

VIRGINIA CODE COMMISSION

Monday, July 20, 2015 - 10 a.m.
General Assembly Building, 6th Floor
Speaker's Conference Room
Richmond, Virginia 23219

1 **MEMBERS PRESENT:** John S. Edwards; Gregory D. Habeeb (by telephone); Carlos L.
2 Hopkins; James M. LeMunyon; Ryan T. McDougle; Charles S. Sharp, Pamela S. Baskervill;
3 Thomas M. Moncure, Jr.; Robert L. Calhoun; E.M. Miller, Jr.; Christopher R. Nolen; G. Timothy
4 Oksman; Robert L. Tavenner

5 **MEMBERS ABSENT:** None

6 **STAFF PRESENT:** Jane Chaffin, Lilli Hausenfluck, Andrew Kubincanek, Nicole Brenner,
7 Ryan Brimmer, Tom Stevens, Division of Legislative Services (DLS)

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

9 **Approval of minutes:** Hearing no objection, Senator Edwards stated that the minutes of the May
10 4, 2015, meeting of the Code Commission stand approved as printed and distributed to the
11 members.

12 **Adoption of policy on remote meeting participation:** Alan Gernhardt explained the proposed
13 policy on member participation in Commission meetings by electronic communication means
14 required under § 2.2-3708.1 of the Code of Virginia. Section 2.2-3708.1 allows individual
15 members of the Commission to participate in a meeting through electronic communication
16 means from a remote location that is not open to the public in the event of (i) an emergency or
17 personal matter or (ii) a temporary or permanent disability or other medical condition. For a
18 member to participate remotely, the Commission must have a written policy addressing such
19 participation and meet other requirements specified in § 2.2-3708.1.

20 The proposed policy is derived from a similar policy adopted by the FOIA Council and provides
21 for automatic approval of a member to participate remotely unless the member's participation
22 would violate FOIA, and, if such participation is challenged, then the matter would be put to a
23 vote. Remote participation due to an emergency or personal matter is limited by law to two
24 meetings or 25% of the meetings per member each calendar year.

25 On motion of Mr. Calhoun, seconded by Judge Baskervill, the Commission approved the policy
26 as presented.

27 The chair recognized that Delegate Habeeb is participating remotely by phone because he is
28 away in Hilton Head.

29 **Approval of Administrative Law Advisory Committee (ALAC) work plan:** Tom Lisk,
30 ALAC chair, presented ALAC's work plan for 2015.

31 Continuing studies include the review of the Model State Administrative Procedure Act, the
32 timeliness of regulations as it relates to the Executive review process of regulations, and issues
33 surrounding incorporation of an agency's guidance document by reference in its own regulation.

34 The MSAPA judicial work group is continuing its discussion of ex parte communications and
35 additional amendments in the Administrative Process Act (APA) on reconsideration and
36 intervention. ALAC will also discuss amendments on administrative hearings by teleconference
37 or videoconference.

38 ALAC proposes to review with the Attorney General's office an interpretation issue on agencies'
39 use of the Administrative Process Act (APA) exemption provided in § 2.2-4006 A 4 a. Section
40 2.2-4006 A 4 a provides that regulations are exempt from part of the APA when the regulations
41 are necessary to conform to changes in Virginia statutory law or the appropriation act where no
42 agency discretion is involved. In 2011, an amendment was added requiring regulations
43 promulgated under this exemption to be filed with the Registrar within 90 days of the law's
44 effective date.

45 In response to a comment by Mr. Calhoun concerning the amount of time it takes for a
46 regulations to undergo the Executive review process, Mr. Hopkins stated that the issue is being
47 looked at internally at the Governor's office. Mr. Lisk stated that this problem is not a new one
48 and has been an issue since the early 1990s. ALAC is looking at ways to hasten the review
49 process without impeding the Governor's authority.

50 Mr. Nolen made a motion, seconded by Mr. Moncure, to approve ALAC's proposed work plan as
51 presented. The motion carried.

52 **Request to study whether changes to Code of Virginia are needed in light of Obergefell v.**

53 **Hodges ruling:** The chair pointed to the June 26 letter from Speaker Howell and Senator
54 Norment requesting the Code Commission to evaluate what changes may be necessary to the
55 Code of Virginia in light of the U.S. Supreme Court ruling in Obergefell v. Hodges and asked
56 how the Commission would like to proceed. After discussing the matter, the Commission
57 requested DLS to evaluate the scope of the request and how it relates to Senator Ebbin's and
58 Delegate Simon's 2015 legislation concerning use of gender-specific terms throughout the Code
59 of Virginia, which is also under review by the Commission. Upon Mr. Miller expressing interest
60 in the history of any overturned constitutional provisions in Virginia, David Cotter reported that
61 there have been two--one pertaining to Virginia's poll tax and the other concerning racial
62 segregation. Mr. Cotter stated that both provisions remained in the Virginia constitution until
63 1971 when the constitution was wholly revised. Staff will report back to the Commission later
64 this summer.

65 **Obsolete laws report - Title 58.1:** Mark Vucci and David Rosenberg presented a chart of Title
66 58.1-related statutes identified as obsolete and a proposed bill draft to remove the obsolete
67 provisions from the Code of Virginia.

68 Mr. Vucci reported that § 58.1-339.5 (earned-income tax credit for low-income families with
69 children) never took effect and is, therefore, recommended for repeal. The section passed in 1998
70 under the condition that the credit was effective upon written notice from the U.S. Department of
71 Health and Human Services that the income tax credit qualifies as a portion of the maintenance
72 of effort under the Temporary Assistance for Needy Families program. Instead, Virginia received
73 a notice that the earned income tax program for low income families does not qualify for federal
74 funds. Mr. Vucci stated that there is already a credit on the books that basically replaces this
75 section, but § 58.1-339.5 potentially could be reactivated if a letter meeting the condition of the
76 1998 act is received from the federal government.

77 Mr. Vucci recommended the following tax credits be repealed because the credits have expired:
78 §§ 58.1-339.9 (rent reductions), 58.1-434 (telecommunications income), 58.1-435 (low-income
79 housing), 58.1-439.1 (clean fuel vehicle and advanced cellulosic biofuels job creation), 58.1-
80 439.11 (employees with disabilities), 58.1-439.13 (investing in technology industries in tobacco-

81 dependent localities), and 58.1-439.14 (research and development occurring in tobacco-
82 dependent localities). Also, staff recommended repealing the following sections pertaining to the
83 issuance of regulations, which are no longer needed since the associated tax credits have expired:
84 § 36-55.63 (low-income housing) and § 58.1-439.16 (tobacco-dependent localities). Staff further
85 noted that the low-income housing tax credit has been replaced by the livable home credit. Mr.
86 Vucci alerted the members that § 58.1-439.1 had recently expired on January 1, 2015, and
87 legislation to extend the tax credit failed.

88 In addition, Mr. Vucci recommended the Commission consider repealing the following sections:

- 89 • Section 58.1-439.15 pertains to the Technology Initiative in Tobacco-Dependent Localities
90 Fund. In 2013 all moneys in the fund reverted to the Tobacco Indemnification and
91 Community Revitalization Fund, therefore, there is no longer a reason to keep this section in
92 the Code.
- 93 • Section 58.1-439.15:01 pertains to incentive payments for using domestic tobacco. This tax
94 incentive expired in 2012. Although legislation was introduced to extend the incentive, the
95 Attorney General's office advised against doing so because of concerns that participating
96 cigarette manufacturers would argue that the incentive was a violation of the Tobacco Master
97 Settlement Agreement.

98 Mr. Rosenberg explained the reasoning for considering the repeal of the remaining sections listed
99 in the chart as follows:

- 100 • Section 58.1-639 sets out transitional provisions related to the state sales and use tax rate
101 increase effective July 1, 2013. It allows corporations who entered into a contract prior to
102 such date but with delivery after that date to apply to the Department of Taxation for a refund
103 of the difference in the tax upon proof of a legitimate contract. The timeframe for applying
104 for this refund has expired.
- 105 • Section 58.1-1840.1 establishes the Tax Amnesty Program and provides for the program to
106 be conducted from July 1, 2009, through June 30, 2010. The period of amnesty ended July 1,
107 2010.
- 108 • Section 58.1-2290.1 establishes a tax on fuel in inventory as part of the transition for the
109 motor fuels tax increase in 2013.
- 110 • Section 58.1-3605.1 requires a one-time report to localities by owners of tax exempt real
111 estate. The report deadline was in 1993.
- 112 • Section 58.1-3712.1 provides for a local gross receipts tax on oil severed from ground. This
113 tax expired July 1, 1995.
- 114 • Section 58.1-3822 provides for an additional transient occupancy tax for Arlington County.
115 The tax expired on January 1, 2012.
- 116 • Section 58.1-3825.1 provides for an additional transient occupancy tax in certain counties
117 and cities in Northern Virginia. The tax was ruled unconstitutional by the Virginia Supreme
118 Court, and Chapter 652 of the 2008 Acts of Assembly declared the tax null and void and
119 provided for the refund of the tax.

120 The Commission discussed the recommendations and asked staff to check with the patron of the
121 failed 2015 legislation to extend the tax credit provided in § 58.1-439.1. Mr. Vucci indicated that
122 staff would do so. Mr. Vucci also stated that he and Mr. Rosenberg are working with the
123 Department of Taxation and other stakeholders to ensure everyone is in agreement with the
124 recommendations.

125 Mr. Vucci explained that a savings clause is included as the third enactment of the proposed
126 legislative draft. The enactment provides that the bill will not affect any tax credit or tax benefit
127 or other tax attribute allowed or earned under any section repealed by the bill or tax liability or
128 obligation pursuant to any such section.

129 Mr. Calhoun asked staff to alert Arlington County about the repeal of the transient occupancy
130 tax.

131 In response to Delegate LeMunyon's inquiry related to credits and carry forwards, staff indicated
132 that there is no fiscal impact resulting from the proposed bill draft.

133 Upon motion of Mr. Miller, seconded by Mr. Nolen, the Commission approved the
134 recommendations and proposed bill draft as presented.

135 **Recodification of Title 23, Educational Institutions:** Ryan Brimmer and Tom Stevens
136 presented proposed Chapters 8 (Health and Campus Safety) and 9 (Academic Policies) and
137 revisited issues previously raised in several other chapters.

138 Proposed Chapter 8, Health and Campus Safety. This chapter is a consolidation of provisions
139 relating to student health and campus safety that are currently scattered throughout existing Title
140 23. Mr. Brimmer explained the changes, and the Commission discussed the following points:

- 141 • In response to Delegate LeMunyon's question concerning whether there is a difference in the
142 use of the term "each baccalaureate public institution of higher education" (§ 23.1-802 C, line
143 82) versus "each public institution of higher education" (§ 23.1-803 B, line 99), staff
144 responded that the usage in § 23.1-803 B is broader. Mr. Brimmer further elaborated on the
145 change from "four-year public institution" to "baccalaureate public institution" by explaining
146 that the change is not substantive and reflects the fact that many students are not graduating
147 in four years.
- 148 • Mr. Oksman expressed concern with current language in proposed § 23.1-802 (existing § 23-
149 9.2:8) relating to student mental health policies. The specific concern involves subsection B
150 (lines 72-80) and whether the statute is contradictory to privacy laws. Mr. Stevens advised
151 that staff will assess whether the language in question complies with the Health Insurance
152 Portability and Accountability Act and Title 16 of the Code of Virginia.
- 153 • Mr. Brimmer explained that a reference to the appointment of auxiliary police forces was
154 added in proposed § 23.1-812 B (lines 379-383). The Commission discussed whether the
155 section should be repealed. Staff will review the language further and return with a
156 recommendation.

157 Proposed Chapter 9, Academic Policies. This chapter is a consolidation of statutes related to
158 academic policies scattered throughout Title 23.

159 Senator McDougle commented on proposed § 23.1-900 (lines 573-606), which pertains to
160 information to include on academic transcripts of students who have been suspended, dismissed,

161 or withdrawn from an institution due to an investigation for an offense involving sexual violence.
162 Specifically, new language in subsection C refers to institutions "described in subsection B."
163 Senator McDougle asked for clarification on whether there is a difference in which institutions
164 are affected under current law versus the ones that would be affected by the proposed change.
165 Staff will compile a list of such institutions for the Commission's review. The Commission also
166 discussed in detail subsection B and how it should be clarified to specifically say what it means.
167 For instance, Judge Baskervill noted that the first part of subsection B provides an exclusion for
168 George Washington University by description, not by name. Mr. Brimmer stated that the
169 titlewide definitions should provide clarification to some of the questions. The definitions are
170 under development and will be presented at a future meeting.

171 Proposed Chapters 25, 26, 27, 28, and 29. Mr. Brimmer addressed outstanding issues in
172 previously reviewed Chapters 25 (Virginia Military Institute), 26 (Virginia Polytechnic Institute
173 & State University), 27 (Virginia State University), 28 (College of William & Mary), and 29
174 (State Board for Community Colleges).

175 Much of the language previously proposed for removal has been restored at the request of
176 individual institutions. For example, an attempt was made to standardize provisions on
177 conferring degrees in the titlewide general provisions section, but staff was unsuccessful in
178 convincing some institutions to agree to remove such language from the statutes applying to the
179 specific institution. Also, other language previously identified as not needing to be set out in
180 statute has been restored because individual institutions have insisted that it be retained. An
181 example of such language is in proposed § 23.1-2510 (existing § 23-112), which authorizes the
182 Superintendent to "enlist musicians for service at the Institute."

183 At the conclusion of his presentation, Mr. Brimmer advised that the Commission has completed
184 9 of the 32 chapters. Staff plans to present 12 chapters at the August meeting and 11 chapters in
185 September.

186 Staff suggested that the Commission consider either lengthening the meeting days or scheduling
187 additional meeting dates in order to finalize the Title 23 recodification by the end of the year.
188 The Commission agreed to work through lunch at its August meeting.

189 **Virginia Law Portal update:** Lilli Hausenfluck updated the members on the status of the Code
190 of Virginia on the Virginia Law Portal. She explained that the portal brings together the legal
191 publications that comprise Virginia law, including the Code of Virginia, Virginia Administrative
192 Code, Virginia Constitution, charters, authorities, compacts, and uncodified acts. The Code of
193 Virginia on the portal updates and replaces the previous format commonly known as "LIS."
194 Bookmarks and links that previously directed the user to LIS now redirect to the portal. Ms.
195 Hausenfluck concluded by announcing that the Virginia Law Portal has a Twitter account
196 @VA_Laws.

197 **Other business:** The Chair opened the floor for other business. No items were presented.

198 **Public comment; adjournment:** The Chair opened the floor for public comment. As there was
199 no public comment and no further business to discuss, the Chair adjourned the meeting at
200 12:30 p.m.