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Activities of Virginia Legislative Study Commissions and Joint Subcommittees



Virginia Division of Legislative Services

Virginia Legislative Record

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The *Virginia Legislative Record* is a report of the activities of Virginia legislative study commissions and joint subcommittees, reflecting the ongoing deliberations and recommendations of interim legislative studies. Meeting summaries were prepared by the staff of the Division of Legislative Services. More information concerning the individual commissions and committees is available on the **DLS website** (<http://dls.virginia.gov/>) or by calling 804-786-3591.

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Regulation Information

The *Virginia Register of Regulations* is Virginia's official publication of proposed, final, and emergency regulations. All regulations must be filed with the Registrar of Regulations to become law. The *Virginia Register*, published every other Monday, provides a snapshot of all regulatory activity in Virginia. The current *Register* issue, as well as prior issues and additional information about the regulatory process in Virginia, is available at <http://register.dls.virginia.gov>. Contact the Division of Legislative Services at 804-786-3591 (ext. 258, 261, or 262) or follow the *Virginia Register* on Twitter @varegs for more information.

Virginia Code Commission

October 21, 2014

The Virginia Code Commission (Commission) met on October 21, 2014, with Senator John Edwards, chair, presiding.

Introduction of New Member

The Commission welcomed Judge Pamela Baskervill, Chief Judge of the 11th Judicial Circuit of Virginia, as the newest member of the Commission.

Administrative Law Advisory Committee (ALAC)

Thomas A. Lisk, Eckert Seamans, ALAC Chair

Upon recommendation of Mr. Lisk, the Commission appointed Kristi S. Wright to ALAC, replacing Katya Herndon as the representative of the Office of the Executive Secretary of the Supreme Court of Virginia.

Mr. Lisk then reported on the recommendations of the Model State Administrative Procedure Act (MSAPA) Judicial Work Group to incorporate certain provisions of MSAPA into the Virginia Administrative Process Act regarding disqualification of hearing officers, default by a nonappearing party, and ex parte communications.

ALAC recommends expanding current law regarding disqualification of hearing officers to include disqualification of both hearing officers (formal hearings) and presiding officers (informal conferences). The Commission voted to introduce a bill to implement this recommendation.

ALAC also recommends adding a new section to allow entry of a default order at a proceeding if a party fails to appear without good cause. Mr. Lisk explained that the determination of good cause would be at the discretion of the hearing officer and that case law addresses this point. The Commission approved the presented draft bill language with a minor change to delete unnecessary language.

ALAC suggests adding language establishing the types of ex parte communications that are permissible among the decision makers and the parties and a mechanism to handle inadvertent or nonmaterial discussion. ALAC could not reach a consensus as to whether the limitations on ex parte communications should apply in both formal hearings and informal conferences and therefore presented two options for the Commission's consideration. The basic provisions are the same; however, the first option applies in both types of proceedings, and the second option applies only in formal hearings. After a brief discussion, the Commission adopted the second option, modified to permit a hearing officer to communicate with a private party on ministerial matters.

Follow-up to Obsolete Laws Report

Scott Meacham, Attorney, Division of Legislative Services

Mr. Meacham had recommended repealing §§ 21-116.1, 21-20, 21-139, 21-427, and 21-427.1 of the Code of Virginia at the last meeting as part of the obsolete laws project. Each of the sections incorporates by reference or continues in effect one or more acts of assembly dealing with the creation and modification of sanitary districts. Staff investigated the substance of the underlying acts to determine if the referenced and continued acts are valid and whether the Commission should consider including these acts in the Code. Mr. Meacham stated that he found the referenced acts still valid, further explaining that while a locality wishing to create a new sanitary district today may make use of sections

set out in Title 21, some of the older districts that continue to operate in localities throughout Virginia are likely to have been created under the acts that are referenced in the five sections at issue. Mr. Meacham stated that the acts are worthy of consideration for inclusion in the Code.

In addition, § 21-291.2 incorporates by reference the acts of assembly creating the Hampton Roads Sanitation District. Mr. Meacham suggested that the Commission consider including these acts in the Code because that district continues to operate and the General Assembly amended the acts affecting it in 2012.

Senator Edwards deferred action and further discussion on this matter until after the Commission receives and discusses the staff report on the policy to not set out certain provisions in the Code.

Recodification of Title 23, Educational Institutions

Tom Stevens and Ryan Brimmer, Attorneys, Division of Legislative Services

Mr. Stevens and Mr. Brimmer reported on the revision of Title 23, Educational Institutions. The Commission discussed proposed Chapter 31, Other Educational Entities, and Chapter 32, Museums and Other Cultural Entities.

The Commission discussed staff recommendations on the following:

- *The Commonwealth Health Research Board and Fund.* Mr. Brimmer indicated that the Commonwealth Health Research Board and the Office of the Attorney General have questioned the placement of this article in Title 23.1, even though it currently is placed in Title 23. Consideration is being given to moving this entity to Title 32.1 (Health).
- *A.L. Philpott Manufacturing Extension Partnership.* Mr. Brimmer noted two substantive changes: the proposed name change from A. L. Philpott Manufacturing Extension Partnership to Genedge Alliance and new language establishing a quorum of the 24-member board at eight members. The Commission expressed concerns with both of these changes and directed staff to obtain additional information and revisit the matter at a future meeting.
- *Science Museum of Virginia.* The Commission questioned some of the changes made to the powers and duties of the museum, including language that broadened the scope of powers regarding contracts. At the conclusion of the discussion, Senator Edwards instructed staff to take the Commission's concerns back to the work group.
- *Virginia Museum of Fine Arts.* Mr. Brimmer stated that the museum had requested adding the Lieutenant Governor as an ex officio member of the museum's board of trustees, but noted that the General Assembly passed legislation in 2010 removing the Lieutenant Governor from the board. The consensus of the Commission was that this change should not be made during the title revision process; the Commission directed staff to remove the change.
- *Virginia Commission for the Arts.* Mr. Brimmer stated that the Office of the Attorney General had noted that the Virginia Commission for the Arts meets the definition of "supervisory" under the classifications of executive branch boards, commissions, and councils in § 2.2-2100. The Commission voiced no objection to staff reclassifying the Virginia Commission for the Arts from advisory to supervisory.



Discussion of Changing the Code of Virginia Numbering System

Nicole Brenner, Attorney, Division of Legislative Services

Ms. Brenner gave a recap of the two-dash numbering system considered by the Commission in July and explained that, if adopted, a third numbering system would be introduced into the Code of Virginia. Ms. Brenner showed a comparison of the 1950 numbering system, which does not embed chapters; the current numbering system, which has been in place since 1984 and embeds chapters; and the two-dash numbering system, which embeds articles and chapters. It was noted that the two-dash numbering system requires new articles to be added at the end of a chapter, limiting organizational flexibility.

After discussing the advantages and disadvantages of adopting a two-dash system and introducing a third numbering system to the Code of Virginia, the Commission voted to retain the more flexible current numbering system.

Review of Policy on Not-Set-Out Code Provisions

Robert L. Tavenner, Director, Division of Legislative Services

Jane Chaffin, Code Commission Staff, Division of Legislative Services

Mr. Tavenner introduced the agenda item, explaining that the Commission had requested that the Division of Legislative Services (DLS) review the Commission's policy to set out in the Code only provisions with general and permanent applicability and to not set out certain other provisions, such as severability clauses; provisions having special or limited applicability; and legislative findings, intent, policy, and purpose statements. He informed the members that the work group will report findings and options but will not make specific recommendations.

Ms. Chaffin opened the report by stating that there are over 100 references to not-set-out sections in the Code. She presented an example of one such section in the online version of the Code, pointing out that there is no catchline and no indication of what the section is about. The print version of the Code does not present as much of a problem, due to publisher annotations describing the contents of the omitted language.

Ms. Chaffin explained that the work group looked at the several broad categories of sections not set out: severability clauses, legislative findings/purpose/intent/policy statements, provisions having only local applicability, provisions that are limited in duration or date-specific, compacts, and property tax exemptions for various individually designated organizations.

The work group found that the application of the policy has varied over the years; most categories include sections that are not set out as well as sections that are set out in full. Other issues include incomplete online search results and the probability that omitted sections are less likely to be updated, amended, or repealed because they are not apparent in the Code.

In considering whether or not to modify the policy, Ms. Chaffin advised that the Commission might add the catchlines in the online and print versions of the Code. If the members decide to add the full text, Ms. Chaffin suggested they continue to omit the text of the approximately 1,000 property tax exemptions for individually designated organizations. Since 2003, these exemptions have been designated by local ordinance; the General Assembly can no longer add new sections to or amend current sections in this category.

During the discussion, some concerns were expressed with setting out the text. One member emphasized that the Commission's mandate is to set out only general and permanent statutes. Bill Crammé, DLS Deputy Director, expressed concerns about setting out legislative findings and purpose and intent

statements, as these provisions may no longer reflect the associated sections. The general consensus was that although legislative findings and purpose and intent statements do not belong in the Code, they are scattered throughout it; most are set out in full, but some are not. A member suggested that Joint Rules might consider issuing a directive that legislators not include these provisions in bills.

The Commission plans to continue its review of the not-set-out policy next year.

Uniform Electronic Legal Materials Act (UELMA)

Robert L. Tavenner, Director, Division of Legislative Services

Mr. Tavenner stated that a few years back, the Commission reviewed DLS staff recommendations on adopting UELMA in Virginia and decided against it. Approximately six months ago, the Uniform Law Commission approached Mr. Tavenner about Virginia adopting UELMA. After talking to representatives from other states that have adopted UELMA, Mr. Tavenner did not obtain solid information as to what it accomplishes, and therefore he is not recommending its adoption. He stated that Virginia does not have an official version of the statutory Code, and UELMA would require that the online Code become official. Although Virginia has an official publisher of the print statutory Code, it is not designated as the official version.

Virginia Administrative Code (VAC) Contract Amendment

Jane Chaffin, Code Commission Staff, Division of Legislative Services

Ms. Chaffin advised that West, the publisher of VAC, is requesting approval of a change to Appendix A of the VAC contract to change the trim specifications of the VAC index from 5.875 x 9.5 inches to 5.75 x 9.5 inches. According to West, this change is almost imperceptible and will conform to all print indexes across the company. The Commission approved the change.

Next Meeting

The Commission is scheduled to meet on Tuesday, November 18, 2014.

Virginia Code Commission

Senator John S. Edwards, Chair

Jane Chaffin, DLS Staff

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Virginia Freedom of Information Advisory Council

Meetings Subcommittee

August 19, 2014

The Meetings Subcommittee of the FOIA Council (the Subcommittee) held its third meeting of the 2014 interim on August 19, 2014, in Richmond. The purpose of the meeting was to continue the study of meetings exemptions under House Joint Resolution No. 96 (HJR 96).

The meeting began with the consideration of two drafts the Subcommittee had requested at its previous meeting. The first draft concerned the legal matters and litigation exemption currently codified as



subdivision A 7 of § 2.2-3711. The second addressed the personnel exemption currently codified as subdivision A 1 of § 2.2-3711.

Legal Matters and Litigation Exemption; Draft Discussion

The first draft separates the legal matters and litigation open meeting exemption into two distinct exemptions in order to clarify the current exemption without making any substantive changes. In the course of discussing this exemption, the Subcommittee members and Craig Merritt, speaking on behalf of the Virginia Press Association (VPA), discussed the concepts of attorney-client privilege and various hypothetical examples of what would be legally protected and what would not. Delegate Richard L. Morris, who attended the meeting out of personal interest in the subject matter, stated that he liked the language regarding litigation but was concerned that the term “reasonable basis” could be construed too broadly, and that he would prefer if a specific basis were required instead. Ms. Dooley noted that if the requirement were for litigation to be specifically threatened before it could be discussed, that would hand power to the plaintiff. It was also noted that “probable litigation” is defined in the exemption and must be by or against a known party; a vague concern that “we might get sued for that” would not be enough to hold a closed meeting. Roger Wiley, a former FOIA Council member representing local government interests, provided an example of a rezoning application where an adjacent landowner spoke against the application at the rezoning hearings as the type of “probable litigation” the exemption would cover. He noted that if he, as the attorney for the public body, discussed the matter with the public body openly at a public meeting, it would make him a witness rather than a defender in the suit. After further discussion, the Subcommittee voted unanimously to recommend the draft splitting the current exemption into two separate exemptions for clarity, without any substantive changes.

Personnel Exemption; Draft Discussion

The second draft considered by the Subcommittee would clarify that the personnel exemption as applied to local governing bodies includes all officers, appointees, or employees of a governing body of a locality and is not limited to those whom a local governing body directly hires or fires. The draft defines “locality” and overrules prior opinions of the Office of the Attorney General (OAG) as to the applicability of this exemption to local governing bodies. Mr. Merritt submitted a written statement opposing the draft on behalf of VPA and spoke to VPA’s concerns about public access and how this draft, by treating non-employees as employees, would be contrary to laws outside of FOIA establishing who is an employee. Mr. Wiley agreed that it is not the FOIA Council’s business to change the relationship of local governments to employees, but that he believed the OAG opinions at issue misstated that relationship. He indicated that in practice the personnel exemption always applied to all employees of a locality, that in reality all local government employees are under the governing body, and the change is to recognize that reality, not to change the relationship. Mark Flynn of the Virginia Municipal League (VML) concurred and noted that most local government attorneys disagreed with the OAG opinions. Mr. Oksman observed that the public holds members of the governing body accountable for the performance of the government as a whole, including all employees, and that the governing body cannot do its job if it cannot discuss the performance of lower- and middle-level employees. He further observed that those discussions could involve serious problems and criminal activity, for which open discussion would be impossible. Delegate Morris stated his view that there is a responsibility to discuss complaints about government employees in public. Mr. Whitehurst observed from his experience as a former reporter that local governing bodies generally did not discuss low- to mid-level employees, but rather dealt with administrators in closed meetings. Mr. Wiley related that such discussions usually were trying to inform the governing body, not to ask the governing body to decide the fate of lower-level

employees. After further discussion without reaching agreement on any changes, the Subcommittee decided to defer consideration of this exemption until a later date.

Considerations of Individual Exemptions

The Subcommittee then proceeded with the rest of its agenda, beginning with consideration of subdivision A 8 of § 2.2-3711, which provides an exemption to boards of visitors of public institutions of higher education for the discussion of certain gifts, bequests and fund-raising activities, and grants and contracts for services or work to be performed. Staff provided a brief legislative history of the exemption, which was enacted in 1979, and Mr. Landon noted that 1979 was also when universities were first brought under FOIA. After inquiry by the Subcommittee, representatives of Virginia Commonwealth University and George Mason University both indicated that they were comfortable with the existing exemption, but they would need to consult with their respective university counsel to answer specific questions about the use of the exemption. The Subcommittee deferred further consideration of this exemption for that reason.

The Subcommittee next considered subdivision A 10 of § 2.2-3711, which provides an exemption for the discussion of honorary degrees or special awards. Ms. Dooley noted that it would matter to persons who were considered but not chosen if such discussions were public. Laura Fornash, on behalf of the University of Virginia (UVA), noted that UVA used the exemption for special awards, but UVA does not award honorary degrees. Without objection, the Subcommittee decided to leave the exemption as is.

Staff informed the Subcommittee that subdivision A 11 of § 2.2-3711, which provides an exemption for the discussion of tests, exams, and certain other records corresponding to the exemption at subdivision 4 of § 2.2-3705.1, was also enacted in 1979. Without objection, the Subcommittee decided to leave the exemption as is.

Subdivision A 13 of § 2.2-3711 provides an exemption for the discussion of certain matters concerning hazardous waste siting agreements. Cindy Berndt, on behalf of the Department of Environmental Quality (DEQ), stated that part of the authorization to DEQ involved certifications that local governments would negotiate with facility operators, and that the negotiations would remain confidential. She observed that the process has not been used, but there is the opportunity to do so. The process also would require filing notice of intent to site hazardous waste, with public notice and a public hearing process. Mr. Wiley observed that there is no such facility in the Commonwealth. Mr. Merritt asked whether the exemption was mere surplusage. Ms. Berndt, Mr. Wiley, and Ms. Dooley replied that the exemption would be helpful if anyone actually wanted to establish a hazardous waste site, and that it was driven by a process established elsewhere in the Code. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 15 of § 2.2-3711 provides an exemption for the discussion of medical and mental health records excluded from this chapter pursuant to subdivision 1 of § 2.2-3705.5. Staff informed the Subcommittee that the exemption was passed in 1989, with only minor amendments since then. Ms. Dooley noted that both state and federal laws made health records exempt from disclosure. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 17 of § 2.2-3711 provides an exemption for those portions of meetings by local government crime commissions where the identity of, or information tending to identify, individuals providing information about crimes or criminal activities under a promise of anonymity is discussed or disclosed. Staff related that the exemption was passed in 1989 and that on the records side there is a prohibition on the release of the identities of confidential informants. Mr. Wiley asked if there was a



comparable exemption for the State Crime Commission; staff stated that the State Crime Commission is not subject to FOIA (subdivision A 4 of § 2.2-3703). After further inquiry from the Subcommittee, it appeared that no one present could recall this exemption ever being used or could think of an example of a local government crime commission. The Subcommittee asked that local government representatives and staff look into the matter and suggested that if there are in fact no local government crime commissions in existence, then this exemption should be eliminated.

Staff informed the Subcommittee that subdivision A 19 of § 2.2-3711 provides an exemption for the discussion of certain public safety and security matters; it was enacted in 1991 and amended in 2002 and 2007. Ms. Dooley observed that the 2007 amendment came about after the Fredericksburg City Council needed a briefing on the safety and security of a courthouse built in 1858 that would have revealed security vulnerabilities, but it was not covered under the exemption at that time because it did not concern terrorist activity. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 28 of § 2.2-3711 provides an exemption for the discussion of certain records of transactions conducted under the Public-Private Transportation Act of 1995 or the Public-Private Education Facilities and Infrastructure Act of 2002. Staff observed the public policy basis of the exemption was to protect the public purse and bargaining position, as well as proprietary information of vendors. Jackie Cromwell, of the Virginia Office of Public-Private Partnerships (VAP3), stated that VAP3 only uses the exemption during independent review panel discussions of confidential documents, and then it reopens the meeting to the public. She stated that by protecting cost estimates, financial models, and other records, it allows the private sector comfort in doing business with the public sector and allows the public sector to get the best value. Mr. Oksman asked for the opinion of VPA; Mr. Merritt and Ginger Stanley, Executive Director, VPA, indicated they felt both the meetings exemption and the corresponding records exemption were overbroad. As an example, Mr. Merritt described Virginia Department of Transportation (VDOT) projects done in increments and phases where records and meetings were not open to the public for many years. He indicated that the practice described by Ms. Cromwell was not problematic, but the statute itself is much broader. Ms. Dooley noted that the meetings exemption is driven by the records exemption, which matches the practice in her experience. Ms. Cromwell stated that the private sector generally wants to exempt everything, but VAP3 does not agree to do so in practice and only exempts things that may damage the private company after reviewing the material with representatives of OAG. Mr. Wiley and Ms. Dooley observed that it is common for boilerplate contracts and even cover letters to be claimed as exempt. After further discussion, the Subcommittee agreed without objection to wait until the Records Subcommittee had a chance to review the corresponding records exemption and then reconsider the meetings exemption.

Subdivision A 29 of § 2.2-3711 provides an exemption for the discussion of certain matters related to the award of public contracts. Staff related that it was enacted in 2003 as a FOIA Council recommendation along with a records exemption, and it had been the subject of a Virginia Supreme Court case in 2006 (*White Dog Publishing, Inc. v. Culpeper County Bd. of Supervisors*, 272 Va. 377, 634 S.E.2d 334 [2006]). A VDOT representative stated that VDOT would want the exemption kept as it is, because panel members and committees sign confidentiality agreements, and that there is transparency once the contracts are awarded. The Subcommittee decided without objection to keep the current exemption as it is.

Subdivision A 33 of § 2.2-3711 provides an exemption for the discussion of certain proprietary records and trade secrets of a local governing body that provides telecommunication or cable television services. Subdivision A 34 of § 2.2-3711 provides an exemption for the discussion of certain proprietary records

and trade secrets of a local authority created in accordance with the Virginia Wireless Service Authorities Act. Subdivision A 40 of § 2.2-3711 provides an exemption for the discussion of certain economic development and retention records. There were no comments regarding subdivisions A 33 and A 34. A representative of the Virginia Economic Development Partnership (VEDP) stated that VEDP finds subdivision A 40 to be very effective as it is. As all three of these exemptions reference corresponding records exemptions, the Subcommittee decided without objection to wait until the Records Subcommittee had a chance to review the corresponding records exemptions and then reconsider the meetings exemptions.

Public Comment

Mr. Whitehurst opened the floor to any further comments from the public or Subcommittee members; there were none.

Records Subcommittee

August 25, 2014

The Records Subcommittee of the FOIA Council (the Subcommittee) held its third meeting of the 2014 interim on August 25, 2014. Subcommittee members Robert Tavenner (chair), Christopher Ashby, Stephanie Hamlett, Edward Jones, and G. Timothy Oksman were present. The purpose of the meeting was to continue the study of records exemptions under House Joint Resolution No. 96 (HJR 96).

Personnel Records Exemptions; Draft Discussion

The meeting began with consideration of a draft that would combine into one subdivision the provisions of the personnel records exemption (subdivision 1 of § 2.2-3705.1) with the limitations on that exemption found later in FOIA (subsection A of § 2.2-3705.8). The draft also adds “name” to the list of items that must be released (names are required to be released under existing law, but that requirement is not explicitly stated). The purpose is to put all of the personnel records exemptions into one location for clarity and ease of use, without making any substantive changes. After reading the draft language, the Subcommittee voted unanimously to recommend it.

Consideration of Individual Exemptions

The Subcommittee at its previous meeting requested sample language that would clarify the exemption for written advice of legal counsel and attorney-client privilege. Mr. Jones indicated that language was not ready for consideration today.

The Subcommittee then turned to the exemption for personal information provided to a public body for the purpose of receiving electronic mail from the public body (a.k.a. the “anti-spam” exemption). The draft would eliminate the reference to the definition of “personal information” in § 2.2-3801 and instead exempt “personal contact information.” Mark Flynn of the Virginia Municipal League (VML) asked if “personal contact information” would include business contact information as well. Ms. Hamlett asked about contact information for members of public bodies. Staff noted that when the exemption was added, the issue addressed was citizens’ contact information, noting that members of public bodies should have public contact information. Roger Wiley, representing local government and speaking as a former FOIA Council member, observed that at the local level an employee’s home and personal contact information could be protected as personnel records, and that the same could apply to board and



commission members. Ms. Hamlett disagreed based on court precedent, stating that public officers are not employees. After further discussion, the Subcommittee voted to add language to the draft indicating it was intended to apply to personal contact information, including home or private business information, furnished by citizens. The vote was initially a tie (Mr. Oksman did not vote initially), but upon a second vote, the motion carried 3-2 (members Ashby, Hamlett, and Oksman voted aye; members Jones and Tavenner voted nay).

The Subcommittee then began its consideration of the records exemptions in § 2.2-3705.7, exclusions to application of chapter; records of specific public bodies and certain other limited exemptions. Staff provided a brief legislative history as each exemption was considered.

Subdivision 1 of § 2.2-3705.7 is an exemption enacted as part of the original FOIA in 1968. The original version, which exempted several different types of records, has been amended many times over the years. The current exemption addresses several types of tax records but also mentions scholastic records. Staff noted that the word “scholastic” appears to have been left from the original exemption as an oversight, as there is now a separate exemption for scholastic records (subdivision 1 of § 2.2-3705.4). Staff also noted that given the list of tax items in this exemption, “scholastic” is a non-sequitur. After brief discussion and supporting comments from Craig Merritt on behalf of the Virginia Press Association (VPA) and Mr. Flynn, the Subcommittee voted unanimously to remove the word “scholastic” from this exemption.

Subdivision 2 of § 2.2-3705.7 is also an exemption enacted as part of the original FOIA in 1968. It exempts the working papers and correspondence of certain government officials and employees. Laura Fornash of the University of Virginia (UVA) and Karah Gunther of Virginia Commonwealth University (VCU) both noted the importance of this exemption to university presidents in working through drafts and difficult management decisions. Megan Rhyne of the Virginia Coalition for Open Government (VCOG) noted that at the local level this exemption is used by multiple parties, such as mayors and city managers, or superintendents and school board chairs. She said that at the state level the exemption was given overly broad interpretation, especially by legislators. Mr. Merritt noted that while “Office of the Governor” is defined in the exemption, there is no equivalent definition for the Lieutenant Governor or Attorney General; he also asked about the breadth of the term “correspondence” given that it is not defined, while the term “working papers” is defined. Staff observed there were not as many inquiries regarding the Lieutenant Governor or Attorney General, and that at least one circuit court has used the dictionary definition of “correspondence” as written communications or the exchange of letters. (In this instance, staff was referring to *Richmond Newspapers, Inc. v. Casteen*, 42 Va. Cir. 505, 506-507 [City of Richmond 1997], which stated that correspondence “has a common meaning. It is unnecessary to resort to principles of statutory construction to determine what is meant. It is defined as the ‘Interchange of written communications. The letters written by a person and the answers written by the one to whom they are addressed.’ Black’s Law Dictionary [6th ed. 1990], p. 344. Also ‘communications by exchange of letters; letter writing.’ Webster’s New Twentieth Century Dictionary, unabridged [2d ed. 1983].”) After further discussion about the breadth of the exemption and its application, Mr. Jones moved to eliminate the word “correspondence” but the motion failed for lack of a second. The Subcommittee agreed to carry over consideration of this exemption.

Subdivision 3 of § 2.2-3705.7 exempts library records that can be used to identify both (i) any library patron who has borrowed material from a library and (ii) the material such patron borrowed. Staff noted that both elements must be present for the exemption to apply. The Subcommittee, Mr. Flynn, Mr. Wiley, and Ginger Stanley of VPA discussed the application of the exemption, noting that it would not

protect a computer search but would protect electronic materials borrowed, and that there had been no complaints from libraries about this exemption. There was no further comment.

Subdivision 4 of § 2.2-3705.7 exempts certain contract cost estimates and other records of the Virginia Department of Transportation (VDOT). Staff indicated the exemption was enacted in 1981 to protect the public purse in the procurement setting. A representative from VDOT stated that the agency uses the exemption to withhold engineering analyses and to protect the amounts VDOT is willing to pay, because otherwise bidders could manipulate the bids. Ms. Stanley asked about the monitoring program mentioned in the exemption; the Subcommittee moved on to consider other exemptions so that VDOT staff could check on the answer to this inquiry. At the end of the meeting, the Subcommittee returned to this topic and VDOT indicated the program was to monitor bids and compare them to cost estimates. The Subcommittee did not recommend any changes to this exemption.

Subdivision 5 of § 2.2-3705.7 exempts lists of owners of bonds issued by a political subdivision. The Subcommittee at this time briefly discussed and clarified that if an exemption was considered but there were no comments or suggestions for change, then the recommendation would be to keep the current exemption without amendment. The Subcommittee then returned to consideration of subdivision 5. Mr. Ashby asked what was the public interest in this exemption. Mr. Wiley stated that if the information was not confidential, people would not be as willing to buy bonds. Mr. Merritt indicated most were in brokerage accounts now anyway. Mr. Wiley agreed, stating he was not sure that a locality would even have access to the list. The Subcommittee did not recommend any changes to this exemption.

Subdivision 6 of § 2.2-3705.7 exempts records relating to financial disclosures by members of the General Assembly. Staff stated the exemption was enacted in 1986 and has not been amended. The public policy is to make financial disclosures public, but the records exempted are those submitted when a member is called before an ethics panel. There is a corresponding meetings exemption as well. The Subcommittee and interested parties discussed whether the exemption would need to be amended due to the formation of the new Virginia Conflict of Interest and Ethics Advisory Council (2014 Acts of Assembly, cc. 792 and 804; codified at Va. Code §§ 30-355 through 30-358). The Subcommittee decided to carry over consideration of this exemption to gather more information on this topic.

Subdivision 7 of § 2.2-3705.7 exempts public utility customer account information. Staff noted that the current exemption requires the release of the amount “paid” for utility service but not the amount charged for such service, which has led to some confusion in application regarding unpaid utility bills. After some discussion of the basis of the exemption to protect customer privacy, the Subcommittee agreed without objection to amend the exemption to cover the amount paid or the amount charged.

Subdivision 8 of § 2.2-3705.7 exempts personal information filed with the Virginia Housing Development Authority or a local housing and redevelopment authority. After staff recited the legislative history of the exemptions enactment in 1988 and two subsequent amendments, there were no comments regarding this exemption.

Subdivision 9 of § 2.2-3705.7 exempts hazardous waste facility siting records. Staff noted there is a corresponding meetings exemption, but there is no such facility in Virginia. Cindy Berndt of the Department of Environmental Quality (DEQ) stated that there was a statutory mandate to have a hazardous waste siting program, and the exemption exists to protect local governments’ bargaining positions. She observed there is still a requirement to publish notice of intent, to hold a public hearing, and to obtain all of the necessary environmental permits. She was unsure of the notice period but stated it was at least 30 days. There were no additional comments.



Subdivision 11 of § 2.2-3705.7 exempts certain game-related records of the Virginia Lottery. Staff stated that this was to protect proprietary records and the public purse; the exemption was enacted in 1989 and had subsequently been amended to reflect the Virginia Lottery's change of name this past Session (2014 Acts of Assembly, c. 225). The Subcommittee confirmed that the exemption is limited and records would be disclosed under certain conditions. There was no further comment.

Noting that it had taken up subdivision 11 out of order, the Subcommittee next addressed subdivision 10 of § 2.2-3705.7, which exempts records regarding certain plant and animal species, natural communities, caves, and significant historic and archaeological sites. Representatives of the Department of Game and Inland Fisheries (DGIF) and the Department of Conservation and Recreation (DCR) both expressed the importance of this exemption to their work, stating that it helps with economic development and in protecting both landowners and resources. There was no additional comment.

Subdivision 12 of § 2.2-3705.7 exempts certain investment-related records of the Virginia Retirement System (VRS), the University of Virginia (UVA), and the Virginia College Savings Plan (VCSP). Staff stated that the exemption was added in 1993 to protect the public purse and proprietary records, and that it had been amended three times. Robert Schultze, Director of VRS, stated that this exemption, along with subdivision 25, were meant to help protect aspects of VRS's and the other entities' investment portfolios, especially regarding private equity investments, which give the highest rate of return. Mr. Schultze further stated that VRS had been shut out by their highest performing private investment manager because of a lack of FOIA protections in 2005-2006. Afterward this exemption was amended and subdivision 25 was added to protect information provided by private partners. Mr. Schultze said he worked with VPA on the language for both exemptions. Mr. Schultze informed the Subcommittee that every state that invests in private equity has an exemption like this one, and he noted that VRS is still subject to oversight by the Joint Legislative Audit and Review Committee (JLARC). Ms. Fornash of UVA and Chris McGee, General Counsel for VCSP, agreed that the same concerns applied to their institutions. There were no additional comments.

Subdivision 16 of § 2.2-3705.7 exempts certain records of the Department of Environmental Quality, the State Water Control Board, the State Air Pollution Control Board, or the Virginia Waste Management Board relating to enforcement actions. Ms. Berndt stated that this exemption concerns DEQ's enforcement strategies regarding regulatory programs, permits, and other things, and the records become public once enforcement is completed. There were no additional comments.

Subdivision 18 of § 2.2-3705.7 exempts certain records of the Virginia Lottery concerning retailers and individual game winners. Amy Dilworth spoke on behalf of the Lottery, stating that this exemption helps strengthen the perception of integrity of the Lottery and shows that real people do win. Ms. Stanley noted that VPA agreed with the state agency about this exemption. There were no further comments.

Subdivision 25 of § 2.2-3705.7 exempts certain records of the Virginia Retirement System, a local retirement system, or the Virginia College Savings Plan relating to certain investment strategies, investment managers, or trade secrets. This exemption was already discussed in conjunction with subdivision 12. Ms. Fornash asked why UVA had not been added to this exemption, since UVA was included with subdivision 12; no one knew the answer. Mr. McGee noted that VCSP was added in 2009. There were no additional comments.

Public Comment

Mr. Tavenner asked if there were any additional comments or questions from the Subcommittee or the public; there were none. The Subcommittee decided to have staff poll members for future meeting dates. The meeting was then adjourned.

Virginia Freedom of Information Advisory Council**Senator Richard H. Stuart, Chair**

Maria J.K. Everett, Executive Director and Senior Attorney

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**General Laws Special Joint Subcommittee Studying
the Virginia Public Procurement Act****Work Group 1: Construction and Design Professionals**

October 15, 2014

Work Group 1, Construction and Design Professionals, of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (Special Joint Subcommittee) held its fifth meeting of the 2014 interim on Wednesday, October 15, 2014, in Richmond.

Cooperative Procurement; Revised Discussion Draft

After the call to order, the work group proceeded to review the omnibus draft containing provisions pertaining to cooperative procurement, job order contracting (JOC), small purchase procedures, and term contracts for architectural and engineering (A/E) services. The objective was to reach final consensus points on these areas for recommendation to the Special Joint Subcommittee. Initial discussion centered on the limitations for the use of cooperative procurement. The omnibus draft prohibited the use of cooperative procurement for new capital construction and included a definition of that term. Hunter Merrill, Virginia Association of Roofing Professionals, Steve Vermillion, Associated General Contractors of Virginia (AGC), and Patrick Cushing, Williams Mullen, did not approve of the definition. Mr. Merrill suggested returning to the existing language, which prohibits the use of cooperative procurement for construction in excess of \$200,000 by a local body under a contract negotiated by another local public body located more than a straight-line distance of 75 miles away. After additional discussion, the work group reached the following consensus regarding cooperative procurement:

- Specify the difference between joint procurement and cooperative procurement;
- Continue to prohibit the purchase of A/E services under a cooperative procurement contract;
- Make no changes to the existing language limiting the use of cooperative procurement for certain construction.



Job Order Contracting; Revised Discussion Draft

The discussion then moved to provisions of the omnibus draft pertaining to JOC. Chris Stone, P.E., Clark Nexsen, offered language to address concerns from the design professionals community that would (i) prevent a public body from issuing a JOC solely for the purpose of providing professional architectural and engineering services; (ii) allow incidental A/E services, provided the services do not require the seal of an architect or professional engineer; and (iii) require the public body to select or designate the architect or engineer to perform the services. Mr. Stone asserted that the public body should not allow the JOC contractor to make design decisions. Mr. Cushing noted that if a public body did not have an existing A/E services term contract, it could use the \$60,000 small purchase exemption to secure A/E services in a timely manner and avoid project delays. Steve Owens, Senior Assistant Attorney General, offered language that would limit incidental A/E services to no more than 25 percent of the total project, not to exceed \$60,000. Mike Halvorson, Centennial Contractors Enterprises, Inc., expressed support for the language, stating that JOC providers did not want to engage in providing A/E services. William H. Hefty, Esq., Hefty & Wiley, P.C., stated that the \$60,000 small purchase exemption represented 12 percent of the \$500,000 total project threshold. After additional discussion, the work group reached consensus on the following provisions relating to JOC:

- Limit the term of a JOC to one year, renewable for two additional one-year terms;
- Limit the sum of all jobs in a one-year term to \$5 million;
- Limit individual job orders to \$500,000;
- Prohibit the use of JOC for construction, maintenance, or asset management services for a highway, bridge, tunnel, or overpass;
- Prohibit the issuance of a job order solely for providing A/E services;
- Limit incidental professional services to 25 percent of the total costs, not to exceed \$60,000;
- Require an individual job order to result in a stand-alone construction project;
- Prohibit “job splitting,” or the manipulation of job orders with the intent of keeping a specific job order under statutory thresholds;
- Prohibit any unused amounts from one contract term to be carried forward to any additional term; and
- Establish a reporting mechanism for participating public bodies to relate their respective experiences and findings regarding the appropriateness or sufficiency of the JOC project cost limitations.

Term Contracts for Architectural and Engineering Services; Revised Discussion Draft

The work group then moved to review the language in the omnibus draft relating to A/E services term contracts. The initial objective of the draft was to remove the A/E services term contract provisions from the definitions section of the Virginia Public Procurement Act (VPPA) without making substantive language changes. Mr. Hefty stated that an additional cost threshold tier should be established for larger localities. He suggested that for localities with a population of more than 200,000, the limit should be raised from the current maximum of \$5 million to \$7.5 million. Several members of the work group, including Mr. Stone, Mr. Cushing, and Mr. Merrill, argued that another tier was unnecessary. Mr. Merrill did not support adding a tier because an A/E services term contract is a relatively new mode of

procurement. Without consensus, the resolution was to keep the current thresholds. Annette Cyphers, Director of Facilities Planning and Construction, University of Virginia, stated that language limiting project fees and prohibiting any unused amount from one contract term to be carried forward to any additional term did not apply to public institutions of higher education having level 2 or 3 authority under the Restructured Higher Education Financial and Administrative Operations Act of 2005 (§ 23-38.88 et seq. of the Code of Virginia). It was suggested that language be added to clarify this distinction. Concluding its review of the omnibus draft, the work group approved by consensus a provision in the draft clarifying that small purchase procedures may be used for construction, provided the work complies with the Uniform Statewide Building Code.

Establishment of Independent Advisory Board; Discussion

The focus of the work group then turned to the review of possible improvements to the administrative appeal process and options for increased enforcement and oversight. Mr. Vermillion offered a measure on behalf of the AGC that would establish a nine-member Independent Review Board for Construction. The Board would be staffed by the Department of General Services (DGS) and would have the authority to receive complaints of noncompliance with the VPPA by all public bodies. The Board also would have the authority to reach findings and either compel corrective action or refer the matter to a body that could compel the corrective action. Bert Jones, Associate Vice Chancellor for Facilities Management Services, the Virginia Community College System, asserted that the current focus should be on gathering empirical data rather than establishing a review board. Jeff Southard, Executive Vice President, Virginia Transportation Construction Alliance, suggested starting small and having the Office of the Inspector General or DGS provide advisory opinions.

As another option for consideration, staff developed language establishing an Advisory Procurement Council that would be located in the legislative branch of government. The purpose of the 13-member Council would be to encourage and facilitate compliance with the state's procurement laws. The powers and duties of the Council would be as follows:

1. Conduct training seminars and educational programs;
2. Publish educational materials;
3. Review written determinations of public bodies regarding methods of procurement and statutory waivers and related exemptions from the laws governing public procurement and collect data necessary to evaluate the effectiveness and appropriateness of such determinations, waivers and exemptions;
4. Provide a forum to address concerns regarding public procurement;
5. Monitor changes in state laws relating to public procurement and make recommendations for changes in such laws; and
6. Provide an annual report.

The work group discussed the possibility of establishing an advisory entity with limited powers but could not reach an agreement. Some members wanted the entity to review complaints that a public body had not complied with the VPPA, make determinations, and exercise authority to enforce its determinations. Areas of continued disagreement included the composition and size of the board, the powers it would exercise, the scope of its authority, and staffing. Due to the lack of a consensus, the work group did not advance any specific language or recommend any legislation for consideration.



Public Comment

The work group opened the floor to receive public comment.

Herschel V. Keller; Petty, Livingston, Dawson & Richards, Individual & Corporate Counsel

Mr. Keller stated that the appeal entity must have the ability to review complaints and compel compliance with its decisions. He asserted that an advisory entity would not have the authority to do so and therefore could not successfully address or alleviate the pressing concerns of the small contractor community regarding the improper use of discretion by some public bodies when procuring construction.

Next Steps

Staff informed the work group members that they were released from service. A report including the activities of the work group and consensus recommendations will be presented to the Special Joint Subcommittee at a meeting that will be scheduled prior to the commencement of the 2015 legislative session.

**Work Group 2: Information Technology, Goods,
and Other Professional Services**

October 15, 2014

Work Group 2, Information Technology, Goods, and Other Professional Services, of the General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act (Special Joint Subcommittee) held its fifth and final meeting of the 2014 interim on Wednesday, October 15, 2014, in Richmond. The meeting began with the review of two redrafts comprising (i) the efforts of the work group to establish equal footing for competitive negotiation and competitive sealed bidding and (ii) the gradual removal of the requirement for the publication of notices of requests for proposals (RFPs).

Equal Footing for Competitive Negotiation and Competitive Sealed Bidding; Discussion Draft

The first redraft removes preference for the procurement of goods, services, or insurance by competitive sealed bidding. The draft does not change the requirement for professional services to be procured by competitive negotiation or the preference for construction to be procured by competitive sealed bidding. The work group unanimously approved the draft for recommendation to Special Joint Subcommittee. The second redraft removes the requirement for the publication of notices of RFPs by July 1, 2017. During the interim, the Department of General Services (DGS) will provide an electronic data file of business opportunities to any requesting newspaper or other print publication with circulation in Virginia. Localities would have the option of doing the same or providing an electronic data file of all business opportunities to DGS's central electronic procurement website. Also during this period, public bodies issuing RFPs are required to ascertain the method by which an offeror submitting a proposal in response to the RFP became aware of the solicitation, whether by newspaper publication, website posting, or other method. Such findings will be reported by July 1, 2016, to the Chairmen of the House Committee on General Laws and the Senate Committee on General Laws and Technology.

Phyllis Errico, Virginia Association of Counties, stated that the draft should clarify that there will be no fee charged to localities providing the files to DGS. It was also noted that the redraft called for the publication of all business opportunities, while current law only requires the publication of RFPs. Joseph

Damico, Deputy Director, DGS, supported allowing more transparency. The floor was opened to receive public comment on the redrafts. Ginger Stanley, Executive Director, Virginia Press Association, directed comments to the publication draft. She asserted that the public has a right to know how its money will be used and requested more time to consider the ramifications of the changes. After making a few technical changes, the work group unanimously approved the draft for recommendation to Special Joint Subcommittee.

Establishment of Virginia Procurement Advisory Council; Discussion Draft

The work group then moved to review a discussion draft establishing the Virginia Public Procurement Advisory Council (the Council). The draft was based on previous work group discussions and modeled to some degree on the Freedom of Information Advisory Council. The Council would be a legislative branch entity consisting of 13 members, including legislators and representatives of state and local government and the vendor community. The purpose of the Council would be to encourage and facilitate compliance with the state's procurement laws. The Council would be authorized to hire an executive director and other employees as deemed necessary. The powers and duties of the Council would be as follows:

1. Conduct training seminars and educational programs;
2. Publish educational materials;
3. Review written determinations of public bodies regarding methods of procurement and statutory waivers and related exemptions from the laws governing public procurement and collect data necessary to evaluate the effectiveness and appropriateness of such determinations, waivers and exemptions;
4. Provide a forum to address concerns regarding public procurement;
5. Monitor changes in state laws relating to public procurement and make recommendations for changes in such laws; and
6. Provide an annual report.

Eric Denby, Director of Procurement and Supplier Diversity Services, University of Virginia, suggested removal of item three under the powers and duties because the work group had just approved a draft removing the requirement for written determinations to use competitive negotiations for the procurement of goods and services. It was noted that written determinations were still required to use competitive negotiation to procure construction. Tom Kaloupek, Director of Materials Management, Virginia Tech, did not support the Council having such authority. Mr. Damico agreed that item three should be deleted and that item five should be expanded to include the collection of data on the use of such waivers. Mr. Denby asserted that a 13-member Council would be too big and would create operational issues that could hold up procurements. Robert Gleason, Director, Division of Purchases & Supply, DGS, stated that he had not seen the number of issues rise to the point of supporting another level of oversight to the process. Gwendolyn Davis, Chair, Equipping Businesses for Success Institute, maintained that the Council is needed and that recent disparity studies support the need for additional oversight to ensure compliance with the state's procurement laws and regulations.

Mr. Kaloupek stated that the entity should start out with a more limited focus and should serve as a resource. He maintained that a three-member entity limited to providing education, training, and a forum for discussion would be appropriate to start. Phil Pippert, Director, Supply Chain Management, Virginia Information Technologies Agency (VITA) suggested including the state's Chief Information Officer as a



part of any proposed entity to gain the perspective of technology procurements. Mary Helmick, Director, Procurement Services, James Madison University, expressed support for an entity that would be truly advisory. She suggested the duties be pared down to (i) conducting training seminars and educational programs, (ii) publishing educational materials, (iii) providing a forum to address concerns regarding public procurement, and (iv) monitoring changes in state laws relating to public procurement and making recommendations for changes in such laws. Eugene Anderson, Director, Department of Procurement Services, Norfolk State University, added that item four is a key component because currently there is no forum for members of the vendor community to express their concerns. Mr. Anderson also stated the importance of ensuring that the entity is properly staffed, and he suggested the draft be changed to require the Council to hire an executive director.

While there was some degree of consensus reached on the possibility of establishing an advisory entity, there remained substantial disagreement in several areas including composition and size, powers and duties, and appropriate staffing. The group could not reach a consensus to the point of advancing specific language or recommending legislation for consideration. The floor was opened for public comment on the establishment of an advisory council. No comment was offered.

Cooperative Procurement to Purchase Insurance

A final issue for consideration before the work group pertained to the use of cooperative procurement to purchase insurance. The issue had been referred by Work Group 1 because it concerned the purchase of nonprofessional services, which was included in the scope of work for Work Group 2. After brief discussion, no action was recommended.

Next Steps

Staff informed the members that they were released from service. A report including the activities of the work group and consensus recommendations will be presented to the Special Joint Subcommittee at a meeting that will be scheduled prior to the commencement of the 2015 legislative session.

General Laws Special Joint Subcommittee Studying the Virginia Public Procurement Act

Delegate C. Todd Gilbert, Chair

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Joint Subcommittee to Evaluate Tax Preferences

November 5, 2014

The Joint Subcommittee to Evaluate Tax Preferences held its third meeting of the 2014 interim on November 5, 2014.

Report on Land Conservation

Division of Legislative Services staff provided an overview of the Virginia Land Conservation Incentives Act, which provides a tax credit equal to 40 percent of the value of land or an easement donated to a state agency or a land trust for conservation purposes. Currently, a taxpayer may claim up to \$100,000 per year in tax credits and carry over any unused credits for a period of 10 years. A taxpayer may also transfer unused credits to other taxpayers. The maximum amount of credits that may be issued by the Department of Taxation in a calendar year is \$100 million.

The Code of Virginia sets forth processes and procedures related to the necessary appraisal that must be submitted when applying for land preservation tax credits, requires that the Department of Conservation and Recreation (DCR) verify the conservation value of land that is the subject of an application for more than \$1 million worth of credit, and clarifies that the appraised value may not exceed the current highest and best use of the land.

While the maximum amount of credits that may be issued in a given year cannot exceed \$100 million, the Commonwealth's annual liability is not capped at that amount. Because credits may be carried over for a period of 10 years, at any given time there are outstanding credits from past years that might be claimed in a given tax year. For example, data provided by the Department of Taxation indicates that 14 percent of the credits issued in tax year 2007 are still unclaimed.

Since the inception of the tax credit program, more than \$1.4 billion in credits have been issued and more than 700,000 acres of land have been preserved. In addition to the conservation efforts pursued through this program, the Commonwealth also provides funding for several grant programs that support conservation efforts, such as the Virginia Land Conservation Fund, the Open-Space Lands Preservation Trust Fund, Civil War battlefield preservation grants, and farmland preservation grants. A draft copy of the land preservation tax credit report is available on the Joint Subcommittee website.

DCR staff briefed the Joint Subcommittee about land conservation programs, including the tax credit program, providing more detail on the conservation value review required for tax credits over \$1 million. The review encompasses the conservation purpose of the donation, the public benefit of the donation, and water quality and forest management practices that have been put in place. Staff also outlined the pre-donation and pre-application review and other services that DCR performs, upon request, for interested landowners.

In addition to assisting with the tax credit program, DCR administers the Virginia Land Conservation Fund. DCR also manages and oversees the Commonwealth's 36 state parks and 61 natural area preserves. GIS mapping services performed by DCR track all conservation lands in the Commonwealth, including federal, state, and local properties and donated easements. A copy of DCR's presentation is available on the Joint Subcommittee website.

The Virginia Outdoors Foundation (VOF), a state agency tasked with preserving open spaces and recreational areas in the Commonwealth, presented the Joint Subcommittee with an overview of its role in land preservation. VOF manages about 3,700 preservation easements in the Commonwealth—more than any other land trust in the nation—and is responsible for protecting about 80 percent of the



conservation acreage in the Commonwealth. The VOF director said that the easements held by VOF are intended to protect the land, while providing flexibility to the landowner to keep the land livable and workable.

Based on a VOF survey of landowners who have placed conservation easements with the Foundation, 90 percent of the land is used for agricultural production and/or forestry. This includes activities ranging from raising livestock to growing agricultural crops to growing Christmas trees. VOF indicated that the tax credits have assisted with the landowners' financial stability, and the money is often reinvested in an existing business or used to start a new business. A copy of VOF's presentation is available on the Joint Subcommittee website.

Members of the Joint Subcommittee asked questions about the tax credit program and discussed its application. Delegate Chris Jones indicated that the Joint Subcommittee should continue to discuss the goals and objectives of the program in a broader context to see if they had been met; he also questioned whether the program could be scaled back in order to forgo less revenue, which the Commonwealth could put toward other uses. Delegate Lee Ware opined that the program should be maintained, but the General Assembly should be mindful of current budget issues. He indicated that he would be in favor of reforming the program. Senator Emmett Hanger said the Joint Subcommittee should look at some specific reform proposals. He stated that the program is viable and has been proven to work, but there is also a need for fee-simple acquisitions, money for state parks, and best-management practices.

Senator Hanger made a motion, which was seconded, to recommend continuing the land preservation tax credit for now, but to work with stakeholders to develop some recommendations to reform the program. The Joint Subcommittee unanimously agreed to the motion.

Partial Sales Tax Exemption for Food

The Joint Subcommittee returned to the subject of partial sales and use tax exemption for food, previously discussed at the July 24, 2014, meeting, but for which no recommendation had been made. There had previously been interest in possibly eliminating the state portion of the sales and use tax on food, but only if revenue sources could be found to hold education and transportation funding harmless. Senator Hanger indicated a need to find a mechanism to do this as part of a discussion about larger tax reform. He made a motion, which was seconded, to recommend continuing the partial exemption at its current rate for now, but to keep the issue on the agenda as part of a larger reform discussion. The Joint Subcommittee unanimously agreed to the motion.

Sales Tax Exemption for Nonprofit Organizations

The Joint Subcommittee then returned to the subject of sales tax exemption for nonprofit organizations, previously discussed at the October 8, 2014, meeting. No motion was made at the prior meeting because of a lack of a quorum. Senator Hanger made a motion, which was seconded, to recommend continuing the nonprofit exemption. The Joint Subcommittee unanimously agreed to the motion.

Joint Subcommittee to Evaluate Tax Preferences

Senator Jeffrey L. McWaters, Chair

David Rosenberg, DLS Senior Attorney

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Joint Subcommittee to Formulate Recommendations to Address Recurrent Flooding

September 10, 2014

The Joint Subcommittee to Formulate Recommendations to Address Recurrent Flooding pursuant to HJ 16 (2014) and SJ 3 (2014) held its second meeting on September 10, 2014, in Richmond.

The Joint Subcommittee is tasked with formulating recommendations for the development of a comprehensive and coordinated planning effort to address recurrent flooding, including recommendations for short-term and long-term strategies for minimizing the impact of recurrent flooding. Final recommendations will be presented to the 2016 Session of the General Assembly.

After opening remarks by Delegate Chris Stolle, Chairman, the Joint Subcommittee heard from Nicole Riley, Virginia State Director of the National Federation of Independent Businesses, regarding the impact of recurrent flooding on businesses. Ms. Riley reported that the rising costs of flood insurance and the updating of flood maps have presented challenges to many businesses. Ms. Riley mentioned several techniques that businesses can use to try to reduce the impact of high flood-insurance premiums. Although Ms. Riley was not able to give dollar estimates of actual losses from recurrent flooding, she stated that loss of business often causes more financial harm than actual flood damage to a business.

The Joint Subcommittee also heard from Bill Tibbens, Manager of Government and Industry Affairs for Farmers Insurance. Mr. Tibbens discussed recurrent flooding and the mitigation of risk. According to Mr. Tibbens, the negative outcomes of recurrent flooding include possible mold, weakened construction, below-standard repairs, auto claims, and loss of life. There are a variety of ways to manage such risks, including risk avoidance (withdrawing from the risk-prone area), risk reduction (optimizing fortification), risk sharing (obtaining insurance), and risk retention (bearing the cost). Ways of mitigating the risks might include returning an area to its natural floodplain. According to Mr. Tibbens, for every dollar spent on mitigation, there is an average savings of \$4 in claims cost. Mr. Tibbens emphasized the importance of educating consumers about flood coverage, including informing them that basic insurance policies lack flood coverage. He also pointed out sources of further information such as government websites and community rating systems.

Bob Kerr, representing the Virginia Association for Commercial Real Estate and the Hampton Roads Association for Commercial Real Estate, also addressed the Joint Subcommittee. Mr. Kerr presented perspectives from the commercial real estate industry. He noted that local governments are on the front line regarding issues related to recurrent flooding and have been developing strategies to deal with these issues for a number of years. Mr. Kerr noted that some of the issues of immediate interest include stormwater regulations and increases in finished-floor elevations. Other issues on the radar include further changes in state and local requirements and changes to commercial lending and insurance. He noted that although there is sufficient time to address many of the issues related to recurrent flooding, the cost of many options will only increase with the passage of time. Mr. Kerr noted that challenges for the Joint Subcommittee as it considers solutions include the impact of new policies on national and regional competitiveness, confusion regarding state versus local authority, and the cost and funding of new requirements and projects.

The Joint Subcommittee also received an update from Jim Redick, Director of Emergency Preparedness and Response for the City of Norfolk and a member of the Secure Commonwealth Panel. Mr. Redick informed the Joint Subcommittee of the Panel's continued work and highlighted possible recommendations of the Panel, including creating a "resilience coordinator" position and establishing a



centralized source of information. Mr. Redick also emphasized the importance of Virginia's stakeholders speaking with a unified voice in order to maximize possible federal funding. Mr. Redick stated that he will keep the Joint Subcommittee updated on the Panel's work.

After a general discussion, the Joint Subcommittee set a third meeting date for November 5, 2014, in Norfolk at Old Dominion University.

November 5, 2014

The Joint Subcommittee to Formulate Recommendations to Address Recurrent Flooding pursuant to HJ 16 (2014) and SJ 3 (2014) held its third meeting on November 5, 2014, at Old Dominion University (ODU) in Norfolk.

The Joint Subcommittee is tasked with formulating recommendations for the development of a comprehensive and coordinated planning effort to address recurrent flooding, including recommendations for short-term and long-term strategies for minimizing the impact of recurrent flooding. Final recommendations will be presented to the 2016 Session of the General Assembly.

After welcoming remarks from John R. Broderick, President of ODU, the Joint Subcommittee received a presentation from Ray Toll, Director of Coastal Resilience at ODU. Mr. Toll stated that issues related to sea level rise have been a priority focus for ODU for the past five years. He noted that the university created the Sea Level Rise Initiative in 2010 to facilitate research and education on sea level rise. Mr. Toll noted that earlier this year, ODU announced the creation of a federal pilot program to develop a regional approach to sea-level-rise preparedness and resilience planning. ODU will serve as the neutral facilitator and coordinator to incubate intergovernmental solutions. The goal over the next two years is to establish the Hampton Roads Sea Level Rise Preparedness and Resilience Intergovernmental Planning Team, the first of its kind in the nation. Mr. Toll also informed the Joint Subcommittee of the university's efforts to create a National Center for Sea Level Rise in partnership with Virginia's congressional delegation and with the College of William and Mary's Virginia Institute of Marine Science.

The Joint Subcommittee also heard from Roy Hoagland, Director of the Virginia Coastal Policy Clinic at the College of William and Mary Law School. Mr. Hoagland presented an overview of legal issues related to local authority to take action on recurrent flooding and sea level rise. Mr. Hoagland began by giving an overview of the Dillon Rule as it impacts local authority in Virginia. The Dillon Rule limits the powers of local governments to those expressly granted by the General Assembly, those fairly implied from those express powers, and those that are essential to the exercise of those governmental powers. The Virginia Supreme Court has held that when there is reasonable doubt whether a legislative power exists, the doubt must be resolved against the local governing body. Mr. Hoagland concluded that although there is authority within existing statutes to support local government actions to respond to recurrent flooding, the state of the law is confusing. He stated that the Joint Subcommittee might want to consider legislative action to resolve the issue in a straightforward manner. Among the alternatives that Mr. Hoagland suggests is the crafting of legislation that exempts local government actions taken to respond to recurrent flooding and sea level rise from application of the Dillon Rule. Other alternatives include undertaking a detailed legal analysis to assess the specific extent of authority that exists under the current state of the law.

Robert Bennett, Division Director of Dam Safety and Floodplain Management with the Department of Conservation and Recreation, also addressed the Joint Subcommittee. Mr. Bennett noted that the

General Assembly amended the Flood Damage Reduction Act in 1989 in response to several severe floods and storms that hit the state between 1969 and 1985. As part of these amendments, the Department of Conservation and Recreation (DCR) was named coordinator of flood protection programs in the Commonwealth. DCR was also designated coordinating agency for the National Flood Insurance Program. Furthermore, DCR was directed to develop a flood protection plan for the Commonwealth. Such a plan was implemented in 2005 but has not been updated since that time. The enabling statute is silent on the timing of any further updates. Mr. Bennett noted that new resources and information have become available since the creation of the initial plan. He briefed the Joint Subcommittee on what DCR would need to initiate a process to modernize the plan. Mr. Bennett also brought forth additional floodplain management ideas such as greater disclosure of floodplain locations as a part of the Virginia Residential Property Disclosure Act and offering grants to localities as an incentive to join the community rating system.

During a period for public comment, the Joint Subcommittee heard from representatives of the Virginia Association of Realtors and the City of Portsmouth regarding the issue of real estate disclosure of flood zones. The Association representative noted that Virginia has always been a “buyer beware” state, and the City of Portsmouth representative explained that some buyers are finding out after the fact that an expensive insurance policy is required due to the location of a dwelling.

Finally, Jim Redick, the Director of Emergency Preparedness and Response for the City of Norfolk and a member of the Secure Commonwealth Panel, gave an update on the work of the Panel. He mentioned recommendations such as the creation of a resiliency coordinator, a continuation of the Panel, and an update of the floodplain plan.

The Joint Subcommittee concluded by discussing possible recommendations to be taken up at the final meeting of 2014. This meeting will be devoted to the development of interim recommendations to the 2015 Session of the General Assembly and the discussion of possible plans for 2015.

Joint Subcommittee to Formulate Recommendations to Address Recurrent Flooding

Delegate Christopher P. Stolle, Chair

Jeff Sharp, DLS Senior Attorney

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Legislative Meeting Calendar: December 2014

December 1	11 a.m.	Joint Commission on Technology and Science (JCOTS) Higher Education Equipment Advisory Committee	3rd Floor East Conference Room, GAB
	1 p.m.	Senate Committee on Education and Health	Senate Room B, GAB
December 2	9 a.m.	Lobbyist-in-a-Box (LIAB) New User Training Session (registration required)	Suite 660, 6th Floor, GAB
	10 a.m.	Virginia State Crime Commission	Senate Room A, GAB
	10 a.m.	Virginia-Israel Advisory Board	House Room 2, The Capitol
	1 p.m.	Small Business Commission	Senate Room B, GAB
	1:30 p.m.	Criminal Justice System Panel	House Room D, GAB
	2 p.m.	Virginia Commission on Youth	House Room C, GAB
	2 p.m.	Virginia Council on the Interstate Compact on Educational Opportunity for Military Children	Jefferson Conference Room, 22nd Floor, James Monroe Building, Richmond
December 3	9 a.m.	Lobbyist-in-a-Box (LIAB) Existing User Review Training Session (registration required)	Suite 660, 6th Floor, GAB
	9:30 a.m.	Chesapeake Bay Restoration Fund Advisory Committee	4th Floor East and 4th Floor West Conference Rooms, GAB
	10 a.m.	Joint Commission on Technology and Science (JCOTS)	House Room D, GAB
December 4	10 a.m.	Governor's Roundtable on Bioscience	Senate Room 3, The Capitol
	10:30 a.m.	CANCELED Virginia Offshore Wind Development Authority	House Room 3, The Capitol
	noon	Virginia Foundation for Healthy Youth, Board of Trustees and Executive Committee	3831 Westerre Parkway, Richmond
December 5	10 a.m.	Commission on the Virginia Alcohol Safety Action Program Executive Finance Committee	701 E. Franklin Street, Suite 1110, Richmond
	11:30 a.m.	Governor's Council on Childhood Success Data and Governance Work Group	Lt. Governor's Conference Room, Oliver Hill Building, Richmond
December 8	10 a.m.	Joint Legislative Audit and Review Commission (JLARC)	Senate Room A, GAB

December 8	10 a.m.	Governor's Council on Childhood Success Virginia Preschool Initiative Subgroup	West Reading Room, Patrick Henry Building, Richmond
	1 p.m.	Governor's Council on Childhood Success Access to and Quality of Preschool and Child Care Subgroup	Department of Social Services Central Regional Office, Henrico Room, 1604 Santa Rosa Road, Richmond
	1:30 p.m.	Virginia Bicentennial of the American War of 1812 Commission	House Room D, GAB
	2 p.m.	Lobbyist-in-a-Box (LIAB) New User Training Session (registration required)	Suite 660, 6th Floor, GAB
December 9	10 a.m.	Virginia Housing Commission Affordable Housing, Real Estate Law and Mortgages Work Group	House Room C, GAB
	1 p.m.	Commission on Unemployment Compensation	Senate Room B, GAB
	3 p.m.	Lobbyist-in-a-Box (LIAB) Existing User Review Training Session (registration required)	Suite 660, 6th Floor, GAB
December 10	9 a.m.	Virginia Housing Commission Common Interest Communities Work Group	House Room C, GAB
	10 a.m.	Virginia Housing Commission	House Room C, GAB
	1 p.m.	Capitol Square Preservation Council	House Room 2, The Capitol
December 11	9 a.m.	Lobbyist-in-a-Box (LIAB) New User Training Session (registration required)	Suite 660, 6th Floor, GAB
	9 a.m.	Criminal Justice Services Board	House Room D, GAB
	10 a.m.	State Water Control Board	House Room C, GAB
	11 a.m.	Indigent Defense Commission	1604 Santa Rosa Road, Richmond
December 12	9 a.m.	Senate Courts of Justice	Senate Room B, GAB
	9 a.m.	Governor's Council on Childhood Success Health and Well Being Subgroup	Department of Health Professions, 9960 Mayland Drive, Henrico
	10 a.m.	State Water Control Board	House Room D, GAB
	10 a.m.	Commission on the Virginia Alcohol Safety Action Program (VASAP)	6th Floor Speaker's Conference Room, GAB
	1 p.m.	Joint Meeting of House and Senate Courts of Justice Committees - Judicial Panel Subcommittees on Judicial Interviews	House Room C, GAB



December 12	4 p.m.	State Board of Elections	House Room 1, The Capitol
December 15	9 a.m.	Lobbyist-in-a-Box (LIAB) Existing User Review Training Session (registration required)	Suite 660, 6th Floor, GAB
	10 a.m.	State Water Commission	House Room C, GAB
December 17	9:30 a.m.	Joint Meeting of House Appropriations, House Finance, and Senate Finance Committees	House Room D, GAB
	1 p.m.	Joint Rules Committee	6th Floor Speaker's Conference Room, GAB
	2 p.m.	Joint Meeting of House and Senate Transportation Committees	House Room D, GAB
December 18	9 a.m.	Lobbyist-in-a-Box (LIAB) New User Training Session (registration required)	Suite 660, 6th Floor, GAB
	9:30 a.m.	State Executive Council for Comprehensive Services for At-Risk Youth and Families	3900 West Broad, Richmond
	1 p.m.	Fort Monroe Authority Board of Trustees	Bay Breeze Conference Center, Fort Monroe
December 29	3 p.m.	Lobbyist-in-a-Box (LIAB) Existing User Review Training Session (registration required)	Suite 660, 6th Floor, GAB

Meetings may be added at any time; please check the General Assembly and DLS websites for updates.

Other Legislative Commissions and Committees

The following legislative commissions and committees also hold regular meetings during the interim. Visit their websites to obtain full information regarding their meeting dates, agendas, and summaries.

Virginia State Crime Commission

vscc.virginia.gov/meetings.asp

Joint Commission on Health Care

jchc.virginia.gov/meetings.asp

Joint Legislative Audit and Review Commission (JLARC)

jlarc.virginia.gov/meetings.shtml

Virginia Commission on Youth

vcoy.virginia.gov/meetings.asp

House Appropriations Committee

hac.virginia.gov/

Senate Finance Committee

sfc.virginia.gov/

Virginia Law Portal: A New Look for Virginia's Laws

Visit the Virginia Law Portal (law.lis.virginia.gov) for publications that constitute “Virginia law,” including the Code of Virginia, the Virginia Administrative Code, the Constitution of Virginia, Compacts, Charters, Authorities, and Uncodified Acts of Assembly. For updates, follow Virginia Law on Twitter @VA_Laws.

Complete information on meetings during the 2014 interim is available on the website of the Division of Legislative Services (<http://dls.virginia.gov/commissions.html>).

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