

COMMONWEALTH OF VIRGINIA

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VIRGINIA HOUSING COMMISSION

Common Interest Communities Work Group Meeting
Virginia Housing Commission
June 26th, 2008, 3 p.m.

Members Present:

Senator Mary Margaret Whipple-Chair
Delegate Terrie Suit
Delegate John Cosgrove
Mike Inman
Chip Dicks
Ron Kirby
Janice Burgess
Jay DeBoer
Cynthia Schrier
Pia Trigiani
Dale Goodman
Sarah Broadwater
Chandler Scarborough

Invited Guests:

Senator Jill Vogel

Welcome and Call to Order

- **Senator Whipple** called the meeting to order at 3:04 p.m.
 - The first issue on the agenda was Senate Bill 6016. This bill would not normally be introduced until January.
 - A question was presented whether or not it rises to the level of emergency that requires it be handled mid-year.
 - The work group should consider whether this rises to that level of emergency, and what recommendations should be made concerning the bill.

The first speaker was **Senator Vogel**, to speak about SB 6016.

- Given the unlikely meeting of the House General Laws Committee, and the practical constraints in terms of time, this bill will probably not be heard by House General Laws, but she feels it is worthy of being introduced in Special Session.
- This bill addresses a major area of concern in Virginia, and one that is not unique to the 27th district. There are 9,111 Property Owners Associations (POAs) in the Commonwealth of Virginia.

DELEGATE JOHN A. COSGROVE
DELEGATE ROBERT D. HULL
DELEGATE DANIEL W. MARSHALL, III
DELEGATE ROSALYN R. DANCE
DELEGATE TERRIE L. SUIT

SENATOR MAMIE E. LOCKE
SENATOR JOHN C. WATKINS
SENATOR MARY MARGARET WHIPPLE

F. GARY GARCZYNSKI
F. ANDREW HEATWOLE
T. K. SOMANATH

- The issue is that declarations are inconsistent, and there is a question of integrity of POAs under the Property Owners Association Act (POAA).
- What can we do this session?
 - There is ongoing litigation in the 27th district over a specific POA (*Lake Holiday*); the legislation should not be specific to this litigation, nor be retroactive or create discomfort among members.
 - This bill presents the opportunity for a specific judicial cure. A POA can petition a judge to evaluate petitions.
 - The bill also makes an effort to clarify the definition of “development” for judicial interpretation and application.

Senator Vogel asked the work group to consider the measures included in this legislation. Many parties have reviewed it and think it has enormous value.

Senator Whipple asked to hear from other people who wish to speak on SB 6016.

Howard Estes, an attorney from Woods Rogers, spoke on behalf of his client, who opposes the bill, both its language and the emergency clause.

- While **Senator Vogel** is trying not to draft legislation that will impact the current litigation, this bill will do more than just settle ambiguity in statutes. It will have an impact on individual property rights.
- The bill will cause an increase, not a decrease, in litigation.
 - This is a new type of taking, by creating a specific judicial remedy and allowing freer reign to litigate specific issues in deeds and impose the will of the majority of landowners against the will of minorities.
- Mildred Bemis, lead plaintiff (*in the Lake Holiday case*) is an elderly lady who bought in 1974. Her deed does not have restrictions that the POA now wants to impose.
- There are far-sweeping consequences of some of the provisions of the bill.
- Asking that the Housing Commission absorb, review, and get feedback on this legislation, specifically regarding the issues with deeds and amendments to deeds in future.
- **Senator Whipple** asked **Mr. Estes** how this bill impact current litigation.
 - **Mr. Estes** pointed to line 67 of the bill, which gives a judge authority to review individual declarations, and gives the court jurisdiction to reform any provision of a declaration.
 - The bill also changes the definition of “declaration” to include a series of declarations or deeds where the owners are of the same POA as a single declaration.

The next speaker was **Todd Sinkins**, an attorney from Rees Broome, PC, in favor of addressing this issue, although not necessarily the particular wording of SB 6016.

- There are many communities that have budgets to deal with obligations thrust upon the POAs by local governments.
- A modification of POAA is necessary to allow communities the rights and powers to effectively administer these obligations.

- The association (*Mr. Sinkin's client in the Lake Holiday litigation*) developed the lots in periods, beginning in 1970. The local government intended to treat this as one community, phased over periods of time.
- There are differences in the deeds of the various sections. This has subjected the Association to much litigation; fourteen lawsuits over the last ten years.
- The POAA should be revisited to clarify these types of problems. The clarifications that need to be made are minor.
- The bill created creates a reformation section to make changes to clarify issues to the betterment of the community. It is not adding restrictive covenants, but rather clarifying issues or errors that occurred during the development process.
- **Delegate Suit** asked **Mr. Sinkins** whether this is an emergency that needs to be dealt with right now. Does this legislation rise to such a level of emergency, or can it be continued in the Commission with a recommendation to study it going forward? It seems that the nature of the emergency is the ongoing lawsuit, is this correct?
 - **Mr. Sinkins** replied that the bill will constitute a change in law after the litigation is over.
- **Delegate Suit** said there seems to be no time emergency so critical that the issues cannot be dealt with during the regular session of the General Assembly. This will allow more time for the legislation to be carefully crafted to properly address the issues.

Mike Inman spoke next.

- Mr. Inman stated that as a real estate attorney involved with community associations, he has examined many documents over the years, and at times there are conflicts in documents.
- The conflicts often arise from the fact that from time to time, attorneys borrow documents from each other, and they do not always tailor them to the particular lots.
- This occurs particularly in a phase development where different developers and attorneys draft supplemental declarations and additional documents.
- However, other than this present litigation, this does not seem to be a pressing issue
 - There may be cases or clients who are struggling with the interpretation of documents, so this legislation would be useful at some point in time.

Pia Trigiani echoed **Mr. Inman's** comments, stating that she has worked on the regulatory side with the Real Estate Board.

- There is merit in the proposal.
- The POAA has not served the industry as well as it should have, and the Housing Commission should examine the issue carefully, not "on the run," as the emergency clause would indicate.
- This draft might not be quite right, and needs to be studied further.

Chandler Scarborough stated that his concern, as the president of a Home Owners Association, is not for the pending case but rather what impact the outcome of the litigation will have on other POA's.

Bob Diamond, an attorney with Reed Smith, whose client is Lake Holiday, LLC, an intervener in the pending litigation of Lake Holiday.

- Mr. Diamond wished to explain two things:
 - The issue of the Lake Holiday case is whether an association can use the POAA to collect assessments or does it have to file an action in General District Court?
 - There are three to make these legislative changes.
 - 1- As of July, 2008, HB 516 will take effect, which adds a definition of “common interest community.” This will lead to further complications.
 - 2- In the Lake Arrowhead and Dogwood cases, the Supreme Court interpreted the POAA. The legislature can make its own decision on whether or not this interpretation was correct. The result of these cases was not good for home owners associations.
 - 3- There is currently no method for reformation in the Commonwealth, and there needs to be a solution for issues where one property owner controls because he has enough votes.

Senator Whipple then stated that if there is no objection, the work group will look at this through the course of the year. Other interested parties should spend some time looking at it as well.

Delegate Suit suggested that a smaller work group form and devote specific attention to this issue in the future. **Senator Whipple** agreed.

Senator Vogel thanked the work group for listening and thanked those who came to speak on the proposed bill.

Next, **Jay DeBoer** from the Department of Professional and Occupational Regulations (DPOR) spoke on the legislation effective July 1, 2008.

- There are solicitations for two positions newly created at DPOR to comply with terms of legislation.
 - One is the ombudsman, who must be a lawyer in good standing. The application deadline for this position was June 30th, 2008. The salary range for this position is between \$55,000 and \$95,000. There are nine applications (*as of June 26th, the date of this meeting*).
 - The other is the common interest community analyst. The application deadline for this position was June 30th. The salary range is between \$40,000 and \$55,000. There were 37 applications for this position (*as of June 26th, the date of this meeting*).
- The Common Interest Communities Board constitution:
 - Many nominations have already been received.
 - The Governor has not made any appointments for the board (*as of June 26th, the date of this meeting*).
 - Each of the slots (except for the citizen members) must have specific qualifications.

- Until there is a board, DPOR cannot undertake the creation of initial regulations, rules and procedures.
 - However, the staff does have some models prepared.
- **Delegate Suit** asked whether the work group should send a letter to the governor expressing urgency of these appointments.
 - Mr. DeBoer answered that this was not necessary as the governor was working on the appointments that afternoon (*of June 26th*).
- Both the Board and the Ombudsman will have staff.
- The primary task of the board is to create a hierarchy of regulation, beginning with management firms which must be licensed, a certification for managing supervisors and those in front offices, and voluntary certification for non-supervisory and other positions not otherwise required to hold certification.
- Any person providing management services must hold a license by the Board.
 - Management services means exercising control over an association, there are several defining factors.
- The Real Estate Board will need to adopt a regulatory scheme adopted by the Common Interest Community board.
- The Common Interest Community management recovery fund may be used to pay costs and fees of court appointed receivers. This is financed by assessments through managers.
 - Each association covered pays a one time \$25 assessment fee.
 - The Common Interest Community board may also impose special assessments.
- The Ombudsman will assist individuals and take an advocacy position to help them understand deeds, restrictions, and covenants.
 - He or she will take in complaints; receive notice of adverse decisions of governing bodies, etc.
 - This is not specifically tailored to an arbitration or mediation setting, but the position does allow for alternative dispute resolution as an alternative.
- **Mike Inman** asked whether the ombudsman will have direct, personal meetings with parties who choose to come to Richmond.
 - **Mr. DeBoer** replied that his depends on the volume of complaints, which will need to be monitored carefully.
 - If something this is something that the ombudsman or staff can do, this is something that might be available depending on the volume.
- **Mr. Inman** asked whether the Ombudsman would meet with one party, or whether he or she will insist that both parties be present.
 - Mr. DeBeor replied that DPOR reads this statutory creation as being an advocate for members and not so much for the associations. The ombudsman will be stressing the rights of members and establishing a complaint process.
- **Pia Trigiani** asked how the ombudsman will interact with the Board.
 - **Mr. DeBoer** responded that how closely they will be related is yet to be determined, but that DPOR is expecting that the ombudsman will not be isolated from the Board, but that he will also not be answerable to the Board.
 - The reporting hierarchy dictates that the Board report directly to the Deputy Director of Licensing and Regulation. The ombudsman will also report to the Deputy Director of Licensing and Regulation, but separately.

- The ombudsman will receive first notice of things that constitute violations. This is more of an investigator position.
- **Sarah Broadwater** asked whether there was a way that individuals, and not just property managers, can get information regarding the new legislation and the new process.
 - **Mr. DeBoer** replied that there is an FAQ available on DPOR's website.
 - **Senator Whipple** agreed that this was a valid point, and that perhaps there should be a link from DPOR's home page that would direct an interested person by topic.
- Senator Whipple closed the issue by stating that the DPOR and the work group members should track this in the course of the year, and should bring to the attention of the work group anything during the year that is problematic with the implementation of the legislation.
- **Mr. DeBoer** stated that he hoped to have the newly appointed Executive Director of the Board, and the Ombudsman, attend the next work group meeting.

Chandler Scarborough stated that he hoped the work group could visit some issues neglected by HB 516, including providing guidance for leaders of community associations. The work group should keep in mind that the associations are run by homeowners, and not the proverbial "big brother."

- **Senator Whipple** asked **Mr. Scarborough** to provide the work group with a list of those issues affecting the associations.

The meeting adjourned at 4:16.