

PUBLIC OFFICIALS' LIABILITY

Presented at the

VML'S NEWLY ELECTED OFFICIALS CONFERENCE

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PRESENTED BY:

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INTRODUCTION

Point No. I. The goal is to avoid putting yourself in a situation where someone can question your integrity, politically or legally.

Congratulations on your election to public office. I think you will find that serving as a locally elected official will expose you to all of the drama present today in society and in the governments of cities and towns, and will challenge your entire set of skills, cognitively, emotionally, and economically. The goal of this talk is to educate you about matters that can create liability for you and the resources available to you and your locality, through VML and other sources, so that you can identify these matters and avoid putting yourself in a position where a claim can be asserted against you. You do not need to have the answers to all of these legal or political matters, but you do need to be well-informed so that you can anticipate the potential legal or political issues and the resources available to assist you.

A. Political Liability

1. There can be political liability for many matters, e.g. for publically funded trips and opposition to zoning matters.

B. Legal Liability

1. Criminal
2. Civil
3. Seek advice of counsel
 - a. City attorney, CA, A.G., VML
 - b. Use VML as resource
4. Always provide notice of any claim to VML or insurer

Point No. II. Sovereign immunity is the principal defense to liability for locally elected officials but this defense has been eroded by recent Virginia Supreme Court decisions.

This defense exists by virtue of the Virginia Supreme Court case decisions as well as Virginia statutes. In Virginia, cities and towns have less liability than the locally elected or appointed officials that serve on their governing or policy boards or councils. There are several reasons for this fact. First, towns and cities have no liability for many governmental activities, only proprietary activities. Proprietary activities include activities undertaken for pecuniary profit and not the health, safety, and welfare of citizens.

Governmental activities include activities undertaken for the health, safety, and welfare of all citizens, without pecuniary profit. Second, unlike the private sector businesses local governments have no vicarious liability for their employees, officers, and agents. Third, in its case decisions the Virginia Supreme Court has created have fewer exceptions to the sovereign immunity of towns and cities and many more exceptions for their employees and officers.

A. Examples of Governmental and Proprietary Activities of Towns and Cities.

1. Governmental Activities

- a. Police
- b. Firefighting
- c. Health and sanitation regulation, social services
- d. Garbage removal
- e. Landfills
- f. Hospitals
- g. Ambulance service
- h. Jails
- i. Planning
- i. Selecting and adopting a plan for the construction of public streets or sidewalks
- ii. Traffic control devices
- j. Engineering, designing and planning of water and sewer systems
- k. Legislative
- l. Emergency response
- m. Traffic signals and other traffic control devices
- n. Snow and ice removal
- o. Building code enforcement and inspections

- p. Water service for fire protection
- q. Storm drainage
- r. Public buildings

2. Specific Proprietary Functions

- a. Streets and sidewalks
- b. Water – once a system has been constructed and experience has shown it to be inadequate, liability attaches. *Stansbury v. Richmond*, 116 Va. 205, 81 S.E. 26 (1914)
- c. Sewer
- d. Market
- e. Electric utility
- f. Gas utility
- g. Rental of municipal property
- h. Airport
- i. Swimming pool
- j. Public housing

B. Other Authorities for Immunity

1. Virginia Code § 15.2-1405- Immunity of members of local government entities; exception.

“The Members of the governing bodies of any locality or political subdivision and the members of boards, commissions, agencies and authorities thereof and other governing bodies of any local government entity...shall be immune from suit arising from the exercise or failure to exercise their discretionary or governmental authority as members of the governing body, board, commission, agency, or authority which does not involve the unauthorized appropriation or misappropriation of funds or intentional or willful misconduct or gross negligence. However, the immunity provided by this section does not apply to conduct constituting intentional or willful misconduct or gross negligence.”

2. Virginia Code § 15.2-1809. Immunity for operation of parks, playgrounds and recreational facilities.

Point No. III. Exceptions to Sovereign Immunity of Cities, Towns, Counties, and Locally Elected Officials frequently “swallow the rule” that would otherwise provide of immunity.

It is important to recognize that, notwithstanding the defense of sovereign immunity, there is still considerable exposure to legal liability for local government entities and locally elected officials; that sovereign immunity is a “bleeding edge” of liability defenses; and that there are a great number of lawsuits filed in order to continue to challenge this defense, develop the exceptions to sovereign immunity, and provide monetary recoveries. These lawsuits arise from the following exceptions:

1. Exceptions to sovereign Immunity for Locally Elected Officials.

- a. Intentional acts. Cite Defamation case by Contractor arising out of Southside Regional Landfill Authority contract.
- b. Gross Negligence. Cite Volpe v City of Lexington and Gagnon v. Burns.
- c. Willful and wanton negligence (i.e. a knowing or knowledgeable or reckless disregard for another’s safety). Cite Volpe v. Lexington, finding no claim.
- d. Unauthorized actions or actions outside the scope of employment
- e. Non-judgmental, non-discretionary, or ministerial actions
- f. Employment claims. Cite Tax Assessor v Suffolk and “retaliatory discharge” cases.
- g. Unauthorized actions or actions outside the “Scope of Employment”
- h. Contractual claims. Cite Charlottesville recent case and Old School v. Town of Cape Charles.
- i. Civil rights claims. Cite Hopewell case alleging conspiracy and obstruction of justice.
- j. Torts committed outside the Commonwealth
- k. Unauthorized or misappropriation of funds
- l. Conflicts of Interest

One of the greatest exposures for liability of elected officials arises under the Conflicts of Interest Act, Virginia Code § 2.2-3100.

- See
- 2.2-3104.2 – local ordinance
 - 2.2-3103(5) – acceptance of money or gifts
 - 2.2-3103(9) – gifts
 - 2.2-3107 – personal interests and contracts
 - 2.2-3112 – personal interests in transactions
 - 2.2-3115 – personal interests
 - 2.2-3119 – nepotism
 - 2.2-3121 – knowing violations.

2. Exceptions to sovereign immunity for local government entities.

- a. Public nuisance. Cite Charlottesville road block case.
- b. Contractual claims
 - (1) See, *Nelson County v. Coleman*, 126 Va. 275 (1919); *Holland v. Nelson County Service Authority*, 698 Va. Cir. 99 (2005)
 - (2) See, also, inverse condemnation cases, *Bell Atlantic Va., Inc. v. Arlington*, 254 Va. 60 (1997)
- c. Planning and Zoning
 - (1) Appeals of site plan, plans of development approval, Virginia Code § 15.2-2259, 2260
 - (2) Appeals of decision of local governing body adopting or failing to adopt a proposed zoning ordinance or amendment, or to grant or failing to grant a special exception per Virginia Code § 15.2-2285(F)
 - (3) Appeals of BZA decisions, Virginia Code § 15.2-2314
 - (4) Building and permit appeals. Under Va. Code § 15.2-2313, nongovernmental parties without notice of the issuance of building permits may seek to enjoin or vacate construction of a structure believed to be contrary to the zoning ordinance without first having recourse to the Board of Zoning Appeals, as might otherwise be required.
 - (5) Vested rights claims. These claims are set forth in Virginia Code § 15.2-2307.
 - (6) Regulatory takings. Regulatory takings occur when the government physically invades a property in any manner. Any such intrusion,

regardless of how minor, will constitute a compensable constitutional taking. The Virginia Supreme Court's treatment of takings cases has expanded. The Court found an unconstitutional taking as a result of a denial of a zoning category that would have permitted the only "practically" viable use of property was invalid. *Boggs v. Board of Supervisors*, 211 Va. 488, 178 S.E.2d 508, 510 (1971). The Court said that the application of a zoning ordinance had the effect of completely depriving the owner of beneficial use of his property by precluding all practical uses. A zoning of land for single family residences is unreasonable and confiscatory and, therefore, illegal where it would be practically impossible to use the land in question for single family residences. In *City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1*, 239 Va. 412, 389 S.E.2d 312 (1990), the Court gave short shrift to any takings claim arising out of the City's "Green Line" down zoning, holding that the land involved could have been leased, even if it was no longer developable as a planned unit development, for the time the down zoning was in effect. Since the ordinance did not "deprive [the landowner] of all economically viable uses", there had been no taking. *Id.* at 416. See, also, *Wilson v. City of Salem*, 55 Va. Cir. 270 (City of Salem 2001), wherein the court rules that depriving landowner of his "view" is not a taking.

d. Employment Rights

- (1) Title VII: Former Employees May Sue for Retaliation
- (2) FLSA: Salary-Basis Test
- (3) ERISA: Non-Interference
- (4) Sexual Harassment
- (5) Age Discrimination
- (6) Unions

e. Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq.

- (1) Religious Discrimination
- (2) Rehabilitation Act of 1973, 29 U.S.C. § 701. et seq.
- (3) Fair Labor Standards Act of 1938, as Amended ("FLSA")
- (4) Family and Medical Leave Act ("FMLA")
- (5) Wrongful Discharge

f. Claims based upon federal legislation:

- (1) Deprivation of due process. 42 U.S.C. § 1983. Section 1983, originally enacted as Section 1 of the Civil Rights Act of 1871, states:

Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

- (2) The rule, as stated in the *Monell* case, allows Courts to limit a local government's § 1983 liability to those situations where an official policy or custom resulted in a constitutional or statutory violation. *Monell* 436 U.S. at 691, 694.
- (3) Legislators, when acting in their legislative capacities, enjoy absolute immunity from 42 USCA § 1983 damages. Board members have been found entitled to absolute immunity for their discipline of a fellow Board member. *Whitener v. McWaters*, 112 F. 3d. 740 (4th Cir. 1997). See, also, *Cooper v. Lee County Bd. of Supervisors*, 966 F. Supp. 411 (W.D. Va. 1997) regarding legislative immunity granted to Board members but not the Board, for discontinuance of benefits, supplemental to the Compensation Board's salary reimbursements, to an employee of a constitutional officer, who was of a different political party.
- (4) The administrative decisions of a council or board, however, are not subject to absolute immunity. In *Roberson v. Mullins*, 29 F.3d. 132 (4th Cir. 1994), the court of appeals held that the termination of a government employee was not within the traditional legislative province and, thus, the board members who voted to fire him were not entitled to absolute immunity.
- (5) The distinction between legislative and administrative powers is not always clear. However, budget decisions are generally legislative, and employment and personnel decisions are generally administrative. Courts usually focus on the impact of the action - the more general, the more likely the action is legislative; the more specific, the more likely it is administrative. *Alexander v. Holden*, 66 F.3d. 62 (4th Cir. 1995)
- (6) Some situations commonly the subject of § 1983 litigation:

- (a) Land use (see page 6)
- (b) Police (excessive force and related issues)
- (c) Operation of jails
- (d) Deprivation of equal protection, 42 U.S.C. § 1983
- (e) Inverse condemnation
- (f) Environmental, Superfund, or CERCLA.

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, et seq, ("CERCLA" or "Superfund"), was enacted in 1980. In 1986, Congress amended CERCLA through the Superfund Amendments and Reauthorization Act ("SARA"). CERCLA is administered and enforced exclusively by the U.S. Environmental Protection Agency ("EPA"). CERCLA, as amended, imposes several obligations and creates types of liabilities important to state and local governmental entities.

- (g) First Amendment and Freedom of Expression.

