

Personnel, Operations & Procedures (POP) Committee
Volusia Growth Management Commission

MINUTES FOR
MEETING HELD
Tuesday, June 23, 2009

Room #4
Ormond Beach Regional Library
30 S. Beach Street
Ormond Beach, FL

The meeting was called to order at 9:30 a.m. by Committee Chair, Gerald Brandon.

The following POP Committee Members were present: John Heaphy, Dwight Lewis, Sandy Jones, Terry Griffiths and Sandra Walters.

Also in attendance: VGMC Chair Joan Spinney, VGMC Legal Counsel Paul Chipok, VGMC Planner Barry Wilcox, and VGMC Coordinator Merry Smith.

OLD BUSINESS – Procedures Review

1) Senate Bill 360 – Mr. Chipok referred the committee to a memorandum he prepared dated June 18, 2009 relating to this issue. He stated that a question was previously raised as to whether the commission should defer taking action on the rules amendments until it was determined if or how the VGMC review process would be impacted. Mr. Chipok stated he reviewed SB 360 looking at items which would be specific to how the VGMC operates, and in his opinion he does not believe there is any major impact on the VGMC application review procedures as they are presently written or with the proposed amendments. He stated that any of the major changes or issues in SB 360 are not unique to VGMC, that they are systemic statewide and everyone will be dealing with the same issues.

Mr. Chipok pointed out a change in Section 11 of the bill relating to the dispute resolution process (Section 186.509) which deals with one government having the ability to request meetings and mediation with a neighboring jurisdiction to resolve disputes. He stated this section previously read that the jurisdiction could go into a “voluntary” mediation if initial meetings did not resolve the issues, however, the word “voluntary” has been changed to “mandatory” requiring that mediation occur if they go into the 186 process. Mr. Chipok stated this process if offered statewide and, in our situation, is in addition to the VGMC process, adding that it does not override or negate the VGMC process and that it really addresses more of the 163 issues rather than the limited review of consistency by the VGMC.

With respect to the transportation concurrency exception areas, Mr. Chipok stated some of the jurisdictions within Volusia County will be designated as such and that information should be available in mid-July. He stated the question of how the exception areas are quantified and what the impacts are going to be on applications when they come through the VGMC process is still

unanswered and something that everyone in the state will have to be looking at. He added we will need to deal with that as it comes along.

Overall, Mr. Chipok stated the impacts of SB 360 on the VGMC process will be the same whether we amend the rules or not, and in his opinion there's no need to slow down the rules amendment process.

Committee Chairman Brandon asked for a show of hands by the committee members to indicate if they wished to move forward with the rules amendments process. The committee unanimously concurred not to hold up the rules review process and to continue forward.

2) Home Rule Powers Act -- Mr. Chipok stated at the May 27th hearing, Scott Simpson argued that some of the actions taken by the VGMC may be limiting the municipalities' rights under the Home Rule Powers Act. Mr. Simpson has provided a memorandum dated June 17, 2009 which outlines his concerns, and Mr. Chipok also prepared a memorandum dated June 22, 2009 for the committee.

Mr. Chipok stated that Mr. Simpson concluded on page 2 of his letter that if VGMC reviews issues other than consistency determination, the VGMC will be violating the Municipal Home Rule Powers Act by acting on issues that are exclusively within the power of the adopting local government. Mr. Chipok stated if the commission started looking at issues such as building codes, he would concur with Mr. Simpson's statement. He also stated, however, that in addition to determining consistency, the charter states "The commission may perform such other directly related duties as the commission from time to time deems necessary." Mr. Chipok stated that the "other directly related duties" must be related to determining consistency.

Mr. Chipok commented that he believes some of the jurisdictions have had issue with the fact that in some jurisdictions, we review planned developments (PD's) which is a zoning category. He stated this came about through a series of events, beginning with a comprehensive plan amendment. Mr. Chipok explained that when reviewing an amendment application, we must consider the maximum potential impacts under the proposed land use. In some instances, the jurisdiction is not intending to develop the property to the maximum allowed by the proposed land use and are willing to place limitations on the amendment in order to find it consistent. What has developed over the years is that the jurisdictions have typically agreed that in that land use category, for the particular amendment, they will place a restriction on the property that they will rezone it to PD, and the PD will be limited to a certain zoning designation. In order to ensure compliance, the conditional approval through VGMC resolution requires the jurisdiction to submit the PD to VGMC for review. Mr. Chipok stated that the situations in which the VGMC looks at zoning relate directly back to a prior consistency determination, and in those limited circumstances we have that power.

Mr. Chipok stated he believes that this is part of the concern raised by Mr. Simpson, however, in his opinion, in those circumstances where the action of the VGMC is directly related back to a consistency determination, then yes we have the power to continue those types of activities. If

the action is unrelated to a consistency determination, then he agrees with Mr. Simpson that it is beyond the scope of our jurisdiction to delve into those areas.

Commissioner Walters stated that even if we delve into what are typically zoning issues, as long as it is one of our directly related duties, we are not any type of a zoning board, but rather the VGMC dealing with peripheral zoning issues in connection with our consistency determinations.

Commissioner Griffiths asked who decides whether or not we should go into that area. Mr. Chipok responded that in some jurisdictions, the decision was made long ago and we are merely following up on existing resolutions. He added that we have a list of resolutions that are monitored and over the course of the past two years we have reviewed all of the resolutions to ensure compliance.

Ms. Walters asked who Scott Simpson's client is, adding that he has been working diligently over a year to revise our rules, make drafts, go to meetings, etc. She also asked who's paying him. Mr. Chipok stated he has a right under the constitution to participate in the process and how he is paid is beyond the scope of the VGMC. Several committee members commented that he represents the cities of Oak Hill, Holly Hill and South Daytona.

With respect to the conditional approvals, Commissioner Lewis commented that he felt it worked in the jurisdictions' favor since maximum impacts must be used and the amendments might otherwise be found inconsistent. Mr. Chipok concurred, adding that the conditions are not created in a vacuum but rather through discussions and negotiations with the jurisdictions. Mr. Lewis commented that the process facilitates intergovernmental coordination. Mr. Chipok added that it provides flexibility as well.

Mr. Brandon asked the committee if they wanted to move forward with what they previously recommended or do they want to consider adopting any changes based on Mr. Simpson's memorandum.

Sandy Jones made a motion to move forward with what the committee has already recommended and submitted to the full VGMC; seconded by Dwight Lewis. For clarification purposes, Mr. Chipok stated we have a memo from Scott Simpson which states that under the Home Rule Powers Act there may be some activities that the VGMC should not be delving into. Mr. Chipok stated he understood the motion to be that as long as the activities the VGMC is delving into are directly related duties to a comprehensive plan consistency determination, then the VGMC feels they are justified in acting on those. However, the VGMC should stay away from other activities which affect Home Rule Powers which are outside of those directly related duties to a comprehensive plan consistency determination. Ms. Jones concurred that is her motion.

The motion carried unanimously.

3) Rehearings – Mr. Chipok stated the committee has discussed rehearings in the past and there are basically two questions: 1) Whether a rehearing of a VGMC consistency certification public hearing should be allowed; and 2) If rehearing is to be permitted, whether the last

sentence of proposed Section 90-46(d), which directs the commission to state if the rehearing is to be a trial de novo or limited to specific issues, should be included or deleted.

Mr. Chipok stated that the power to hold a rehearing or not hold a rehearing is a policy decision, and there is no right or wrong. He stated if the commission decides to move forward with it, Section 90-46 was drafted based upon language in the Volusia County Historic Preservation Board policy. Mr. Chipok stated the deviation from that is in subsection (d), last sentence, which states "The commission shall also state whether the rehearing public hearing shall be a trial de novo or limited to review of the specific issues designated by the commission based on the request for rehearing."

Mr. Chipok stated if we are going to hold a rehearing, there are standards for how the rehearing is to be held. He stated there are several dynamics to consider. One is that we are a commission consisting of 21 members. Not all members are present at every meeting and we may also not have the same 21 members from one meeting to the next. If the commission makes the determination that there is to be a rehearing, how is that new or different member going to get the background facts and decide on the limited issues if he does not have the broader view of the overall issues involved. Another factor is that even if it is a specific issue of a misinterpretation of some evidence, surprise, or new evidence that was presented at the hearing that needs to be reheard, Mr. Chipok stated that sometimes it is difficult to segregate out that particular evidence without putting it into context of how it affects the overall process. Essentially, the committee needs to consider if it is better to rifle shot it, or re-do the entire hearing so they have the context of how that new evidence fits in with the overall review.

Mr. Chipok reminded the committee that the VGMC works in an administrative capacity, but not an administrative capacity such as Florida Statute Chapter 120 administrative hearing process. He stated that has its own set of rules which do not necessarily apply to a board like the VGMC. Additionally, he stated we are not a court so the court rules do not specifically apply to VGMC. Mr. Chipok stated that we are in that "gray area" where we loosely follow some of those rules but we are not bound by all of them because we are a different type of entity than a court or a formal administrative process under Chapter 120.

Mr. Chipok stated this is a policy issue and whichever way the commission decides to go with this issue, he felt they could create a legal defense. He added, however, either way is subject to considerable debate and the outcome cannot be guaranteed in terms of how a judge or court would rule.

Mr. Brandon stated at the October POP meeting, the committee had recommended that rehearings be allowed and the first item they need to consider today is whether the committee still wants to recommend allowing rehearings. If the committee decides to allow rehearings, Mr. Brandon stated the second issue is determining the method by which they will be handled.

Mr. Lewis commented that he felt we need to have the ability to have a rehearing if there is information that may have been misapplied or inaccurate. He added that the commission would

not necessarily have to hold a rehearing, it would be a decision by the commission to determine whether or not to rehear a case if requested.

Mr. Chipok confirmed it would be a two-part process. If a rehearing is requested, the commission would first hear evidence as to why a rehearing should be granted, which he stated is different than a substantive review of the application. Basically, he stated it would be a hearing to determine whether a rehearing would be granted. If the commission decides to allow the rehearing, a date and time is set to hold the rehearing.

The second part of the process would be the rehearing itself. Referring to subsection (d) of the draft rehearing language, Mr. Chipok stated the first sentence reads "If the commission grants the request, it shall state its reasons for doing so, and set a date, time and place for another public hearing upon due public notice." He stated that language is consistent with how Volusia County handles it with their Historic Preservation Board. The next sentence which reads "The commission shall also state whether the rehearing public hearing shall be a trial de novo or limited to review of the specific issues designated by the commission based on the request for rehearing." he stated is unique to the VGMC. Mr. Chipok reiterated that we have a lot of members on the commission and the issues we are faced with sometimes cut across the whole application and can be difficult to cut out how it affects the whole application. He stated this language was drafted to provide maximum flexibility for the commission to determine whether the rehearing can be limited to just one issue, or whether the issue cuts across the whole application where the commission may want to hold a trial de novo so that all parties can speak on how it affects the overall application.

Dwight Lewis made a motion to recommend allowing rehearings; Sandra Walters seconded the motion for discussion purposes.

Ms. Walters commented that she supports rehearings, however, recommended that the last sentence of subsection (d) be deleted. She stated a trial de novo should not be allowed to give someone a second bite at the apple just because they didn't like the results of the first hearing.

Mr. Lewis stated that there are two parts to the rehearing issue and the first issue the committee is dealing with is whether or not to allow them. Mr. Brandon agreed and stated if the committee votes to recommend rehearings, then the next item for consideration would be the method by which the rehearings would be held.

Commissioner Jones asked what recourse someone would have if new information is brought forward after the commission has already made their decision. Mr. Chipok stated it would be circuit court. Ms. Jones commented in opposition of allowing rehearings, stating they already have another venue beyond the VGMC where they can take it to the next level if they do not like the decision of the VGMC.

Mr. Chipok stated if you put the rehearing argument in context with the overall rules amendments, our present rules state that if you file an application with the VGMC, you cannot file an application on the same subject matter within one year. In the proposed amendments, he

stated the recommendation liberalizes that policy which reduces the reapplication timeframe to six months, and also that the six month restriction only applies to an application which has gone to a published public hearing. As a result, if a jurisdiction sees an issue, they would have the ability to withdraw an application anytime up to an advertised public hearing, which would allow them the opportunity to get with their neighbors and resubmit with new information if they wish to do so. He added this is another factor to consider as to whether or not there really needs to be a right to a rehearing.

Chair Spinney commented that one of the original intentions of the VGMC was to remove the necessity for the jurisdictions to sue one another. Ms. Jones stated that the recommended amendments liberalizing the resubmittal requirements provides a method whereby a rehearing would not be necessary. Mr. Chipok confirmed that if an application has been advertised or gone to public hearing, the jurisdiction would have to wait six months to reapply, but if it has not, they could withdraw and reapply at any time under the proposed rules.

Ms. Walters stated she would withdraw her second to the motion if the language allowing trial de novo was included in the policy. Mr. Brandon clarified that the present motion is only to determine whether or not rehearings would be allowed.

Mr. Brandon called the question to the prior motion recommending that rehearings be allowed. The motion failed with a vote of 3-3; committee members Jones, Heaphy and Walters voted in opposition of the motion.

Sandra Walters made a motion to add Section 90-46 allowing rehearings, but eliminating the second sentence in subsection (d) referencing trial de novo. The motion died for lack of a second.

For clarification purposes, Mr. Chipok stated that this issue was raised by a commission member at the May 27, 2009 hearing and it has come back to POP for further discussion. The result of that discussion today is that there is no recommendation because there was not a consensus reached by the POP. No changes to the draft amendments are being proposed by the POP committee at this time, but the issue of rehearings will come back before the full VGMC with an indication that POP has not made a recommendation on this issue as the committee was unable to reach a consensus. The committee concurred with Mr. Chipok's assessment.

OTHER BUSINESS:

Mr. Chipok stated at the last POP meeting, the committee addressed the addition of Section 90-45 relating to the appointment and removal of commission members and made the recommendation to delete the last sentence of the proposed section which relates to a member being removed from the commission with or without cause by their appointing jurisdiction. The draft has been updated to reflect that recommendation.

Additionally, Mr. Chipok stated that the commission has had a long standing policy that the VGMC member must reside in the jurisdiction by which they are appointed, however, this policy

has not been documented in the rules. As a result, he stated a sentence has been added to the draft which reads: "Each voting member of the commission shall reside within the jurisdiction that such member represents." There was a consensus of the committee to add the language as proposed.

With respect to the issue of standing, Mr. Chipok stated that a letter has been sent to all of the jurisdictions asking that they provide some type of formal response back so that we can get a sense on where the jurisdictions stand on that issue. Mr. Brandon stated we asked for a resolution from the jurisdictions in order to get feedback based on the full commission/council of the individual jurisdiction, as opposed to an individual speaking on behalf of a jurisdiction.

The committee discussed scheduling another POP committee meeting sometime in July to review the remaining issues that have not yet been addressed. Additionally, our communication relating to standing sent to the jurisdictions requested a response by July 31st. Therefore, a POP meeting will also be scheduled in early August to further discuss the issue of standing. The VGMC coordinator will get with the committee members to schedule the meetings.

Mr. Brandon asked if there was anyone present in the audience who wished to address the committee.

Rita Press addressed the committee relating to attendance and suggested that jurisdictions be notified if their representative is missing meetings. Mr. Brandon stated that we do have rules relating to attendance and we do notify jurisdictions consistent with our rules. Ms. Press also raised questions relating to the request that went out to the jurisdictions asking for a resolution relating to their position on standing. Mr. Brandon stated that we are asking the jurisdictions for their input while this issue is being evaluated by the committee, however, we cannot require them to issue a resolution on the matter.

Alice Jaeger of Ormond Beach addressed the committee regarding the Florida Hometown Democracy Petition and also spoke in opposition of eliminating citizen standing.

Suzanne Steiner commented that she is in favor of not allowing rehearings and had previously voted against allowing them when she was on the POP committee because she felt it would be difficult to determine the criteria for holding a rehearing.

Aiden Magee, Volusia/Flagler Environmental Action Committee, discussed joint agreements, developer influence on jurisdictions, and spoke in opposition of eliminating citizen standing.

Mike Woods, Cobb Cole, suggested that the VGMC resolutions be posted on the website so that the jurisdictions can have ready access to what conditions of approval are applicable to them.

Aiden Magee addressed the committee again relating to membership and the influence a developer may have on a jurisdiction with respect to their appointee. He commented on the importance of protecting an objective status for the members.

ADJOURNMENT

The meeting was adjourned at 10:35 a.m.

A handwritten signature in black ink, appearing to read "Gerald Brandon", written over a horizontal line.

Gerald Brandon, POP Committee Chairman