

# Draft

## VIRGINIA CODE COMMISSION

*Monday, May 7, 2018 - 10:00 a.m.  
Richmond, Virginia 23219*

**Members Present:** John S. Edwards; Ryan T. McDougle; Gregory D. Habeeb; James A. Leftwich, Jr.; Robert L. Calhoun; Rita Davis; Leslie L. Lilley; E.M. Miller, Jr.; Chris Nolen; Thomas M. Moncure, Jr.; Samuel T. Towell; Mark Vucci

**Members Absent:** Charles S. Sharp

**Staff Present:** Scott Meacham, Amigo Wade, Kristen Walsh, Karen Perrine, Anne Bloomsburg, Andrew Kubincanek, Lilli Hausenfluck, Division of Legislative Services (DLS)

**Others Present:** Senator Adam Ebbin; Tom Lisk, Chair, Administrative Law Advisory Committee; Brian Kennedy, LexisNexis; Janet Carpenter, Treasury Department; Ellen Coates, Office of the Attorney General

**Call to order; welcome and introduction of new members:** Senator Edwards, chair, called the meeting to order at 10:05 a.m. He introduced Delegate Leftwich; Rita Davis, Governor's designee; and Samuel Towell, Attorney General designee, and welcomed them to the Commission.

**Approval of minutes:** The minutes of the November 20, 2017, meeting of the Commission, as printed and distributed to the members, were approved without objection.

**Election of vice chair:** Senator Edwards asked for a motion to nominate a vice chair for the Commission. Delegate Leftwich nominated Delegate Habeeb, and Judge Lilley seconded the nomination. Delegate Habeeb accepted the nomination. He stated that the Commission should adopt a policy to rotate the chairmanship between the Senate and the House. The Commission elected Delegate Habeeb as vice chair of the Commission.

**Reappoint members of the Administrative Law Advisory Committee (ALAC):** Tom Lisk requested that the Commission reappoint four members of ALAC whose terms expire this month: Tom Lisk, Brooks Smith, Alex Skirpan, and Eric Page. At later meetings, Mr. Lisk will request additional reappointments or new appointments to fill vacancies. On motion of Mr. Nolen, properly seconded, the Commission reappointed the four individuals as requested.

Mr. Lisk will present ALAC's work plan at the next meeting.

**Referral of Senate Joint Resolution 216 (2017) - repeal the constitutional prohibition on same-sex marriages and civil unions:** Senate Bill 782 (2017), which repeals statutory prohibitions on same-sex marriages and civil unions, and Senate Joint Resolution 216 (2017), which repeals a similar provision in the Constitution of Virginia, were referred by the Senate Committee for Courts of Justice to the Commission. At its November 2017 meeting, the Commission approved a bill for introduction in the 2018 Session of the General Assembly to repeal §§ 20-45.2 and 20-45.3 of the Code of Virginia as obsolete. In light of the procedural policy of the House of Delegates not to consider constitutional amendments in short sessions, the Commission deferred action on SJR 216 until after the 2018 legislative session. Mark Vucci stated that in the 2018 legislative session, the Commission's bill (Senate Bill 50) and a similar bill introduced by Senator Ebbin (Senate Bill 3) were carried over to the 2019 session.

Senator Edwards reminded the Commission that it had received an opinion from the Attorney General indicating that §§ 20-45.2 and 20-45.3 were obsolete within the meaning of § 30-141 of the Code of

Virginia and that the similar prohibition in Article I, § 15-A of the Constitution of Virginia violated the U.S. Constitution due to the United States Supreme Court's decision in *Obergefell v. Hodges*.

Senator Ebbin explained that his resolution provides the voters an opportunity to speak on this matter, and the earliest that will occur is November 3, 2020. The purpose of the resolution is to have the Constitution reflect the law of the land.

Senator McDougle stated that Senator Ebbin will need a new resolution for the 2019 session. The Commission briefly discussed whether a new resolution was necessary. Senator Ebbin indicated he would introduce a new resolution in the 2019 legislative session. Senator Edwards stated that the Commission's motion would be a motion to recommend a change in the Constitution. Delegate Habeeb stated that when the Commission adopts its 2019 legislative package, the Commission would support the statutory repeal and the change to the Constitution as part of the package.

On motion of Mr. Towell, seconded by Mr. Miller, the Commission recommended to the General Assembly that the Constitution be amended to remove the prohibitions on same-sex marriages and civil unions.

**Code of Virginia publication contract:** Mr. Vucci stated that the most recent contract with LexisNexis was signed in 2009 and contained an expiration date of August 31, 2016, with two two-year renewal options. The second two-year renewal option was approved last year, and the final contract expiration will be August 31, 2020. Mr. Vucci recommended forming a work group for a publication contract that should be in place by the end of 2019. The Commission designated Mr. Vucci, Mr. Miller, and Ms. Davis as members of the work group.

**Contract renewal for publication of the Virginia Register of Regulations:** Karen Perrine stated that the current contract with LexisNexis for publication of the Virginia Register of Regulations will expire June 1, 2018. The contract provides for renewal every two years. Staff recommends renewal on the same terms as the current contract, and LexisNexis is in agreement. On motion of Mr. Miller, duly seconded, the Commission approved renewal of the contract until June 1, 2020. Mr. Nolen abstained from voting; LexisNexis is a client of his law firm, although he does not personally represent or provide services to LexisNexis.

**Recodification of Title 55, Property and Conveyances:** Amigo Wade reviewed the current status of the recodification project and the schedule for 2018. Staff will present the complete recodification report in October and the final draft bill in November.

Mr. Wade, assisted by Kristen Walsh, presented proposed Subtitle V - Miscellaneous, Chapters 1 through 6. During the review, the Commission discussed or took action as follows:

**Chapter 1 - Escheats.**

Line 59: Delegate Leftwich questioned the replacement of "seised" with more modern terminology, as there is a body of law based on the word "seised." Mr. Wade said the recodification work group expressed no concerns about removal of that term but that staff will check with the work group.

Lines 101–104: Mr. Wade explained that the substantive change regarding the number of jurors required to concur in the verdict after an inquest is recommended because the section contains conflicting requirements. The Treasury Department and Office of the Attorney General agree with the recommendation to use a majority vote. Ms. Walsh stated there is no case law on this matter and that her research had indicated the intent of the General Assembly was to use a majority vote.

Mr. Miller proposed that the Commission recommend changing the number of jurors required to return a verdict to a majority as proposed by staff. The change will be highlighted in the recodification report as a substantive change. Ellen Coates, Assistant Attorney General, stated that it has been a very long time since this process has been used to escheat a property.

Senator McDougle proposed that the Commission recommend seven as the required number of jurors and draft a separate Commission bill to change seven to a majority. He stated that making substantive changes in Commission bills undermines the way General Assembly members consider those bills.

After discussion, Senator Edwards determined that the review of the remainder of the subtitle should continue and this issue would be revisited.

Line 161: Rita Davis questioned the impact of deleting the phrase "if in written form" on a holdover lease that converts from a yearly agreement in writing to a month-to-month without being in writing. After discussion, the Commission decided to retain the phrase "if in written form."

At the request of Judge Lilley, Ms. Coates and Janet Carpenter, Department of the Treasury, explained and clarified the escheat process. Ms. Carpenter stated that since the law changed some years ago allowing localities to sell property for back taxes within two years, her office has not seen any escheats.

Senator Edwards directed staff to obtain information and background from escheators and persons involved in the addition of "majority" in 1988.

#### Chapter 2 - Uniform Disposition of Unclaimed Property Act.

Line 2: Mr. Miller questioned the addition of "uniform" to the chapter title, as the Virginia statute has not kept pace with the Uniform Law Commission's uniform acts. Mr. Wade suggested replacing "uniform" with "Virginia," and the Commission concurred.

Line 513: Ms. Davis suggested retaining the phrase "in his discretion" to have a standard for review by a circuit court. Mr. Wade and Ms. Walsh explained that use of the word "may" on line 512 set the standard for review.

Lines 657–658: Mr. Vucci stated that before Senator McDougle left, he expressed a concern about the reference to "a newspaper of general circulation in the county or city where the property is to be sold," as many small localities no longer have papers. Mr. Wade explained that newspapers such as the *Richmond Times-Dispatch* and the *Virginia Pilot* would qualify, as each is a newspaper of "general circulation" in a locality.

Chapter 3 - Property Loaned to Museums. Mr. Wade advised that all changes in this chapter were technical.

#### Chapter 4 - Drift Property.

Lines 17–46: Mr. Wade stated that §§ 55-202 through 55-206 are repealed as obsolete.

#### Chapter 5 - Trespasses; Fences.

Line 80: Senator Edwards questioned changing "creep" to "pass." Mr. Vucci advised that Senator McDougle had the same question. After discussion, the Commission determined to leave "pass," as it includes "creep."

Line 130: Mr. Towell asked if the addition of the phrase "of general circulation in such county" imposed a greater publication burden. Ms. Walsh indicated that it would; staff was attempting to make

it consistent with similar requirements in other sections. Mr. Wade added that this provision concerns an important declaration that requires adequate notice.

Lines 224–233: Mr. Towell asked if jurisdiction would always be in general district court, no matter the dollar value. Mr. Wade stated that staff will research the limits of damages. Ms. Davis stated that the changes seem to eliminate the requirement that an owner get a warrant within three days. Ms. Walsh advised that the work group felt three days was not practical. Mr. Wade explained that the change also was to modernize the provision to reflect current practice and stated that staff will revisit the provision.

Lines 242–246: Delegate Leftwich stated that the changes regarding how a governing body may make local fence law appear to be substantive. Ms. Walsh stated that in the past, the Commission has included substantive changes in a recodification bill. The changes are listed prominently at the beginning of the recodification report in the Executive Summary. Ms. Walsh explained that "by ordinance" was added because under Title 15.2, counties act by ordinance, resolution, or motion and not by declaration, and the addition clarifies existing law. After discussion, Senator Edwards directed staff to check with stakeholders, such as the Virginia Municipal League and the Virginia Association of Counties.

Line 402: Mr. Wade stated that this reference to "a newspaper having general circulation" will be reviewed with similar provisions previously discussed.

#### Chapter 6 - Virginia Self-Service Storage Act.

Delegate Leftwich asked whether portable storage units, often called PODS, fall under this Act, particularly those that are transferred to a large warehouse for storage. Ms. Walsh stated that staff will research the issue and report to the Commission at a later meeting.

Lines 180–183: Ms. Walsh informed the Commission that there are six savings clauses in the Code of Virginia and generally they are very old. In this case, the date is July 1, 1981. The Commission discussed whether there could be a rental agreement entered into before July 1, 1981, that is still in effect somewhere in Virginia. After discussion, the Commission determined not to repeal the savings clause provision.

**Status of 2018 Code Commission–related bills:** Karen Perrine reviewed the chart of Code Commission–related bills in the 2018 Session of the General Assembly. The bills recommended by the Commission relating to Title 23.1 recodification cleanup, obsolete election laws, obsolete provisions and venue in criminal cases in Title 16.2 or 17.1, notification of withholding orders, and time frame for a hearing officer's report passed. As previously discussed, Senate Bill 50 was continued to 2019 in the Senate Committee for Courts of Justice.

House Bill 246 regarding the duties of the Commission was continued to 2019 in the Senate Committee on Rules. House Bill 413 and Senate Bill 603 were based on the report regarding the use of gender-specific and gender-neutral language that was presented to the Commission at its October 2017 meeting; neither bill passed.

**Other business:** Mark Vucci stated that the terms of Mr. Nolen and Judge Lilley on the Commission expire this summer. Under § 30-145 A 5 of the Code of Virginia, the Commission may recommend the appointment of a citizen member. Both appointments are made by the Speaker of the House. Mr. Moncure moved that the Commission request that the Speaker reappoint Mr. Nolen and Judge Lilley. Mr. Towell seconded, and the motion passed.

**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.

The next meeting is Monday, June 18, 2018, at 10 a.m. in the Speaker's Conference Room, 6th Floor, Pocahontas Building.