

Wednesday, November 20, 2013 - 10 a.m.
General Assembly Building, 6th Floor
Speaker's Conference Room
Richmond, Virginia 23219

1 **MEMBERS PRESENT:** John S. Edwards, Gregory D. Habeeb, James M. LeMunyon (by
2 telephone), Ryan T. McDougle, Thomas M. Moncure, Jr., E.M. Miller, Jr., Christopher R. Nolen,
3 Wesley G. Russell, Jr., Charles S. Sharp, Robert L. Tavenner

4 **MEMBERS ABSENT:** Robert L. Calhoun, J. Jasen Eige

5 **OTHERS PRESENT:** Joanne Maxwell, Edward Mullen

6 **STAFF PRESENT:** Jane Chaffin, Karen Perrine, Lilli Hausenfluck, Andrew Kubincanek,
7 Nicole Brenner, Alan Wambold, Mindy Tanner, Jescey French, Ryan Brimmer

8 **Call to order:** Senator Edwards called the meeting to order at 10:05 a.m.

9 **Approval of remote participation:** Pursuant to § 2.2-3708.1 of the Code of Virginia, Delegate
10 LeMunyon requested approval to participate via telephone as he was in Jamaica and unable to
11 attend the meeting in person. On motion of Delegate Habeeb and duly seconded, the Virginia
12 Code Commission unanimously approved Delegate LeMunyon's participation via telephone.

13 **Approval of minutes:** Hearing no objection, Senator Edwards stated that the minutes of the
14 October 23, 2013, meeting of the Code Commission stand approved as printed and distributed to
15 the members of the Code Commission.

16 **Report of the Administrative Law Advisory Committee:** Thomas Lisk, chairman of the
17 Administrative Law Advisory Committee (ALAC), presented ALAC's annual report. ALAC
18 recommends proposed legislation to amend § 2.2-4026 of the Administrative Process Act to
19 clarify the date of adoption or readoption of a regulation for purposes of appeal under the Rules
20 of Supreme Court of Virginia. The purpose of the proposed legislation is to promote uniformity
21 and eliminate uncertainty, which has arisen due to conflicting court opinions. The proposed
22 amendment provides that the date of adoption or readoption of a regulation for purposes of
23 appeal is the date of the public meeting at which an agency takes final action on a final
24 regulation or, if adopted outside a public meeting, the date the final regulation is filed with the
25 Registrar of Regulations. The members discussed the proposal and expressed concerns about
26 whether it is reasonable to believe that the interested public would be aware of when regulations
27 are adopted at a public meeting.

28 Mr. Russell suggested establishing the adoption date as the date filed with the Registrar of
29 Regulations or the date adopted at a public meeting and suggested using Rule 5:9 (a) of the Rules
30 of the Supreme Court as a model. Rule 5:9 (a) provides that "A notice of appeal filed after the
31 court announces a decision or ruling – but before the entry of such judgment or order – is treated
32 as filed on the date of and after the entry." The Code Commission directed staff to revise the
33 draft bill using Mr. Russell's suggestion. The effect of the amendment would be to give someone
34 two opportunities to file an appeal—(i) 30 days from the date the action is taken at a public
35 meeting and (ii) 30 days from the date the action is published in the Virginia Register. On motion
36 of Mr. Russell and second by Senator McDougle, the Code Commission unanimously approved
37 the amended draft bill in concept. Senator Edwards directed staff to coordinate with Mr. Russell
38 regarding the specific language. Senator McDougle agreed to carry the bill.

39 Mr. Lisk reported that ALAC revised the Hearing Officer Deskbook, which ALAC previously
40 reviewed in 2009. Subsequent to ALAC's 2009 review, the Office of the Executive Secretary of
41 the Supreme Court asked ALAC to conduct periodic reviews of the deskbook. The work group

42 conducted an online survey of all approved hearing officers for input and made technical
43 changes, checked references, and added hyperlinks to external resources where applicable. The
44 revised deskbook will be returned to the Office of the Executive Secretary for publication prior
45 to the hearing officer training session in December.

46 Finally, ALAC continues to review the Adjudication and Judicial Review provisions of the
47 Model State Administrative Procedure Act.

48 On motion of Mr. Nolen and second by Senator McDougle, the Code Commission accepted
49 ALAC's annual report.

50 Mr. Lisk requested that the following five members be reappointed following the expiration of
51 their terms in December 2013: Katya Herndon, Thomas Lisk, Eric Page, Alexander Skirpan, and
52 Brooks Smith. On motion of Mr. Nolen and second by Senator McDougle, the Code
53 Commission reappointed all five individuals.

54 **Obsolete laws report (required by § 30-151 of the Code of Virginia):** Mindy Tanner advised
55 that staff had completed the additional research requested by the Code Commission at its last
56 meeting regarding the proposed amendment to § 55-96 of the Code of Virginia. Jescey French
57 explained that in 2000, when Article 9 was revised to Article 9A, subsection (5) of § 8.9-302 was
58 intentionally left out of Title 8.9A because it was not a uniform law. Therefore, it is appropriate
59 for the Code Commission to approve repealing the phrase "except as provided in subsection (5)
60 of § 8.9-302" in § 55-96 as obsolete.

61 On motion of Delegate Habeeb and second by Senator McDougle, the Code Commission
62 unanimously approved the proposed amendment to § 55-96.

63 **Recodification of Title 23: Educational Institutions:** Ryan Brimmer advised that he and Tom
64 Stevens have been assigned to staff the Title 23 recodification, which will begin in 2014. Staff
65 presented a list of entities invited to participate in the recodification effort and stated that 23
66 entities have confirmed their interest, but staff is waiting to hear back from 13 entities.

67 Mr. Moncure stated that the Code Commission will need to review the substance of the Code
68 provisions in Title 23. Also, he suggested that there are many common provisions that can be
69 removed from the individual institution sections and placed in a general section applicable to all
70 institutions.

71 On motion of Mr. Moncure and second by Mr. Nolen, the Code Commission unanimously
72 approved establishing the workgroup as provided in the list of entities presented by Mr.
73 Brimmer, with the understanding that a particular individual for an entity may change.

74 **Discussion of reorganizing and renumbering the Code of Virginia:** At the request of Senator
75 McDougle, the Code Commission deferred Item 7 (Approval of final report: Title 33.2) until
76 after consideration of agenda Item 8.

77 Senator Edwards stated that he would like to reinstate a complete reorganization and
78 renumbering of the Code of Virginia to be completed in 2019. The Code Commission initiated
79 an effort in 2005 to reorganize and renumber the Code in 2007; however, the project did not go
80 forward due to opposition from the Supreme Court and others who had concerns about the
81 monetary impact of a complete renumbering of the Code. The 2007 Code of Virginia
82 reorganization project was effectively terminated after House Bill 740 (2006), which provided
83 savings and transition provisions for when the Code of Virginia is renumbered, was passed by
84 indefinitely by the House Rules Committee. Senator Edwards indicated that the Supreme Court
85 is more likely to support the project now as the Chief Justice has changed and two former Code

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86 Commission members are now justices. Mr. Miller emphasized the importance of the Code
87 Commission having specific budget information before making a decision to proceed given the
88 nature and scope of the project. In order to gain a clear understanding of the impact and costs of
89 such a project, Mr. Miller suggested that Senator Edwards establish a task force, consisting of
90 two members of the Code Commission; representatives from the Supreme Court of Virginia, the
91 Virginia State Police, the Division of Legislative Services, and other state agencies identified as
92 being most impacted by the project; and private attorneys. Senator Edwards noted that the
93 Judicial Council should be included and should be in agreement with the proposal. Senator
94 McDougale stated it was important for the Code Commission to have a number on the cost to the
95 legal community, and reiterated the need for private attorneys on the task force. Mr. Miller
96 indicated that after the information and costs are collected, the Joint Legislative Audit and
97 Review Commission or the staff of the money committees should be asked to review the
98 numbers.

99 Mr. Miller moved that Senator Edwards appoint a task force to determine the overall fiscal
100 impact of reorganizing and renumbering the entire Code of Virginia and that such task force
101 would report to the Code Commission in time for the 2015 Session of the General Assembly.
102 After seconding the motion, Mr. Tavenner asked for clarification on the scope of the project. Mr.
103 Miller responded that the work done previously should be used as a starting point (i.e., new
104 numbering system; proposed restructuring, reorganization, and renumbering of titles; etc.). The
105 Code Commission unanimously approved the motion.

106 **Approval of final report: Title 33.2, Highways, Bridges and Ferries:** Nicole Brenner
107 presented the final report and executive summary for the Title 33.2 recodification. She noted that
108 the executive summary explains changes made throughout Title 33.2 and specifically identifies
109 (i) changes made due to rules of construction, (ii) changes made to apply more specifically to the
110 subject matter of the title, and (iii) changes that are considered substantive in nature. Ms. Brenner
111 also presented the proposed enactment and savings clauses for the draft bill.

112 Next, she reviewed three unresolved issues from prior meetings:

113 1. Regulations language - §§ 33.2-241 (lines 23-24), 33.2-319 (line 70), 33.2-327 (lines 124-
114 126), 33.2-334 (line 137), and 33.2-340 (lines 176 & 177). The Code Commission had asked for
115 regulations language to be more specific with regard to the promulgating entity. Ms. Brenner
116 reviewed the proposed language in each section that now identifies or describes the regulations
117 as "Department" or "Board" regulations.

118 2. Public-Private Transportation Act of 1995 (§56-556 et seq.): The work group recommends
119 moving the PPTA into proposed Title 33.2 and add a note in the executive summary that the
120 relocation of sections, articles, or chapters from other titles of the Code is not intended to have
121 any substantive effect on their interpretation.

122 3. Transportation District Act of 1964: The issue was how to clearly identify the Northern
123 Virginia Transportation District in new Chapter 19. In each case, the entire name of the
124 commission is stated.

125 The Code Commission had no objections to the matters presented.

126 On motion of Delegate LeMunyon and second by Judge Sharp, the Code Commission
127 unanimously approved the final report on the recodification of Title 33.1 and agreed to go
128 forward with introducing legislation to enact new Title 33.2. Delegate LeMunyon agreed to carry
129 the legislation.

130 **Public comment; other business; adjournment:** The Chair opened the floor for public
131 comment. Mr. Mullen congratulated the staff on the recodification report. As there was no
132 additional public comment or further business to discuss, the meeting adjourned at 11:15 a.m.