Commonwealth of Virginia

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Administrative Law Advisory Committee

Meeting Summary
House Room 2, Capitol Building
October 19, 2010, 12:00 P.M.

Members Present: Chris Nolen (chair), Michael Quinan, Thomas Lisk, Roger Chaffe, Katya Herndon, Phyllis Errico, Eric Page, Karen Perrine, Angela Bowser, Alex Skirpan, Cindy Berndt, Elizabeth Andrews

Staff Present: Elizabeth Palen, Jillian Malizio

I. Welcome and Call to Order

- Chris Nolen, *Chair*
- Welcome and call to order at 12:06
- Code Commission adopted budget
- Give Code Commission an agenda by their next meeting

II. Introduction of New Member

- Elizabeth Andrews

III. *Volkswagen of America, Inc. v. Smit* Work Group

- Report of work group, Mike Quinan
  - The workgroup met during the summer and addressed the Virginia Supreme Court's decision in *Volkswagen III*. The issue considered in the case was the impact of the regulations and guidelines that agencies do or do not issue under their empowering statutes.
  - The question the workgroup faced was whether the case has broad applicability or does it only apply narrowly to the Department of Motor Vehicles (DMV)? The workgroup concluded that the case is narrowly written but it would be beneficial to other agencies to know of the court's ruling.
  - The statute at issue in the case required a motor vehicle manufacturer equitably allocate the percentage of new vehicles it ships to its dealers. The allocation in the case resulted in a small dealership not receiving any new vehicles. The dealership complained to the DMV, which informed Volkswagen they were in violation of the statute.
  - Volkswagen argued that the statute was unconstitutionally vague and that the DMV had failed to issue regulations that would guide the company in determining

    - The court held that although the statute may not be constitutionally vague on its face, it may be unconstitutionally vague as applied.
        - The action of the DMV commissioner could not be supported because the statute was constitutionally vague.
        - If a statute establishes a standard using equitable terms, and an agency is empowered to administer and define that term through guidelines or regulations, the agency should take such action.
        - If agencies are not aware of this case, they may find that their failure to issue guidelines will create problems.
- The workgroup decided to write a short memorandum to the various state agencies that would not critique the case or offer legal advice but would just make the agencies aware of the ruling and its potential effect.
    - A couple of questions arose while drafting the memo. Currently the memo is being sent to directors and counsel at the state agencies; are these the proper people to receive the memo? Who should the memo be sent from, ALAC or the Code Commission? Finally, before it is sent out we want to make sure the appropriate people at the Attorney General's office and in the Executive office have had a chance to read the memo.
- **Chris Nolen**—At the last meeting, the Code Commission expressed an interest in this workgroup. The discussion at the meeting acknowledged the limited applicability of the case but the possible broader implications mean that the issue is something that should be considered before it becomes a problem.
    - As with any recommendation, the memo has to go to the Code Commission first. I am not sure whether it will be sent from ALAC or the Code Commission.
- **Roger Chaffe**—maybe the Code Commission would like to send it to the General Assembly and Legislative Services because they're the ones writing the statutes.
- **Chris Nolen**—perhaps through Elizabeth this can be sent through the AGs office prior to our taking it to the Code Commission. With regard to the executive branch, perhaps sending it to the chief of staff, counsel to the governor.
    - Any public comment with regard to this?
- **Roger Chaffe**—I support the recommendation of the workgroup to send a memo to the various state agencies. However, at the same time, it wouldn't hurt to bring the issue to the attention of the General Assembly. Some of the ambiguity could be resolved if the General Assembly drafted the language in their bills more clearly.
- **Chris Nolen**— That is definitely something to raise to the Code Commission.
- **Mike Quinan**—In terms of going forward, why don't we set a date for giving feedback and making changes to the memo.
- **Elizabeth Palen**—We can accept comments until November 2, 2010.
- **Mike Quinan**—After November 2, I will circulate the final draft.
- **Mike Quinan**—Who will this memo come from?
- **Chris Nolen**—The Code Commission will have to approve it, but for now we can put ALAC in the "from" line. We also want to make sure it is sent to the regulatory coordinator at each agency.

- **Karen Perrine**—Remove the agency counsel as one of the recipients. Send the memo to the agency directors and to regulatory coordinators.
- **Katya Herndon**—For the purpose of this issue, I work for the Virginia Supreme Court, so I am abstaining from this discussion.

IV. Small Business Regulatory Flexibility Work Group

- Statutory review, Karen Perrine
  - Statute requires an analysis of regulatory flexibility for all small business.
  - A review of regulations already in existence was supposed to be done July 1, 2009, unless the agency requested an extension.
  - Another section of the statute applied to regulations that were adopted after July 1, 2005. These regulations have to be reviewed every five years; no extensions are offered.
  - One issue discussed by the workgroup was that the statute required review every five years was out of sync with the Governor's Executive Order that requires regulations be reviewed every four years.
  - The workgroup saw two possible ways to address issue. One is a legislative change to try and weave into the statute a provision for public comment, a provision for when and how to publish and provision
  - The second was to send a memo to agency heads and regulatory coordinators
  - **Chris Nolen**—*Karen would you agree that the most substantive change is probably the public comment portion, whereas the issue of where, when, and what to publish is more procedural?*
    - **Karen Perrine**—Yes.
  - **Chris Nolen**—*I believe that this is done during the periodic review that normally takes place. So to the extent we recommend syncing those up that's procedural. Given that this was enacted to ease the regulatory burden on small business, perhaps some public comment would be taken allowing small business to make a comment.*
  - **Karen Perrine**—I have been in contact with fourteen different agencies since the workgroup meeting. Ten have replied and most indicated they had completed the review of 2005 regulations and completed the review of the post 2005 regulations. There were two agencies that hadn't done it specifically for the small business and but had completed the periodic review required by the Governor, which they felt was compliance.
  - **Roger Chaffe**—*Do we know how many agencies actually complied*?
    - **Karen Perrine—**Ten have responded and eight said they have complied.
  - **Cindy Berndt**—The Department of Environmental Quality is not in 100% compliance.
  - **Karen Perrine**—The smaller agencies that have said they can be in compliance. Two of the larger agencies indicated they weren't in compliance.
  - **Roger Chaffe**—If we can do the small business review in conjunction with the Governor's review it would help agencies a lot.
  - **Cindy Berndt**—Townhall is an important tool because it tracks the review.

- Periodic review, Cindy Berndt
  - Our second possible solution to this issue was to write a memo to the heads of agencies to notify them of the provision in the statute. The memo would also give them suggestions on how to comply.
  - Suggest to agencies that they conduct the small business review as part of the Governor's review, even without new legislation. If agencies conduct the small business review in conjunction with the governor's review, they will be in compliance automatically with the five year requirement.
  - We could also recommend to agencies that if they are not conducting reviews in conjunction with the Governor's review on way to remind themselves it needs to be done is by using town hall.
  - **Chris Nolen**—*I think the approach here is that we would like to here back from the Department of Planning and Budget. Based on their input we could change up the memo and/or the legislation. Bring both options to the Code Commission and allow it to decide which it would like to pursue.*
  - **Chris Nolen**—*If any member of the group has a comment to add please let us know by November 2, 2010. All appropriate edits will be made and finals drafts will be circulated to the entire group.*

V. Discussion of Legislative Veto of Regulations

- **Chris Nolen**—This issue has been put on the work plan because there had been at least one bill introduced this past session that dealt with the Joint Commission on Administrative Rules' (JCAR) authority to suspend regulations. The bill may have been a consequence of the storm water management regulations considered at that time. We don't believe the issue has gone away, and it is a possible topic for our group to explore.
  - There is a 1982 Attorney General opinion with regard to this issue. On the ALAC website there are two documents related to the last time this group looked at the issue in 2000.
  - Open up the discussion and see if it is a worthwhile endeavor.
- **Roger Chaffe**—*Will the Code Commission be asked if this issue should be addressed?*
- **Chris Nolen**—The Code Commission left it up to us if we wanted to take it our not. We would be a resource for legislators. This has political overtones to it so we would try and stay away from that and ask them.
- **Chris Nolen**—Does the Attorney General's opinion leave something short of outright vetoes?
- **Roger Chaffe**—*The compromise that was struck is that the General Assembly would make a recommendation to the governor for a veto.*
- **Cindy Berndt**—*From an agency perspective this is a huge issue. One thing that concerns me about the bill is that the veto can happen after the regulation has become effective.*
- **Chris Nolen**—Is there any material or research that would be helpful?

- **Tom Lisk**—*Look at the jurisprudence in terms of federal court interpretation. Look to see what other states have done and express that without issuing any policy statement.*
- **Chris Nolen**—In the next year we may want to take up the issue of guidance documents as well.
  - A reminder that the Administrative Law Conference will be held on November 4, 2010.
  - If any member has a change in their contact information please let us know.

VI. Adjourn

- **Adjourned at 12:54.**