:** Just to follow up on a couple of questions can you explain the rationale for the suspension of entrance fees in one situation where you did have the consent decree, and the other where you were recommending it, but did not have a consent decree, as I understand it. It seems that to some extent that that would potentially undermine the fiscal situation at the facility and sort of the rationale of how that was handled.
 - **Mr. Buyalos:** I think in the situation where the Virginia Domestic CCRC we took action before that facility was placed into bankruptcy, so in order to protect new residents from coming on board we did take action. In the second case it was a Maryland corporation and that was operating here. They were placed into bankruptcy and the bankruptcy court pretty much stopped them from taking new residents and we did get the company to consent here in Virginia to not write any new contracts, but we did not do that by order, because the bankruptcy court had already done that.
- **Sen. Barker:** And did not collecting the entrance fees, in either of those two situations, exasperate the problem in any way or how do you prevent a situation that is problematic in the first place, and the bankruptcy from getting worse?
 - **Mr. Buyalos:** No, we don't take that decision lightly because typically when a CCRC is having problems it's a problem with occupancy and really we are trying to protect the new residents and I know the current residents certainly are put in a tough position because they are working as hard as they can to increase occupancy and along comes an order that doesn't allow them to take any residents. Now there are certain options they have there where they can continue to allow people to come in on a monthly basis and not collect the entrance fee up front to try to meet fixed cost.
 - Our regulation of CCRCs is certainly when we compare it to the regulation insurance companies it certainly regulation light. I mean with the insurance companies we have lots of different means we can have them stop writing risky types of business or sell certain types of risky assets, we can give them 30 to 90 days to raise capital, issue a [inaudible] order, we can issue a suspension order that stops them from writing all together. If things get bad enough we actually put the company into receivership, we take control of the company we run the company our self. We look for a buyer to come in and buy the company and if all else fails

we can sell off pieces of the insurance company or we could liquidate the insurance company. So with insurance companies we have lots of options, with CCRCs in the past our option has been to protect those new residents who come in with the big entrance fees from joining the CCRC.

- **Sen. Barker:** In the two situations that you have had, that you described, looking back on those is there anything that could have been done to prevent those situations from getting to the point that they did is there anything in terms of additional tools or additional information that would have made a difference?
 - **Mr. Buyalos:** We always look back at that and especially the insurance companies you can look back and say junk bonds with the insurance companies we pass laws to eliminate junk bonds and all kind of...you know we look back at the Virginia CCRC there, if my recollection is correct, it was a problem where there were construction delays and the construction days shorten the period from the time residents moved in and the first interest of principals were due and combined with the economy and the housing market, looking back at it...I just you know, personally, I don't see how a feasibility study or anything like that would have foreseen construction delays or the economy or the housing crash. Also, when I read back about the big national company that went into bankruptcy, it too, it had a certain debt load and with the economy and housing pretty much caused its problems. Personally, I don't see what could have been done different.
- **Ron Herring, The Glebe:** Is there any relationship that you are aware of between the debt load and bankruptcy, notwithstanding the issues of a recession or a delay in construction, whatever those variables may be, but is there any relationship between a heavy debt load where a debt load could be too heavy that can't cover the initiation of the facility? In other words, does it affect the outcome, for example, in bankruptcy or in financial stress?
 - **Ed Buyalos:** It's my understanding, that the lenders put a lot of time and effort in reviewing feasibility studies and that type before they lend the funds so kind of from just looking through this GAO report it appears that the lenders put more restrictions on the CCRCs than the regulators due. They have higher reserve requirements and restriction in the loan documents than most regulators have; so the lenders seem to be the parties putting the biggest restrictions on the CCRCs. And even the local one here, it did have a sinking fund for its debt where the sinking fund they had to add each year to be able to retire the debt as it came due. So they did have provisions to reserve for the debt and it didn't work.
- **Peter Straub, Greenspring Retirement Community:** You indicated that the insurance industry is much more highly regulated; do you have an opinion as to

whether or not people who are insured are better protected by all of the regulations than people who live in CCRCs with fewer regulations?

- **Mr. Buyalos:** I will say that I think with the insurance industry it has had so many problems there has been a lot of changes and there's just so many tools for us to use, overall, there appears to have been much fewer problems with CCRCs. This GAO report I would read you one of their conclusions in this study that they did, they did say, finally, all those state laws differ significantly, in breadth and in detail, it is not clear that CCRC resident's in states with less stringent requirements are necessarily at greater risk than residents in heavily regulated states.
- **Peter Straub:** So one of the major differences, of course, would be that there's a bigger group of residents than there is individual insurance. If there is an insurance problem it might affect fewer people than a CCRC problem affecting all of its residents.
 - **Mr. Buyalos:** Some of the insurance companies are fairly large. It does affect even when Fidelity Bankers here in town failed, in 1981, it had two hundred thousand contract holders. I think I took calls from about half of them.
- **Ms. Jane Woods, Virginia Association of Area Agencies on Aging:** If you were going to wave a magic wand that would give you tools that perhaps you have seen in other states or you read about in the GAO report that you don't have today; what would be your top three?
 - **Mr. Buyalos:** That's a tough question. Like I said we have had these two cases and it has been a really unusual time, in fact, I don't see how the times could have been any worse for CCRCs things affecting there occupancy rates, but I am just a little leery to say what they might be. I mean I do acknowledge that we do regulate CCRCs at a less degree than we do insurers. We don't license CCRCs we actually register them, and the process is not as stringent as a new insurance company is coming into the state, as far as what they go through. I'm a little hesitant to make recommendations on that.
- **Mr. Herring:** If entrance fees were escrowed in a way that made allowance for in contacts were life care was involved for the provisions of health care and a payment of those health care needs going forward...
 - **Mr. Buyalos:** That's a really good question and we could certainly look into that for you and get back. So you are talking about some type of reserve that would have to be set up. I don't know all the ramifications of a CCRC having to do that and we could certainly look into that for you.
- **Mr. Herring:** Let me do a quick follow up question because and I will say this on my remarks a little bit later, that it is my opinion that we apparently have a lot of

I'm going to call rederrick about some of the problems about CCRCs. That leads me to the conclusion that what we need is some more objective independent research on some critical questions. For example, one of the things that when I got involved in this, one of the things that I look for was: what are the signals? How do we know in advance of financial stress or bankruptcy or both...How would we know what are the signals and what are the benchmarks that would tell us, that here is a danger point? And my personal assessment is that we don't have enough good research that answers some critical questions in this industry. Would you agree or disagree or comment further on that?

- **Ed Buyalos:** I think the primary tool right now is that audited financial statement. I mean even the notes to financial it's a fairly good document and it does list in there when debt is coming due, the interest payments, if they are in compliance with loan covenants. So our primary tool is that audit report we get and I would think for residents that would have to be what they would go to try to keep abreast of the financial condition of their facility. I do know that some lenders even require quarterly financial filing, more so than even the states do.
- **Mr. Nelson:** Could you share with us any experience that you had in the return of entrance fees to states or to people who depart a CCRC, recognizing that there are really two varieties of CCRCs today one is life care, which if I can say kind of the old and good, and the new, which is the fee for service which is a little bit different? But what experience do you have either directly or through an ombudsman in regards to our concerns?
 - **Mr. Buyalos:** We are certainly aware that there have been CCRCs operating in Virginia that the returns of resident's deposits have been delayed because new residents have not moved in. So I think there have been some expectations when residents leave that there would be a much quicker return to the refunds, and I think primarily because of the housing market there certainly have been some delays there.
- **Senator Barker:** Let me just jump in on one quick thing and then back to you. In those situations, has it been a situation where the contract said that they would get their money back when someone else made the entrance fees so it wasn't that there was a violation of the contract it was that there was a delay in filling the unit?
 - **Mr. Nelson:** Yes, the real estate market, I think, has affected that. I guess a couple of clues that I've sensed from talking with other people is that if there is a bond issue or a financing type of issue and you see that the covenants are being changed generally, not pulled up, but pushed out, you probably have a good enough auditing clue.

- **Sen. Barker:** Let me follow up on a couple of questions that were asked. One was on a question of “the reserves” that Mr. Herring had raised directly related to life care communities that sort of have a contractual obligation to provide long term care services and other health care services etcetera. I note that on the chart that you had 23 states have that. Do you have any ideas as to how they determine what they do there, or is this, just sort of all over the map?
 - **Mr. Buyalos:** Different states do it different ways some reserves are I mentioned a certain amount of principal on interest payments expressed in a certain number of months, the way I interpret it is, like a year in advance you would have to have enough reserves set aside to satisfy the principal on interest payments next year. Most of these things are six months to a year from what I see some reserves are calculated as a percentage of deposits received from residents, some reserves are measured by cost of operation. I see that as being... you have to have enough reserve set aside to continue to operate the facility for six months. Some reserves are measured by entrance fee refund obligations. So they are all over the board.
- **Sen. Barker:** One of the other things that you mentioned was the [inaudible] studies and you talked about New York have a requirement every three years to have that type of analysis done, again, do you have any idea whether that has value or whether that is something that would produce some benefit?
 - **Ed Buyalos:** There is certainly cost that’s associated with this...
- **Sen. Barker:** That is why I didn’t want to pinch you with this.
 - **Mr. Buyalos:** Let’s see, I would think, some lenders even require that to be done. I know New York requires it but it wouldn’t surprise me at all that some lenders are already requiring it. Some states only require those documents if they are already prepared. So they don’t make the CCRCs to go out and get the document but they do say if you have the document it must be filed with the department.
- **A. Prescott Rowe, Cedarfield Resident:** So far your presentation has quite rightfully been directed more toward the provider itself. What happens, in the case, at the Corporation Commission should a single resident or a group of residents come forward with either concerns, complaints, whatever; do you have the ability to handle those or do you handle them?
 - **Mr. Buyalos:** We have certainly had instances like that in the pasted. We have met with the residents, and with the residents groups. And then we have met with the companies, and we have tried to somewhat act as a mediator depending on the issues, but I don’t think we could get involved between contract disputes, which is what a lot of them come down to, but

we certainly have met with both sides on different areas. But if it is some type of contract dispute I think we are prohibited from ...

- **Senator Barker:** From intervening, from getting involved in those situations then. You are prohibited from being able to get involved with those situations.
- **Mr. Buyalos:** Right.
- **Sen. Barker:** Elizabeth could you talk about with the Common Interest Communities and what's been done in the last couple of years with the ombudsman and those types of things. For the members of the sub work group here, there is a sort of a precedence on how its been handle through the Housing Commission with some other situations that I think people might want to be aware of.
 - **Elizabeth Palen, VHC Director:** The CIC Board was established through DPOR , approximately four years ago. The Board has an ombudsperson, who is an attorney, and she works to resolve complaints from residents of the CIC and managers of CICs. She may determine if the complaint deals with whether or not there has been a violation of the agreement that has been signed between the residents of that CCRC and the management association. If the issue involves something that is judge determinative, for example: if water poured through one unit and flooded the unit beneath it, the ombudsperson cannot determine who is at fault for that call. But the person can say my unit was flooded, and I went to the Board, and the Board refused to take any action. That is where the ombudsperson can step in and say well, according to your agreement, the management association is supposed to call a meeting of the Board; and if you disagree with it, you are supposed to have a series of things you can do to remedy the situation.
- **Senator Barker:** And that is what has been tried just in the last few years in the CIC so we do have a least a [inaudible] for having sort of done the type of thing that you were asking about there of having someone who's not dealing with financial side but sort of dealing with the relationship side of the two parties in those situations. Thank you, Elizabeth.
 - **Elizabeth Palen:** The CIC also has a Board at DPOR not the board of each CIC, but a board like the Real Estate Board that oversees all the different CICs and that Board confine each of the individual organizations if they are not for filling. They do the job that the SCC is doing; but they have a little bit more authority to go in and take disciplinary action against the organizations.
- **Senator Barker:** One other question I had, at our last meeting there was a little bit of discussion that often there is financial information that the residents get from the audit, etcetera, and it's done according to the county principals etcetera,

but that doesn't mean they can understand what all those figures are. Do you have any thought on how we might be able to provide something more user friendly to the residents?

- **Ed Buyalos:** You mean, require some type of standard format.
- **Sen. Barker:** Yes, I am leaving an open end to exactly what might work. The issue is that residents are receiving the information that is required to be provided, the financial information. It is done according to general county accounting principles, it is not that there is any problem with the information, it's just that someone who's not familiar with reading those reports and preparing them or whatever, in many instances, is going to say there are a lot of numbers here but they don't necessarily mean anything to me. How do I know my interests are being protected by reviewing this type of information and how might we make it something that is sought of more user friendly?
 - **Mr. Buyalos:** We can certainly think about that. I have been fairly impressed by some of the residents I met with down at the Bureau's ECPAs, retire CPAs that come in and they are quite knowledgeable when they come in with the reports but I can see were you are going, someway that would make it more user friendly the financials.
- **Sen. Barker:** The information is there. The information is done the way it's supposed to be done, it's provided to the residents and it's not that the facilities are trying to hide anything. It's just that it is not easy necessarily to interrupt it in some instances.
 - **Mr. Rowe:** It is further compounded in organizations that are consolidated into one entity. In the case of Cedarfield we can't determine by the information that we receive all of which we assure is legal. That is not the question that has been raised but exactly how are these fees determined; and what is included in the cost of care? And I am not an accountant. So my word is that it is all jumbled up there. And so you stand before 300 people in a meeting, and throw in all these numbers, to people who are 75, 80, and 90 years old and you expect them to understand; how come their fees went up, when there is just no explanation.
 - That is the issue of transparency and it is twofold. If you are a single organization the disclosure statement is much clearer. If you are a multiple organization, it is very hard to determine within the organization, which entity is doing what, and naturally you would be interested in your own. So that is an issue we feel that we have.
- **Mr. Herring:** Let me put a real face on that question of a lot of complex information in a single document like a disclosure statement. So if we look at that disclosure statement and we say to the average person who is going to enter a CCRC, and in particular the life care contract part, everything else is more simple

or a little bit easier to work with, but the complexities of a life care contract are extremely unique because the implications of a life care contract are daunting. When you think about it, so what we have are the daunting implications of a very complex document. Now, to pick up on what has been commented on; I talked with eight colleagues after they had been in their residency somewhere between a year and three years, eight of them. And the question I asked them was, retrospectively, do you believe that you really understood what was in that contract in that disclosure statement? And the answer was...No! And that personally defines one of the challenges.

- My own take on this in conversations with administration has been maybe transparency isn't so much the answer, if one is committed to transparency; I am not so sure that transparency is the answer, and I want to suggest that maybe the answer is communication. How do you take complex information and break it down in ways that the average person who comes into a life care CCRC arrangement can understand what you are telling them? Most of the people I know in our CCRC are pretty bright. They are capable of understanding, but once you start moving them into the complexities of the kinds of documents and the implications we are talking about, it's not working.
- **Sen. Barker:** Well, we maybe follow up on these types of things. I think this is very good. Thank you very much.
- **Mr. Straub:** Just as a follow up to his question, you don't get involved in the management or decisions of management with the various CCRCs? If it isn't on the papers that you get in your forms, you are not too involved with it, are you?
 - **Ed Buyalos:** That's correct. Certain information has to be filed with us and we make sure that information comes in and we make sure that the information the resident's get is there; but we don't get involved with at all with the day-to-day management of the CCRC.
- **Mr. Straub:** And an issue that is apparently not wide spread within Virginia but is a topic of great discussion with VACCRA, you would not get involved with whether or not residents should be on their Board of Directors?
 - **Mr. Buyalos:** No, we won't get involved with that.
 - **Mr. Straub:** Then who would?
- **Sen. Barker:** If I might answer that the legislators is who would be involved with that type of thing. There is not power given to the SCC to be able to make those decisions. They are not in a position to decide one way or another.
- **Mr. Nelson:** My colleague down the way talked about the complexity for a life care. We are not in a life care for Windsor Meade we are a fee for service. I would tell you the same kind of store occurs with people who have just signed the contract to people who have been there for five or six years. You got to be not

only a CPA but done consolidate statements and be willing to take time to go from about 20 different pages to get even the definition of one of the categories there either call the reserve or even a liability. So, we have seen these black and yellow books they call them the *Financial Analysis of CCRCs for Dummies*, we need some help there; and if you could be of any help to us, some of us can help you or help some of the communication problems. You are quite right it is communication and understanding.

- **Sen. Barker:** Let me pick up on the last comment that Mr. Rowe had made a little bit ago talking about the financial reports for corporations that have multiple facilities and how that translates into the individual facility. There are a lot of hospitals are the Commonwealth that have multiple hospitals but yet they file individual statements on each of their hospitals in terms of their financial information with state agencies etcetera. What would be the implications of requiring at least some basic information on individual facilities to be file by corporations that have multiple facilities?
- **Mr. Janoski:** We do have a lot of the CCRCs that are in consolidated financial statement format, but then supplemental information the CPAs provide a break out of all the facilities in the back. I believe the issue with the Hermitage and Cedarfields they do not have that in their CPAs report. That is something their company can pay to have done. It is a supplemental section to their CPA report but a lot of our...
- **Sen. Barker:** So that's something that many of the CCRC companies do provide but not necessarily all the facilities.
- **Mr. Janoski:** And I will say this for example because its public knowledge; and I'm the analyst for Virginia Baptist Homes all of their facilities in the back of their CPA report are laid out separately so you could see each Lakewood Manor, Newport News all of those separately and then consolidating at the end.

III. VACCRA Recommendations

- **Mr. Ron Herring:** Affectionately or dis affectionately, depending upon your position, one of the greatest transformations on integrating a system that I have ever seen and it is working. Now, I find myself on the other end of this and it is quite different but these two ends of the spectrum that I have been affiliated with as an advocate had one thing in common they had vulnerability of the population group. They have that in common and I think if one tries to sift through all of the rederrick and all of the needs of all of the rest of that. The bottom line from my perspective is the need to do the very best we can to protect that vulnerability. These are vulnerable populations and that seems in my view and I have spent time on both ends of that spectrum, 55year's worth.

- My comments are going to be directed primarily at what I'm going to call sort of a national perspective because as I indicated, I am involved in a financial solemnize exercise by the national association with several others. It's not complete, yet, but we hope that it will be found useful in activity with the General Assembly not only in Virginia, but in other places.
 - The last comments I want to make about my comments are that these comments are related to not necessarily the facility that I live in but they are made in that context of some of the national issues that we are aware of, some of the similarities, and some of the differences that are occurring throughout the country.
 - Refer to his *SJR 40 Study Committee Remarks* *handout*.
- **Mr. Straub:** I might just point out that one more example of the wide disparity of the rules and governing rules of various CCRCs. Greenspring, of course, does repay the deposit from the sale of the unit to the successor, but there is a three month requirement, and if it is not done in three months then Greenspring will make that payment. So it is kind of a combination of relying on a new purchaser but with a timeframe.
 - Mr. Nelson: Let me just say, thank you, and I second your motion of what you have presented of what our need is and what our responsibility if within CCRCs, because when you think about it the residents are the only source of revenue.
 - Sen. Barker: Alright, Mr. High. Mr. High has been a long time leader and his background now is legislation.
- **Mr. George High, Westminster Resident:** I think Ron pretty much said it all. What I would say is that we see example, after example, after example of it. When you grew up in the 30s, and the 40s, not to mention in the 20s, if you are that old, your fear of old folk's homes is enormous. It was a place where people got out and sat and nodded as people came in, and maybe they woke up once in a while and maybe they didn't. There is a carry over these days with CCRCs as if everybody living there is close to being nodding and half a sleep out front of where ever they are living and that is not the case anymore.
 - There are lots of younger people in their last 60s, 70s and even in their 80s who are alert, who had very responsible positions in government, in the private industry, and just plan working, before they retired, who feel that they invested their money in these place. The CCRCs do what they do because of the money that we provide, as was just said, and they want to know what is going on. All too frequently things go on in the upper boardroom that don't get out to the residents, and we suddenly are

surprised and it maybe something rather minor and sometimes it's something that is more significant than that.

- In the 1992 Department of Aging study, there is recommendation number seven urging for the creation of a state level CCRC committee to be studied. And that has been sort of sitting there now, for ten years; and it was more or less reiterated in the GAO study of 1993, all trying to deal with communication, transparency, and participation. We are not looking to give management a hard time. We are simply trying to participate with them in the management of the operation and we provide just that one person on the Board perhaps, we are trying to provide the input of a person who actually lives there and experiences what is going on.
- We in NaCCRA have a very positive relationship with the leading age, the national organization for management of CCRCs we meet once a year alongside their meeting where ever it may be. So we got along just fine with them. I am afraid that we are disappointed that our relationship with VANHA is not as constructive as they are among the strong opponents of having us have any kind of representation at all on these boards, and we are disappointed because we really want to be constructive, we want to participate and we want to be helpful.
- **Mr. Rowe:** Being one of the younger one at 75 years old, I still have my mind. I will certainly support everything you just said and I think it is important. It is a new era, this is past the time when you didn't question to ask the doctor for a second opinion, and we do have rights; and we should be able to assert those rights. And the Commonwealth of Virginia should protect us of those rights and that is what I hope we can seek.
- **Mr. Herring:** One other comment, the consensus among a number of us who are working on the financial soundness issues is that the state of Florida has the best model for monitoring and intervening in financial stressed organizations. There are currently by some sources 30 CCRCs across the country that are in financial stress. Leading age has recently appointed a representative who can on call go to a CCRC and particularly its residents counsel at their request and help them begin to understand if they have issues that may lead to financial stress and or bankruptcy. That's now still going on and Florida seems to have the consensus of the [inaudible].
- **Sen. Barker:** Ed can you come back up here for just one second... when you were presenting and the rest of your staff there, one of the things that you talked about has a significant effect on the financial health facilities is the occupancy facilities. What type of information do you get on occupancy facilities? What types of perspective do you have for what a good range is for occupancy rates within the facilities and when it drops below a level do they start having any more

risk or exposure to financial difficulty and do you have any thoughts in terms of how we may address that particular issue?

- **Mr. Janoski:** We don't currently receive occupancy information. It is not in the requirement of the Code. Some of the facilities providers include that information in their disclosure statement, but it is not a requirement.
- **Sen. Barker:** Do you have any census of sort of what levels of occupancy are healthy and when there is a risk that would be incurred?
 - **Mr. Buyalos:** I have a general sense from some that have had issues above 90 is certainly the comfortable range and down in the 70 percent you are going to have issues.
 - **Mr. Nelson:** The Windsor Meade model at least the [inaudible] studies were 95 percent and our management continually tells us when we get to 95 percent we will be able to provide what we told you we would. I guess the second comment I would share with you is that our apartments are over 90 percent, our villas, our free standing homes, are at 70 percent, so we average out at 80, and the gap between our revenue and our operating expenses is 39 percent. Yeah, if it is 95 percent with the kind of economy we have had in the past few years, you can't do it below 95 percent.
- **Sen. Barker:** You talked earlier about the two instances where you had bankruptcy issues there was a third one before 1985, before the law was passed, in Virginia. So it would have been prior to SCCs involvement in it. There was a life care community in Northern Virginia that got approval to build a second one and they had one in Alexandria and they were developing one in Virginia at Fairfax and, basically, had fiscal problems, financial problems during the end of the construction period and the construction company took over operation of the facility and Jane being from Fairfax City she is well aware of it. It is just outside the line.
 - **Mr. Woods:** Yeah, but certainly I think that drove very many of the particulars within the law in 1985.
- **Sen. Barker:** Well, we did then have that issue and then actually the original facility in Alexandria than later got taken over by another hospital corporation in Northern Virginia, but there was at least one other that sort of led to some of the creations of what happened there in 1985.

IV. Public Comment

- **Sam Derieux, Residents' Council of Cedarfield:** I am a resident of Cedarfield. I am chairman of their Finance Committee and apparently a perpetual job for a CPA. For the quality of life in a continuing care community we need physical comfort and we need peace of mind. Physical comfort is based on the lodging, the

food, health care. Physical comfort is based on the confidence that the residents have in its community, in its management and its govern board.

- So the latter is what I want to talk to you about. At Cedarfield we are in a unique position. We are one of six facilities in the parent corporation of Virginia United Methodist Homes of UNH. There is a seventh one which is Windsor Meade but it is separately incorporated. There are three points I would like to make. One is that in the not-for-profit organizations we the residents are the stakeholders and transparency is essential for the confidence that we could have in the facility and in its management and its board. I want to talk a little bit about resident fees and the ability to increase those fees, and thirdly, the need for direct interaction between the residents and the boards.
- Many of these things have been mentioned, here, but at Cederfield we do have the quarterly meetings as required. We get quarterly financial information. We get a balance sheet of the corporations of the United Methodist Homes and we get its operations compared to budget. We get Cedarfield's operation compared to budget.
- That is good information and we appreciate getting it but it just is not enough to satisfy our need. For example, we get no information about the disposition of the funds that are generated at Cedarfield whether it is used somewhere else in the corporate structure or not. We have been told "Cedarfield's fees are not conditioned on the needs of any other facility. We also know that prospective residents are being told that their fees will be based on costs at the community that is the term that they had used at Cedarfield. So anyway, I want to talk a little bit about being a stakeholder. At Cedarfield the entrance fees are range from \$145,000 to 512,000 for the first resident. Second person 66,000; monthly fees are \$2,327 to \$5,182 plus \$1,400 for a second resident.
- So those funds are generated and we believe that we should be entitled to know the disposition of those funds. The annual disclosure statement that has been mentioned earlier has audited financial statement it's a complete set: balance sheet, income statement, and cash flows. We never get a balance sheet of Cedarfield we have to ask for it. As a matter of fact, one time we specifically asked, what is the book value of the property plant equipment at Cedarfield? The answer: we don't give out that information. I would have thought that management and the board would want us to know how much is invested in Cedarfield but they simply will not do that
- The first question that I ever asked of management was a simple one: in the budget how do you determine the amount by which revenue should exceed expenses? I asked that seven years ago. I have not received an

answer. Section 38.2-4910 as Ms. Hepler mentioned, does call for free discussions and it says discussions of the facility not the overall corporation facility, our facility at Cedarfield. It says that they may include income, expenditures, and financial matters as they apply to the facility and other things that can be included. You've used the word it should include things that's our interpretation of the word. These things should be included in our discussions when we have these quarterly meetings. VMH and I think others have taken the position that it is optional, if it is optional on the part of the provider than those words are of no benefit what so ever to the residents. So one recommendation of ours is that either a regulation or legislation it should be made clear that option of including those subjects should be of the resident's option not the provider's option.

- Furthermore, the financial matter if we get to discussing those and they say, yes, we will do that, then, how far do we have to go to get a full free discussion of financial matters. It should include the facility assets and liabilities, in other words a balance sheet. The year-end financial sheets as I said, we are just in there with the others and we never see anything about our assets and liabilities; and as I said earlier, questions have been unanswered when we tried to receive the information that we want. So transparency, as it has been said earlier, is important and communication they are a part of the same issue. Communication is a means of being transparent.
- Now, our major concern is the compounding effect of monthly fee increases. We became particularly concerned about this in 2008 and 2009s budget. Our fees were raised four percent that year about five months later when we finally got the budget we found that operating expenses actually decreased by \$300,000. Now, as you can imagine, I asked the question why had that been done this person is who no longer is with VMH she was the chief operating officer she said, our fees are competitive. Our residency agreement said, fees maybe increased and reflect increase in the cost of care. How do you determine what those fees should be if you have not determined what the cost of care is? We have been told that the cost of care not only includes what we see in the budget but it includes other factors. And, we have asked about those other factors and the definition has changed from time to time. One time they told us it includes future costs then I said, "if it includes future costs why are we being charged now with a 100 percent of the current costs weren't some of those paid within the last 15 or 16 years? We've tried to get them to tell us what is included, but if the fees are necessary then tell us why? So far, they have been

unwilling to do that and we have been trying for many months to discuss this with the President of VMH but we have not been able to schedule a meeting. And that is our primary concern.

- So our second recommendation is the provider should be required to give residents the actual computations of the application of any formula for fee increases. The Code does say that the SCC does have the authority to issue regulations so that is the reason that I am saying this will be done either by regulation or legislation, which ever you folks think is the best way to accomplish whatever it is you might recommend.
- The third point I would like to make is regulations with the governing boards, this has been referred to earlier, the residents of these CCRCs many of them has vast experience in business and professions. I know of one instance, a problem in management, and their consulting engineers couldn't solve it, so who solved it; a resident who was also an engineer. He told them what he thought should be done and it worked. Thank you very much. I appreciate your time, if you have any questions, I will be happy to answer any questions.
- **Mr. Kemp Philips:** *CFO of Virginia Baptist Homes:* You have heard Lakewood Manor and the Chesapeake and the Glebe mention today and Virginia Baptist Homes owns all of those. We do have an additional CCRC in Culpepper so that's who we are. I have been the CFO a couple years at Virginia Baptist Homes. I love the Commonwealth but by no means can represent expert on CCRC law in Virginia. Prior to my work at Virginia Baptist Homes, I was a consultant in the CCRC industry particularly in the not-for-profit CCRC industry for about 25 years. I worked in North Carolina, Florida and those are two states that a lot of people point to in terms of looking at regulation that might address some of the concerns of this subcommittee even then I don't hold myself out to be an expert in the industry.
 - CCRCs are very diverse; it's a very diverse industry, small but diverse. With respect to the regulations in Florida, my former boss was actually on the taskforce that helped to create Chapter 651 which is the set of regulations in the state of Florida that dictate how CCRCs operate, if I may it's like our Chapter 49 on steroids. It is very, very onerous, in my personal opinion so onerous that it does have a negative effect in terms of entrance fees and monthly fees. I think in general monthly fees and entrance fees in Florida are relatively high given relative to other states. I would also suggest to the subcommittee to do a little bit of research and look at a particular community in Palm Beach Gardens in Florida at PGA National it is in foreclosure or to be in foreclosure it is a CCRC that has struggled for some time. I only bring that up to suggest that even with the

owner's regulations in place in the state of Florida, they are not immune to the same struggles that some of the other CCRCs in the nation have suffered.

- I did want to talk a little bit about how our audit works every year because I want to tie this back to a statement made by the Bureau of Insurance that the Commonwealth does not require the service of an actuary to satisfy the department's regulations. However, they do require an audit. In order for us to get an opinion for our audit every year we have to do something called future service obligation calculation.
- Let me back up one step and suggest that you are not alone in trying to tackle this issue that the AICPA has been grappling with this for some time. They came out with a statement of a position SOP-90-8, sometime in the late 80s.
- I apologize I don't know the exact timeframe and since then as updated that guidance but what that statement and what it really tells an operator like me is how to treat entrance fees in terms of revenue recognition and how to convince myself, the reader of the financial statement, the auditor, and the resident that we are in fact healthy looking out into the future. And the way looking into the future calculation works is that the actuary who we have to hire. It's not a requirement of the Bureau of Insurance but it really is truly a requirement for us to get the audit to issue that it is a requirement from the state. That actuary looks at our revenue stream out into the future and it looks at our expense stream out into the future and then that actuary makes a determination as to whether the present value of that future revenue stream is greater than the future value of that expense stream. If it is honky dory, everything is okay; if it is not, then we are required to book a deficiency on the balance sheet of any CCRC that shows a deficiency in its future service obligation.
- The intent to that is to give a negative conformation to the reader of the balance sheet. Hey there could be a problem in the future to the extent that that number is absent from the liability page of the balance sheet the CCRC has basically be blessed by the actuaries who last looked at it.
- The Glebe today and frankly it is the first CCRC that I have ever been associated with that actually has a deficiency on its balance sheet. Why does it have a deficiency on its balance sheet, primarily, because we can't accept entrance fees and I would back up and say that I think the Bureau of Insurance does a fantastic job. We have worked with Tony for some time they have been entirely appropriate and professional in our dealing with the Glebe as they have been with all of our CCRCs.

- We regret that they had to put a stay on our ability to collect entrance fees, but let me say this whether they foresaw this or whether anybody foresaw this, that actually turned out to be a good thing for us because it was that continuing that building pool of entrance fees that we could not collect that help us to formulate a plan of reorganization to get us out of bankruptcy. So in my humble opinion while we don't like it they did the right thing and they worked with us to really reach that stay after that and after that the plan was blessed by the court.
- So, I wanted to talk about that FSO because you can talk about creating some reserves. The state of Florida and the state of North Carolina both require you to have reserves. To simplify it down to its, the easiest way to understand, both states basically require that after occupancies [inaudible] 80 percent is higher I think is what they call "state" generally. A CCRC is required to keep about six months' worth of operating expenses in a segregated account. Those monies can also be accounted for your reserve requirements, for your debt, generally looking at Virginia Baptist Home our requirements are debt requirements in terms of liquidity which are actually higher than what the state of North Carolina or the state of Florida would require of us if we were in those two states. So I would suggest that the fact that that mechanism is in place, the requirement to do this calculation every year that satisfies a lot of things.
- I heard some of the commentary regarding rate increases. I think it is completely understandable to question why in any given year, if the facilities expenses have not increase, why have my monthly service fees increased? Well, the fiduciary responsibility of a CFO not to look at just next year, it's to look at the ability of the CCRC to exist in perpetuity and to suggest that my expense changes one year in relation to the resident rate increase in that one year defines everything it just is not an appropriate way to look at things. You have to look at the future service obligation calculation; you have to look at the expectation of where inflation affects may occur in future years. All of these issues come in to play when we talk about what the rate increase should be every year and of course there is a limiting factor of the market. Certainly, we have to listen to that as well. Senator those are my comments.
- **Mr. Rowe:** I have two comments one in determining your future expenses and budgeting and so forth, you talked about inflation and all that; do you ever consider that so same things impact your residents; while your fees go up the residents incomes probably steadily go down. Does that ever factor into your consideration?

- Mr. Philips: It does, but the reality is we have to pay attention to the fact that we have to cover our expenses going forward. We have to estimate what those expenses are going to be, as you said, we only have one source of revenue and that is our residents.
- I would tell you that we are a not for profit organization, of course, we are faith-based not for profit we have a pretty strong foundation and we take very, very seriously when we profile our residents when they move in. That we are in essence accepting assignments for them not legally or technically, but when we qualify a resident in terms of their ability to cover fees, you are right, we make certain expectations to what the inflationary environment is going to be like in the future and if we are wrong we have a foundation in place to help cover any gap.
- **Mr. Rowe:** My second question do I understand that you have a consolidated balance and all that that you offer?
 - **Mr. Philips:** We do.
- **Mr. Rowe:** But you do break it down by your entities?
 - **Mr. Philips:** We break it down by entities and of course, we have to submit a disclosure statement for each one of those entities.
- **Mr. Rowe:** Is that a complete disclosure of each entity, for example, Lakewood Manor is able to get its own financial report?
 - **Mr. Philips:** As was explained earlier, we have a consolidating audit but we have supplemental schedules as a part of that audit that gives an entity by entity balance sheet income statement...
- **Rowe:** And would they give the kinds of things those supplementary ones that we have been urging our particular entity to give; the detail sheets of how the fees are determined; you know, what goes into the cost of care? Is all of that included?
 - **Mr. Philips:** If you are asking whether there is a calculation in our disclosure statement that ties back to the rate increase, no. There is not such calculation.
- **Mr. Rowe:** So there is no rate looked at in the face of the competition, do you look at what all the others are doing?
 - **Mr. Philips:** To some extent, yes. It would be wrong for me to say, no, but all of these rate increases are occurring in real time, at the same time, and so we don't know what the competition is doing until after they do it. We can see the history just like you can but our goal is to keep rates as low as we possibly can.
- **Sen. Barker:** I assume in terms of the separate statements you have for individual facilities part of the advantage of doing it the way you are doing it is that you don't have to go through the whole auditing process of exactly how you are allocating funds across facilities when you are allocating overhead or expenses,

but that it does provide the basic information that would be on the statements that is available if the facilities were separately incorporated?

○ **Mr. Philips:** Yes. In that there is a separate income statement separate balance sheet which indicates a segregation of just the items relative to that community.

- **Senator Barker:** One other question...you said that there was some impact of the additional regulation and requirements associated with North Carolina and Florida upon entrance fees...do you have any ballpark as to what the magnitude to that type of thing would be? I think part of what we have to struggle with is that we want to make sure we're providing protections, but we don't want to impose a lot of additional cost which will get pasted on to most of the corporations and to the residents. So nobody wins in that situation, so.

○ **Mr. Philips:** I think more so in Florida than in North Carolina it's just my personal opinion, I am not prepared to quantify what the magnitude would be, but I've assisted in developing 4 CCRCs in the state of Florida and each time it's pretty remarkable the kind of interest carry and all of this comes back to interest carry because basically there is a huge requirement in the state of Florida you have to ask for 100 percent of the entrance fees until you get to 50 percent of the occupancy. So you cannot use any entrance fees for all of those operating losses which happens when you first open the doors and so you got to take on additional bond debt to cover that operating loss which creates incredible amounts of interest carry which has to be paid for by the residents. I can't quantify for you today, but that is the nature of the beast.

- **Mr. Herring:** I cut it out on my remark in the ones that I had printed but I had a question about a friend of mine who is an actuary and he made this statement to me and it was an e-mail statement, so I can share it and I would like your opinion on that statement regarding the use of actuary skills he made the following observations: accounts are concerned about CCRCs operating as a growing concern. Accounting auditors merely past judgment on what there management reporting follows a set of quasi legislative rules pertaining to the CCRC as an economic activity. Actuaries and some regulators, however, are concerned also with equitable interests of residents as well as the commitments the provider has made to them. Would you agree or disagree, and if you disagree in what way would you challenge that orientation?

○ **Mr. Philips:** I don't know, Mr. Herring, I don't know that it is appropriate to comment about that at this point. Honestly, I would like to think about that and respond to you.

- **Respondent:** Senator Barker and members of the committee, I just have a very short comment. Of all of the discussion today, we heard several references to

documents which pertain to state legislative efforts in relation to CCRCs. I did not hear a citation of the US Senate committee on Aging investigation of CCRCs from which a report was issued on 2012 recommending certain state elements of legislation so I think if that is not on the committees meeting list it should be added.

- **Sen. Barker:** Thank you all for participating and thank the members of the workgroup. I think this was very productive. We got a lot of things, and what we will try to do is synthesize that... work with staff and try to get information out to people prior to the next meeting; and we will set up a meeting probably sometime in October. Try to get that nailed down as quickly as we can and then put ourselves in a position to be able to move forward on things and make any decisions and recommendations, at that point. And, with that, if there is no further business, we shall rise. Thank you.

V. Adjourn

- Seeing that there were no further comments, the meeting was adjourned at 4:15 P.M.

SUMMARY
Virginia Housing Commission
Continuing Care Retirement Communities Sub-Workgroup
Senate Room A, General Assembly Building
November 30, 2012
10:00 AM

I. Welcome and Call to Order

- **Senator George Barker**, *chair* called the meeting to order at 10:00 AM;
- In addition to the invited speakers the following workgroup members were in attendance:
 - **Workgroup members:** Senator George L. Barker, Chair; Senator Mamie Locke, VHC Vice Chair; Bill Axselle, *Erickson Retirement Community*; Mary Lynne Bailey, *Virginia Health Care Association*; Al daCosta, *Virginia Baptist Homes Foundation Resident*; Chip Dicks, *Realtor Association*; Daryl Hepler, *State Corporation Commission*, Bureau of Insurance; Ron Herring, *Glebe Resident*; George High, *Westminster Resident*; H. Donald Nelson, *Windsor Meade Resident*; Dana Parsons, *Virginia Association Nonprofit Homes for the Aging*; Jim Rothrock, *Dept. of Rehabilitation Services*; A. Prescott Rowe, *Cedarfield Resident*; Peter T. Straub, *Greenspring Retirement Community*; Pia Trigiani, *Common Interest Communities Management Fund*; and Amy Marschean, *Department of Rehabilitation Services*
 - **Staff:** Elizabeth Palen, *VHC Director*

II. Continuing Care Retirement Communities Overview

- **Dr. Katherine Pearson**, *Professor of Law, The Dickenson School of Law, Pennsylvania State University*, gave a presentation on Continuing Care Retirement Communities that has been made available under the “Materials” section.
- **Mr. H. Donald Nelson**, *Windsor Meade Resident*: We have seen a transition between life-care and entrance fee plus fee for service. Do you see either opportunities or conflicts that developed because of that?
 - **Dr. Pearson:** I think the biggest problem is of definition. For a time, we defined facilities as either type a, type b, or type c facilities. In reality, there are multiple types in individual facilities. What you are increasingly going to have are additional fees because the entrance fee was not viewed as adequate for whatever the risk is going to be. That is going to create tension. It is definitely a trend, and there is even going to be the potential

for differences of opinion among residents about how they are being treated.

- About 80% of the CCRC market is non-profit, but the core of that non-profit is not the traditional mission-driven charitable, non-profit organization. It is a hybrid, where it is often a for-profit developer or a for-profit manager combined with a not-for-profit entity, and the not-for-profit entity is not financially at risk if a property is less than successful.
- The risk is limited to the dollars invested in the project, not into the greater financial wherewithal of the organization. I think that is a change in the marketplace, and it is one that creates greater risk for residents.
- **Ms. Dana Parsons:** Please comment on the states that have a mandate for a resident to serve on the governing board. Could you also comment on those states relating to the scope of practice the CCRCs who have residents serving on committees and councils that work directly with the board as well as those communities having an open door policy for residents to speak with the governing boards and administrations?
 - **Dr. Pearson:** Many facilities allow voting members without legislation requiring it. In some of the states that allow it rather than mandate it, they are confused about that role, and they try to have the only person that gets to know anything about the financial decision-making being that resident, and then that resident member is sworn to secrecy. Well that just heightens the tensions! So you've got to be willing to still be financially transparent about big changes with the whole resident group and with all of your residents, that two-pronged approach that New Jersey takes.
 - Residents' presence on key committees is very important. They started off without an understanding of how the process works, and as they recognized that residents really want the success of the operation and are willing to be educated about what that means. Some residents come with a great deal of financial sophistication already. The facilities that I'm hearing have had the best success are the ones that have integrated the residents actively in decision-making.
- **Sen. Barker:** We in Virginia have a requirement that there be resident councils if the residents want to do that as part of the process. We also have the majority of our facilities that do have resident members on their board. So we have it on a voluntary basis.
- **Mr. George High:** I just wanted to amplify one of your many helpful remarks, and that is relationships between residents and the local management organization. In Virginia, we in VACRA, the Residents' State Organization, have wonderful relationships with the national management organization. At the last meeting they had in Denver just about a month ago there was even a session

where residents led the discussion, were there to answer questions, and it was heavily attended by management people talking about resident management relationships.

- In Virginia, we haven't been so successful. A number of years ago VACRA did attend an occasional VANHA meeting, and people appreciated that. We haven't done that for years. We haven't been invited back to it. In fact, I'm afraid we've had a rather hostile relationship organization to organization there has been resistance from VANHA .
- It really is disappointing because we have this general interest. We're not looking for conflict. We want to work together, but we want our views to get into the picture to amplify what governing boards are trying to do. So there is still that hurdle to go over in Virginia, and it's a disappointing one, because we want to be cooperative.
- **Ms. Parsons:** I don't believe that the interactions with the association are at issue here at the moment, but I do feel the need to respond. Our association has been very open to coming and speaking with the VACRA association in Virginia and working with them directly, and we've always been pleased for the opportunity to speak at those events. We were very pleased at our event in Denver that we had a number of residents come and attend our event.
- Just in response to both of you, I hear a little breakdown in communications right there, because I hear Mr. High saying he wants to be heard, and I you saying that you want to speak.
- **Mr. Axelle:** When we had our September 5th meeting, the State Corporation Commission, which provides us with a degree of oversight here in Virginia, advised us that we have fifty-five CCRCs in Virginia, and to their knowledge, no CCRC resident has ever had their contract effected because of any financial instability.
 - **Dr. Pearson:** I don't know specifically what Virginia's history is, but I have heard this argument before. When I first started looking at CCRCs in Pennsylvania, the response was always, "There has never been a bankruptcy in Pennsylvania. We're managing just fine without new regulations." And then the bankruptcies of the Covenant Hills and Frank Lee Erickson hit, and so they couldn't use that argument anymore. Then the argument was, "There has never been a facility that lost their contract rights" (as a result of financial instability.)
 - There has always been a buyer, as was fortunate in the Erickson homes. But then we had Covenant Hills, where the residents lost \$25,000,000. We can't keep planning based on what didn't happen, when we know that residents are being asked to pay increasing percentages, and the rate of

- increase of the monthly fees is going up, and that's consistent with the contract, but it's not at rates they were necessarily expecting.
- What is frightening residents is how are these large lump sum fees being used? If they're a type a contract, and the fees are going up, why is it that that type a contract amount is not being adequately accounted for in an actuarial sense or the future health care needs. If it's a refundable fee, why aren't, from an accounting standpoint, those funds being escrowed in such a way that provides refundability, so that residents' monthly fees don't have to go up to support refundability?
 - Nobody likes the idea of a Ponzi scheme, and I don't think CCRCs are in any way a Ponzi scheme, let me make that very clear, but if you don't have a system for repayment or use of these large fees, and you're only developing, and you're only relying on the next resident's large entrance fee as the means for refunding somebody, then that puts you closer to Ponzi scheme-like effect than I think residents are comfortable with. That's the safest way I can describe it.
 - **Mr. Axelle:** You indicated that you are not familiar with the experience here in Virginia, so I assume you then accept what the State Corporation Commission told us in September.
 - **Dr. Pearson:** What I've been told by individual residents is that they feel that their fees are going up at rates that are inconsistent with what their expectations were. Do the contracts allow you to do that? Absolutely.
 - **Mr. Axelle:** The SCC said in September that no CCRC resident in Virginia has ever had their contract voided because of any financial instability. Do you accept that?
 - **Dr. Pearson:** I'm not aware of any. That's correct.
 - **Mr. Axelle:** That would include the two Erickson facilities here in Virginia.
 - **Dr. Pearson:** That is correct as far as I know.
 - **Mr. Axelle:** Just for the record, Erickson did have difficulties. They did come through it. They are better for it. Right now one facility that Erickson owns, called the Green Sphinx Village, has a 99.4% occupancy, a two year waiting list, and the not-for-profit has \$50,000,000 cash balance.
 - **Dr. Pearson:** It sounds like Mr. Davis is doing a great job. The other thing is, unlike Mr. Erickson, Mr. Davis is not doing this greatly expanded, highly leveraged growth plan with other facilities down the line. You're doing stability planning as opposed to growth planning, and it sounds like it is working.
 - **Mr. Axelle:** I would concur with that.
 - **Sen. Barker:** Just to follow up on that, I think our experience with the two Erickson facilities here is that the facilities themselves were actually in strong

financial shape. It was at the corporate level at Erickson that there were the issues. From the perspective of a legislator representing one of those as well as the residents, once we looked into things it was very quickly apparent that the structure of the individual organization was pretty good.

- **Mr. Straub:** Yes, that's exactly correct. With regards to Greenspring, we had bought facilities prior to the bankruptcy from Mr. Erickson, from the corporation. So the bankruptcy did not affect us at all.
 - I was interested in your comparison of the conversation and comments of Ms. Pearson and Mr. Will, because on a macro level, that's the one complaint that I hear from almost all residents. We don't get consulted enough.
 - We at Greenspring had a speaker from Leading Edge, and he went through a list of things to be concerned about in the future, and the difference in the generations, and so on, and his discussion of solutions invariably included in each case, "Consult with the residents." This is one issue that is not subject to legislative control. The solution to such problems requires a two way street.
- **Mr. Ryan Herring:** Dr. Pearson, from your experience and your research, could you please comment on the concern that we don't have benchmarks as we monitor CCRC operations. So that before bankruptcy or reorganization or whatever you want to call it would suggest that we are having financial problems. Are there some benchmarks that your experience could suggest that can be used to get at that before the eggs break in the basket?
 - **Dr. Pearson:** These benchmarks exist. The industry has them. One of them is published annually by Financial Ratios and Trend Analysis by KAARF and CCAC-accredited organizations. There is a 2012 publication that is a joint publication between KAARF and CCAC and Zigler
 - It talks about this problem of having comparability when you are using different standards for entrance fee models. I think the industry is finally beginning to come to terms with this lack of comparability and the need for better benchmarking standards, and that's part of the reason why the FASBE has adopted a new standard. That's in large part because residents have said this has got to be done better, so we don't have to live from economic crisis to economic crisis without better security.
- **Mr. Al daCosta:** I would like to hear your thoughts on how you envision mandating any legislation at all that would fit the diversity that exists in the CCRCs.
 - **Dr. Pearson:** Accountants, actuaries and financial advisors that there is a common issue for all CCRCs, and that's, how account for the large fees that are paid in advance, and whether it's going to be assessed as devoted

- to health care costs (type a model) I think that there is growing recognition that you actually have to account for it that way, and treat it appropriately.
- On the refundable fees, I think there's been a level of confusion for a number of years. Many people don't realize that that really is a fee for service model, because that is a refundable fee, and you have to account for how you are going to repay it.
 - There is a common interest, except for equity model, in how you are going to handle those upfront fees. How are you going to account for them? You may call it an escrow or a reserve. You may have an actuarial standard that's tied to healthcare that's tied to type a contracts, and you may have a life standard actuarial figure that you use to account for an escrow sum for the refundable fees.
- **Mr. Rowe:** Could you elaborate a little bit on the effectiveness of residents being on committees versus there being a single representative on multiple boards. It seems to me the interchange could be greater if residents could be on various committees.
 - **Dr. Pearson:** You can't substitute a voting member on the board with dialog with the residents. Having them be a part of the financial decision-making mechanism is very appropriate.
 - Many people have used that voting member as the wedge to get on those committees, but certainly it can and should be done without that, and that's really a question of understanding of well-run facilities that that is part of how you achieve stronger communities through trust.
 - **Mr. Rowe:** I agree and I think that often overlooked in our communities is the wealth of knowledge and experience of the residents sometimes exceeds that of the management.
 - **Dr. Pearson:** I think that's true, and I'm also going to speak on behalf of management. We need to recognize that sometimes residents don't stay up-to-date. It's a challenging market, and just because you are a captain of industry in one field may still mean that you are going to have challenges if you are attempting to direct the management of a CCRC industry.
 - **Mr. Straub:** I have two points. First, the perspective of age is a significant differing factor. A professional in middle age may not be able to grasp the needs or have the best interest of the elderly. Second, people at GAO, reviewed your documents and presented the final document for the Senate. She was unable to be here today, but she has been interpreting what you have said right along. I am glad to get your side because it is more accurate.
 - **Dr. Pearson:** When I spoke before the Senate for a National Bill of Rights for residents, I was very cautious. I was very willing to allow the residents,

industry, and legislators to come together as what it might be. I was also concerned, and I did not want to do a reaction to the crisis in 2010.

- I have heard from more residents in the past twelve months that I have heard in the past six years. This tells me that there is a continued risk factor that shared governance might help to lessen.
- **Mr. George High:** Very recently Westminster has had a number of resident problems. Our governing board decided months ago, that they needed to go to designated people if they need to deal with us. To go to them, to let them know that the communities need support, and to ask for a donation. Over the last two months, a number of our residents discovered that, and some were angry, annoyed, or surprised, because they thought it was totally inappropriate. We finally had a meeting yesterday among our residents, and this all was brought to a head.
 - The head of our resident support committee for all of our organizations explained that this is a very common practice in most CCRC's, that they need to go to these legal representatives to see if they can get some money for them, because there are places to go for money.
 - We, as residents, aren't supporting enough, and particularly, if we're looking for these people who lose their moneys. Most of us agreed with that. The surprise was that this came as surprise to virtually all our residents because nobody had told us that they were going to legal representatives, and that's where the hassle came from. Communication is vital.
- **Sen. Barker:** We can all agree on that one.
- **Mr. Herring:** From the experiences that many of us talk about, that the synergy in CCR life is shifting with an intense need to engage residents. That synergy relates to transparency and accountability. Any of us that ignore that and work to improve it, do that at our mutual peril. What we've experienced in the economy and in terms of management and governance issues that CCRC's face has driven this synergy to a new a new level, and ignoring it is to ignore it at our mutual peril.
- **Dr. Pearson:** What you just said is that the CCRC's have said that residents are "the best marketing tool". That is always going to be true.

III. Similarities and Differences between Common Interest Communities and Continuing Care Retirement Communities

- **Pia Trigiani, *Common Interest Communities Management Fund*:** There are some similarities between (CCRCs and CICs), but there are lots of differences, such as the governance aspect. The Community Associations Institute, in the late '90s,

adopted rights and responsibilities to try and address these issues of resident and owner input visa vie leadership and management.

- There are basically four different kinds of community associations in VA: Condominiums, property owners' associations, timeshare developments, and real-estate cooperatives. These are all different kinds of development that are the brainchild of creative developers. In Virginia, condominiums, cooperatives, and timeshares are heavily regulated, with property owners associations to a lesser extent. As the senator has requested, I'm going to focus on condominiums.
- Condominiums are statutory fiction. What that means is that they don't exist but for the statutory scheme that creates them. Condominiums are owned property, which is probably the biggest distinction. When you purchase a condominium, (and by the way, there are some continuing care communities that are condominiums) you buy a few simple title to you unit. You own however that unit is defined plus an undivided interest in the common elements.
- The developer role is only temporary. Their goal is to put in place a governance structure and give it to the owners as soon as they can. They are required under the statutes that create condominiums, to record governing documents, called condominium instruments: a declaration, bylaws, and description of the property. They must create and define what is unit, and what the common element is.
- The big thing the developer must do is to create an association that has powers which are detailed in the condominium instruments. Those powers are extraordinary, because what you do as a unit owner in a condominium is seed that authority to an executive organ, a board of directors, that makes decisions on behalf of all the owners with respect to the budget, enforcing rules, bringing and defending legal action, etc.
- In Virginia, condominiums are typically not incorporated to condominium owners associations. They are unincorporated associations. That is not true on the property owners' association side. They must be incorporated because they own the common areas. In a condominium, you give up rights. There is somebody else who makes the decisions.
- Associations are all different and have different personalities. The challenge is how you create a governance structure. There are some, which we call benevolent dictatorships, and others, which have elaborate committee structures. This is also used as a leadership development tool to get you to the board. So the governance structure is based on the recorded condominium instruments in the bylaws, and those authorities are very carefully spelled out.

- VA has historically taken the position on regulation of these communities that our citizenry is very smart, but we want to make them smarter. In 1962 when the horizontal property act went into place, the real estate commission inspected properties and prepared a property report. In 1974, our second-generation statute went into place, which has 4 articles: one talks about general things, one about what a developer can and cannot do, a third article about operation, and a fourth about regulations.
- When that 4th article was put into place, in order for developers to get some benefits and flexibility in their ability to develop a piece of property, they gave up some regulatory rights. The real estate board, at that time, created regulations, and there was a requirement for the delivery of a public offering statement
- In the public offering statement, the developer goes in to detail to describe what they're buying, including what the governance structure is going to be. The goal is that you give the information to the purchaser and they make the decision. On the initial sale of a residential condominium, there's a disclosure requirement, which is also true of time-shares and cooperatives. There is this public offering statement that must be delivered to tell people what they are buying, but this is not the case for property owners' associations.
- (The scheme of registration by the Real Estate Board, now the Common Interest Community Board, for condominiums, timesharing, and cooperatives, which is kind of a self-disclosure on initial sale.) The developer still has to give what's called an association disclosure packet, but the association prepares that document. Whether or not you can fly the flag or put a sign in your yard are all disclosures you receive when you buy into one of these common interest communities.
- On the governance side, again, it is completely driven by the documents and the volunteers. Now, we do have professional management, not in all instances, but some. In fact, in 1978, they began regulating community association management, so there is a regulatory scheme for the managers. The goal is to get an educated manager, and to not tell them how to do it, but help them do it. Virginia's regulatory scheme tries to help people give them the tools to what they need to do.
- The governance structure, again driven by the recorded documents, and self-directed by those who live in the community. The developer in transition does work with the community to try to set up processes and procedures for committees. Again, some have elaborate structures, while some do not. These are not regulated by the state, except that our general

assembly believes that there should be disclosure, and requires that associations operate in the open.

- In fact, while they're not governments, they have some characteristics of a government. Virginia has applied and put into the statutes that govern these common interest communities freedom-of-information-like provisions on access to books and records, and open meetings.
- While associations are required to give access to books and records, there are limits. For example, an individual's personal information is protected. Attorney-client privileged information, pending contracts under negotiation, personnel information, will all be excluded.
- There are requirements for open governance. Participation though, is very community specific, and there are no requirements in the law for committees at all. There is a requirement that there be a Board of Directors, and that they meet periodically in the open.
- Good governance is participatory, and that is the model that community associations institute recommends. If you have rules and you seek compliance with rules, open governance is a good thing. It's not always participatory, because the Board of Directors ultimately makes the decision.
- I agree with you about managing conflicts of interest. Just because you have an interest doesn't necessarily mean you have a conflict. And in fact, you can argue that every board member in a community association has a conflict because he/she owns and piece of property in that community. While they are alike, they are very different, and the biggest difference is I think in the ownership issue. It's a regulatory scheme that's worked, but it is again, consistent with the Virginia way, which is to allow business to do its business, to allow developers to conduct themselves with a general framework. We like to say it permissive, not proscriptive. It's not into the detail and minutia.
- **Del. Barker:** What does the code require in the composition of the boards of condominiums?
 - **Ms. Trigiani:** That is completely driven by the documents that create the association, and is typically dependent on the size of the community.
- **Del. Barker:** Have there been instances of condominiums going bankrupt or having financial problems? How do those get resolved given?
 - **Ms. Trigiani:** We have not seen many situations where once the developer is gone, the associations get into financial trouble, although there is a growing. This is a result of internal litigation. Because associations' governing documents to not put limits on the authority to assess, the board completely often makes those decisions.

- **Ms. Parsons:** Because of the uniqueness of the condominiums association, would you say you not mandate structure of governing board?
 - **Ms. Trigiani:** Yes, these condominiums are very different and very dependent upon the services, amenities, architectural structure, common area, etc. The answer to your question is no, there is no statute that describes who must be on the board.
- **Mr. Straub:** In CCRC's, we buy an unlimited right to use space, which is a difficult concept to define. Is that something that could be transformed by the legislature into a genuine property right?
 - **Ms. Trigiani:** That is what they have done with time-shares, so ,yes, I believe so. There are probably examples where the General Assembly has defined something as real estate.
- **Mr. Axelle:** The Virginia Constitution, under your interpretation, would prohibit changing existing code on the subject of contract. Could the General Assembly establish an entirely new concept if they chose to do so?
 - **Ms. Trigiani:** Going forward with a completely new regulatory scheme, the General Assembly could put in place a system that in some ways affects it, but you would have to evaluate each community separately, as they are so different. However, I do not think you could go back and affect that contract.
- **Del. Barker:** There are clearly some things that can be done, but we would have to look into what is permissible and what is problematic.

IV. Continuing Care Retirement Communities Industry Speakers

- **Ms. Sandee Levin, VANHA President:** A Continuing Care Retirement Community is a combination of residential and care options that is owned and operated by private companies and staffed to provide a continuing of care for residence. The distinct difference is that a condominium is owned by a residence; and with some limited exceptions, a CCRC is owned by private companies and residents pay monthly fees.
 - These residents make a commitment to live for the remainder of their lives in these CRCC's. Residents are encouraged to have their attorneys and family members involved in the decision making process. (VAN house) encourages the resident input and involvement on governing boards of CCRC in accordance with community policies, and there are many communities in which there is a resident on the board with voting rights. In Virginia, approximately 60% of CRCC's have residents on the board, some voting and some non-voting. From a survey, we found that there are

an average of 90 meeting a year for CCRC that gives the residents and staff the opportunities for open communication.

- Because CCRC have varying personalities, we feel that the General Assembly should not dictate how the administration interacts and communicates with the residents, in that there are so many different types and so many different residents.

- **Mr. Bob Gerndt, Executive Director; The Glebe:** I was going to speak to the issue of communications and commitments. The previous speaker mentioned the survey done and indicated that on average there were 90 opportunities for meetings and comments back and forth. In 2010, there were over 3,000 meetings within our fifty communities between management and residents. In 2011, there were 4,000 meetings. Granted, these meeting vary greatly in length and frequency. The numbers indicate that there is a very clear intention of the CCRC's to maintain communications.

- Most of the CCRC's are mission driven service organizations, and we cannot meet our mission without effective communication. There is a wide variety of the CCRC's, each with its own culture. There are also a wide variety of residents, with different needs and desires.
- The economics of the CCRC's do not define the relationship between the residents and CCRC's. There is an ethical commitment to the residents, which includes meeting their needs; and we cannot accomplish this without open communications. CCRC's go through a great deal of effort every year to raise money to provide for the residents. In most life-care contracts, if a resident runs out of funds to no fault of their own, the CCRC will provide services for the rest of their lives for no charge or whatever they can afford. This is a clear indicator of commitment our residents.
- They also help to explain that even with the economic downturn; there have been very few issues with CCRC's. They have met the financial, contractual, and ethical commitments to the residents. The examples of problems with CCRC's, have raised question of what the financial situation of the communities are.
- Regarding financial information, a previous speaker had mentioned the structure of CCRCs and how the financial arrangements are getting more complicated. Careful Reading of the disclosure statements require will answer a lot of questions, as the disclosure statements require CCRC's to explain their corporate structure, their relationships between the financial relations, and include the list of the Board of Directors and how to contact them.

- **Mr. Kent Phillips, Chief Financial Officer, Virginia Baptist Homes:** I would like to bring up the notion of a future service obligation. It is a relatively esoteric accounting concept that gets back to the idea of financial transparency, which is one of the goals. We are an insurance company, a real estate company, a hospitality company, and a health care company all under one roof. We are much more than anything that ties back to the fee-simple real estate, like time-shares and condominiums
 - All CCRC's must provide a disclosure statement every year, which includes the audit that contains an opinion rendered by a certified public accountant. The CPA uses the future notice obligation as a test, which is to stay in concert with sound actuarial data. We look a forward looking revenues, expenses, entrance fees, and debt service in perpetuity to determine if you have a surplus or deficit. To begin to define the notion of affordable stability, I would suggest you look at the future service obligation calculation. This gives a good measure for whether a CCRC is sustainable.
 - Ms. Pearson mentioned an amendment to this mechanism in order to determine how to classify entrance fees. That essentially is a non-cash issue and has to do with how refundable entrance fees are taken into operations. It has nothing to do with how the actual cash is used. It just tells a CPA of CFO when to put that money on the income statement.
- **Mr. Herring, Glebe Resident:** Could you describe the purpose of an entrance fee and can it be audited against that purpose?
 - **Mr. Phillips:** The entrance fee is a part of the payment stream that is put in place to cover a set of service that we are contracting to give a resident. One way to finance this cost of future care is to collect an entrance fee up front and have a relatively nominal monthly fee going forward. It can certainly be audited. That future service obligation is in place to capture all the revenues and expenses.
- **Mr. Herring:** there are many claims against that set of asset we are calling the entrance fee. It is used to cover future health care, and, thus, is a way recognized by the IRS of purchasing future health care services. This is a claimant against that set of assets. The second claimant is the proprietor, himself may have needs in terms of the operation of the facility for which the entrance fee can be used. The last piece of the claimant is the potential bond holder, who can claim an entrance fee as an asset in a bankruptcy. With this set of assets and strong claimants against those assets, then you do not have a way to control and maintain them the funds.
 - **Mr. Phillips:** The key issue to your question is bankruptcy, and how to know if I'm going to go into bankruptcy. The future service obligation is a

good indicator of financial stability, and there are other predictive measures in place to suggest that if you do not fix what is wrong now, you may be in default. If you do not fix that default, you will be in bankruptcy.

- Is there a difference in the accounting for life care versus the entry fee and fee for service type of obligation for a CCRC?
- **Mr. Phillips:** No, There are defined ways to handle specific entrance fee models that depend on whether the fee is refundable. The refundable portion is what the recent guidance has indicated that there some changed in the way you would have to treat that issue.
- **Mr. daCosta:** I just wanted to recognize the fact that in sixty year of business, the VHD has never denied a resident a service. This is a very important benchmark for all residents.
- **Mr. Meade Spotts, Virginia United Methodist Homes:** Emphasized financial assurance concerns and transparency and listed various state and federal organizations (SEC, BOI (financial aspects), DSS (assisted living component), Department of Health (nursing home component), Medicare, Medicaid with oversight over CCRCs, and regulatory requirements that apply. (HIPAA, fair housing, ADA, fire protection, zoning, building codes, for example).
 - He then described the contents of a typical disclosure statement as presented to a typical prospective resident, including the description of the provider, purpose of the corporation, governance information, real property owner description, affiliations, current fees and a history of increases, financial statements, pro forma income statements, admission practice, procedures for filing complaints, and pro forma residency agreement itself.
 - CCRC has accountability to provide services laid out in contract. He claimed that financial pitfalls cannot be predicted, and the effects of legislation cannot be predicted. Struggling CCRCs, such as Windsor Meade, may suffer financially due to poor timing. He described the difficulties of Windsor Meade in more detail (low occupancy, a lender who wanted out) as well as the role of the SEC. No one has been displaced and situation is improving.
 - The financial assurance concerns in Virginia have been addressed by the proactive nature of the legislation currently in place, and also in part by the operators in Virginia, including the VUMH. He mentioned the need for a simpler template for financial transparency, approved by the Bureau of Insurance, and pointed out that some people want more information than is currently provided in the financial disclosure. CCRCs don't want to create their own template, because they don't want to be accused of hiding

data. He summarized the choice factors for people who make educated decisions when selecting a CCRC.

- **Mr. Nelson:** There have been two presentations and a memo in the last 60 days, and “the natives are restless.” He discussed the need for improved communication.
- **Mr. daCosta:** What about the resident who is concerned about this workgroup and where it is going? He described unsolicited comments he received from another resident. Good management and good relations with the residents is most important.
- **Mr. Straub:** I would prefer less governmental control and more governmental guidelines. The industry needs to realize that the residents are the lifeblood of the industry, and treat them that way.
- **Sen. Barker:** We need to get a consensus on what issues we will move forward on. The issues we discussed were financial accountability and transparency, governance, and communication.
 - On the financial side, Ms. Palen and I met with people from the Bureau of Insurance and the State Corporation Commission to go over the financial issues and concerns. Legislation may not be required at this time. Bureau of Insurance has offered to do several things. First, create a simplified financial form (simple to understand and to put together); Second, create a way for multi-facility organizations to provide simplified information the fiscal condition of the overall organization as well as for the specific facility. Third, create a consumer information guide that is substantive but not overwhelming; fourth, send an administrative letter out to all facilities stressing the role of the Bureau of Insurance and State Corporation Commission and of their oversight responsibilities as well as the responsibilities of the facilities, particularly if there are material changes to information that has been submitted to the Bureau of Insurance. Then that needs to be communicated to the bureau quickly. This would be an ongoing process where drafts of the documents would be submitted to this committee for comments and revisions.
- **Mr. Staub:** I would like to get more distinct information without creating a burden to facilities. The financial side is quantifiable and generally adequate. Interaction between management and residents is qualitative. Procedures regarding finances are adequate, but our concerns are the problems with paternalism. That is the more challenging problem.
- **Sen. Barker:** I will report to commission that the Bureau of Insurance is working on those four documents. We are concerned with the issue of governance, especially resident representation on the Board of Governance. 60% of CCRCs

already have this in place, some voting, some not. The industry is also looking at this issue.

- Challenges include how you implement this when one corporate entity owns multiple facilities, and what other roles for residents exist on committees. I propose recommending that the chair of the Housing Commission write a letter to all CCRCs asking for information about how they are structured now in terms of residents serving on the board and committees, and encourage those that don't have residents on their boards to reconsider, requesting a response back early next year. This should allow us to better understand the issues and challenges of various organizations.
- **Mr. High:** I would like to know the details behind VANHA's suggestion that resident representation on boards is that high. VACRA has been not been successful discovering what goes on at each community. This subgroup will enable them to get the information. Management has input regarding what resident is on the board at his facility. There is a need for the ability to deal with a resident board member who becomes incapacitated during his or her term. I would like to see more information about ways different organizations handle the issue of residents on boards.
 - **Sen. Barker:** This process should allow us to get this information.
- **Mr. High:** VACRA has discussed the concept of a committee or commission overlooking CCRCs, for gathering information. VACRA wants access to the information available to this committee, the housing commission, etc.
- **Mr. Nelson:** Would you consider sending a similar questionnaire to the president of the resident association to see if you get their view?
 - **Sen. Barker:** We could send out a letter asking for input into the situation.
- **Mr. Rowe:** At Cedarfield, they are more focused on committees than the board. I hope this letter will include a request for information about committee structure.
 - **Mr. Barker:** Yes, that is the intent, to get each organization's organization of board and committees.
- **Ms. Parson:** What is your long term goal, and do you think the Housing Commission is the appropriate entity to request it? Maybe I would volunteer my organization (VANHA) to obtain this information.
 - **Sen. Barker:** The Housing Commission needs to have a role in this process, but we could work with your association.
- **Ms. Parsons:** It seems somewhat intrusive. What are you hoping to do with the information, long term?
 - **Sen. Barker:** From this information, I plan to determine possible trends, and find opportunities for improvement. We can meet with you, Ms. Parson, between now and Wednesday to discuss further.

- **Mr. Straub:** VACRA would like also like to work with VANHA at the meeting.
- **Sen. Barker:** offered to be a facilitator at a meeting between VACRA and VANHA
- **Mr. Straub:** Communication and sharing of information is vital. I propose an annual meeting or conference between VACRA and VANHA for residents and others as both listeners and participants, as a way to bind the two organizations together in a common cause.
- **Sen. Barker:** I think this can happen after February.
- **Mr. Axelle:** We also need more communication within each facility.
 - **Mr. Barker:** Agreed. There are some facilities that seem to work very well, and others where there are perceptions of concern.

V. Public Comment

- **Jean Hurley, Past president, current secretary of VACRA:** thanked Mr. Barker for organizing this, called attention to a study in 1992 that made seven recommendations. One was for a consumer guide, and it never happened. Another was to create a state-level continuing care committee to meet with people who have a common interest. A 1993 study recommended again a continuing care committee. She expressed interest in beginning this 2012, and asked if this was a possibility.
 - **Sen. Barker:** We are taking recommendations on to the Housing Commission and then work with them to help us get additional information, and move on with that information in 2013. We'll be looking at the products from the Bureau of Insurance as well.
- **Warren Dixon, Windsor Meade:** Dr. Pearson, considering the refundable mortgage, I keep seeing on television commercials on refundable mortgages. Is there some way that our refundable payments could be paid back to us over a period of time in smaller amounts? It seems that this could be beneficial to both residents and CCRCs who would be refunding smaller amounts.
 - **Dr. Pearson:** It is possible. This not happen because the concept of refundable fees was a marketing decision to make CCRCs more attractive to prospective residents than life-are contracts alone. The industry may find other ways to market, but this would likely involve higher monthly fees as a result of earlier refundable entrance fees.
- **Mr. Dixon:** Greenspring gives 100% refunds upon the death or departure of a resident. Goodman House reduces the value of the initial deposit by 2% per month, so if you are not satisfied and leave, you get a partial refund. Second Question: Could we make a charitable contribution of the returnable portion of our investment to a charitable organization that has the ability to wait for our passing or whatever comes next?

- **Mr. Barker:** That is certainly a possible option, I would think, in certain situations.
- **Bob Spensky, Windsor Meade resident:** I am frustrated with the lack of trust and communication at Windsor Meade. We have tried to get a resident on the board, because they do not feel they are being heard, and are unable to meet with the board. I ask for an intervention (through a law or otherwise) to require a resident on the board, because the residents have been told by the management that this will not happen.
 - **Jean Bozeman, Harbor's Edge:** This has been a great revelation for us. We appreciate this forum, and knowing that we are not alone. Please keep this going.

VI. Adjourn

- Upon hearing no further comment, the meeting was adjourned at 12:45 PM.