

**THREE LESSONS ABOUT  
LEGAL LIABILITIES  
OF  
LOCAL GOVERNMENT ELECTED OFFICIALS**

**Presented at the**

**VML CONFERENCE FOR NEWLY ELECTED OFFICIALS**

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## **INTRODUCTION**

The purpose of my talk today is not really to teach you the answers to all of the legal issues that you will face as locally elected officials, but to educate you so that you can at least spot or identify these legal issues, as well as the resources necessary to address them. After all, you will be working with public agendas. You will have prior notice before you have to vote. You do not need know or memorize the correct answers to all of these potential legal issues, but it is critical that you have a familiarity with them so that you can access the resources available for researching potential solutions to these issues. For simplicity, I have reduced these lessons to three:

### **Lesson No. I. Be Resourceful.**

#### **A. Political Issues**

You can have political liability for many matters - everything from the failure to oppose re-zoning requests to conflicts of interest to political fallout for attending expensive publically funded out of town trips or conventions. VML is the best resource in Virginia for the issues confronting local governments. Use it. Read the "Virginia Town and City" Magazine, the Legal Resource, and other links on the VML website. Obtain VML publications and research papers on important issues confronting your locality. In order to understand the issues when they arise, use VML as a resource to research possible solutions to the issues of your locality. This is a challenging and important time in in our history. Our society has never been more polarized or troubled than today. Tell story of "A New Direction" in 1994 in City of Richmond.

#### **B. Legal Issues**

You can also have legal liability for many matters, including criminal and civil matters. Use Chuck Jones, Director of Claims at VML, as resource. Ask him questions and always provide notice of any potential claim to VML. Better to be safe than sorry. It is important for you to seek the advice of counsel, e.g. the City Attorney, Attorney General, or the VML appointed attorney.

### **Lesson No. II. Understand the defense of Sovereign Immunity.**

#### **A. The Original Grounds for Sovereign Immunity**

The history of this defense is rooted in Old British law. as well as the U.S. Supreme Court and Virginia Supreme Court decisions based on the premise of protecting the "King's purse."

**1. Different Rules Apply to Cities & Towns versus Counties. Absolute Sovereign Immunity exists for all negligence claims against Counties, but only for negligence claims against Cities and Towns arising out of “Governmental Activities.”**

Under the Virginia Constitution and Virginia Supreme Court case decisions, counties and their officials and employees enjoy sovereign immunity for all claims of negligence arising out of any activities, but not other claims like contractual or civil rights claims. On the other hand, cities and towns, as well as their employees and agents, enjoy sovereign immunity for any claims of negligence that arise out of activities that have been classified by the courts as “governmental activities,” but not for activities classified as “proprietary activities,” or contractual or civil rights claims. Generally speaking, governmental activities include activities undertaken for the common good of all citizens, and proprietary activities include activities that have not historically been provided by governments.

**a) Governmental Activities**

- (1) Police
- (2) Firefighting
- (3) Health and sanitation regulation, social services
- (4) Garbage removal
- (5) Landfills
- (6) Hospitals
- (7) Ambulance service
- (8) Jails
- (9) Planning
  - i. Selecting and adopting a plan for the construction of public streets or sidewalks
  - ii. Traffic control devices
- (10) Engineering, designing and planning of water and sewer systems
- (11) Legislative

(12) Emergency response

(13) Traffic signals and other traffic control devices

(14) Snow and ice removal

(15) Building code enforcement and inspections

(16) Water service for fire protection

(17) Storm drainage

(18) Public buildings

**b) Proprietary Activities**

(1) Streets and sidewalks

(2) 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)

(3) Sewer

(4) Market

(5) Electric utility

(6) Gas utility

(7) Rental of municipal property

(8) Airport

(9) Swimming pool

(10) Public housing

**B. Statutory Authorities for Immunity.**

In addition to the defense of sovereign immunity based upon U.S. Supreme Court and Virginia Supreme Court decisions, there are also a few Virginia statutes that provide sovereign immunity.

**1. Virginia Code § 15.2-1405. Immunity of locally elected officials 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.**

“No city or town which operates any park, recreational facility or playground shall be liable in any civil action or proceeding for damages resulting from any injury to the person or from a loss of or damage to the property of any person caused by any act or omission constituting ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such park, recreational facility or playground. Every such city or town shall, however, be liable in damages for the gross negligence of any of its officers or agents in the maintenance or operation of any such park, recreational facility or playground.”

**Lesson No. III. Understand that the exceptions swallow the rule of Sovereign Immunity.**

Finally, it is important for local government elected officials to recognize that local government entities and locally elected officials still have considerable exposure to legal liability; that sovereign immunity is a “bleeding edge” of liability defenses; and that there are a great number of lawsuits filed in order to continually challenge this defense, attempt to develop exceptions to sovereign immunity; and, thereby, provide monetary recoveries. The following lawsuits arose from the exceptions in question:

- 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 Copenney v. 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.

- M.** Public nuisance. Cite Charlottesville road block case.
- N.** 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)

#### O. 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 takings 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.

**P. 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

**Q. 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

**R. 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 v.



Dept. of Social Services of the City of New York, et al, 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, whereas 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)
  - (a) Police (excessive force and related issues)
  - (b) Operation of jails
  - (c) Deprivation of equal protection, 42 U.S.C. § 1983
  - (d) Inverse condemnation
  - (e) 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.

- (f) First Amendment and Freedom of Expression.

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