

VIRGINIA CODE COMMISSION

*Tuesday, October 21, 2014 - 10 a.m.
General Assembly Building, 6th Floor
Speaker's Conference Room
Richmond, Virginia 23219*

MEMBERS PRESENT: John S. Edwards; James M. LeMunyon; Ryan T. McDougale; Pamela S. Baskervill; Thomas M. Moncure, Jr.; Robert L. Calhoun; E.M. Miller, Jr.; Christopher R. Nolen; G. Timothy Oksman; Carlos L. Hopkins; Robert L. Tavenner

MEMBERS ABSENT: Gregory D. Habeeb; Charles S. Sharp

OTHERS PRESENT: Thomas A. Lisk, Eckert Seamans; Brian Kennedy, LexisNexis; Melanie West, Department of Planning and Budget

STAFF PRESENT: Jane Chaffin, Lilli Hausenfluck, Andrew Kubincanek, Karen Perrine, Nicole Brenner, Ryan Brimmer, Bill Crammé, Scott Meacham, and Tom Stevens, Division of Legislative Services (DLS)

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

Welcome and introduction of new member: Senator Edwards welcomed Judge Pamela Baskervill, Chief Judge of the 11th Judicial Circuit of Virginia, as the newest member of the Virginia Code Commission (Commission). Judge Baskervill, who will retire from the bench in November, thanked Senator Edwards and indicated she was pleased to be appointed to the Commission.

Approval of minutes: Hearing no objection, Senator Edwards stated that the minutes of the September 16, 2014, meeting of the Commission stand approved as printed and distributed to the members of the Commission.

Administrative Law Advisory Committee (ALAC): Tom Lisk, ALAC Chair, stated that ALAC had several matters to bring before the Commission.

Appointment of new member - Mr. Lisk requested the appointment of Kristi S. Wright to ALAC to replace Katya Herndon as the representative of the Office of the Executive Secretary of the Supreme Court of Virginia. On motion of Chris Nolen, seconded by Tim Oksman, the Commission unanimously voted to appoint Ms. Wright to ALAC.

Report of the Model State Administrative Procedure Act Judicial Work Group - Mr. Lisk advised that based on the report of the Judicial Work Group, ALAC recommends amending the Virginia Administrative Process Act to incorporate certain provisions of the Model Act.

- **Disqualification** - ALAC recommends expanding current law regarding disqualification of hearing officers to include disqualification of both hearing officers (formal hearings) and presiding officers (informal conferences) by adding a new section numbered 2.2-4024.1 and amending current § 2.2-4024. The purpose is to increase public confidence in the proceedings. Robert Calhoun moved to present ALAC's recommendation as a Commission bill. On second of Delegate Jim LeMunyon, the motion passed unanimously.

- 41 • Default by nonappearing party - Mr. Lisk explained that Virginia law currently does not
42 contain a mechanism to allow entry of a default order at a proceeding when a party does not
43 appear. ALAC recommends adding a new section numbered 2.2-4020.2 to allow a default
44 order if a party fails to appear without good cause. Mr. Calhoun moved that the first sentence
45 of subsection A be amended to delete the unnecessary language that reads, "of this
46 Commonwealth, other than this Title." On second of Mr. Nolen, the motion passed
47 unanimously. Upon question of what constituted "good cause," Mr. Lisk explained the
48 determination would be at the discretion of the hearing officer and that case law addresses
49 this point. Senator Edwards noted that the purpose is to avoid a formal hearing and save time
50 and resources. Senator Edwards moved that ALAC's recommendation, as amended, be
51 presented as a Commission bill. On second by Mr. Oksman, the Commission unanimously
52 approved the motion.
- 53 • Ex parte communications - Mr. Lisk explained that Virginia law currently does not prohibit
54 ex parte communications among the decision makers and the parties. ALAC recommends
55 adding a new section numbered 2.2-4024.2 to establish what types of communications are
56 permissible and a mechanism to handle inadvertent or nonmaterial discussion. Mr. Lisk
57 indicated that ALAC could not reach a consensus as to whether the limitations on ex parte
58 communications should apply in both formal hearings and informal conferences; therefore,
59 ALAC presented two options for the Commission's consideration. The basic provisions are
60 the same; the only difference is that the first option applies to both hearing officers (formal
61 hearings) and presiding officers (informal fact-finding conferences), and the second option
62 applies only to hearing officers. Mr. Nolen noted that the language in subsection C permitted
63 a hearing officer to communicate on ministerial matters with (i) an individual authorized by
64 law to provide legal advice to the hearing officer and (ii) an individual serving on the
65 administrative staff of the hearing officer but not a private party. He recommended that the
66 proposed language be expanded to permit the hearing officer to communicate on ministerial
67 matters with any party to the matter. After a brief discussion, Mr. Calhoun moved the
68 adoption of the second option as a Commission bill, with the change recommended by Mr.
69 Nolen to permit a hearing officer to communicate with a private party on ministerial matters.
70 On second by Mr. Oksman, the motion passed unanimously.
- 71 20th Annual Administrative Law Conference - Mr. Lisk reminded members that the annual
72 Administrative Law Conference will be held at the State Capitol on November 6, 2014.
- 73 **Follow-up to obsolete laws report:** Scott Meacham explained that he had recommended
74 repealing §§ 21-116.1, 21-20, 21-139, 21-427, and 21-427.1 of the Code of Virginia at the last
75 meeting as part of the obsolete laws project. Each of the sections incorporates by reference or
76 continues in effect one or more Acts of Assembly dealing with the creation and modification of
77 sanitary districts. The Commission had asked staff to investigate the substance of the underlying
78 acts to determine if the referenced and continued acts are valid and whether the Commission
79 should consider including these acts in the Code. Mr. Meacham stated that he found the
80 referenced acts still valid, further explaining that while a locality wishing to create a new sanitary
81 district today may make use of sections set out in Title 21, including those in Chapter 2 (§§ 21-
82 112.22 through 21-140.3), some of the older districts that continue to operate in localities
83 throughout Virginia are likely to have been created under the acts that are referenced in the five

84 sections at issue. Mr. Meacham stated that the acts are worthy of consideration for inclusion in
85 the Code.

86 In addition, § 21-291.2 incorporates by reference the Acts of Assembly creating the Hampton
87 Roads Sanitation District. Mr. Meacham suggested that the Commission consider including these
88 acts in the Code because the Hampton Roads Sanitation District continues to operate, and the
89 General Assembly recently amended the acts affecting this district in 2012.

90 The Chair deferred action and further discussion on this matter until after the Commission
91 receives and discusses the staff report on review of the policy to not set out certain provisions in
92 the Code.

93 **Recodification of Title 23, Educational Institutions:** Tom Stevens and Ryan Brimmer
94 presented the recodification report regarding new Chapter 31, Other Educational Entities, and
95 Chapter 32, Museums and Other Cultural Entities.

96 Chapter 31 - Other Educational Entities.

97 • Article 1 - The Commonwealth Health Research Board and Fund.

98 ○ § 23-277 et seq. (lines 5-187): Mr. Brimmer indicated that the Commonwealth Health
99 Research Board and the Office of the Attorney General have questioned the placement of
100 this article in Title 23.1, even though it currently is placed in Title 23. One suggestion is
101 to move this article to Title 32.1. The Board does not have a recommendation at this time,
102 but is reviewing the matter. Staff will report back to the Commission.

103 • Article 2 - Genedge Alliance.

104 ○ § 23-231.8 (lines 188-202): Mr. Brimmer noted the proposed name change from A. L.
105 Philpott Manufacturing Extension Partnership to Genedge Alliance to reflect current
106 usage. Delegate LeMunyon moved that if an entity's name changes, the statute should
107 indicate that the former entity is continued under the new name. On second by Senator
108 Ryan McDougle, the motion was approved. In later discussion, Judge Baskervill
109 expressed concerns with the entity changing its name without legislative approval. Upon
110 inquiry of Bob Tavenner regarding funding, it was discovered that the entity is funded in
111 the budget bill as A. L. Phillipott Manufacturing Extension Partnership. The consensus
112 was that if the entity wants to formally change its name, it should find a patron and do so
113 by separate bill.

114 ○ § 23-231.9 (lines 255-256): Mr. Brimmer explained that subsection D is added to
115 establish the number needed for a quorum at a meeting. Currently, a quorum is a simple
116 majority of the 24 members, but the board indicated that generally only eight or nine
117 members attend a meeting. After discussion of this proposal, the Commission deferred a
118 decision on Article 2 until further information is received.

119 • Article 4 - New College Institute.

120 ○ § 23-231.32 (lines 523-527): Mr. Brimmer noted that the language regarding corporate
121 powers will be amended once the work group finishes its review of similar language
122 found in the provisions regarding higher education.

123 Chapter 32 - Museums and Other Cultural Entities.124 • Article 4 - Science Museum of Virginia.

125 ○ § 23-242 (lines 1176-1185): Mr. Brimmer indicated that this section, regarding the
126 organizational structure of the museum, is being repealed. The museum has advised that
127 the divisions listed in the section were never established, and no plan exists to create the
128 divisions as listed.

129 ○ § 23-240 (line 1249): Mr. Brimmer explained that the museum requested the addition of
130 subdivision 7, which reads, "Inspire Virginians to enrich their lives through science."
131 Several Commission members questioned changing the text on line 1235 from "The
132 purposes of The Science Museum are" to "The board shall" and broadening the scope of
133 subdivision 6 of § 23-250 on line 1263 regarding contracts. At the conclusion of the
134 discussion, Senator Edwards instructed staff to represent the section to the Commission
135 taking into consideration the Commission's discussion.

136 • Article 5 - Virginia Museum of Fine Arts.

137 ○ § 23-253.1 (lines 1318-1319): Mr. Brimmer explained that in 2010, the Lieutenant
138 Governor was removed as an ex officio member of the board of trustees of the museum.
139 At the request of the museum, the Lieutenant Governor is added as a board member. The
140 consensus of the Commission is that this change should not be made as part of the
141 recodification and asked staff to remove change and represent this section to the
142 Commission.

143 • Article 6 - Virginia Commission for the Arts and Virginia Arts Foundation.

144 ○ § 2.2-2508 (lines 1435-1436): Mr. Brimmer stated that the Office of the Attorney General
145 noted that under the classifications of executive branch boards, commissions, and
146 councils in § 2.2-2100, the Virginia Commission for the Arts meets the definition of
147 "supervisory." Therefore, staff noted that the classification of the Virginia Commission
148 for the Arts is changed from advisory to supervisory.

149 **Discussion of changing Code of Virginia numbers to a two-dash numbering system:** Nicole
150 Brenner gave a recap of the two-dash numbering system that was considered by the Commission
151 in July and explained that, if adopted, a third numbering system would be introduced into the
152 Code of Virginia. Using two chapters from the recently adopted Title 33.1 recodification, Ms.
153 Brenner showed a comparison of the 1950 numbering system, which does not embed chapters;
154 the current numbering system, which has been in place since 1984 and embeds chapters; and the
155 two-dash numbering system, which embeds articles and chapters. It was noted that the current
156 numbering system seems to provide more flexibility in organization of titles, while the two-dash
157 numbering system requires new articles to be added to the end of a chapter, limiting
158 organizational flexibility.

159 After discussing the advantages and disadvantages of adopting a two-dash system and
160 introducing a third numbering system to the Code of Virginia, Senator McDougle made a
161 motion, seconded by Mr. Nolen, to retain the current numbering system. The motion was
162 approved.

163 **Review of policy of not setting out text of certain Code provisions:** Mr. Tavenner introduced
164 the agenda item, explaining that the Commission had requested DLS to review the Commission's
165 policy to set out in the Code only provisions with general and permanent applicability and to not
166 set out certain other provisions, such as severability clauses; provisions having special or limited
167 applicability; legislative findings; and intent, policy, and purpose statements. He informed the
168 members that the work group will report findings and options but will not make specific
169 recommendations.

170 Jane Chaffin presented the report and began by stating that there are over 100 references to not-
171 set-out sections in the Code. Ms. Chaffin directed the Commission's attention to an example of
172 one such section in the online version of the Code and pointed out that there is no catchline and
173 no indication of what the section is about. The print version of the Code does not present as
174 much of a problem because the publisher provides annotations describing the contents of the
175 omitted language.

176 Ms. Chaffin explained that the work group looked at the broad categories of sections not set out,
177 but did not analyze the individual sections. The categories are listed on page 2 of the report. The
178 Commission addressed the severability category last month by approving legislation to remove
179 all unnecessary severability provisions from Code.

180 The work group found that the application of the policy has varied over the years; for most
181 categories of sections that are not set out, there are other sections within those categories that are
182 set out in full. Other issues include incomplete online search results and the probability that
183 omitted sections are less likely to be updated, amended, or repealed because they are not
184 apparent in the Code.

185 In considering whether or not to modify the policy, Ms. Chaffin advised that the Commission
186 might consider adding the catchlines in the online and print versions of the Code. If the members
187 decide to add the full text, Ms. Chaffin stated that the Commission should consider continuing to
188 omit the text of the approximately 1,000 property tax exemptions for individually designated
189 organizations. Since 2003, these exemptions have been designated by local ordinance. This
190 category is unique in that the General Assembly can no longer add new sections to or amend
191 current sections in this category. Mr. Oksman moved that, in the print and online versions of the
192 Code, catchlines be added to the sections that are currently not set out. On second of Mr. Nolen,
193 the motion passed. The Commission agreed that the property tax exemptions for individually
194 designated organizations should remain not set out, but that staff should develop a way to make
195 these exempted organizations searchable online.

196 Discussion initially seemed to favor setting out the Code sections, with the exception of the
197 property tax exemption category, but as the discussion continued, some concerns were expressed
198 with setting out the text. Tom Moncure emphasized that the Commission's mandate is to set out
199 only general and permanent statutes. Bill Crammé, DLS Deputy Director, expressed concerns
200 about setting out legislative findings and purpose and intent statements because these provisions
201 may no longer reflect the associated sections. The general consensus was that although
202 legislative findings and purpose and intent statements do not belong in the Code, in reality they
203 are scattered throughout it; most are set out in full, but some are not. Mr. Calhoun suggested that
204 Joint Rules might issue a directive that legislators not include these provisions in bills.

205 Delegate LeMunyon said that he would like to see the text of the legislative findings and of the
206 purpose, intent, and policy statements. Staff will compile the text for the Commission to review
207 at its next meeting.

208 Senator Edwards left the meeting briefly, and Delegate LeMunyon assumed the chair.

209 **Uniform Electronic Legal Materials Act (UELMA):** Mr. Tavenner said that the Commission
210 reviewed DLS staff recommendations a few years back and decided not to adopt UELMA.
211 Approximately six months ago, Mr. Tavenner was approached by the Uniform Law Commission
212 about Virginia adopting UELMA. Mr. Tavenner said that after talking to representatives from
213 other states that have adopted UELMA, he did not obtain solid information as to what it
214 accomplishes, and therefore he is not recommending adoption of this uniform act. He stated that
215 Virginia does not currently have an official version of the statutory Code, and the act would
216 require that the online Code become official. Although Virginia has an official publisher of the
217 print statutory Code, it is not designated as the official version.

218 Senator Edwards returned to preside over the meeting.

219 **Virginia Administrative Code (VAC) contract amendment:** Ms. Chaffin advised that West,
220 the publisher of VAC, is changing the trim specifications of the VAC index from 5.875 x 9.5
221 inches to 5.75 x 9.5 inches. This almost imperceptible change is being made to conform to all
222 print indexes across the company. West indicates that this change will greatly help with several
223 efficiency metrics and ensure a more consistent product. E.M. Miller moved, seconded by
224 Delegate LeMunyon, to approve the change in trim size of the VAC index to 5.75 x 9.5 inches.
225 The motion was approved.

226 **Other business; public comment; adjournment:** The Chair opened the floor for public
227 comment. As there was no public comment and no further business to discuss, the Chair
228 adjourned the meeting at 12:15 p.m.