

# **HBAV LEGISLATIVE BULLETIN**

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## **STATE LEGISLATURE IN HIGH GEAR AS FEBRUARY ARRIVES IN CAPITOL CITY “HBAV Joins Eminent Domain Battle”**

The unusually warm weather during the winter of 2012 has brought much action and much heat to the halls of the state legislature in this first week of February. The 25 Standing Committees of the House of Delegates (14) and the State Senate (11), and their 70 combined Subcommittees were working at a full throttle pace.

Among the issues drawing much attention are the repeal of the “one gun a month” law, the law repealing the “after labor day” public school opening requirement, the “Eminent Domain” Constitutional Amendment that HBAV is opposing with large groups of other pro-business organizations and the State Budget.

Also bringing much action to the General Assembly Building is the fast-approaching Crossover Deadline for the State Legislature. The Crossover Deadline is the last day each house (House of Delegates and State Senate) can consider bills that originated in their bodies. The 2012 Crossover Deadline is Tuesday, February 14<sup>th</sup>.

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HBAV has joined the fight “against” the eminent domain constitutional amendment (HJ 3 and SJ 3) because it would not enable local governments to use that power to expand their public water and sewer systems. The proposed Constitutional Amendment will also create substantial uncertainty as to the viability of major transportation and vital public and private infrastructure projects in the Commonwealth.

Also opposing the HJ 3 and SJ 3 are the Virginia Association of Realtors (VAR), the Northern Virginia Chamber of Commerce Partnership, the Virginia Association of Commercial Real Estate, Virginia Beach Vision, the Virginia Society of Engineers, the American Council of Engineering Companies and many other local Chambers of Commerce and business organizations.

Ironically, for decades, HBAV and the VAR have been “LEADING” defenders of personal property rights with the members of the Virginia General Assembly.

In 2007, the state legislature, at the urging of HBAV and VAR, responded to the famous “Kelo Decision”, by supporting legislation to place very specific limitations on the government’s power of eminent domain in the Code of Virginia. The proposed constitutional amendment invalidates the current “public use” definition in the Code, and creates significant new uncertainty as to what

is, or what is not, a “public use”. If the constitutional amendment passes both houses of the state legislature and is approved by the voters, it could take the courts in Virginia years to sort out the definition of “public use”.

House Joint Resolution 3 will easily clear the more conservative House of Delegates, but the outcome of Senate Joint Resolution 3 is uncertain in the evenly divided and more moderate State Senate, where 20 Democrats and 20 Republicans were elected last November.

## **HBAV 2012 LEGISLATIVE AGENDA ADVANCES FARTHER IN STATE LEGISLATURE**

Most components of the 2012 HBAV Legislative Agenda advanced this week in the Virginia General Assembly. Mixed among the more than 1,500 House Bills and 600 Senate Bills are six (6) bills introduced by state legislators at the request of HBAV. Each measure was recommended by one or more of the HBAV-affiliated local associations to the HBAV Legislative Committee, chaired by John Napolitano of the Tidewater Builders Association.

### **Proffer Amendment Application Procedure Clears House of Delegates**

**House Bill 326, by Delegate Massie** of Henrico County, was approved by the House of Delegates this week and will now be considered by the State Senate. The measure is designed to clean up a 2011 Loudoun County Circuit Court decision that all property owners subject to a proffered condition had to be co-applicants of a proffer amendment application before a locality could consider such an application. This ruling was a departure from established Virginia practice and presented an unreasonable standard to achieve in many circumstances.

**House Bill 326** will make clear that any landowner subject to a proffered condition may apply for an amendment to that condition so long as sufficient notice is provided to other landowners subject to the proffer. Moreover, the locality will also be required to conduct a public hearing for all applications for proffer amendments related to density and use on the subject property. Finally, the legislation clarifies that no landowner shall possess any vested right in a proffered condition; as such rights exist in the underlying zoning.

### **State Senate to Soon Consider Two Additional HBAV Priorities**

The State Senate and House of Delegates will likely wait until the February 14<sup>th</sup> Crossover Date to take up or consider House Bills. Two House Bills on the top of the Senate Committee on Local Government Docket are **House Bill 170** and **House Bill 166**, both by **Delegate Cosgrove** of Chesapeake.

**House Bill 170** will make it clear that an aggrieved party may petition a circuit court for review of the decision of the governing body to ensure fairness with the administration and enforcement of proffered conditions.

Local Zoning Administrators are authorized to administer and enforce conditions attached to a rezoning or an amendment to a zoning map. Any person who is aggrieved by a decision of a local zoning administrator may petition the local governing body to review the decision of the zoning administrator. Today, it is unclear whether or not the decision of the local governing body can be appealed to a circuit court.

**House Bill 166** will remove the ability of a Zoning Administrator or other administrative officer to reverse a decision of the Zoning Administrator after 60 days based on a "non-discretionary" error.

The Code of Virginia allows a Zoning Administrator or other administrative officer to change, modify or reverse a Zoning Administrator's decision within 60 days. After 60 days, such a decision cannot be changed, modified or reversed unless it was either obtained through malfeasance or fraud or it is tarnished by a clerical or other "non-discretionary" error. Unfortunately, some Zoning Administrators in Virginia are using the vague "non-discretionary error" exception to routinely reverse decisions after 60 days.

HBAV believes landowners should be able to rely on decisions of local government administrative officers after a 60-day period, with few valid exceptions.

## **HBAV PROFFER LIMITATION BILL ADVANCES** **“Receives Approval of House Committee”**

On Friday morning of this week, a late addition to the HBAV Legislative Agenda was approved by the House Counties Cities and Towns Committee. The measure is **House Bill 1253**, by **Delegate Barry Knight of Virginia Beach**.

For several years, landowners in Virginia have been protesting that the “proffer system” in Virginia is “Out of Control”. More evidence of that assertion has recently been discovered.

Recently, a locality in Virginia crafted a “proffer” in a rezoning case, where it acknowledged it was requiring a per-lot cash proffer to be paid outside the boundaries of the law prohibiting local governments from accepting per-lot cash proffers after final inspection and before the CO is issued, and the proffer went further to require the landowner to waive his legal rights to challenge the proffer. Then, it included in the same proffer, that if the landowner challenged the legality of the earlier payment of the per-lot cash proffers and prevailed, the rezoning would revert.

**House 1253** would prevent any other locality, after January 1, 2012, from requiring any cash proffer which purports to require a landowner to “waive his legal rights” surrounding the later payment of the per-lot cash proffer, as approved by the state legislature. The legislation also states that if such a waiver of legal rights is included in a future proffer, and a landowner later chooses to exercise his legal rights, the rezoning shall not revert.

This is a good government bill, which reinforces the rights of all Virginians, including business owners to have access to Virginia’s court system.

## **HBAV CONDOMINIUM DEVELOPMENT BILL PASSES COMMITTEE**

On Thursday of this week, **House Bill 902**, by **Delegate Randy Minchew of Leesburg**, was approved by the House General Laws Committee. The measure now goes to the full House of Delegates for consideration.

**House Bill 902** would increase from seven years to 10 years from the date of recordation of the declaration the time limit in which a declarant/developer of a condominium must exercise his rights to expand, contract, or convert a condominium.

Some condominium developers in Virginia are concerned that the current housing climate in Virginia may be the “new normal” market, and that it will not enable them to fully development their planned condominium projects in the current 7-year time limit.

**House Bill 902** will go before the full House of Delegates next week!

## **TOP 2012 HBAV PRIORITY TO BE COMING NEXT WEEK**

The top 2012 priority of the HBAV will be considered by the House Counties, Cities and Towns Committee next week. The measure is **House Bill 571**. **The House Patron is Delegate Danny Marshall of Danville.**

**House Bill 571** would extend the sunset date of several previously passed measures related to various land use approvals, the timing of cash proffer payments, and bonding requirements from July 1, 2014, to July 1, 2017. The bill also expands the scope of such measures that will be subject to the extension to include those measures approved by January 1, 2011. **HBAV believes the passage of House Bill 571 is critical to the survival of the home building industry in Virginia in these unprecedented times for the industry.**

In the 2009 Session of the State Legislature, legislation was enacted to extend the validity of approved and valid local development plans and associated plans until July 1, 2014. Legislation was also enacted in 2009 to reduce the administrative fees associated with performance bonds from 25% of the anticipated construction costs of the new facilities to 10%. In 2011, the state legislature enacted legislation to prohibit the payment of per-lot cash proffers to localities until after final inspection by a local building official and before they issued the Certificate of Occupancy. The package of legislation outlined above was designed to help the struggling home building industry through an historic downturn in new home construction in Virginia.

At that time, the home building industry and many highly regarded economists anticipated the housing industry leading the nation’s economy out of the near depression of that period, and certainly before 2014. That has not happened. In most markets in Virginia, the 2011 new home production was below the 2010 level of production and rests near the 59 year low level of production that occurred in 2009.

Unfortunately, before there will be a demand for valid land developments to be improved with water and sewer, roads and sidewalks, dry utilities such as electricity and cable and stormwater

facilities to be constructed, the demand for new homes will have to accelerate significantly. The home building industry is crucial to the economy of Virginia. Over 55 local companies are involved in the acquisition, financing and construction of every new home in Virginia. These “main street” companies in every community in the Commonwealth employ thousands of hard-working Virginians. And once the new homes are sold, new buyers spend thousands more furnishing, decorating and landscaping their purchase, further employing Virginians and broadening the tax base of the Commonwealth.

## **MITIGATION BANK BILLS TO BE CARRIED-OVER TO 2013**

Earlier this week The Nature Conservancy and private mitigation bankers called a truce and agreed to have the legislation that would change the completion landscape between the non-profit and private enterprises carried over to the next session of the state legislature. HBAV sided with the The Nature Conservancy in the debate, believing the legislation would have imposed unnecessary and unwarranted restrictions on the free market exchange of wetland and stream mitigation credits marketed by the conservation group in Virginia. Both groups and HBAV agreed to talk over the spring and summer to work on a compromise. **Senate Bill 410 and House Bill 799** were introduced at the request of the mitigation banking industry.

HBAV members often need such credits to enable them to move forward with their land development projects in most parts of Virginia. HBAV has expressed concern that the measures would reduce the regulatory compliance options for our members, which would increase our already significant regulatory compliance (mitigation) costs.

HBAV maintains that the mitigation market in Virginia is too big, too geographically diverse, and too open to new entrants for any one player to dominate it, especially a nonprofit (The Nature Conservancy) whose mission is to deliver conservation projects across the Commonwealth. As you may know, The Nature Conservancy created the first mitigation bank in Virginia in 1995, and today nearly 80 banks operate throughout the state.

## **HOUSE CC&T SUB-COMMITTEE SETS ASIDE ANTI-HOUSING LEGISLATION**

On Thursday morning of this week, the House CC&T Subcommittee Number 2 carried-over three (3) bills which would have had a significant "NEGATIVE" impact on the home building industry in Virginia.

**House Bill 728** would have allowed the amount of road impact fees to be determined at any time prior to the issuance of a building permit. Under current law, the amount of the road impact fee must be determined before or at the time of site plan or subdivision approval. Can you imagine a homeowner or builder purchasing a lot in a subdivision, only to discover when they applied for a building permit that the locality had imposed a \$15,000 or \$25,000 road impact on the lot owner?

**House Bill 731** would have allowed localities to retain full performance guarantees until streets in a new development are accepted by the state agency, local government department or agency,

or other public authority that is responsible for maintaining and operating such public facility. Its companion bill in the State Senate, **SB 177**, was considered by the Senate Committee on Local Government two (2) weeks, and then set aside for further consideration before February 14th, the Crossover date for the 2012 legislative session.

The bill also provides that if a developer is in default with regard to street completions in one development within a locality, the locality may withhold acceptance of securities or plat approvals in other projects. Furthermore, a locality may withhold building permits or occupancy permits within a development until streets in a new development are accepted by the state agency, local government department or agency, or other public authority that is responsible for maintaining and operating such public facility.

**House Bill 1150** would remove the provision in the Code of Virginia allowing a court to award reasonable attorney fees, expenses, and court costs to any person, group, or entity that prevails in an action successfully challenging an ordinance, administrative or other action as being in conflict with that section of the statute which prohibited localities from accepting per-lot cash proffers until after final inspection and before the issuance of a certificate of occupancy.

The bill would also make the per-lot cash proffer payment delay legislation prospective to cash proffers formed after July 1, 2010. In other words, it would "GUT" the 2009 legislation that was passed by both houses of the state legislature to help the home building industry during this historic downturn for the industry.

Most legislation "carried-over" to the next session of the state legislation is later laid-on-table and not considered the following year.