

# VIRGINIA HOUSING COMMISSION

## 2005 ANNUAL REPORT

### MEMBERS

Delegate Terrie L. Suit, Chair  
Delegate Jackie T. Stump, Vice-Chair\*  
Senator William C. Mims, work group Chair  
Senator Mamie Locke  
Senator Mary Margaret Whipple  
Delegate Bradley P. MARR  
Delegate Melanie L. Rapp  
Delegate Gary Reese  
Mr. Gary Garczynski  
Mr. Andrew Heatwole  
Mr. T.K. Somanath

### **Staff**

Mr. Amigo R. Wade, Senior Attorney  
Ms. Elizabeth A. Palen, Research Associate  
Ms. Lisa Gilmer, Senior Staff Assistant

\*resigned December 2005

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\* Full copies of presentations made to the work groups are available on the Housing Commission's website: <http://dls.state.va.us/houscomm.htm>

## **Executive Summary**

The Virginia Housing Commission evolved from the Virginia Housing Study Commission which was created by the 1970 General Assembly. Its mandate was "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. House Bill 1231 of the 2004 General Assembly Session, called for the Commission to be a permanent legislative commission charged with studying and providing recommendations for legislation that will ensure all Virginians have safe, sound and affordable housing. The Commission also serves as a forum for new ideas relating to housing and community development and allows for the development of statutory, regulatory and non governmental initiatives.

The Commission is comprised of 11 members; five members of the House of Delegates, three members of the Virginia Senate, and three citizen members appointed by the Governor. For the 2005 interim Delegate Suit served as Commission Chair, Delegate Jackie Stump as Vice Chair, and Senator William Mims as the work group Chair for affordable housing and policy issues. The Commission is staffed by the Division of Legislative Services and is funded through special fund appropriations.

The Commission's activities in the 2005 interim focused primarily on two areas of interest to the Commonwealth: eminent domain, blight removal, and brownfields remediation; and affordable housing and policy issues. Two work groups were established so each could center exclusively on one of the two areas of interest. The Commission's held three full commission meetings in January, April, and November; and many work group meetings, whose accomplishments are listed under the individual work group reports, were also held during the 2005 interim. Legislation for the 2006 legislative session was referred by the Commission and work toward the establishment of a statewide housing policy was also put forth this interim. The Commission also maintained an up-to-date website (<http://dls.state.va.us/houscomm.htm>) available to all housing partners and the general public.

# **VIRGINIA HOUSING COMMISSION**

**Delegate Jackie Stump, Acting-Chair  
Commission Meeting January 31, 2005  
Fourth Floor West Conference Room  
General Assembly Building  
Richmond, Virginia**

## **MEETING SUMMARY**

The meeting was called to order at 8:40 am by acting Chairperson Delegate Jackie Stump.

### **Commission members present:**

Delegate Jackie Stump  
Delegate Terri Suit  
Delegate Brad Marrs  
Delegate Melanie Rapp  
Senator Mamie Locke  
T.K. Somanath

### **Commission Members absent:**

Senator Mary Margaret Whipple  
Senator William Mims  
Mr. Gary Garczynski  
Mr. Andrew Heatwole

Delegate Stump asked for nominations from the floor to serve as Chairperson of the Committee. Delegate Melanie Rapp nominated Delegate Terrie Suit and Delegate Brad Marrs seconded the motion. Delegate Suit was elected by unanimous consent.

It was further resolved that Delegate Stump will continue in the position of Vice Chair.

The meeting was adjourned at 8:50 am.

## ***MEETING SUMMARY***

### ***Virginia Housing Commission***

***April 28, 2005, General Assembly Building, House Room C, Richmond, Virginia***

#### **Members in attendance**

Delegate Terrie Suit, Chair  
Senator William Mims  
Senator Mamie Locke  
Delegate Bradley Marrs  
Delegate Gary Reese  
Mr. Gary Garczynski  
Mr. Andrew Heatwole  
Mr. T. K. Somanath

#### **Members absent**

Senator Mary Margaret Whipple  
Delegate Melanie Rapp  
Delegate Jackie T. Stump, Vice Chair

#### **Staff Present**

Amigo Wade  
Elizabeth Palen  
Lisa Gilmer

The meeting was called to order by **Delegate Terrie Suit**, Chair, at 3:10 p.m. **Delegate Suit** welcomed to the Commission Delegate Gary Reese, who was appointed by the Speaker of the House, to fill the position left vacant by the departure of Delegate Thelma Drake.

**Amigo Wade**, Senior Attorney, Division of Legislative Services, provided an overview of housing related legislation passed during the 2005 legislation of the General Assembly. The overview of the 32 bills and resolutions were divided into six areas: i) Residential Landlord and Tenant, ii) Eminent Domain, iii) Zoning and Comprehensive Plans, iv) Code Enforcement and Professional Regulation, v) Community Associations, and vi) Miscellaneous.

The Commission then proceeded to discuss its interim work plan. **Delegate Suit** designated two work groups to complete the work of the Commission for the interim. Each of the work groups will consist of all members of the Commission and designated advisors; however, only Commission members will be voting members. In addition to the designated advisors, all interested parties will be encouraged to participate and have their respective positions and perspectives included. The two work groups are titled "Affordable Housing and Policy Issues" and "Eminent Domain/Blight Removal/Brownfields Remediation Issues."

### **Affordable Housing and Policy Issues Work Group**

This work group is to be chaired by **Senator Mims** with **Senator Whipple** serving as vice-chair. The work group is charged with i) reviewing legislation and studies referred to the Commission as assigned and ii) discussing current issues and developing policy recommendations that will advance a broader Housing Policy for the Commonwealth. In terms of study issues, the following issues were referred to the work group for study:

**SJR 376-** Exempting nonprofit organizations construction low-income housing from certain zoning provisions.

**SJR 370-** Notification and right of first refusal to local housing authorities and nonprofit housing organizations upon intended sale of multifamily properties.

**SB 1206-** Affordable housing; developer contributions.

**HJR 596-** Comprehensive impact of residential overcrowding on localities.

**HJR 719-** Local incentives to developers to preserve affordable single and multifamily housing.

**HB 2167-** Affordable housing; developer contributions.

The work group will hold up to four meetings, with one meeting possibly being held in the Northern Virginia area, prior to making its recommendations to the Commission.

### **Eminent Domain/Blight Removal/ Brownfields Remediation Issues**

This work group is to be chaired by **Delegate Suit** with **Delegate Stump** serving as vice-chair. The work group is charged with i) continuing with the review of the blight removal and eminent domain work of the Commission begun last year, ii) review legislation and studies referred to the Commission as assigned, and iii) discussion of current issues and development of policy recommendations that will advance a broader Housing Policy for the Commonwealth. The following issues were referred to the work group:

**SB 1269-** Housing Authorities Law; exercise of eminent domain to acquire blighted commercial properties.

**HB 1806-** Local condemnation authority; definition of public uses.

The work group will hold up to three meetings prior to making its recommendations to the Commission.

**Delegate Suit** stressed that the meetings of the work groups will not be Commission meetings. The work group meetings of the work groups will be scheduled at the Virginia Housing Development Authority (VHDA) building in Richmond, Virginia, because its conference and meeting rooms offered excellent forums for discussion. The chairs of the

respective work groups will develop the work plans with the concentration on developing overall housing policy recommendations as well as recommendations on the specific issues that have been referred for study.

**Mr. Garczynski** asked if the official name of the Commission is now the Virginia Housing Commission. **Mr. Wade** responded that pursuant to legislation that was passed by the General Assembly in 2004, the name was officially changed from the Virginia Housing Study Commission to the Virginia Housing Commission.

**Delegate Suit** asked if anyone in the audience had any questions or wanted to address the Commission. There being no questions or responses from the public, the meeting was adjourned at 3:41 p.m.

# **AFFORDABLE HOUSING AND POLICY ISSUES WORK GROUP**

Senator William C. Mims, Chair

## **REPORT - 2005 INTERIM**

### **WORK GROUP CHARGE**

Review legislation and studies referred to the Commission as assigned; develop current issues and policy recommendations to advance a broader housing policy for the Commonwealth.

#### **Appointed Advisors**

Jeffrey W. Ainslie or designee, Home Builders Association of Virginia  
John Broadway or designee, Virginia Association of Realtors  
Connie Chamberlin or designee, Housing Opportunities Made Equal  
John G. "Chip" Dicks, FutureLaw  
Joseph Emerson, Henrico County (*Designated by the Virginia Association of Counties*)  
Andrew Friedman, Virginia Beach (*Designated by the Virginia Municipal League*)  
Mark Ingrao or designee, Apartment and Office Building Association  
Dr. C. Theodore Koebel, Virginia Center for Housing Research, Virginia Tech  
Barry Merchant, Virginia Housing Development Authority  
Emory Rodgers, Department of Housing and Community Development

### **SUMMARY**

- Held four meetings over the course of the interim (June 9, July 11, September 14, and October 26).
- Conducted public forum to receive recommendations and suggestions related to fostering increased affordable housing across the state.
- Developed a list of issues for consideration from suggested solutions to advance the affordable housing efforts in the Commonwealth; established legislative recommendations for:

- Community housing tax credit
- Assessment considerations for below market rate housing



- Alternate tax rate on income from the sale of certain buildings
- Establishment of Housing Rehabilitation Zones
- Funding for state and local affordable housing programs

- Monitored the work of the Arlington Affordable Housing Roundtable receiving progress reports and presentations from the participants over the course of the interim.
- Established subwork group to review the geographic distribution of the income tax credits across the state; Subwork group efforts resulted in development of a detailed map indicating the location by locality of low income tax credits.

**Affordable Housing and Policy Issues  
Richmond, Virginia  
Work Group Meeting  
June 9, 2005**

**Members** present were:

Senator Mims  
Senator Whipple  
Senator Locke  
Delegate Suit  
Delegate Marrs  
Delegate Rapp  
Delegate Reese  
Mr. Garczynski  
Mr. Somanath

**Advisers** present:

Jeff Ainslie  
John Broadway  
Jim Campbell  
Andrew Friedman  
Mark Ingrao  
Ted Koebel  
Berry Merchart  
Emery Rogers

**Senator Mims, Chair of the work group**, welcomed the group and called the meeting to order at 10:00 a.m.

He then gave an overview of where he thought the task force was headed.

- 1) The group has government partners including the Department of Housing and Community Development and the Virginia Housing Development Authority.
- 2) Legislation to be examined this interim.
- 3) The next meeting will be in Falls Church on **July 11, 2005 at 10:00 a.m.**

Also he stated that the housing policy work began last year and affordability issues were tackled. He said that there will be an interesting intersection with a new administration coming this year. There are lots of policy ideas to be considered and the economic situation allows new initiatives that would not have been possible two or three years ago.

Two speakers gave an overview of their agencies housing issues; 1) Bill Shelton of the Department of Housing and Community Development, and 2) Susan Dewey of the Virginia Housing Development Authority.

**Bill Shelton of the Department of Housing and Community Development (DHCD)**

DHCD has three core divisions:

- 1) Housing division--its main target is low-income people, those who are below 80% of the poverty level.
- 2) Community Development--involves many intercity groups.
- 3) Virginia Fire Prevention Code and Virginia Building Code (Virginia is only one of a few states that has a statewide building code.)

### *Agency Overview*

The emphasis of the department is on leveraging funds and using available resources to their fullest.

Also, concentration is on capacity building of organizations, debt instruments, and the homeless arena.

The regulatory climate balances the safety of buildings and creates a level playing field across the state.

Special needs populations, primarily the homeless and mentally ill, intersect between social services (which DHCD does not have) and the need for buildings.

The adoption of a Building Code creates an effective way to reuse structures, but DHCD is continually constrained by finances. They have a strong emphasis on combating homelessness and mental health issues; these prevail even with a strengthening economy. There is economic strength in distressed communities.

At the July 2005 DHCD board meeting, the board will adopt a model code that will bring down the cost of rehabilitating buildings.

DHCD has the funds from the dismantled Virginia Housing Partnership Fund and with the funding will create a charter for a community loan bank as a collaborative effort as:

- federal resources are in state of flux,
- CDBG consolidated funds may be leaving HUD,
- there is a need for domestic budget restraints.

A strong housing market -higher housing values mean fewer units for low income peoples and there is a demand for home ownership over rental units. DHCD will continue to focus on homeless elimination.

The financial resources at DHCD are used to operate homeless shelters /services, homeless intervention; this is 15% of the budget.

Funding for DHCD comes from the following sources: \$ 7 to 8 million from the state, \$ 2 million federal money to provide interim money for renters, and federal HOME dollars, 15 million, for single- family down payment assistance, and multi-family development.

State appropriations, approximately \$8 million dollars, are used for assistance for substandard housing, weatherization, and plumbing. About \$1 million dollars of CDBG

(community housing block grant) money is used to rehabilitate neighborhoods and increase community development.

### *Community Development Bank*

DHCD is creating a community development bank that will be owned by nonprofit entities as well as a for-profit subsidiary. The work has been in progress over 18 months and DHCD is developing a procedure for technical assistance/credit enhancements to operate statewide. It will have an independent board of directors and will be capitalized by using 7.5% of the priority housing fund that is already authorized by the General Assembly.

Like the Credit Union of South Carolina, housing will be the bank's primary focus initially. Distressed community will be defined by the United States census. It will be a bank for community development, not a consumer bank.

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### **Susan Dewey, Virginia Housing Development Authority**

VHDA is a quasi-governmental authority.

They authorize tax bonds through lenders to help create affordable housing. They just revised the Statewide Housing Needs Study strategic plan to:

- 1) Find ways to better serve low/medium income individuals in need of housing,
- 2) Become less divided on issues--high growth areas (N. VA-Tidewater) v. rural areas

The following programs are VHDA programs:

- 1) REACH initiative, (Resources enabling affordable community housing), it has three times the previous allocation of funds with a competitive process for localities as well as housing entities. The program works to get consumers a 30 year fixed rate mortgage or an interest-only, years one through seven, with no payment on own needed or PMI insurance,
- 2) GENISIS-- home ownership education, revitalization, assist inner cities with creating mixed- income/mixed- use developments,
- 3) Doing pilot projects using the "Main Street model," commercial on the first floor and residential upstairs,
- 4) SPARK--On-line link to put developers in touch with those people who need accessible housing, funding for ramps, particularly for armed services people who are amputees, going out to consumers and providing in- house consumer help,
- 5) LIHTC--VHDA allocates the state low-income tax credit program,
- 6) Housing Virginia-- broad coalition including DHCD and Fannie Mae that develops work force housing for teachers, police officers and other public servants.

**Delegate Suit** asked if she could see data about which localities allow for tax credit projects and where they are located.

A discussion on tax credits ensued.

**John Henry of the Rapidan Habitat for Humanity**

He spoke about the Habitat for Humanity organization and his desire to have the zoning provisions changed in his locality.

The meeting was adjourned at 12:05 p.m.

*Housing Commission  
Affordable Housing Work Group  
George Mason Middle/ High School  
Falls Church, Virginia  
July, 11, 2005*

**Commission members in attendance:**

Delegate Terrie L. Suit  
Senator William C. Mims  
Senator Mary Margaret Whipple  
Delegate Bradley Marrs  
Mr. Gary Garczynski  
Mr. Andrew Heatwole  
Mr. T. K. Somanath

**Appointed Work Group Advisors:**

Jeffrey W. Ainslie, Home Builders Association of Virginia  
John Broadway, Virginia Association of Realtors  
Connie Chamberlin, Housing Opportunities Made Equal  
John G. "Chip" Dicks, FutureLaw  
Joseph Emerson, Henrico County (*Designated by the Virginia Association of Counties*)  
Andrew Friedman, Virginia Beach (*Designated by the Virginia Municipal League*)  
Mark Ingrao, Apartment and Office Building Association  
Dr. C. Theodore Koebel, Virginia Center for Housing Research, Virginia Tech  
Barry Merchant, Virginia Housing Development Authority  
Emory Rodgers, Department of Housing and Community Development

**Senator Mims, Chair of the Affordable Housing Work Group**, called the meeting to order at 10:20 a.m. He explained the format of the meeting would be a public forum and all who wished may speak. He mentioned he would like to hear solutions to the affordable housing issue as we are all currently aware that a problem with lack of affordable housing exists.

**Senator Mims** stated that in the late 1980's and early 1990's the General Assembly addressed affordable housing, Fairfax and Loudoun County adopted the "proffer" model. In the 1990's there were many ad-hoc solutions to housing issues. One example is the LINC depository program. **Senator Mims** stated that in 2005 Northern Virginia has a housing crisis and needs new housing solutions.

**After the opening comments of Senator Mims, Mr. Wyatt, Assistant City Manager for Fairfax**, welcomed all who were present at the work group session.

The first speaker was **Delegate Jim Scott**. He stated that the Northern Virginia region is losing affordable housing as fast as it is being created. The area's goal is to preserve 1,000 units of affordable housing and that to reach that goal Arlington's City Council

unanimously passed a resolution to dedicate \$.01 of the real estate tax assessment to go toward affordable housing.

**Delegate Scott** then discussed House Joint Resolution 719, which addresses the preservation of affordable housing. He asserted that affordability of housing is more of a problem than transportation for the Commonwealth and that he would like to see tax credits given to developers because in his district there are a number of at-risk projects because the developer's have limited income and are worried about rising assessments.

**Delegate Scott** then requested the Housing Commission to please consider the issues raised in the resolution.

**Mr. Jay Fissette, Arlington County Supervisor** explained Arlington County's site plan process. Under the process, any developer who needs additional density or height can do so within Arlington's site plan process and there will be a gain for affordable housing.

**Mr. Fissette** then gave a brief history of Arlington's affordable housing dilemma. He said 47% of market-rate units were lost in Arlington in the last four years. Arlington County created its own guidelines for affordable housing solutions but made changes too rapidly for the developer community. In April of 2004 a law suit and state legislation to mandate Arlington's site plan process was set aside so Arlington could work to resolve its own affordable housing issues. It did so by creating a public forum where all the stakeholders involved in the issue were present. Twenty-three people formed the "roundtable", 14 of them are developers. There have been five meetings held at this point in time and the meetings have raised most of the significant questions concerning affordable housing and density trades.

**Mr. Fissette** stated that the group intends to have a solution by this fall. The goal is to find the best solution for the majority of people of people; to allow more density while realizing affordable housing is the primary goal, he said.

**Mr. Somanath** inquired as to why the Arlington law suit was filed. **Mr. Fissette** responded that the Judge in the case had ruled that the developer's contributions were not actually voluntary in nature and he found it to be unreasonable to require affordable housing be exchanged for density benefits to developers.

**Mr. Chip Dicks** said that from a developer's perspective the mandate to donate to affordable housing is not in the state code and therefore was not a voluntary process. He stated that the case decision held that the developer contribution program was outside of the scope of state law and was not voluntary. **Mr. Dicks** further stated that there had to be a change in guidelines for bonus density options. The developer needs to have adequate equity for projects and with six million dollars of contribution needed for affordable housing the developers cannot afford to finance affordable housing.

**Senator Mims** expressed that the above summaries gave a good overview of the various parties' opinions.

**Mr. Earnie, City of Alexandria,** said developer housing contribution policies, before Mr. Fissette's "roundtable" was established, have been put on hold. He pointed out that no developer is obliged in Alexandria to make a contribution to affordable housing. An ordinance is not set up in Alexandria; instead policy created by a workgroup is used to determine density options and affordable housing contributions.

**Mr. Dicks** asked if the city program conforms to state policy and if it also includes commercial development. He said if the ordinance is not city endorsed then the developers don't have to comply.

**Delegate Suit** asked several questions concerning how the developer contribution is used as well as questioning if any developers in Arlington are choosing to comply voluntarily. In response, she was informed that the developer contribution may consist of both onsite, i.e. setting aside specific units in a completed project, or off-site, i.e. setting aside units in projects that are located elsewhere in the locality. There was consensus that at this time no developers have voluntarily complied but there contributions are expected shortly.

**Mr. Mark Ingrao** stated that an issue for consideration included how a developer could show that he has made an affordable housing contribution.

**Mr. Heatwole** asked where the developer's money was going if the City wasn't collecting it. He was informed that the developer needed to provide a written commitment that he would be providing it before the money was used for affordable housing.

**Ms. Connie Chamberlain,** asked how the City of Alexandria is getting developers to voluntarily donate funding? She indicated that she had been informed that developers had realized they have to make their development fit with in the proposed community and wanted the community to accept their project. To gain that acceptance, many were willing to make the contribution.

**Senator Whipple** said that from her perspective the best proposals come from the developer community.

**Delegate Mars** asked if in actuality the process is really voluntary. The general response received indicted that a developer would have to make a project fit within the community and a community is more likely to accept a development if it includes affordable housing.

**Delegate Suit** said if there is more housing and property prices go down public won't get money for affordable housing --let the market play into it

**Mr. Garczynski** said that balance is the key and money has to come from somewhere and he hopes all counties take into account the Housing Trust Fund.

**Ms. Cindy Mester, City of Falls Church,** stated that meeting's dialogue illustrates the nexus between air quality, transportation, and housing. She maintained that the solutions



could not achieve on a piece meal basis, going locality by locality, but instead the region needs to be treated as a whole. Ms. Mester asserted that partnerships to solve these issues have to be public-private partnerships and if the system continues as it has for the last 14 years the region will not be successful.

**Delegate Suit** asked how the regional aspect can be implemented. **Ms. Meister** answered that if Arlington's concept works and is included in the state code, then commercial retail bases would be needed to link home and work.

**Delegate Suit** said that there is a need for incentives to proactively work together.

**Mr. Somanath** added that transportation issues affect quality of life

An individual speaking on behalf of the Coalition of High Growth Communities said it is the responsibility of the localities to maintain healthy communities. If the older more fully developed communities such as Arlington and Alexandria address affordable housing then Spotsylvania will not have to provide the housing for those who work in Arlington and Alexandria. The loss of housing units means there is less real-estate commission to be contributed to affordable housing. He also agreed that home builders can't bear all the costs of creating affordable housing.

**Mr. Jim Campbell** inquired if there are there any vehicles to use to establish affordable housing districts. His response was that regionalism only happens if the state provides tangible incentives such as what the state has done with the jail system.

**Herb Cooper-Levy, Executive Director, RPJ Housing, a non profit housing organization**, stated that local governments are stepping up to the plate. The federal government has traditionally been a provider of affordable housing but resources are diminished and the state is not filling in where the federal government traditionally gave funding. **Mr. Cooper-Levy** further stated there are some easy solutions if the state would provide money; if they are not going to do so then they shouldn't impose restrictions to affordable housing. The supply/demand economic housing solution will not solve the problems. Locally, he said, there are more jobs that housing units available and the imbalance puts more pressure on existing housing stock.

**Paula Sampson, Director, Fairfax County Department of Housing and Community Development** said Fairfax County has a problem with housing; there are 8,000 people on a waitlist for affordable housing. She said 24,000 housing units have been lost and there are 700 people on waitlist for affordable dwellings for home ownership and there are not enough units. In Fairfax County there are 42,000 people below poverty line (the size of Charlottesville's population) and that number should double by 2020.

**Ms. Sampson** asserted that we need to solve land use issues by using creativity. There is a program through the Fire department to get firefighters housing and more programs such as this could be implemented. A partnership formed with developers, realtors and the legislature needs to exist. She would like to see the state invest in affordable housing.

VHDA, she said, is a good partner but projects can only carry so much debt, even soft debt, instead they need equity investment.

**Delegate Marrs** inquired about what soft debt is and was told it is when equity is given for a lien on property but if the property is sold the lien must be paid back. Debt will stay on the records but is not paid by the mortgage then when the property is sold there is a split of equity or forgiveness of the debt.

**Delegate Suit** inquired if there are 700 ready, willing and able buyers why can't they buy housing. **Ms. Sampson** responded that the people are they are on a waiting list for affordable units that are very significantly below market rate and must stay affordable for 15 years, they are certain units held by covenants and ordinances. **Delegate Suit** said that Empower Hampton Roads is looking at a program that at end of control period can be sold at market rate and then the equity in the home is split 50/50 with the homeowner and the county. The county's 50% is put back into a trust fund. The housing must be owner occupied and for rental units each year the occupant's income needs to be re-checked and the occupant must re-qualify for the unit. The ordinance was adopted by the General Assembly, see §§ 5.2-2304 and 15.22305.

**Ms. Chamberlain** asked if there is a preference program and was told you have to work and live in Fairfax County.

**Delegate Suit** suggested creating a program where employers subsidize housing or set up housing programs.

**Charles Rinker**, an Arlington resident, said that the population in Arlington County is 190,000 persons but 215,000 people have day-time jobs in Arlington. The school bus drivers in Arlington live in West Virginia. The housing situation he feels is "beyond crisis mode". He said in 2000 there were 1,900 housing units, in 2004, 1,300 housing units; there was a loss of 475 to 715 units for those at 50% of median income and 765 for those at 40% of median income. The state needs to give localities more latitude, more authority, some more balance between what state allows and what the locality can require. HB1325 didn't get out of committee and he feels it should have. If Arlington had a housing authority they could preserve property.

**Jim Campbell** inquired where 47% housing stock that is lost, where did it go? He was informed that an increase in rent, redevelopment and conversion to condominiums.

**Delegate Suit** commented that she would like to see more people move from rental homes to home ownership position.

**Mr. Gene Bennett** said that in four years lost the area has lost 475 units of housing stock, and the cost of an average home \$457,000, and \$640,000 for a single family home. There have been 5,000 apartment units that have become condominiums. This has made it harder and harder to get an adequate work force for the area. He said that the Federal Housing Reform Act would require 5% of the profit made from Freddie Mac and Fannie

Mae Corporations be placed in the National Housing Trust Fund and this would provide an affordable housing solution, however there is not just one solution.

**Ellen Bowser**, Alliance for Housing and Solutions, which is a private citizen organization and a county-wide organization made up of community organizations, said the Alliance's goal is to concentrate on solutions. She indicated that community organizations needed federal, state, and local action as well as substantial funding to provide an effective solution. Ms. Bowser stated that while regionalism is the answer the best modus operandi is to start small and grow.

**Mike Toalson**, a lobbyist for the homebuilders, spoke about how the cost of the proffer system is great and the effect is to raise costs of existing housing. He stated that the demand is greater for new houses than there is housing available. He noted that in the Tidewater, Richmond, and Northern Virginia areas every new house is pre-sold. Mr. Toalson asserted that the legislature must let the providers of housing do what they can to increase the supply of housing. He further stated that plat approval, site review and other elements to be approved make the process to build a lengthy one and that the lack of a quick approval process is stifling the building process.

The meeting was adjourned at 12:40 p.m.

**MEETING SUMMARY**

***Affordable Housing and Policy Issues Work Group,  
Virginia Housing Commission***

***September 14, 2005, Hotel Roanoke, Roanoke, Virginia***

**Commission members in attendance:**

Senator William Mims, Chair of Workgroup

Delegate Terrie Suit

Senator Mary Margaret Whipple

Delegate Melanie Rapp

**Work group advisors in attendance:**

John Broadway

Connie Chamberlin

Chip Dicks

Joseph Emerson

Andrew Friedman

Mark Ingrao

Ted Koebel

Barry Merchant

Pat O'Hare

Emory Rodgers

**Staff present:**

Elizabeth Palen

Lisa Gilmer

The meeting was called to order by **Senator Mims**, at 1:20 p.m. who also provided an overview of the meeting objectives. **Senator Mims** indicated that the meeting would cover three main items: i) the progress made from the Arlington round table discussions, ii) continued synthesis of the nineteen issues for consideration created from the July 11, 2005 meeting in Fairfax, Virginia, and iii) development of possible legislation from those issues. **Senator Mims** further explained that the matrix of the points for discussion developed by staff was an intermediate work product and that not all of the areas encompassed in the matrix would have legislative solutions. He suggested that the work group have a final meeting in October for the purpose of developing consensus and voting on a package of proposals to recommend to the full Housing Commission meeting to be held in November 2005.

**Status of Arlington Round Table**

**Jay Fissette**, Chairman of the Arlington County Board of Supervisors provided an update of the round table discussions. He provided an overview of the County's site process plan. **Mr. Fissette** asserted that Arlington County has the an acute affordable housing problem; the plan attempts to alleviate some of the problem by giving significant amounts of additional density in exchange for affordable housing units. The round table

meetings began in May 2005 and have met four times over the summer using the services of an outside facilitator. **Mr. Fissette** asserted that a significant amount of work had been accomplished by the round table participants and that the goal was to achieve a result that would stay within the confines of existing state law and with which most of the participants could live.

**Senator Whipple** and **Mr. Ingrao** also took part in the round table discussions. Both indicated that they felt the group has narrowed their differences and established a clean framework for compromise. **Mr. Fissette** stated that different mechanisms for handling the issues raised by the round table were discussed with the intention of -all too be done without state enabling statutes or authority. The ultimate goal is for the community to solve the problem rather than through legislative changes. **Senator Mims** expressed concern that the difference between the two options may be millions of dollars.

**Mr. Ingrao** stated that the round table has come a long way and that the latest framework attempts to build upon Alexandria's model.

There was some discussion among the work group that consideration should be given to making changes to the provisions of Section 15.2-2304 and Section 15.2-2305 as an option.

**Senator Mims** stated that he felt the round table was moving toward a consensus and the legislation may not be needed. **Mr. Fissette** reiterated that the clear difference is if the FAR requirement is authorized by state or not and that his feeling was that Arlington does not need a change or to have the approval of the state. Any change would be a significant problem

**Mr. Dicks** stated that the essential question is if the provisions of §15.2-2304 are "reasonably related" to the project, in which case everyone would pay same rate across the board. There may still need to be some work to determine the legal framework for the process.

Discussion among the work group also developed the following informational points:

- The cost of the site plan process to developers; some asserted that such costs reach up to 1/2 million dollars.
- Some consideration should be given to amending enabling legislation to allow for providing affordable housing based upon density.
- Floor to Area Ratio (FAR) legislation should be considered (FAR calculations is the framework used by most urban localities for determining density calculations). The numerator is the number of square feet of the building and the denominator is the number of square feet in ground parcel).

## **DRAFT**

- Section 15.2-2305 does not accomplish what it is designed to do and §15.2-2304 lacks sufficient specificity to.
- Arlington County may be better off having developers to give contributions and units that are affordable rather than TDR's.

**Senator Whipple** asked if there is ultimately agreement where the legislation is needed and is there some way to go about it with a revision?

**Senator Mims** stated that the parties were better off reaching a consensus and encouraged substantive consensus rather than procedure.

**Senator Mims** also stated that it is nearly always better if no legislation is needed and suggested that perhaps it would be helpful to get informal AG's opinion. He There are three categories where a bill has no changes made-1) if legislation is so simple, 2) so complex no one understands it, 3) or if sponsor of the bill says you make any changes, I'll strike the bill.

The work group then proceeded to discuss in more detail the FAR calculations. **Senator Mims** noted that in the suburban areas of East and Central Loudon, a FAR of 4 is considered exceptionally dense. A FAR of 4 is a typical suburban office complex with surface parking and a 50 ft. set back and internal roadway. A 30-story building = FAR of 10.

**Senator Whipple** added that that a FAR of 1.5 is free, if more than that, a contribution cannot be called a proffer because has to have "reasonable benefit" to project. **Mr. Ingrao** stated that the whole ordinance is in state code but Arlington is not locked into it. **Mr. Dicks** added that the nexus in traditional zoning law is not an issue if the affordable units are on site or built elsewhere. He further noted that if you build project in a suburban area you may need a deceleration lane, a stoplight or other thing that may be proffered. Section 2305 requires revision.

**Senator Mims** noted that the work group will continue the monitor the progress of the Arlington roundtable group.

### **Review of the Worksheet on Issues of Consideration**

At the conclusion of the status update, the work group proceeded to the review the work sheet developed by staff. The work sheet matrix included 12 of the 19 items contained in the Issues for Consideration Document. It organized the items under the general headings of I. Tax-related, II. Financial, and III. Local Authority and Land Use Provisions. Each item included a reference to the Issues for Consideration document and a staff discussion providing options for possible recommended legislative action by the work group.

The headings and topics were as follows:

**I. Tax-Related**

- A. Consider the feasibility of state income tax credit for the preservation of affordable housing and the use of tax credits to increase production and availability of affordable housing. (Item 1, (iii) and Item 10)**
- B. Consider the feasibility of authorizing the set aside of a percentage of low-income housing tax credits to preserve affordable housing in areas with high housing costs. (Item 1, (iv))**
- C. Assessment relief for income-limited rental properties. (Item 2)**
- D. Support for increased use of federal tax incentives and initiatives. (Item 17)**
- E. State and local tax incentives for increasing the production of affordable housing (Item 16.)**

**II. Financial**

- A. Establishment or increased investment in state and local partnership funds. (Item 8)**
- B. Establishment of Community Development Banks. (Item 12)**
- C. Feasibility of using creative financing mechanism to increase affordable housing availability (i.e. "soft debt"). (Item 13)**

**III. Local authority and Land use**

- A. Amendments to Affordable Dwelling Unit statutes (ADU) (Item 5)**
- B. Strengthening the comprehensive plan requirement related to the production and availability of affordable housing. (Item 6)**
- C. Consider issues relating to the transfer of development rights (TDR's). (Item 11)**
- D. Consider providing localities with increased statutory authority to pursue a wider range of options for dealing with affordable housing issues (Item 15)**

**Work group discussion**

The work group then moved to more detailed discussion of several of the items listed on the work sheet.

**DRAFT**

*Item I.A. (State income tax credit for the preservation of affordable housing and to increase production and availability of affordability).*

**Senator Mims** stated that items contained in I and II may be appropriate for legislative initiatives. **Senator Whipple** added that issue I.A. would work better for rehabilitating and could use tax credit potentiality.

**Neal Barber**, of the Virginia First Cities Coalition, stated that these items would be a useful tool for offsetting land development costs. **Delegate Suit** added that the Richmond and Tidewater areas could both benefit because of the amount of multi-family housing in those areas.

**Senator Mims** also noted that, regarding item I.A, any tweaking with interest may not be terribly useful. When considering the Community Housing tax credit the work group should also keep in mind the concept of grants and the revolving loan fund.

**Mr. Barber** stated that the tax credit would be useful for land development costs and help to foster production on those types of projects.

**Delegate Suit** questioned if there would there be a way for a nonprofit to receive a discount on its tax rate and whether a 501(c)(3) could get a tax benefit for in-kind contribution?

*Item I.B. (Authorizing the set aside of a percentage of low-income housing tax credits to preserve affordable housing in areas with high housing costs).*

**Senator Mims** asked if the Virginia Housing Development Authority (VHDA) considering expanding the program statewide. **Barry Merchant**, Policy Analyst with VHDA, responded that additional resources are targeted for preservation and that the agency is in the process of finalizing the plan through the public hearing process. He noted that it was the agency's intention to proceed internally and legislation was not required.

*Item II. B. (Establishment of Community Development banks).*

**Bill Shelton**, Director of the Department of Housing and Community Development (DHCD) provided the work group with an overview of the Virginia provide Community Development Bank (VCDB). The VCDB is meant to support inner city and rural areas that lack the new development and capital that is needed for more purposeful lending. It was begun as part of the Governor's Virginia Work's initiative. The state equity funding began with roughly \$ 7.5 million. There will be \$15 to \$16 million in capitalization and \$ 9 million in cash. DHCD requested a partner, a private entity with appropriate mission and focus on community development lending. DHCD selected VA Community Development Inc., which is comprised of Virginia Community Development Corporation, Community Housing Partners and Federation of Appalachian housing. It will be a for profit bank entity and DHCD will finalize arrangement to enter into a



contract shortly. **Mr. Shelton** stressed that the VCBD is not a retail bank, but rather a wholesale bank that will provide technical assistance.

*Item II. A. (Establishment or increased investment in state and local partnership funds).*

**Senator Mims** explained that the VHDA program it was a designated area within the community similar to an enterprise zone-enabling legislation to allow a waiver on tax liens on vacant or abandoned property. **Mr. Friedman** noted that the City of VA Beach will **be asking** for state housing fund general revenues. **Senator Mims** responded that he might want to address and this bring it to the October meeting.

*Item III. A. (Amendments to Affordable Dwelling Unit statutes).*

It was noted that exclusive to the Northern Virginia beltway area in there are specific amendments and that § 2305 formula is out-of-date. **Senator Mims** suggested directing attention to and making amendments to § 2304 and leaving not making any changes to § 2305. **Mr. Dicks** asserted that amendments to § 2304 would not alleviate the problem. **Senator Mims** mentioned that it is likely that Fairfax and Loudon won't want to amend § 2305.

*Item III. C. (Consider issues relating to the transfer of development rights TDR's)*

**Senator Mims** stated that any changes to TDR's would have to be made legislatively **Mr. Broadway** informed the work group that he would be interested in working with **Senator Whipple** on this issue.

**Delegate Suit** noted the fact that when groups are applying for tax credits a letter is required for the localities in order to receive extra points. She would like to take the letter out altogether and will discuss it more in October.

At the close of the review, **Senator Mims** summarized the proposals that will be reviewed for final recommendation by the work group as follows:

1. Item I. A. – Consider establishment of a Community Housing Tax Credit
2. Item I. C. – Review the feasibility of assessment relief For below market rate housing.
3. Item I. E. – Consider establishment of Housing Rehabilitation Zones
4. Item I.E. – Consider authorizing or requiring a lower percent tax on the taxable proceeds of a sale of an apartment building or complex in certain instances.
5. Item II.A - Establishment of increased investment in state and local partnership funds

6. Item III.A- Consider potential amendment to §§ 2305 with § 2304.

### **III. Update on tax credit Mapping Project**

**Mr. Koebel** as a representative of the “mapping” sub-workgroup made a presentation. He spoke about the progress of the group and about the difference in zoning; comparing need/demand/opportunity with map quintiles.

**Senator Whipple** asked what was the ultimate objective of the mapping study. **Ms. Chamberlain** answered that the objective was to get beyond "fair share" to determine where it is most useful for affordable housing to go. The work group will provided a final report on its findings at the next meeting of the joints subcommittee.

**Senator Mims then opened the meeting for public comment.** There being no comment, the meeting was adjourned at 3:30 p.m.

***Affordable Housing Work Group  
Virginia Housing Commission  
House Room C  
Richmond, Virginia  
October 26, 2005***

**Commissioners present were the following:**

Senator William C. Mims  
Senator Whipple  
Delegate Rapp  
Delegate Mars  
Mr. Garczynski  
Mr. Heatwole  
Mr. Somanath

**Appointed Advisors present:**

Jeffrey W. Ainslie, Home Builders Association of Virginia  
John Broadway or designee, Virginia Association of Realtors  
Connie Chamberlin or designee, Housing Opportunities Made Equal  
John G. "Chip" Dicks, FutureLaw  
Joseph Emerson, Henrico County (*Designated by the Virginia Association of Counties*)  
Andrew Friedman, Virginia Beach (*Designated by the Virginia Municipal League*)  
Mark Ingrao or designee, Apartment and Office Building Association  
Dr. C. Theodore Koebel, Virginia Center for Housing Research, Virginia Tech  
Barry Merchant, Virginia Housing Development Authority  
Emory Rodgers, Department of Housing and Community Development

**Senator Mims** called the meeting to order at 1:25 p.m. and stated that the objective of the meeting was to review the group's work over the interim and make some final recommendations to the full Commission. This would include the review of legislative drafts that had been prepared by staff. He also noted that Mr. Jay Fissette, chairman of the Arlington County Board of Supervisors, would be attending the meeting and that when he arrived the meeting will be interrupted to hear from him.

**Senator Mims** clarified that only the Commission members on the work group would be able to vote on whether draft legislation would be recommended.

**I. Review of Legislative Drafts**

*A. Tab C- LD 5278- Assessments for Income restricted properties*

This bill provides for the local tax assessor to consider state and federal restrictions on property when determining the assessed value. There are three methods used for assessing real estate and this one focuses on the capitalization method which says you must allow for the "economic rent" not actual rent paid.

**Senator Mims** asked if this was the legislation Delegate Scott was interested in. **Mark Ingrao** answered, that this draft goes to property being developed, and it's another issue when accepting rent below market rate.

Andrew Heatwole said he has knowledge about this, primarily he see the problem under §42. When you have paid an extraordinary sum for rental property, assessors can then use that rate for capitalization. You would have to hold the property for 15 years and also must pay bond against loss of credits.

Rents would be are restricted based on the median income-housing tax credit. A developer he said is handi-capped because there is an increase in the assessment of the property but the rent rates get capped.

Andy Friedman said he has no problem with the concept but, specific items of creditworthiness of individual residents is super subjective.

Senator Mims asked for responses to #3 and #4.

Andrew Heatwole said his concern was that the draft is not specifically asking assessor to look at credit worthiness of each resident but of the residents overall percentage of income spent on housing.

T.K. Somanath said that under §42 you may challenge the real-estate assessor and final judgment is open until the appeal but to appeal costs money.

The market value gets transferred to low-income property; it is almost like a rent controlled unit and the extra burden is not transferred to the tax payer. He asked if there is someway the localities can have flexibility on cap rates that can serve as some relief for the developer.

Andrew Heatwole said that this may not solve the problem. It is simply economic if people know they will have a problem with tax assessment and a problem with equity providers.

Gary Garczynski asked if anyone had worked with VML and VACO.

Senator Mims suggested that without objection that there is a deletion of #3; and all agreed.

Senator Mims asked Andrew Friedman if he was opposed to #4, and he responded that asking an assessor to analyze the housing market is a whole new area of work that we don't have the information at hand to do so #4 is problematic.

Senator Whipple said she was concerned that a percentage of the population under 60% of the area median income is something for the assessor to determine.

Andrew Heatwole responded that he was not really asking the accessor to do income but instead saying to accept this fact when setting capitalization rates.

Senator Mims said if there was no objection, as we are sending this to the full commission, shouldn't we include item #4?

Roger Wiley, Virginia Municipal League said rather than make risk factors a must that must be factored in delete #3 #4 , add that an assessor may consider evidence proposed by property owner, that would affect the market value.

Andrew Heatwole said it should say shall not will.

Senator Mims said, " let's say shall but know it may turn out to be may."

Roger Wiley said he would have an accessor look at it.

Senator Whipple: I am assuming all will request a hearing

Roger Wiley said that property owners frequently ask for information before an assessment and that we certainly don't want everyone to appeal.

Chip Dicks said that property owners can submit information prior to the determination of the fair market value (FMV) and that doesn't mean it will affect the FMV, but, now would have to consider factors that property owners would submit upfront and mitigate appeals. The burden would be on the property owner.

Senator Mims suggested setting up a conference call with Roger Wiley, Chip Dicks, Andrew Heatwole and T.K. Somanath to get a good additional sentence added to the proposed draft, presuming something can be agreed on.

Karen Harwood-Flag provision- if property owner fails to comply and provide information then there is a chain of error in that year's assessment

Senator Whipple inquired about who is the president of the Assessors association?

Senator Mims responded that Allen Albert may be that person.

Senator Mims then said there was a consensus to send it to the full Commission provided Amigo Wade adds an additional sentence.

Jay Fissette, the Arlington County Board Chair then gave a quick background on - affordable housing problem in Arlington. He said that they tried to address the problem through contributions of developers. Further more he said that at 60% of median income Arlington lost 50 % of units available; at 40% of median there are only about 200 units left. The problem was to be resolved in Court and by General Assembly; now there is a threshold agreement, a comprehensive plan agreed to by all members. All are winning in the end; developers/citizens/ housing advocates, all of them are recognized in the agreement.

Melissa Bondy said that through a small working group of seven people, with Senator Whipple, we are taking the agreed upon plan and advertising it and will adopt it in December through amendments to the County plan.

Senator Whipple said a larger group worked down to a smaller one and the development community stepped up to help slow the housing problem and recognize the density issue. There will be a housing ordinance and she would like to see it codified.

Mark Ingreo said one piece built on another and all agreed not one word will be changed. At the end of the day this is what compromise looks like, complements of Jay Fissette and Senator Whipple.

Jay Fissette said that this was an educational experience and everyone agreed if it was codified that it is very, very important that it not change because then either party could claim bad faith.

Senator Mims agreed it was important to reach a compromise.

Senator Mims: said that no vote was needed here as it is an informational matter.

Gary Garczynski asked about what kind of impact this will have.  
Jay Fissette said that there would be possibly more affordable units and more options available.

*B. Tab B- LD 5266 - Community Housing Tax Credit*

Neil Barber asked what would be the maximum price for each unit. He mentioned that land cost have gone up to 8 to 12 %.

Barry Merchant said that it means for every and all development, costs including land. His concerns are how is it related to the LIHTC and single family housing and how is it made compatible.

Senator Whipple asked if is this exclusively for land, and Neil Barber expressed that it is broad enough for land and development.

Senator Mims asked if there should be a land based credit and if there was any objection to focusing exclusively on land.

Andrew Heatwole suggested that you could sell credit separately for at best 50% on \$1.

Neil Barber responded that the current tax credit 65 cents on \$1. He said that Barry Merchant's analysis is correct but the value of the credit would go over 60%. The point is \$100,000 tax credit can use 40% against personal income-federal tax is adjusted because you can't take state tax against the deduction.

Andrew Heatwole aid that if you assumed that an individual developer is at the 35% bracket and have to pay 35% federal tax it wouldn't work.

Neil Barber said that a grant program would work better and to limit it to land, with a per unit limit and be modest but realistic.

Senator Mims said for Andrew Heatwole, Barry Merchant, Neil Barber, and T.K. Somanath to get together to work on this.

Andrew Heatwole said he didn't want a ceiling amount.

Barry Merchant said that any tax credit program is extremely difficult to administer, a state matching proposal to go with a grant program with recapture provisions would have the same end.

*Tab F- Matching Funds for the Local Housing Trust Funds proposal, could be way of state leveraging local dollars*

Senator Mims directed them to work on: 1) land only 2) per unit only 3) tweak family of four languages.

T. K. Somanath said the focus should be on multi-family housing.

Delegate Mars said it should only be for on multi-family housing and Andrew Heatwole agreed.

Senator Whipple said that it could be expanded later and that the greatest need now was for multi-family housing. A consensus was reached with the group.

*C. Tab D- LD 5276- Alternative Tax Rate proposal*

Alternative House bill 1325 from the 2000 session; created a rate of tax on capital gains that is at 2.3 % to act as an incentive.

Andrew Heatwole asked why the limitation is to non profit or tenant's organizations, why not for for-profit developments?

Senator Whipple said that there should be the intent to hold the development affordable.

Andrew Friedman said that there are non profits that don't work as non-profit organizations.

Senator Whipple asked if then it would then open up to for-profit-also what about mixed projects.

Andrew Heatwole said that it was set up to assist seller and he thinks it is useful; at about 50% or 40% of median income.

Chip Dicks suggested that if instead of apartment,-multi-family dwelling unit or applicable portion thereof, would capture the discussion.

Senator Whipple said she wanted to go back to non-profit just so it is flexible and affordability can be transferred, she said to go back to Chip Dick's language.

Heatwole: Then we will have to define affordable-not enough of an incentive to seller if only 20 out of 100 units are affordable

Senator Whipple said that rather than a reduction of capital gains; the deduction should go to the seller who will provide affordable units.

Should it only apply to the affordable units? For what % and at what time?

Andrew Heatwole questioned if 20% at 50%, and 40% at 60%, is the median or 20% at 80% of the median income.

Senator Mims said that the proposal can stand on its own two feet and that this is Delegate Almond's proposal; he suggested legislative services have it ready for the full commission meeting.

Senator Whipple commented that the goal is to transfer property and keep it affordable.

#### *D. Tab E- LD 5265- Housing Rehabilitation Zone proposal*

This is to help depressed older urban areas

Neil Barber said tax/lien effectuate scale-is it within housing rehab zone provision to allow designation of 25% or more revenues to go back into the area?

Andrew Heatwole said Title 36 should be limited to the area within the existing housing authority.

Chip Dicks said his concern is city/town attorney there is no limit to rehab zone, he doesn't want to create it city- wide.

Roger Wiley said his concern was that it is too broad.

Senator Mims inquired if the proposed draft would be place in Title 36.

Amigo Wade said it would be carried through the General Laws Committee.

Roger: maybe should be in Title 52

Senator Mims said it would advance "as is".

#### *E. Tab F. -Matching Funds for Local Housing Trust Fund proposal*

This provision provides funding from the state for local governments.

Andy Friedman asked if the idea is to identify funding source-here the recordation tax as a state incentive for a generation of new local funding.

Senator Whipple asked if it is for development, rehab or rental assistance?

Andrew Friedman answered that it is as the locality determines.

Senator Whipple said she wants to reward the locality.

Gary Garczynski said he is looking for production and preservation and to leave rental assistance out.

Chip Dicks said that the Virginia Association of Realtors would support a dedication of a 1 cent of the recordation tax.

Senator Mims said he wanted to endorse the concept and if it is without with out objection he will have legislative services create legislation. The motion was made and passed to endorse the legislation if Virginia Beach moves forward.

Amigo Wade asked if it the desire of the Commission to have a one penny revenue source? Senator Mims responded to work with Andy Friedman and the Chair.

#### *F. Tab G- Senate Joint Resolution 376*

This follows the spring meeting at the request of Senator Houck.

John Henry of the Rappidan Habitat for Humanity said land prices and availability of land are sky high and it would make it easier to divide acres of land, would help if land could be in parcels less than 1 acre. It costs \$89,000 in Orange for an acre. John Henry asked for the state to provide a provision for land division but only for non-profits or charities.

Senator Mims said he was caught between a rock and a hard place because he is an advocate for Habitat for Humanity and for affordable housing; but, zoning subdivisions in chapter 15.2 are sacrosanct. It is restricted to the local authorities. He said he is not going to tell localities how to write zoning ordinances, legislative staff could draft this bill and bring it to the full Commission but, he would have to vote against it.

Senator Whipple inquired about what kind of response he has had in his area from local government? Have they been at all receptive?

John Henry said the Long-range Planning Commission totally ignored the request.

Gary Garczynski asked if he had looked to the private sector to work within an existing sub division. And the response was yes, they have a developer that is willing to sell \$289,000 lots for 40,000 each.

Senator Mims said that Amigo Wade and Elizabeth Palen will draft a bill and the full Commission will take it as an informational item.

T.K. Somanath inquired if there a precedent to lend localities a pledge of support?

Senator Mims responded that a letter from the chair or vice-chair has on occasion been written to a locality to ask for the Commissions' views to be considered, but, that won't be done here.

#### *G. Tab I - Report of Tax Credit Mapping Sub-work group*



Amigo Wade gave the presentation saying that this product is a map created at the request of the Chair to show the geographic distribution of Low Income Tax Credits, (LIHTC) The map shows the top 20% of localities that have tax credits.

Senator Mims concluded by announcing that the drafts that are being sent forward will have the proposed delegates or senators as their potential sponsors:

Tab B; Community Housing Tax Credit-Not Sure Yet

Tab C: Senator Mims-Delegate Scott may need a companion bill on the House side

Tab D- Senator Whipple

Tab E.: Delegate Rapp, Senator Locke

Tab F: Delegate Suit

Tab G: Senator Haulk

The meeting was adjourned at 3:55 p.m.

# **EMINENT DOMAIN/BLIGHT REMOVAL/BROWNFIELDS REMEDATION WORK GROUP**

Delegate Terrie L. Suit, Chair

## **REPORT - 2005 INTERIM**

### **WORK GROUP CHARGE**

Review of blight removal and eminent domain statutes; review of legislation and studies referred to the Commission as assigned; and discussion of current issues and development of policy recommendations that will advance a broader Housing Policy for the Commonwealth.

#### **Appointed Advisors**

Phillip F. Abraham or designee, The Vectre Corporation  
Jeffrey W. Ainslie or designee, Home Builders Association of Virginia  
John Broadway or designee, Virginia Association of Realtors  
Randy Cook, McCall, Martin, Evans & Cook (*Designated jointly by Virginia Municipal League and Virginia Association of Counties*)  
Kathy Frahm, Department of Environmental Quality  
Mark Ingrao or designee, Apartment and Office Building Association  
Susan Rubin or designee, Virginia Farm Bureau  
Jose Simon, Virginia Natural Gas, Inc.  
Joseph Waldo or designee, Waldo & Lyle, P.C.  
Stuart Waymack, Virginia Department of Transportation  
Karen Wilds, Newport News Redevelopment and Housing Authority

### **SUMMARY OF ACTIVITIES**

- Held four meetings over the course of the interim (June 9, July 11, September 14, and October 20).
- Established subwork group to develop recommendations related to the redevelopment of brownfields and site notification; developed legislative proposal clarifying local government authority to adopt ordinances to require site assessments and record notice as a part of a rezoning or subdivision approval process. Subwork group efforts included development of model subdivision and zoning ordinances.

- Received presentation from the Department of Environmental Quality on the State's brownfields remediation program and efforts to reuse or redevelop brownfield sites.
- Reviewed the eminent domain authority as used by housing authorities and other entities; included in its review referred legislation. (*Senate Bill 1269 and House Bill 1806*)
- Held a statewide public forum to review the decision of the United States Supreme Court in Kelo v. City of New London and its effect on eminent domain authority in the Commonwealth; established a public comment period to receive comments and recommendations for legislative action in response to Kelo.
- Developed legislative proposals to amend the State's definition of "public use" and the authorization of state and local entities authorized to use eminent domain.
- Facilitated review of relevant provisions of the Housing Authorities Law with the objective of updating language and deleting obsolete provisions.

**Virginia Housing Commission**  
**Eminent Domain /Blight Removal/Brownfields Remediation**

**Thursday June 9, 2005**  
**1:30 p.m.**

**Members Present:**

Senator Whipple  
Senator Locke  
Mr. Garczynski  
Delegate Marrs  
Delegate Rapp  
Mr. Heatwole

**Not Present:**

Senator Mims  
Delegate Reese  
Mr. Somanath

**Advisor Members:**

Delegate Suit welcomed the work group and called the meeting to order.

**Karen Wilds, Newport News Housing Authority** then gave an overview of Virginia Housing Authorities. Points mentioned in her talk included:

- 1) Housing Authorities in Virginia have a good reputation and are high performers;
- 2) there is a need for the Housing Authorities because of a shortage of affordable housing and the existence of blighted areas;
- 3) there are 30 Housing Authorities in the state and they vary greatly; larger agencies have 200/400 employees, 48,000 housing units and budgets range from 200,000 to 4 million plus. How they operate varies on location.

There powers are granted by the General Assembly and they encompass the management of subsidy programs like section 8 as well as redevelopment and some Housing Authorities for example, Newport News, administer the CDBG and HOME programs.

All Housing Authorities have the power to: make contracts, purchase/lease real estate, eminent domain, have redevelopment and conservation plans, do spot blight abatement. They also identify blighted or deteriorating areas and acquire them to keep the blight from spreading.

The Housing Authorities classify redevelopment as a government function and for the Authorities' purposes, public use equals public purpose. They classify public recreation and transportation as public use. Authorities' categorizes and identify which parcels are to be gained and what should be private enterprise and what is a public entity.

Housing Authorities have no more than five years to redevelop an acquired property and anyone whose property is being acquired is notified by certified and regular mail of the acquisition. A housing redevelopment plan from the Housing Authority is good for three

years but can be extended another five years. After the effected property is sold the law also allows for conservation plans but the property has to be for public use and properties need to be rehabilitated within one year of acquisition.

The design standards for the area are taken into consideration and with spot blight hearings have to be held and notice given and the owner needs to respond within 30 days of notification from the Housing Authority. Other provisions include the necessity of providing three weeks prior notice to abutting property owners of an impending planning commission meeting where the property is to be discussed. Two notices in area newspapers, no less than six weeks apart is also required.

Since 2002 Housing Authorities have reported their housing acquisitions and it is used when a willing seller can't provide clear title or liens exceed value of property. Also, most eminent domain acquisition done by the Housing Authorities is done to clear title. In Virginia, 19 of 401 parcels acquired by the Housing Authorities were taken by eminent domain and 14 of those parcels the object was to obtain a clear tile. The Housing Authorities have found the needs outweigh the resources they can provide, particularly in urban cities.

A conversation regarding Ms. Wilds talk ensued. Delegate Suit inquired if Housing Authorities need to have a person who is receiving a section 8 voucher on the Authorities' Board and the response from Ms. Wilds was that no, just a housing consumer was needed to fill that Board slot.

Chip Dicks commented that government can take for economic development and that Redevelopment equals public use. He also said that to determine which areas are blighted areas, the Housing Authorities' proclaim that the elimination of blight is public purpose and that equals a public use.

Delegate Suit asked how Housing Authorities deal with commercial properties in blighted areas.

Andrew Heatwole answered that in Virginia Beach, which doesn't have a housing authority, a spot blight process is used Virginia Beach's government has a five year limit on redevelopment as does the Housing Authority and the sources of funding to redevelop the property must be in place within that time period.

Virginia is unique, he said, in that redevelopment and housing authority is rolled into one entity.

Delegate Suit voiced her concern that Housing Authorities are used to hide from localities the ugliness of the eminent domain task.

Chip Dicks said that the current legislation is intended to establish the ability to have housing authorities deal with individual properties.

He will look at the enabling statute to come up with new statutes.

**Delegate Suit** mentioned that it is a good idea to explore this issue further and assigned Chip Dicks, Delegate Marrs and Randy Cook to delve further and report back to the Work Group.

Next, Karen Wilds was asked to join the advisor group for the work group.

**Robert Burnley of the Department of Environmental Quality**, who spoke about environmental assessments, was the next speaker. Main points of his presentation included: 1) the concern is with residential projects; 2) the overall goal is to promote redevelopment; 3) there are a number of different environmental assessment programs administered by the state.

He said we want remediation to work and have safe transfers of former commercially used property to residential use. For residential site clean up after 1980, the Department of Environmental Quality set up a program to allow owners to negotiate clean up levels, since 1993 250 sites have enrolled in the program.

Underground storage tanks may be in individual homes and restrictions on use of property are supposed to be disclosed upon selling the property

In recent developments, in Chesapeake, all development must have environmental assessments, but a potential buyer still must look to past uses of property at court house

Delegate Suit said from a policy standpoint we have passed the Brownfields Act and it takes into account existing buildings that have been converted. What can we do, she asked, to put requirements in the Code so that the local government and residents feel comfortable?

Bob Burnley replied that liability and time are the issues and we want local government to tell perspective buyers what is wrong with sites, and how much it will cost to clean it up. Incentives and liability protections need to be in place.

Mike Toleson added that Phase 1 environmental studies are done everywhere now and as Virginia is a Dillion Rule state, environmental disclosures needed must go through the state enabling authority.

Delegate Suit said that developers need to know when remediation will be over.

Mike Toleson said we need to develop a statement that doesn't scare future sales away.

Andrew Heatwole said he doesn't want to be in the position to have to prove the negative 'we have no contamination'.

Chip Dicks added that once the contamination was placed in the chain of the title of property, it will be stigmatized forever. He also asked for more information on when is the proper time to do a phase I assessment.

Jeff Ainsley inquired about when it changes from a voluntary assessment to a required one. Mr. Burnley responded that it is voluntary if property was developed in the 1950's 1960's or 1970's but has been required from 1980's onward.

Randy Cook asked if any notice restriction is put in the chain of title and Mr. Burnley answered that it is not.

It was agreed more discussion on the environmental assessments was needed and a group will be formed to continue the discussion.

The meeting was adjourned at 3:20 p.m.

The next meeting will be held July 11, 2005 in Falls Church at 1:00p.m.

***MEETING SUMMARY***

***Eminent Domain/Blight Removal/Brownfield Remediation Work Group,  
Virginia Housing Commission  
July 11, 2005, George Mason High School, Falls Church, Virginia***

**Commission members in attendance**

Delegate Terrie Suit-Chairperson  
Delegate Bradley Marrs  
Senator William Mims  
Senator Mary Margaret Whipple  
Senator Mamie Locke  
F. Gary Garczynski  
F. Andrew Heatwole  
T.K. Somanath

**Work Group Advisors present:**

Phillip Abraham  
Randy Cook  
Mark Ingrao  
Susan Rubin  
Jose Simon  
Karen Wilds  
Michael Ball  
John G. "Chip" Dicks

**Other Legislators Present**

Delegate Robert McDonnell  
Delegate Robert Marshall  
Delegate Rosalyn Dance  
Delegate Robert Hull

**Staff Present**

Amigo Wade  
Lisa Gilmer

The meeting was called to order at 1:30 p.m. **Delegate Suit** began the meeting by announcing an addition to the work group **Mr. Michael Ball**, with the City Attorney's Office of the City of Norfolk. **Delegate Suit** stated the objective of the meeting was to receive a thorough review of the decision in Kelo v. New London Development Authority and discuss options for proceeding with possible legislation. She also invited all interested parties to submit their suggestions and comments to Commission staff and that everything that is received will be included in the Commission's review when it determines legislative recommendations.



**Delegate Suit** then introduced **Dr. Steven Eagle**, the guest speaker. **Dr. Eagle** began by stating that eminent domain has been increasingly used in community development and that he intended to review federal and state law pertaining to the use of eminent domain.

**Dr. Eagle** stated that eminent domain is the inherent power of the sovereign to take private property for public purposes. In the almost 500 years that the power has been recognized, it has come to include the duty to compensate the affected property owner. He noted that just compensation does not mean full compensation and that eminent domain takings typically result in some uncompensated injury such as loss of associations, memories, business good will with customers, etc. **Dr. Eagle** stated that the breadth of the power was one of the reasons that the framers felt it should be used sparingly.

**Dr. Eagle** discussed the “takings clause” in both Virginia and United States Constitution. Both authorize taking private property for public use. The key issue is whether “public use” mean one of the three uses traditionally so defined: i) property to be used by the government (e.g. post office, school), ii) use by a private “common carrier” obligated to serve the entire public (e.g. electric utility company, railroad), or iii) used by the general public (e.g. a road). The further question, which presents the issue in Kelo, is whether “public use” equates to “public purpose” or “public benefit.” It is clear from past decisions of the United States Supreme Court that removal of blight and ending land monopoly are “public uses.” Taking non-blighted land for private development has become more controversial as local governments have begun using condemnation as a tool for seeking to lure bigger businesses to the area and thereby providing jobs and tax revenue. **Dr. Eagle** asserted that most of the time this slow expansion flew under the radar without much attention.

**Dr. Eagles** then reviewed some relevant federal case law. He noted that the case of Poletown Neighborhood Council v. City of Detroit, decided in 1981, was the high water mark of these cases in terms of the allowing eminent domain for private development. In that case the Michigan Supreme Court permitted the condemnation of an ethnic neighborhood composed of 1200 homes, businesses, and churches for retransfer to General Motors for an auto assembly plant. In doing so that court used a very deferential test that permitted the Detroit City Council to define public benefit. **Dr. Eagles** noted that in 2004 the Michigan Supreme Court reversed its Poletown decision with County of Wayne v. Hathcock. In that decision the Court decided that condemnation for retransfer to a private entity was only allowed if there was extreme public necessity, remaining accountability to the public or alleviation of blight.

**Dr. Eagles** then provided an overview of the facts in the Kelo case and then proceeded to with an analysis of the case. In the Kelo decision the Court upheld condemnation for economic redevelopment. Justice Stevens wrote for the 5-4 majority. The court rejected the landowner’s request that it adopt a new bright line rule that economic development does not qualify as a public use. The 5-4 decision held that promoting economic development is a tradition and long accepted function of government. The “principled way of distinguishing economic development from the other public purposes that we

have long recognized.” After reviewing the holding, the presentation moved to discussion of the concurring opinion of Justice Kennedy and the dissenting opinions of Justice O’Conner and Justice Thomas.

**Dr. Eagle** then noted that Justice Stevens made it a point to emphasize that the individual states were not precluded from placing further restrictions on their exercise of the takings power and that many states already imposed “public use” requirements that were stricter than federal baseline. At least ten states already forbid the use of eminent domain for economic development: Arkansas, Florida, Illinois, Kentucky, Maine, Michigan, Montana, South Carolina, Utah, and Washington. On the other hand, six states expressly allows private property to be taken for private economic purposes: Connecticut, Kansas, Maryland, New York, and North Dakota. **Dr. Eagle** stated that in Virginia it is the job of the courts to determine whether or not there is blight.

At the close of the presentation, several questions were asked. **Delegate Hull** asked which entity was actually doing the condemnation. He stated that in most cases it was utilities, but, most often was it done by the governing body. **Dr. Eagle** responded that in the Kelo case it was New London Development Authority, which had been given power of eminent domain through the local governing body. **Delegate Marshall** asked what would currently prevent private to public to private transfer, such as a taking for a park and then reselling. **Dr. Eagle** responded that once property is acquired there is no further accountability.

**Senator Mims** presented the following fact pattern: a deal is reached between a private developer and locality involving a shopping center wherein the developer proffers road construction and sewer connections. The locality keeps an easement but none would be necessary but for the shopping center being built. Is this deal suspect? **Dr. Eagle** responded that you must look at the private verses public good.

**Mr. Heatwole** noted that in Virginia even an Authority needs an approved redevelopment plan, which the elected local government is required to approve. **Dr. Eagle** noted that that was correct and that in Kelo the majority stressed that there were a copious amount of hearings that were conducted by the local government.

**Mr. Garczynski** asked if the General Assembly should be in a rush to set an objective test for public use. **Dr. Eagle** replied that that was a question of political judgment and that he would leave that to the legislature.

**Ms. Wilds** stated that in Virginia the local government must approve a redevelopment plan. She further stated that blight must be a component but every property in plan doesn't have to be blighted. She then asked how would the unblighted properties be released. **Dr. Eagle** stated that in Kelo, the plaintiffs asked the court to consider the probability of success of the plan and the court rejected such consideration.

**Mr. Abraham** asked Dr. Eagle if he agreed that the Virginia law has strictly construed public use. **Dr. Eagle** responded that there was not much case law on that specific issue.

He further noted that the blight definition might yield case law. **Mr. Abraham** then asked if there were any case where takings for Kelo type use. **Dr. Eagle** responded that the question really brings the consideration back to the localities consideration to approve development plans in the first instance.

**Delegate Suit** thanked **Dr. Eagles** for his presentation and noted that the work group would proceed with developing thoughtful, measured legislation to alleviate concerns that had been raised by the Kelo decision. She encouraged all interested parties to provide their suggestion and comments on eminent domain to be included in the work group's future consideration.

Meeting was adjourned at 3:10 p.m.

## ***MEETING SUMMARY***

***Eminent Domain/Blight Removal/Brownfield Remediation Work Group,  
Virginia Housing Commission  
September 14, 2005, Hotel Roanoke, Roanoke, Virginia***

### **Commission members in attendance**

Delegate Terrie Suit-Chairperson  
Senator Mary Margaret Whipple  
Delegate Melanie Rapp

### **Work Group Advisors present:**

Phillip Abraham  
John Broadway  
Randy Cook  
Mark Ingreo  
Pat O'Hare  
Susan Rubin  
Jose Simon  
Joe Waldo

### **Staff Present**

Elizabeth Palen  
Lisa Gilmer

The meeting was called to order by **Delegate Terrie Suit** at 3:40 p.m. and began with a brief overview of the meeting objectives.

## **Status Report of Brownfield Sub-work Group**

**Elizabeth Palen** provided a brief overview of the status of the Brownfield sub-work group established by Delegate Suit to provide recommendations regarding the appropriate level of disclosure and risk reduction for former Brownfield sites. The sub-work group members include: **Kathy Frahm**, Department of Environment Quality (DEQ), **Jeff Ainslie** and **Pat O'Hare**, Virginia Homebuilders Association, **Joseph Durant**, Assistant Chesapeake City Attorney, **Mark Flynn** and **Debbie Thompson**, Virginia Municipal League. The sub-work group met on two occasions, August 2, 2005 and September 9, 2005, and has included in its discussion the following alternative methods for risk reduction for development occurring on contaminated sites:

i) Uniform Environmental Covenants Act (UECA). This legislation was developed by the Uniform Code Commission and would provide a mechanism for using – and removing – use restrictions on sites that are remediated to less than residential use. It's been passed by several other states and there appears to be growing interest in Virginia. The sub-work group is looking into the possibility of having an individual

familiar with UECA to appear before the full work group to provide an overview of the legislation.

ii) Draft legislation clarifying local government authority. This aspect of the sub-work group's efforts involves development of legislation clarifying the authority of localities to adopt ordinances requiring site assessments as part of a re-zoning or subdivision approval process and possible model ordinances to assist with the implementation of that authority. The work group is working to develop legislation and documents for consideration by the subcommittee.

iii) Draft legislation relating to property disclosure provisions. The sub-work work group is reviewing the feasibility of including deed notice requirements on all sites that have satisfied remediation requirements. The group is working on language to accomplish this for consideration by the subcommittee.

iv) Information and ideas on training our outreach approaches. The sub-work group is discussing ways to increase access to information on potential contamination for local governments, planning staff, title companies, and real estate agents including increasing outreach and training, the possibility of the DEQ providing more consistent GIS-based information via the internet on Brownfield sites that the agency is aware of and expanding the Uniform Real Estate Disclosure Form to include information not only on where purchasers can get information on petroleum releases, but information on other contaminated sites as well. Currently DEQ has some of this information in GIS format and is working to update and expand this information for petroleum releases, and voluntary remediation program sites; however the agency does not have information on all of the known un-permitted waste disposal sites in GIS format and obtaining that information may be resource intensive.

## **Review of Eminent Domain Work Sheet/Matrix**

**Delegate Suit** then explained that the meeting would proceed with review of the matrix of suggestions and comments provided by interested parties relating to eminent domain. (See Tab A) The matrix divides the suggestions and comments under four broad categories: A. Public Use Definition/Eminent Domain Authority, B. Accountability, C. Condemnation Procedure, and D. Compensation.

The work group proceeded with reviewing the matrix with the comments provided by members throughout the review. During the review several of the items invoked discussion among the work group members.

### **A. Public Use Definition/Eminent Domain Authority**

*Suggestion 1. Prohibit the use of eminent domain for economic development or tax enhancement purposes.*

This suggestion included language for a proposed amendment to the definition of "public use" found at § 15.2-1900. **Mr. Dicks** expressed the concern that the suggestion lacked a definition of "economic development" and "tax revenue." **Mr. Waldo** also expressed a concern that the language may have the effect of broadening the housing authorities.

*Suggestion 2. Amend the definition of "public uses" to prohibit condemnation by a locality that (i) is made with the intent of making the property available for ownership or use by a private entity unless any benefits that will accrue to the private entity as a result of its ownership or use of the property are merely incidental when compared to the benefits that will accrue to the public or (ii) is otherwise predominantly for a private purpose.*

This suggestion also included language amending the same code section. **Delegate Suit** stated that the language might create difficulty in situations where eminent domain was being used to clear title. **Mr. Dicks** stated that the definition used in the suggested amendment would be too broad. **Mr. Abraham** suggested that the work group consider removing the word "predominantly" from the suggested language as it would cause confusion and uncertainty in individual cases.

**Ms. Rubin** asserted that the work group should move forward on this issue. **Mr. Broadway** maintained that perhaps the work group should not pursue the language.

*Suggestion 3. Prohibit the use of eminent domain for the purpose of receiving additional tax revenue*

This suggestion, which included language for amending § 15.2-1900, was offered jointly by the Virginia Municipal League and the Virginia Association of Counties. **Mr. Cook** stated that the work group must be concerned about placing too many restrictions on public use. He stated, for example, that a utility use of eminent domain was a public purpose. **Mr. Waldo** stated that the suggestion was moving the work group in the right directions. **Mr. Dicks** maintained that a rewrite of the Housing Authority Law contained in Title 36 of the Code of Virginia could be a vehicle for clearing up many problems and confusing provisions related to eminent domain authority and the use of that authority.

*Suggestion 9. Provide that whenever property is condemned and will be used by a private party, the condemnor must establish by clear and convincing evidence that the condemnation of the property is necessary.*

**Mr. Waldo** stated that the current proof of standard was working fine and that this suggestion should be taken off of the table.

The work group continued to review the items under the Public Use Definition/Eminent Domain Authority heading without additional comment. At the conclusion, **Delegate Suit** asked members to come up with a definition of "public use" to be reviewed by the work group at its last meeting in October 2005.

The work group continued with its review of the matrix.

## **B. Accountability**

*Suggestion 1. Consider development of accountability mechanism to ensure that the private entity ultimately develops the property that was acquired through eminent domain as originally planned*

**Mr. Waldo** stated that this issue was better suited to a case by case basis as it affects very few people.

*Suggestion 2. Require the commencement of a redevelopment project occur within a stated period of time after the property has been declared blighted. This would eliminate the indefinite cloud over the property.*

Discussion among the members on this suggestion centered on previous legislation sponsored by former Delegate and Commission Chair Thelma Drake. This legislation would have required action to be taken by the condemning authority within five years of the property in question being declared blighted. It was noted that the provisions applied only to redevelopment districts and did not include conservation districts.

## **C. Condemnation Procedure**

*Suggestion 1. Expand the amendments made to 25.1-203 by HB 1820 so that its provisions apply to Virginia Department of Transportation (VDOT). These amendments modified the provisions associated with the condemnor's entry onto property regarding notice and damage awards.*

**Ms. Rubin** noted that the VDOT had been left out of the right-of-entry provisions of the previous legislation.

*Suggestion 2. Amend relevant section of Title 25.1 to provide for a regular juror selection process in condemnation cases rather than the present system of either commissioners or the selection of jurors from a small, previously selected list of individuals.*

**Mr. Waldo** noted that most parties to a condemnation action want real juries. He stated that it should be treated like a felony case.

## **D. Compensation**

Suggestion 4. Compensation should include business losses.

Discussion among the members concluded that this was really an appraisal issue. It was suggested that it would be helpful to have the professional licensing entity provided some

background on the standards of practice for the profession and how those standards may relate to accounting for business losses in an appraisal done in connection with a condemnation proceeding. The Board is housed in the Department of Professional and Occupational Regulation.

**Mr. Broadway** indicated that he would be willing to work on developing this issue. **Mr. Brad Allen**, stated that he supported reimbursement for business losses in a condemnation action

**Nancy McCord**, of the Virginia Property Right Coalition, then addressed work group in support of changes to the condemnation procedure. She expressed support of a constitutional amendment with public use defined. **Ms. McCord** also noted that the property owner in a condemnation action should be reimbursed for attorney fees because the owner is not getting full fair market value in the first instance. **Ms. McCord** stated that House Bill 1821, which passed during the 2005 Session of General Assembly, was the first time, to her knowledge, that a provision was included for the reimbursement of a condemnee's expenses related to a condemnation action. This legislation provides that if an owner is awarded an amount that is 30% or more greater than the amount offered, then the court may award the owner other expenses including appraisal, engineering and expert witness fees. **Ms. McCord** stated that the award of attorney fees should not be left to the discretion of judges because appeals in condemnation actions last for years and attorney fees continue mount up over that time. In the end, according to **Ms. McCord**, the only winners were the attorneys. **Ms. McCord** also requested the work group to pursue the use of mediation in condemnation proceedings as a means of getting more equitable and timely resolution. She stated that Utah and Florida are states that use mediation and in that those the process has been 95% successful.

### **Public Comment**

At the conclusion of the work group review of the matrix, Delegate Suit opened the meeting for public comment. Two individuals provided comment.

- **Elizabeth Waycoft**, of Patrick County stated that she had two gas lines going through her property. She also stated that when the highway was widened the home owners that were not reimbursed in a timely manner
- **Randolph Grey**, of the City of Roanoke. **Mr. Grey** indicated that he was a Roanoke business owner and that he supported reimbursement for business losses. He also requested that the work group look in to defining blight.

At the conclusion of public comment, **Delegate Suit** detailed the following items for inclusion in the matrix for resolution at the October 2005 meeting: i) mediation, ii) removal of Section 1821 language, iii) definition of blight, and iv) timelines of reimbursement.



**Delegate Suit** stated that the majority of the items on the matrix will be taken up at the October 2005 meeting of the work group with the objective of developing consensus on language for recommendation to the full Commission.

The meeting adjourned 4:35 p.m.

**Eminent Domain Work Group**  
**October 20, 2005**

Members present:

*Delegate Suit*

*Delegate Marrs*

*Delegate Rapp*

*Senator Locke*

*Senator Whipple*

*Mr. Garczynski*

*Mr. Heatwole*

Advisors present:

*Philip Abraham - Vectre Corporation*

*John Broadway - Virginia Association of Realtors*

*Randy Cook- Virginia Municipal League, Virginia Association of Counties*

*Chip Dicks- Future Law*

*Kathy Frahm - Department of Environmental Quality*

*Mark Ingreo - Apartment and Office Building Association*

*Martha Moore - Virginia Farm Bureau*

*Pat O'Hare - Home Builders Association of Virginia*

*Susan Rubin*

*Jose Simon - Virginia Natural Gas, Inc.*

*Joseph Waldo - Waldo & Lyle, P.C.*

*Stuart Waymack - Virginia Department of Transportation*

*Karen Wilds - Newport News Redevelopment and Housing Authority*

The meeting was called to order by the Chair, Terrie Suit, at 10:20 a.m.

Delegate Suit noted that there were two full agenda items; 1) Brownfields and 2) Eminent Domain.

Delegate Suit expressed her hope that the work group was close to reaching a consensus on the Brownfields issue.

Joe Durant, Assistant Attorney for the City of Chesapeake, presented the Brownfields sub-group information.

There were four areas of main focus:

- 1) UECA, it will be brought before the General Assembly in the near future - remediate for less than residential use.
- 2) Deed notice - for occurrences such as leaky underground tanks - complementary to UECA.
- 3) How information held by the state is given to local governments - Department of Environmental Quality has GIS format-overlays may be available when a potential buyer is searching a title.
- 4) Local zoning and subdivision ordinances - record notice not for residential use.

#### *A. Record notice*

Joe Durant noted that at least record notice would give notice that there was an environmental issue on the property. He gave an example that took place in the City of Chesapeake at a residential home site; the owners went to dig to put in a swimming pool and found buried drums from 20 years ago.

He wants to see enabling legislation for Phase I and Phase II Environmental assessments and notice and fees for potential environmental issues.

The City of Chesapeake reviewed 52 Phase I environmental studies and in 12 of them there was no mention of environmental problems although issues existed that were known to the Department of Public Works.

#### *B. Reasonableness of fees*

Pat O'Hare offered amended language from §15.2 of the Code of Virginia to say it is optional to perform a Phase I.

A concern remains in the City of Chesapeake because there are so many cases needing building permits that they need to hire consultants to cover the overflow.

A discussion ensued over the standards for the preparation of environmental site inspections. The City of Chesapeake wants some clarification beyond the current standards.

Joe Durant continued by stating that there is a definition from the Environmental Protection Agency that proposed rules for brownfield sites. Soil/gas especially have elevated methane levels on proposed subdivision sites that need to be regulated.

Joe Durant is proposing additional language from that of the American Society of Developers as there is no current state standard. Site assessment is

generally focused toward what a lender wants and is for commercial development not residential use.

Pat O'Hare said that Joe Durant correctly addressed the fee problem in the 2nd page of the revision. If the Phase I assessment is made a longer process it will mean more expensive homes. If the development community uses the national standard, everyone will know what to expect. The national standard is used all over the country, the flexibility may be in defining what to with a finding in a Phase I and how to explore it further.

Delegate Marris asked what the specifics were for a Phase I Environmental assessment.

Pat O'Hare responded that the records, reviews, interviews, all public records on state/local level are part of it, but no water samples or soil samples are taken.

Uses made of the property, aerial photos, fire insurance maps, anything to see if a Phase II Environmental Assessment is used.

Delegate Mars asked if Mr. Durant said that if staff members of the Department of Public Works can't add input, does a Phase I force a person to go to a locality? Would the process be better with the request going to a locality? Wouldn't it be more economical to do it right the first time?

Pat O'Hare said maybe we could add something about personal knowledge of a locality and Delegate Mars suggested language saying, "but not limited to..."

Delegate Suit inquired if the interviews of people would include city staff. Pat O'Hare responded that the interviews are already incorporated; you have to interview building officials according to ASTM guidelines.

Delegate Suit summed up that there was some agreement that Phase I's should be based on a national standard but disagreement as to local standards.

Senator Whipple said a paper search may not be as good as it could be. She gave an example of a situation in Falls Church where an auto was pulled out of a 50-year-old, forgotten landfill where they intended to build a middle school.

Delegate Suit then said we may have to be over-cautious and then make standard a Phase II.

Andrew Heatwole disagreed by saying a Phase II is written to address and remediate a problem and that usually you don't need a Phase II.

Delegate Suit asked for and received a consensus to move forward with Phase I's. Delegate Marrs then made a suggestion to change the wording to read administrative expenses instead of administrator expenses, all agreed.

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### *Eminent Domain*

Chip Dicks representing the Virginia Association of Realtors gave an overview of the topic to the work group.

He said in Roanoke Delegate Suit suggested that the work group work together to create one strong proposed eminent domain draft and he believes they have done so. Economic development is not defined in the Code of Virginia and most situations in eminent domain involve tax enhancement. When a government condemns, with respect to public use, if a government entity turns over the property to a private enterprise it can only be in certain circumstances.

There is no definition of private entity and the law doesn't apply if the purpose is to flip property from public to private.

He said we should maintain existing case law. There are a series of carve-outs; if not listed among the carve-outs, a private owner cannot take ownership. He made other points including: (i) Virginia doesn't define eminent domain in the parameters of public use; (ii) if developer cannot acquire for FMV, then the government will use eminent domain; (iii) the developer is required to get off-site easement to relocate utilities and a private owner may own the area being condemned; and (iv) land use approval is needed for water, sewer, and storm water to continue on the property.

Delegate Suit asked, what happens if property is acquired for a road and then given to the Department of the Interior?

Chip Dicks said whatever the law is now, Virginia would maintain the law. Delegate Suit also said to add in reference to Senator O'Brien's bill that each time new authorities are created they would have to be added to the list.

Chip Dicks said if they fall under § 15.2 of the Code of Virginia, local government, we would need to add them in the carve-out section. Delegate Suit inquired about state authorities like the Aviation Board, would they be included in the "carve-outs." Chip Dicks answered no.

A decision was reached to come up with a comprehensive list of who is not included in the "carve-out" list.

A motion was made to adopt §15.2-1900 of the Code of Virginia as proposed by the workgroup and all agreed to move it forward.

### *Constitutional Resolution*

A discussion of a constitutional amendment took place with Chip Dicks taking the lead in the discussion.

Chip Dicks said that now public use equates to public purpose and no implied powers are given unless they are expressly granted.

Delegate Marrs said to pass this will take years, if it ever passes. Representatives from VACO/VML comfortable with the way it reads.

Philip Abraham was concerned that the constitutional amendment and §15.2 of the Code of Virginia, unless you lay out the statutes for state agencies, may take away powers that are preserving legitimate uses.

Chip Dicks said the intent was to list if the power was preserved, and if so it is because the General Assembly said so. It may be appropriate to have such a statute as you suggest but it may cross too many code sections and thus make it difficult to find and understand.

Jose Simon said he still have two concerns: (1) concern that § 56-49 of the Code of Virginia could create some confusion and (2) local governments don't have authority.

### *Blight*

A definition exists in the current Code of Virginia but it is not in the same chapter as eminent domain.

Delegate Suit asked the work group to address this specifically related to Title 36 of the Code of Virginia. There was a limitation on what could occur but localities could move without the Housing Authority. Chip Dicks said local government wanted powers extended to individual residential properties and it seemed like a good idea at the time, there was no opposition to doing so for commercial properties.

Delegate Rapp made a motion to carry over the thought to the next interim and it was agreed to by the Commission.

*Housing Commission Impact fee bill*

Martha Moore of the Virginia Farm Bureau said she supports impact fees and asked the Housing Commission to act favorably upon them.

Delegate Suit asked if there was a motion to move forward and the answer was unanimously no.

Delegate Suit announced that she would move forward this concept to the Housing Commission's work load for next year.

The meeting was adjourned at 12:50 p.m.