

VIRGINIA CODE COMMISSION

*Wednesday, August 19, 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; Ryan T. McDougle; Charles S.  
2 Sharp, Pamela S. Baskervill; Thomas M. Moncure, Jr.; Robert L. Calhoun; Jr.; E.M. Miller, Jr.  
3 (by telephone); Christopher R. Nolen; G. Timothy Oksman; Carlos L. Hopkins; Robert L.  
4 Tavenner

5 **MEMBERS ABSENT:** James M. LeMunyon

6 **STAFF PRESENT:** Jane Chaffin, Karen Perrine, Ryan Brimmer, Division of Legislative  
7 Services (DLS)

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

9 **Remote member participant:** Mr. Miller called in to participate in the meeting remotely  
10 pursuant to § 2.2-3708.1 of the Code of Virginia and the Commission's policy on remote  
11 participation. Mr. Miller stated that he was on I-95 traveling to Myrtle Beach, South Carolina, to  
12 attend a 2 p.m. condominium association board meeting.

13 **Approval of minutes:** Hearing no objection, Senator Edwards stated that the minutes of the July  
14 20, 2015, meeting of the Code Commission stand approved as printed and distributed to the  
15 members.

16 **Discussion of next Code of Virginia title recodification:** Mr. Tavenner explained that the list  
17 of suggested title recodifications are based on recommendations of Commission members and  
18 DLS staff. The recodification candidates are Titles 8.01 (Civil Remedies & Procedure), 36  
19 (Housing), 40.1 (Labor & Employment), 45.1 (Mines & Mining), and 55 (Property &  
20 Conveyances).

21 Mr. Tavenner asked the chair to call on Kristen Walsh, the DLS attorney who staffs the Civil  
22 Law Subcommittee of the House Courts of Justice Committee, to discuss the pros and cons of  
23 recodifying Title 8.01. Ms. Walsh reported that she contacted various organizations representing  
24 practitioners who use Title 8.01 and found that the overarching consensus is that practitioners are  
25 satisfied with the current structure and easily can find the information they need. She further  
26 stated that only 33 sections (three percent) of the title have been repealed since the title was  
27 recodified in 1977. In response to an inquiry about reasons to recodify the title, Ms. Walsh  
28 replied that the numbering scheme is not structured in the current format, which embeds chapters  
29 into the section number and the title is difficult for a layperson to navigate without attorney  
30 guidance.

31 The chair invited public comment. Steve Pearson, on behalf of the Virginia Trial Lawyers  
32 Association, stated that the consensus of this group is that the lawyers and judges understand  
33 Title 8.01 as it currently exists. Recodifying this title would be an enormous effort that would not  
34 result in a huge benefit because it is already clear to those who use it. Jeff Palmore, speaking on  
35 behalf of the Virginia Bar Association (VBA), stated that there is no consensus among the VBA  
36 members.

37 The Commission discussed the unwieldy size of the code volume that contains Title 8.01 and the  
38 placement of statutes of limitations that are outside of Title 8.01. The members also discussed  
39 where to place efforts and extend resources to achieve the most benefit, emphasizing that the size  
40 of the task and lack of desire to learn new code section numbers are not valid reasons to avoid  
41 recodifying any title. The chair called for a motion on recodifying Title 8.01, and none was  
42 made.

43 Mr. Tavenner stated that there are five other titles on the list, but an in-depth analysis of these  
44 titles has not been performed. David Cotter stated that he contacted Grice McMullan who first  
45 approached the Commission in 2009 about the need to recodify Title 55 when he was president  
46 of the Real Estate Section of the Virginia Bar Association. There is community interest in doing  
47 Title 55. Mr. Calhoun agrees with the sentiment that Title 55 should be redone and suggested the  
48 possibility of doing Title 45.1 at the same time. Mr. Calhoun made a motion to select Titles 55  
49 and 45.1 for the Commission to undertake next. Jeff Palmore said that he would like to get  
50 feedback from circuit court clerks and other stakeholders before the Commission makes a  
51 decision. The motion was not seconded.

52 Mr. Tavenner stated that DLS will research all suggestions, consult with interested parties and  
53 stakeholders, and make a full report at a later meeting.

54 **Removal of comma in § 2.2-3101, definition of "contract":** Mr. Moncure explained that in the  
55 definitions section (§ 2.2-3101) of the State and Local Government Conflict of Interests Act, the  
56 definition of "contract" contains an erroneous comma and asked the members if they concur in  
57 his conclusion. Mr. Moncure stated that the first comma in the definition, after the word "party"  
58 should be removed as shown and highlighted below:

59 "Contract" means any agreement to which a governmental agency is a  
60 party, or any agreement on behalf of a governmental agency that involves  
61 the payment of money appropriated by the General Assembly or a political  
62 subdivision, whether or not such agreement is executed in the name of the  
63 Commonwealth, or some political subdivision thereof.

64 As currently written, one can argue that there is no implication of payment of public funds unless  
65 the agreement is made on behalf of a governmental agency. In other words, a contract is any  
66 agreement to which a governmental agency is a party irrespective of whether the agreement  
67 involves the payment of public funds.

68 The Commission discussed its authority to correct "unmistakable errors." Since the Commission  
69 is unsure of the original intent of the legislation and the comma appears in numerous acts of  
70 assembly amending this section, the Commission determined that this change could be  
71 considered substantive and should be made through legislation.

72 **Proposed Code Commission Regulations issued under the Virginia Register Act:** Ms.  
73 Perrine briefed the Commission on the background of the Code Commission regulations and  
74 stated that the regulations were last amended in 1994. The proposed amendments were  
75 developed by a work group consisting of staff of the Registrar's office and two experienced  
76 agency regulatory coordinators. After receiving the Commission's feedback and approval of the  
77 proposed amendments, staff will solicit comment on the proposal from state agencies and other  
78 stakeholders and interested parties. Ms. Perrine plans to present final regulations for adoption at  
79 the November meeting.

80 Ms. Perrine highlighted a number of proposed changes, including (i) the elimination of the  
81 provision that permits an agency to file certain regulations by description in lieu of filing full  
82 text, noting that filing by description is different from incorporating a document by reference; (ii)  
83 the ability to update forms associated with a regulation without going through the standard  
84 regulatory process; (iii) a provision prohibiting an agency from incorporating its own document  
85 by reference; (iv) a provision allowing the Registrar to omit certain nonregulatory provisions in  
86 the Virginia Administrative Code; (v) in situations when a regulatory action is permitted to be  
87 effective on the same day that it is filed with the Registrar's office, encouraging agencies to set  
88 the effective date at least three days after filing to give ample time for the Registrar's office to  
89 review and process the regulations before posting them online and incorporating them into the  
90 administrative code; (vi) the addition of several general rules of construction based on the Code  
91 of Virginia; (vii) computation of a time period based on publication in the Virginia Register;  
92 (viii) clarifying that the PDF version of the Virginia Register is the official version; and (ix)  
93 other updates to reflect statutory changes, current terminology, and current practices and  
94 technology.

95 Mr. Calhoun suggested that staff clarify the wording of the second sentence of 3.1:1 C (lines  
96 437-438) pertaining to incorporation by reference.

97 At the conclusion of Ms. Perrine's presentation and after a brief discussion, the Commission  
98 suggested that ALAC review the proposed regulations and also requested staff to bring examples  
99 of regulatory text that incorporates documents by reference to a future meeting.

100 Judge Baskervill made a motion, seconded by Mr. Tavenner, to approve the proposed  
101 regulations, send them to interested parties and stakeholders for comment, and come back with  
102 final recommendations. The motion was approved.

103 **Title 23 recodification:** Ryan Brimmer advised that at the conclusion of today's review, the  
104 recodification review will be approximately two-thirds complete. Staff plans to present 10  
105 chapters in September and the final chapter in October.

106 Mr. Brimmer reported on the following three issues raised regarding several previously reviewed  
107 chapters:

- 108 • The constitutionality of the provision regarding confirmation of board of visitors' members  
109 for Virginia Polytechnic Institute and State University by only the Senate instead of by the  
110 House and Senate (proposed § 23.1-2601, reviewed July 20, 2015) -- in Mr. Brimmer's  
111 opinion and that of counsel for Virginia Tech, the provision is constitutional under Article V,  
112 Section 7 of the Virginia Constitution.
- 113 • Whether § 23.1-802 B concerning who is notified when a college student is involuntarily  
114 committed to a mental health facility is contradictory to privacy laws -- staff is continuing to  
115 work on this issue and will report at a future meeting.
- 116 • The appointment of auxiliary police forces and whether § 23.1-812 B should be repealed --  
117 staff reported that the Association for Chiefs of Police confirmed that some institutions have  
118 auxiliary police forces; therefore, this language will be preserved.

119 Mr. Brimmer presented for the first time proposed Chapters 11 (Bonds and Other Obligations),  
120 12 (Virginia College Building Authority), and 30 (Eastern Virginia Medical School).

121 Proposed Chapter 11, Bonds and Other Obligations. Mr. Brimmer advised that this chapter had  
122 been reviewed by the Department of the Treasury, the State Council for Higher Education, bond  
123 counsel, and the Office of the Attorney General. The goal was to make technical changes only to  
124 this chapter. Mr. Brimmer explained the changes, and the Commission discussed the following  
125 points:

- 126 • Mr. Brimmer explained that staff recommends the repeal of existing § 23-6, which continues  
127 in effect certain acts, as unnecessary. He stated that the underlying acts have not been  
128 repealed and would remain in effect even if the section is repealed. Mr. Calhoun asked that  
129 staff determine if the acts referenced in the section should be repealed. Mr. Nolen stated that  
130 he believes that the referenced 1919 acts would be repealed if they are considered special  
131 acts unless the section is retained or unless the text of the acts is codified. The Commission  
132 directed staff to take another look at this recommendation.
- 133 • In proposed § 23.1-1119 (line 585), the Commission directed staff to retain the word  
134 "special" and delete the proposed changed to "specific."
- 135 • Mr. Brimmer stated the repeal of § 23-30 raises the same issue as was raised for § 23-6;  
136 therefore, staff will review this section.

137 Proposed Chapter 12, Virginia College Building Authority. The Commission discussed a point  
138 raised by Mr. Calhoun concerning the proposed change of the term "municipal officer" to "local  
139 officer" (line 1170 in § 23.1-1214), and the fact that "local" has a broader application than  
140 "municipal." Mr. Brimmer stated that the work group believed the reference "municipal officer"  
141 was faulty. The Commission directed staff to use the term "officer of a locality" instead of "local  
142 officer."

143 Proposed Chapter 30, Eastern Virginia Medical School. Mr. Brimmer noted that the provisions  
144 regarding Eastern Virginia Medical School (EVMS) are only in the Acts of Assembly, and he  
145 proposes including the full text of the acts into new Chapter 30. He will check with EVMS  
146 about changing "municipality" to "locality" in § 23.1-3004 (line 1945) to conform to similar  
147 changes in other chapters.

148 Previously reviewed chapters. Mr. Brimmer reviewed updates to proposed Chapters 13  
149 (Governing Boards of Public Institutions), 18 (University of Mary Washington), 19 (Norfolk  
150 State University), 20 (Old Dominion University), 21 (Radford University), 22 (University of  
151 Virginia), 23 (Virginia Commonwealth University), and 24 (Virginia Commonwealth University  
152 Health System Authority), which were previously reviewed by the Commission. In addition, Mr.  
153 Brimmer noted the proposed change in the name of new Title 23.1 to "Institutions of Higher  
154 Education; Other Educational and Cultural Institutions." The Commission discussed the  
155 following points:

- 156 • Chapter 1, Definitions and General Provisions (page 90) - Mr. Brimmer highlighted the new  
157 definitions "Associate-granting public institution of higher education" and "Baccalaureate  
158 public institutions of higher education" and noted the listing of the institution names under  
159 the defined terms.

160 In response to Senator Edwards question about the need for the word "comprehensive" in the  
161 definition "Comprehensive community college" (page 91), staff replied that all community  
162 colleges are considered "comprehensive." At Senator Edwards' request, staff will check with

163 the Virginia Community College System about removing the word "comprehensive" from  
164 this definition.

165 Section 23.1-107 (page 104) allows private institutions to establish human research review  
166 committees, which is currently provided for in and derived from § 23-9.2:3.3 along with  
167 public institutions. Mr. Brimmer noted that the one substantive change is the exclusion of the  
168 provision requiring private institutions to promulgate regulations. This provision has been  
169 excluded because private institutions are not considered an "agency" under the APA.  
170 However, this provision is retained for public institutions.

171 • Chapter 13, Governing Boards of Public Institutions - In § 23.1-1301 A 3 (page 108), the  
172 Commission directed staff to review the placement of the commas and to define the term  
173 "chief executive officer."

174 Mr. Brimmer stated that § 23.1-1310 (page 127), which pertains to conveyance of property of  
175 predecessor institutions, is currently in the enabling statutes of individual institutions, but is  
176 being standardized and placed in Chapter 13. Mr. Oksman noted that this section requires a  
177 real estate transaction to change the name on a deed. Senator Edwards suggested that staff  
178 change the language "shall be transferred to" to "shall be deemed" (line 3374) so a deed of  
179 conveyance will not be necessary.

180 • Corporate powers; sovereign immunity - Mr. Moncure directed the members' attention to the  
181 sovereign immunity language for the boards of visitors of the University of Mary  
182 Washington on page 132, line 3400, and Radford University on page 146, line 3876. He  
183 compared these provisions with a similar provision granting corporate powers to Norfolk  
184 State University, which does not contain the sovereign immunity language. Mr. Moncure  
185 noted that anywhere corporate powers are granted, the sovereign immunity provisions should  
186 be consistent for all boards of visitors -- either included in or removed from all. After  
187 discussion and input from representatives of the public higher education institutions, Mr.  
188 Moncure moved to remove the sovereign immunity provisions as unnecessary. Judge  
189 Baskervill seconded the motion and the motion passed unanimously.

190 • Chapter 18, University of Mary Washington; Chapter 19, Norfolk State University; Chapter  
191 20, Old Dominion University; Chapter 21, Radford University - Powers and duties of the  
192 boards are preserved in the university's enabling statutes (§§ 23.1-1803, 23.1-1902, 23.1-  
193 2102) instead of standardizing the powers (e.g., conferring degrees, personnel, approving  
194 new academic programs) in the general provisions. Language providing the power for the  
195 board to "generally direct the affairs of the University" is added in § 23.1-1902 at the request  
196 of Norfolk State University.

197 • Chapter 22, University of Virginia - Language in § 23.1-2211 E and F (page 161) clarifies  
198 the relationship between the University of Virginia and the University of Virginia's College  
199 at Wise. The change "chief local administrative officer" to "chief executive officer" in  
200 subsection F was suggested by the university's accrediting agency (Southern Association of  
201 Colleges and Schools).

202 • Chapter 23, Virginia Commonwealth University - Mr. Brimmer explained the difference in  
203 the terms of the members of the board of visitors of Virginia Commonwealth University  
204 (VCU) from other four-year institutions as interpreted by VCU (§ 23.1-2303 B, page 176).

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205 While other four-year institutions allow an individual to serve two consecutive four-year  
206 terms more than once as long as there is a break between appointments (§ 23.1-1300), VCU  
207 does not allow an individual to be reappointed after serving two consecutive four-year terms.

208 • Chapter 24, Virginia Commonwealth University Health System Authority - Mr. Brimmer  
209 stated that the VCU Health System Authority representatives and VCU legal counsel worked  
210 closely with staff to make technical changes and appropriately update nomenclature  
211 throughout this chapter.

212 At the conclusion of Mr. Brimmer's presentation, Mr. Oksman thanked staff for their efforts on  
213 the recodification. He noted that there are a number of changes regarding the issuance of bonds  
214 and since public finance is a highly specialized area asked whether a professional association of  
215 bond attorneys should look at the changes to make sure there are no changes that might damage  
216 municipal bond funds. Mr. Brimmer explained that staff has approached this matter by having  
217 the institutions act as intermediaries between the work group and bond counsel.

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

219 **Public comment; adjournment:** The Chair opened the floor for public comment. As there was  
220 no public comment and no further business to discuss, the Chair adjourned the meeting at  
221 2:10 p.m.