



# **2019 Legal Seminar**

## ***Working with your Board Legal and Ethical Considerations***

**Presented by  
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**December 6, 2019**

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## **I. What is the role of Commissioners?**

Overview of roles and responsibilities

## **II. What laws govern their actions?**

- A.** Virginia Housing Authorities Law
- B.** Virginia Freedom of Information Act
- C.** Virginia Conflict of Interest Act
- D.** Public Procurement – HUD regs affecting Commissioners

## **III. How do Commissioners keep up-to-date and out of trouble?**

Overview of recommended training and policy review practices



# **I. Role of Commissioners**

- Set broad PHA policy
- Administer PHA finances and budget
- Hire the Executive Director



- Executive Director is responsible for
  - Implementation of Board policies
  - Financial decisions based on Board-approved budgets
  - All PHA personnel decisions
  - All day-to-day operations based on Board approved policies
  - Procurement (if approved as Procurement Officer by Board)



## **II. APPLICABLE LAWS AND REGULATIONS**

### A. Virginia Housing Authorities Law (Va. Code Sec. 36-11 *et seq.*)

Size of Board of Commissioners varies

- Must contain at least one "eligible resident" of assisted housing with all rights of other members. Eligible resident includes Low-Income Public Housing (LIPH) resident or recipient of Section 8 tenant-based assistance. Does *not* include recipient of Section 8 project-based assistance. (24 CFR 964.410, 24 CFR 964.415)

All act as fiduciaries of public funds

All operate within By-Laws of PHA

- Officers and Elections
- Meetings and Quorums

Indemnified by PHA for reasonable business acts

Liability limited to amount of annual compensation

PHA may pay each Commissioner up to \$150 per month as compensation for his or her services (Va. Code Section 36-11.1:1)



## B. Virginia Freedom of Information Act - Public Meetings

- All items of public business must be decided in public, at duly noticed public meeting (Va. Code Section 2.2-3707(A))
- Meeting is public if at least 3 Commissioners discuss PHA business (Va. Code Section 2.2-3701)
  - Regardless of where discussion takes place (e.g. cocktail party, office, home) and by what means (e.g. email, telephone)
- Must be noticed at least 3 working days in advance of the meeting in a “prominent public location at which notices are regularly posted” and in the office of the Executive Director (Va. Code Section 2.2-3707(C))
  - Including special closed meetings not open to public



- Virginia Freedom of Information Act - Public Meetings
  - Not permissible by phone or electronically (Va. Code Section 2.2-3707(B))
    - Limited exceptions for specifically identified medical conditions or “personal matters” affecting member
      - Special requirements apply, including maintenance by PHA of written policy allowing for Commissioners to participate electronically in very limited circumstances (Va. Code Sec. 2.2-3708.2)
  - Tips to avoid potential problems:
    - Advise Commissioners to avoid email and telephone exchanges
    - Where email is sent to 3 or more Commissioners, respond only to sender not “reply all”
    - Have PHA staff send emails on behalf of Commissioners, if possible, to ensure exchange will not constitute a public meeting



- Virginia Freedom of Information Act – Closed Meetings
  - Only for discussing specific matters (Va. Code Section 2.2-3711(A))
    - Personnel
    - Acquisition and disposition of real estate
    - New businesses
    - Investment of public funds where competitive bidding involved
    - Legal matters
  - Prior to convening, ensure that no conflicts exist that would require recusal by any Commissioner
  - No votes can be taken in closed session (Va. Code Section 2.2-3711(B))



- Virginia Freedom of Information Act – Closed Meetings
  - Strict procedure for going into closed meeting
    - Resolution citing:
      - The specific matter(s) to be discussed
      - The Virginia Code section that exempts such matter(s) from public disclosure
  - Strict procedure for coming out of closed meeting
    - Resolution certifying:
      - Only matter(s) exempt from open meeting requirements were discussed
      - Only matters identified in the resolution convening the closed meeting were discussed



- **Virginia Freedom of Information Act – Public Records**
  - Open to inspection and copying
  - Reason for request is irrelevant (don't need to specify request is under FOIA)
  - Response within 5 business days
    - May request 7 business day extension in writing
  - Many records are exempt from disclosure
    - Personnel information
    - Vendor Proprietary information
    - Attorney-client work product and communications
  - Emails are public records



- Virginia Freedom of Information Act – Public Records
  - Correspondence between Commissioners and PHA staff is generally *not* exempt from disclosure
  - Signed contracts, employment contracts must be available
    - Records relative to contract negotiations prior to award are exempt
  - PHA may make reasonable charges (actual cost) for searching and for copies



## C. Virginia Conflict of Interests Act (Va. Code Sec. 2.2-3100 *et seq.*)

- Personal interest in a transaction
  - Ownership, or option for ownership, in a business (>3%)
  - Income from property or business (>\$5,000 per year)
  - Salary or benefits (>\$5,000 per year)
  - Ownership of property (>\$5,000)
  - Personal liability on behalf of business (>3% total value of business)
  
- Extends to Commissioner *and* immediate family



## Virginia Conflict of Interests Act

- Disqualification *and* disclosure required where transaction applies to property or business in which Commissioner has a personal interest
  - Disclosure must be written
  - Disqualified Commissioner cannot:
    - Vote on transaction
    - Discuss transaction during, or outside of, meetings
    - Attend closed meetings related to transaction



## Virginia Conflict of Interests Act

- Disclosure, when disqualified, must include:
  - Description of transaction
  - Nature of personal interest
  - Name and address of relevant business or real estate parcel (as applicable)



## Virginia Conflict of Interests Act

- Disclosure (but not disqualification) required:
  - Personal interest arises from membership in a business or group of 3 or more (e.g. Commissioner is a member of a large health provider that may be collaborating with PHA on programming and services)
  - Personal interest arises through representation by Commissioner's firm or business, but not Commissioner personally (e.g. accounting or engineering firm, but Commissioner has not been involved in/or have any personal knowledge of project at issue)
  - Disclosure may be written or made orally and recorded in the minutes



## Virginia Conflict of Interests Act

- Disclosure requirements when voting
  - If personal interest arises by reason of membership in group (of 3 or more) affected by the transaction, must disclose:
    - Description of transaction
    - Nature of personal interest
    - Name of group affected
    - Certify ability to participate fairly, objectively and in public interest
  - If personal interest arises by reason of representation of party to the proposed transaction by Commissioner's business or firm, must disclose:
    - Description of transaction
    - Name of Commissioner's business or firm
    - Name of client represented
    - Certify ability to participate fairly, objectively and in public interest



## Conflict of Interests – Section 16 of the ACC (HUD-Form 53012)

- PHA must maintain written standards of conduct covering conflicts of interest and the performance of its Board Members and employees engaged in the administration and operation of projects covered by the Annual Contributions Contract (ACC)
- PHA may not enter into any contract with any present or former Commissioner or his/her immediate family during his/her tenure or for one year thereafter
- Immediate family: spouse, mother, father, brother, sister, sister-in-law, brother-in-law or child (whether related as full blood relative or as a “half” or “step” relative)



## D. Public Procurement – Role of Commissioners

- HUD Procurement Handbook (HUD 7460.8 Rev 2)
- Requires written procurement policy *approved by Board*
- Requires designation by Board of an official Contracting Officer (generally the Executive Director) who administers procurement functions
- Commissioners do not control procurement activities, but must approve contracts that exceed the monetary threshold limit, which is set by Board



### **III. Keeping up-to-date and out of trouble**

- Orientation for New Commissioners (open to full Board)
- Comprehensive written policies – reviewed and updated regularly  
(Conflict of Interest, Public Procurement, Integrated Pest Management Plan, etc.)
- Training sessions on policies and programs  
(RAD, LIHTC, HOME, CDBG, PHAS, SEMAP, FOIA, COIA, etc.)
- Periodic review and update of PHA Bylaws

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Affordable Housing ■ Project Finance