

VIRGINIA CODE COMMISSION

Monday, May 15, 2017 - 10:00 a.m.

House Room 1, State Capitol

Richmond, Virginia 23219

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

MEMBERS ABSENT: Ryan T. McDougale, Thomas M. Moncure, Jr.

STAFF PRESENT: Amigo Wade, Kristen Walsh, Brittany Olwine, Andrew Kubincanek, Lilli Hausenfluck, Jane Chaffin, Karen Perrine, Division of Legislative Services (DLS)

OTHERS PRESENT: Senator Adam Ebbin, Thomas A. Lisk

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

Approval of minutes: The minutes of the April 4, 2017, meeting of the Commission as printed and distributed to the members were approved without objection.

Administrative Law Advisory Committee legislative update, appointments, and work plan: Tom Lisk, Chair of the Administrative Law Advisory Committee (ALAC), addressed the Commission on behalf of ALAC. He stated that Senate Bill 916, which was recommended by ALAC, passed the General Assembly, was signed by the Governor, and is Chapter 488 of the 2017 Acts of Assembly. The bill consolidates the provisions relating to guidance documents in the Virginia Register Act and requires agencies that do not have regulatory authority to file guidance documents.

Mr. Lisk requested that Mike Quinan, an attorney with Christian and Barton, be reappointed to ALAC. Mr. Lisk explained that Kristina Perry, who had served ALAC as a member of the Office of the Attorney General, had left that office and moved out of state, leaving a vacancy on ALAC. Mr. Lisk requested that Paul Kugelman, Jr., of the Office of the Attorney General be appointed to serve on ALAC.

Mr. Nolen moved that Mr. Quinan and Mr. Kugelman be appointed to serve on ALAC. Delegate Habeeb seconded the motion, and the motion passed.

Mr. Lisk presented the ALAC proposed work plan, containing the following items, for the Commission's consideration and approval:

1. Continue an examination of the executive review process with a goal of shortening the timeframe for completing the regulatory process.
2. Review agencies' guidance document update processes and the timeliness of filing.
3. Review the Department of Taxation process for issuing guidelines. Concerns have been expressed that, in some cases, regulations may have been replaced with guidance documents.
4. Consider the suggestion of establishing standard rules of procedure for administrative hearings. Judge Lilley asked that ALAC consider looking at the statutory provisions regarding the court review of the agency decision.
5. Revisit draft legislation related to protective orders and closed hearings.

Mr. Calhoun asked about a constitutional amendment introduced at the 2017 legislative session that would allow the Virginia General Assembly to nullify a regulation. Mr. Lisk replied that ALAC will be conducting a 50-state survey to see what other states are doing in this regard.

The Commission had no objection to the work plan.

Senator Edwards stated that the order of the agenda would be slightly altered, and item 4 on the Title 55 recodification would be taken up after agenda items 5 (historical treatment) and 6 (Senate Bill 782 and Senate Joint Resolution 216).

Report on historical treatment by the Commission and General Assembly of changes to statutory or constitutional language deemed invalid by a court decision: Mark Vucci stated that at the last meeting, the Commission requested that staff research the question of the Commission's role when a state law or constitutional provision has been deemed invalid by a court. Mr. Vucci reviewed the research report, which was prepared by David Cotter of DLS, before the Commission. To summarize the report, historically the Commission has determined that it has the authority to recommend legislative action to address laws that have been held to be unconstitutional; however, the Commission does not make such recommendations lightly but exhibits great deference to the actions of the General Assembly.

Mr. Vucci explained that the research showed that if it is likely that a member of the General Assembly will introduce a bill or will act on an obsolete provision, then the Commission does not make a recommendation. If the Commission does not anticipate action by the General Assembly, then it will review the situation and make a recommendation. The Commission thanked Mr. Vucci and Mr. Cotter for the report.

Referral of Senate Bill 782 and Senate Joint Resolution 216 from the 2017 Session of the General Assembly. Senator Edwards invited Senator Adam Ebbin to address the Commission. Senator Ebbin reminded the Commission that it was asked by the Senate to review Senate Bill 782, which repeals statutory prohibitions on same-sex marriages and other civil unions, and Senate Joint Resolution 216, which repeals the constitutional amendment dealing with marriage that was approved by referendum at the November 2006 election. He requested that the Commission advise the Senate that the Commission supports the repeal of the statutory provisions and the repeal of the 2006 constitutional amendment to align Virginia with the decision of the United States Supreme Court.

Delegate Habeeb noted that the United States Supreme Court decision did not specifically address a Virginia law and asked if there has been an analysis or comparison of the law at issue in the case versus the Virginia law. No one indicated that he or she was aware of a comparison. Delegate Habeeb stated that it was appropriate for the Commission to act on an obsolete law, but only with a proper foundation. After a brief discussion, Delegate LeMunyon moved that the Commission request an opinion from the Attorney General as to whether the decision in *Obergefell v. Hodges* renders §§ 20-45.2 and 20-45.3 of the Code of Virginia and Article 1, Section 15-A of the Constitution of Virginia obsolete. The motion was properly seconded and carried. Mr. Oksman abstained due to his position at the Office of the Attorney General. Once the Commission receives a formal opinion, DLS attorneys will review the opinion, after which the Code Commission will decide what action to take.

Recodification of Title 55, Property and Conveyances: Amigo Wade provided a recap of the recodification project. Subtitle III is complete, and staff will begin today's presentation of Subtitle IV, Common Interest Communities, by reviewing the chapters pertaining to the Horizontal Property Act, the Subdivided Land Sales Act, and the Common Interest Community Management Information Fund.

Three additional chapters of Subtitle IV - Virginia Property Owners' Association Act, Virginia Condominium Act, and Virginia Real Estate Cooperative Act - currently are under review by the DLS editing office for presentation at the Commission's next meeting. After completion of Subtitle IV, staff will present Subtitle I, Real Estate Conveyances, followed by Subtitle II, Real Estate Settlements and Recordation, and Subtitle V, Miscellaneous, which will complete the recodification.

Amigo Wade presented proposed Chapters 3 (Horizontal Property) and 6 (Subdivided Land Sales Act) of Title 55.1. He also presented existing Chapter 29 of Title 55, related to the Common Interest Community Management Information Fund, the Common Interest Community Ombudsman, and the Common Interest Community Management Recovery Fund, which staff recommends be relocated to Chapter 23.3 of Title 54.1 of the Code of Virginia. During its review, the Commission discussed or took action as follows:

Relocation of Chapter 29 of Title 55 to Chapter 23.3 of Title 54.1

- Mr. Calhoun commented that newly proposed § 54.1-2345.1, which excludes certain real estate arrangements and covenants from being deemed a common interest community, constitutes a substantive change. Staff responded that the proposed section is derived from the Uniform Common Interest Ownership Act and is added for clarity. After discussion, the Commission asked staff to append the phrase "to create a common interest community" at the end of subsection B and to make a notation in the drafting note that this new section constitutes a substantive change.
- The Commission directed staff to show subsection F of § 54.1-2346 as repealed. The subsection is obsolete since all provisional licenses for common interest community management services issued under this subsection expired in 2012.

Staff advised that completion of the recodification is expected in time for the 2019 Session of the General Assembly.

Proposed work plan for the Commission: Jane Chaffin presented the 2017 Code Commission work plan. Continuing studies include the recodification of Title 55, Property and Conveyances; the study of the use of gender-specific terms throughout the Code of Virginia and review of the Code of Virginia for needed changes in light of the U.S. Supreme Court Decision in *Obergefell v. Hodges*; and the combination of the obsolete laws project conducted under § 30-151 and the review of sections in the Code of Virginia labeled as "not set out." Ms. Chaffin explained that Title 15.2 contains 65 "not set out" sections and suggested that DLS staff identify any of the 65 sections deemed to be obsolete. A similar exercise has been conducted with Titles 16.1 and 17.1 and was presented to the Commission at its April meeting. In addition, Ms. Chaffin reviewed the expiration dates of contracts pertaining to publishing the Code of Virginia, the Virginia Administrative Code, and the Virginia Register of Regulations. The Commission determined to adopt the plan with the following revisions: (i) add Senate Bill 782 and Senate Joint Resolution 216 from the 2017 Session of the General Assembly and (ii) include the Commission's decision at the April meeting regarding a bill to add a generic section to the Code of Virginia to establish concurrent jurisdiction for both localities for the prosecution of a crime committed in the courthouse of one locality where such courthouse is physically located in another locality and to repeal the sections and provisions reported as obsolete in Titles 17 and 16.2.

Other business: Jane Chaffin advised that the June meeting needs to be rescheduled to either June 26, 27, or 28. Ms. Walsh stated that staff expects to present approximately 400 pages of the recodification report at that meeting.

119 For informational purposes, Ms. Chaffin presented a chart of 2017 uncodified acts and enactments that
120 were assigned a Code section number or placed in a Code section by the Commission's Executive
121 Committee. Senator Edwards asked that this item be placed on a future agenda for further discussion and
122 that a brief description of the Executive Committee process be disseminated to members.

123 **Public comment; adjournment:** Senator Edwards opened the floor for public comment. As there was
124 no public comment and no further business to discuss, the meeting was adjourned at 11:50 a.m.

125 The June meeting date and location will be announced once the date is confirmed.