

## VIRGINIA CODE COMMISSION

*Monday, November 21, 2016 - 10:00 a.m.*

*General Assembly Building, 6th Floor*

*Speaker's Conference Room*

*Richmond, Virginia 23219*

**Approved**

**April 4, 2017**

**MEMBERS PRESENT:** John S. Edwards; James M. LeMunyon; Gregory D. Habeeb; Ryan T. McDougle; Carlos L. Hopkins; Charles S. Sharp; Leslie L. Lilley; E.M. Miller, Jr.; Thomas M. Moncure, Jr.; Chris Nolen; G. Timothy Oksman; Mark Vucci

**MEMBERS ABSENT:** Robert L. Calhoun, Jr.

**STAFF PRESENT:** David Cotter, Bill Cramme, Beth Jamerson, Scott Meacham, Chrissy Noonan, Brittany Olwine, Tom Stevens, Amigo Wade, Jane Chaffin, Karen Perrine, Andrew Kubincanek, Division of Legislative Services (DLS)

**OTHERS PRESENT:** Tom Lisk, Administrative Law Advisory Committee; John G. "Chip" Dicks, FutureLaw; Brian Kennedy, LexisNexis; Melissa Vasquez, Department of Motor Vehicles; Jeff Palmore

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

**Approval of minutes:** The minutes of the October 17, 2016, meeting of the Commission as printed and distributed to the members were approved without objection.

**Report of the Administrative Law Advisory Committee (ALAC):** Tom Lisk, ALAC Chair, presented ALAC's 2016 annual report.

Mr. Lisk advised that ALAC completed the update of the Hearing Officer's Deskbook to reflect the 2015 legislation regarding disqualification of a hearing officer, ex parte communication, and default judgments.

Mr. Lisk presented two proposed bills for the Commission's consideration. Based on review of the Model State Administrative Procedure Act (MSAPA), ALAC recommends a statutory change that authorizes the presiding officer of a formal hearing to conduct a closed hearing, issue necessary protective orders, and seal all or part of the hearing record upon motion of the parties to the hearing. ALAC also recommends that since guidance documents issued by state agencies interpret both law and regulation, the guidance document provisions of the Administrative Process Act (APA) be amended to require all agencies to file guidance documents, not just those agencies with regulatory authority.

Mr. Lisk reported that the executive branch regulatory action review work group did not reach a consensus on a recommendation. The work group reviewed reports concerning the regulatory process and the length of time it takes to promulgate a regulation, which has been a concern for many years. The timeframe for promulgating a regulation through the normal regulatory process has led to more exemptions from the APA, more fast-track rulemaking actions, and an overall reduction in public input. The current administration has taken measures to improve the executive branch review process and to decrease review time, but the concern is for the overall process now and in the future. E.M. Miller stated that the *Virginia Lawyer*, the official publication of the Virginia State Bar, contained an article about the Department of Taxation's use of Commissioner of Taxation letters instead of adopting regulations, thereby circumventing the APA. He suggested that ALAC review this issue next year.

38 The Commission agreed that ALAC's work plan for 2017 include continued study of the executive  
39 branch process for review of regulatory actions and possible circumvention of the regulatory  
40 process by state agencies.

41 Regarding possible bills for the 2017 Regular Session of the General Assembly, Tom Moncure  
42 moved that the Commission present the draft bill concerning guidance documents to the 2017  
43 Session of the General Assembly. The motion was duly seconded and passed.

44 Regarding the proposed hearing officer bill, Delegate Habeeb asked why the bill was needed in  
45 light of § 2.2-4023 of the APA. Mr. Lisk replied that since that statute only applied to orders and  
46 not to the hearing itself, the concern is the "horse out of the barn" problem. Judge Sharp expressed a  
47 concern that the proposed language is a list of factors and does not contain a true standard. Delegate  
48 Habeeb stated that his concern is the ability to seal a record based on very broad terms that seem to  
49 cover everything. Chris Nolen moved that the standard "for good cause shown" be added on line 32  
50 of the bill draft. Mr. Miller seconded and the motion carried. Delegate LeMunyon indicated that he  
51 supports what the bill is trying to achieve, but he is concerned about public input and will oppose  
52 this bill.

53 Mr. Nolen moved that the draft bill concerning hearing officers, as amended by the Commission, be  
54 presented to the 2017 Session of the General Assembly. The motion failed for lack of a second.

55 **Appointments to ALAC:** Mr. Lisk, ALAC Chair, requested that the following five members be  
56 reappointed to ALAC following the expiration of their terms this month: Kristina Perry Alexander,  
57 Roger L. Chafe, Jeffrey S. Gore, Karen W. Perrine, and Kristi S. Wright. On motion of Mr. Miller,  
58 which was duly seconded, the Commission reappointed all five individuals.

59 **Discussion of the Commission's codification authority:** Mark Vucci reviewed the Commission's  
60 current authority, policy, and process related to codifying the statutes after each session of the  
61 General Assembly. Section 30-148 charges the Commission with arranging for the codification and  
62 incorporation of all general and permanent statutes into the Code of Virginia. Section 30-149  
63 authorizes the Commission to correct certain errors, make certain editorial and technical changes,  
64 and omit certain provisions from the Code.

65 Delegate Habeeb expressed concerns with the Commission's practice of (i) codifying laws enacted  
66 by the General Assembly when the General Assembly has not expressed its intent for such laws to  
67 be codified (e.g., Section 1 bills), (ii) excluding from the Code a law that is enacted with a Code  
68 section number, and (iii) not publishing all enactments in the Code.

69 There was some discussion about the types of provisions that might be included and excluded from  
70 the Code. Delegate LeMunyon stated that members of the General Assembly might be surprised to  
71 know that a Section 1 bill or enactment clause could be codified and placed in the Code of Virginia  
72 and that they should be more careful when choosing to use a Section 1 bill or an enactment clause.  
73 He expressed a willingness to speak with members about the issue.

74 In response to a question, Bill Cramme stated that only a small number of Section 1 bills and  
75 enactment clauses are placed in the Code of Virginia.

76 Delegate LeMunyon recommended that information on the Code Commission's editing  
77 responsibilities and codification practices be placed on the Commission's website.

78 The consensus of the Commission was that this matter needs further discussion and should be  
79 placed on next year's work plan.

**Code of Virginia title page statement about inclusion of all acts:** Brian Kennedy responded to a concern brought up at the last meeting about the Code of Virginia title page, which reads: "Includes all acts adopted at the 2016 Regular Session of the General Assembly." He said that the intent is to represent the currency of the content, not inclusion of all acts. The Commission agreed that the language should be changed. The following format will be used beginning next year: "Current through the 2017 Regular Session of the General Assembly."

**Gender-specific study update:** David Cotter updated the members on the status of this study. He provided a list of sections reviewed by the work group, provided a representative sample of identified changes that replace gender-specific terms with gender-neutral ones, and showed as an example of a gender-specific term where no change is recommended the section providing a woman the right to breastfeed her child. The study will continue next year with a report expected at the end of 2018.

**Follow-up: Terminology changes to comport with newly codified Title 23.1 - Institutions of Higher Education; Other Educational and Cultural Institutions:**

Based on the Commission's comments at its last meeting, Tom Stevens presented a proposed bill draft to correct typographical errors and to make other technical amendments relating to Title 23.1 of the Code of Virginia. An enactment clause declaring the corrections and amendments to be effective retroactively to October 1, 2016, was added. On motion of Delegate LeMunyon, seconded by Carlos Hopkins, the Commission approved the bill draft for introduction to the 2017 Session of the General Assembly.

Mr. Stevens also presented a proposed letter asking the Code publishers to make a number of global citation and terminology changes throughout the Code of Virginia to conform to Title 23.1. He requested approval from the Commission to send the letter to publishers of the Code of Virginia. On motion of Mr. Miller, seconded by Delegate LeMunyon, the Commission approved submitting the changes to the publishers.

**Recodification of Title 55, Property and Conveyances - Subtitle III, Rental Conveyances:**

Amigo Wade presented proposed Chapter 4 (Manufactured Home Lot Rental Act) and Chapter 6 (Commercial Tenancies) of Part B, Commercial and Other Tenancies, of Title 55.1.

**Chapter 4 - Manufactured Home Lot Rental Act.**

Mr. Wade advised that definitions of the terms "authorized occupant," "guest or invitee," "manufactured home owner," "manufactured home park operator," "home park owner," "reasonable charges in addition to rent," "secured party," and "security interest" have been added and the definition of the term "landlord" has been amended in § 55-248.41. Judge Lilley stated that the definitions of "landlord," "owner," "mobile home operator," etc., seem interchangeable and asked for an explanation of the differences in the terms. Chip Dicks explained how the duties are different. Mr. Wade said the work group will revisit the definition of "landlord" and how the term is used.

Mr. Wade directed the Commission's attention to the addition of a new section titled "Transfer of deposits upon purchase" on page 15. He explained that this principle is in the common law, and the work group believed it should be stated in the Code of Virginia. Questions about the provision arose during the discussion, and Mr. Wade indicated the work group will revisit whether the provision should be included.

**Chapter 6 - Commercial Tenancies - Article 1, In General.**

Mr. Wade stated that the applicability section contains a definition of "commercial tenancy." Judge Lilley asked why the text on line 272 uses a citation to the specific Code of Virginia section but the text on line 273 uses "action of unlawful detainer." Mr. Dicks stated that the subject area is bifurcated; some actions are in Title 8.01 and others are in Title 55.1. The work group is still considering where to place all of the provisions about actions in the Code of Virginia. The difficulty is putting a name on the actions in § 8.01-156 of the Code of Virginia.

**2016 obsolete laws recommendations:**

Under its authority in § 30-151, the Commission is charged with identifying obsolete laws and recommending legislation to amend or repeal statutes or acts that have been identified as obsolete. The following recommendations were reported from the staff assigned to the 2016 obsolete laws work group.

- Amigo Wade addressed Title 48, Nuisances. He stated that the title consists of two chapters-- Chapter 1, Abating public nuisances, and Chapter 2, Houses of prostitution, etc. Both chapters stem from 1919, and very few amendments have been made. Mr. Wade contacted the various stakeholders, including the Virginia Municipal League, the Virginia Association of Counties, and the Commonwealth's Attorneys Services Council. Based on comments received, no changes are recommended.
- Scott Meacham stated that he had reviewed Titles 10.1 and 62.1. The only recommendation is to repeal the Ohio River Basin Commission (Chapter 6.1 of Title 62.1), which was terminated by President Reagan in 1981. Judge Lilley moved that the Commission present a bill to repeal Chapter 6.1 to the 2017 Session of the General Assembly. On second by Judge Sharp, the motion passed.
- Beth Jamerson presented changes to Title 5.1, Aviation, to correct outdated cross-references and stated that the Department of Aviation has no other recommended changes. Senator McDougle recommended that the corrections be made under the Commission's statutory authority, and the Commission agreed. Staff will implement the changes set forth in the chart of Title 5.1, which is found in the meeting materials.

**Other business; select bill patrons:** Jane Chaffin requested patrons for the Commission's legislation for the 2017 Session of the General Assembly. Delegate LeMunyon agreed to carry the Title 23.1 cleanup bill. Senator Edwards will carry the guidance documents bill and the reorganization of the taxable income section bill. Senator McDougle will carry the Nonresident Violator Compact bill and obsolete laws bill.

**Public comment; adjournment:** Senator Edwards opened the floor for public comment. As there was no public comment and no further business to discuss, the meeting was adjourned at 12:35 p.m.