

2013

# The Dillon Rule and Sea Level Rise: An Analysis of the Impact of the Dillon Rule on Potential Adaptation Measures the City of Poquoson May Implement

Lauren Gill

---

## Repository Citation

Gill, Lauren, "The Dillon Rule and Sea Level Rise: An Analysis of the Impact of the Dillon Rule on Potential Adaptation Measures the City of Poquoson May Implement" (2013). *Virginia Coastal Policy Center*. 8.  
<https://scholarship.law.wm.edu/vcclinic/8>

**The Dillon Rule and Sea Level Rise:**  
An Analysis of the Impact of the Dillon Rule  
on Potential Adaptation Measures the City of  
Poquoson May Implement

Lauren Gill, J.D.  
Law School Graduate  
Virginia Coastal Policy Clinic  
at William & Mary Law School



**WILLIAM  
& MARY**  
*Law School*

**SPRING 2013**

## Contact Us

Please contact Shana Jones at [scjones@wm.edu](mailto:scjones@wm.edu) if you have comments, questions, or suggestions.



## About the Author

Lauren Gill, J.D., is a recent graduate from William & Mary Law School. She is currently a Law Fellow at the District Department of the Environment in Washington, D.C.. Ms. Gill served on the executive board of the Environmental Law Society for two years, was a Lead Articles Editor for the Law Review, and was a law clerk in the Office of Enforcement and Compliance Assurance at the U.S. Environmental Protection Agency one summer. Before attending law school, she worked in the development departments of two environmental non-profits in D.C., the Environmental Working Group and Conservation International. Ms. Gill graduated from the University of Virginia in 2005 with a Bachelor of Arts in Psychology.

## About the Virginia Coastal Policy Clinic

The Virginia Coastal Policy Clinic (VCPC) at William & Mary Law School provides science-based legal and policy analysis of environmental and land use issues affecting the state's coastal resources and educates the Virginia policy making, non-profit, military, legal and business communities about these subjects.

Working in partnership with Virginia scientists, law students in the clinic integrate the latest science with legal and policy analysis to solve coastal resource management issues. Examining issues ranging from property rights to federalism, the clinic's activities are inherently interdisciplinary, drawing on scientific, economic, and policy expertise from across the university. VCPC has a strong partnership with the Virginia Institute of Marine Science (VIMS) and Virginia Sea Grant.

VCPC is especially grateful to Virginia Sea Grant for providing generous funding to support our work as well as to the Virginia Environmental Endowment for providing funding to establish the clinic in fall 2012.

## A Note from the VCPC Director

VCPC received funding from the Virginia Environmental Endowment to produce a series of white papers analyzing legal issues Virginia localities may face as they respond and adapt to increased flooding caused by sea level rise. To focus the students' analysis, we selected two Virginia jurisdictions—Norfolk and Poquoson—to analyze. The students utilized facts from published reports and press accounts to inform their work. Although we focused on these two jurisdictions, the issues raised are broadly applicable to similarly situated cities in Virginia. The reader should be aware, however, that the legal issues that county governments may face might be different from those in the city government context.

Future work is likely to involve interviews, additional analysis, and engagement with the broader policy community about some of the issues raised. Adapting to flooding and sea level rise is a complex area. We have not identified all of the possible legal issues that may arise. Nor have we necessarily answered every possible legal question as part of the analysis that was conducted. We hope, however, that our white papers begin to answer some of the threshold questions facing Virginia localities at this time. We also anticipate that they lay the groundwork for in-depth work and identify areas of needed discussion and additional research. We therefore welcome any feedback on our work.

Finally, a special thanks goes to Chris Olcott, a rising third-year law student and Virginia Sea Grant Summer Fellow, for source-checking and editing this white paper. VCPC is also grateful to Virginia Sea Grant for funding the VCPC Summer Fellow program at William & Mary Law School.

## Introduction

Virginia is projected to experience at least 1.5 feet of sea-level rise and a 3-foot storm surge over the next 20-50 years, which will cause an increase in the frequency and severity of flooding events, leading to extensive damage to property, infrastructure, and the environment.<sup>1</sup> Poquoson, in particular, is extremely vulnerable to sea level rise due to its 116 miles of shoreline and the fact that the entire locality lies 10 feet above sea level.<sup>2</sup> Currently, however, floodplain management is based on historical, rather than projected, data. To adequately defend against sea level rise, localities must take actions that account for the increased rate of flooding that is expected to occur. In order to avoid a Dillon Rule challenge,<sup>3</sup> it's vital that local jurisdictions in Virginia have legal authority under the existing state land use, planning, and zoning enabling legislation to design and implement adaptive measures based on current and predicted climate change impacts, specifically projected flooding levels associated with sea level rise.

Despite this Dillon Rule concern, Virginia courts almost always uphold land use regulations and find that localities have acted within their authority, unless a statute specifically describes the limits of the authority and the locality has clearly exceeded an express limit.<sup>4</sup> In planning for future sea level rise, local governments will simply be considering future flood risks to inform how they exercise the zoning and planning powers they already have. Moreover, accounting for sea level rise involves consideration of criteria specifically authorized by the statute, such as the future needs of the community, safety of people and property, and the conservation of natural resources.<sup>5</sup> Sea level rise and increased flooding will inundate coastal lands, causing extensive damage to infrastructure and natural resources. Therefore, the following is applicable to the city of Poquoson:

- **The Virginia Code grants local governments' broad authority to consider flood risks when planning and zoning. Localities are urged to consider the "future requirements of the community" and the "conservation of natural resources" when drawing zoning ordinances.**<sup>6</sup>
- **Sea level rise will increase flooding, storm surge, and erosion, so considering future projections of sea level rise when exercising zoning powers is consistent with the legislature's intent to "promot[e] the health, safety, [and] general welfare of the public."**<sup>7</sup>
- **Poquoson is likely to meet substantive due process requirements as long as it advances evidence establishing a reasonable relationship between the zoning ordinance and a legitimate state interest--such as protection from flood impacts.**
- **Poquoson will be able to use its existing land use powers to implement adaptive measures to protect itself against the harmful effects of sea level rise that are consistent with the purposes and criteria enumerated by statute.**

### Background: How Virginia Localities Currently Regulate the Use and Development of Land and Floodplains

The Virginia General Assembly has delegated broad authority to local governments to establish comprehensive plans and zoning ordinances in order to guide the use and development of their land.<sup>8</sup> A locality creates a Comprehensive Plan to provide a general "blueprint" for future community growth and development, which is

then implemented through zoning ordinances.<sup>9</sup> Through these ordinances, local governments divide the community into districts (or zones) and then specify the particular uses and development patterns that are permitted in each district.<sup>10</sup>

Local governments are also authorized to regulate development in floodplains in order to comply with the National Flood Insurance Program. Under this program, local governments must adopt and enforce floodplain management ordinances to reduce future flood risks to new construction in Special Flood Hazard Areas<sup>11</sup> in order to qualify their community for federal flood insurance.<sup>12</sup> However, localities may impose more stringent regulations if they wish.<sup>13</sup>

Federal Emergency Management Agency (FEMA) identifies flood hazard areas throughout the U.S. on Flood Insurance Rate Maps using *historical* data, however, and thus, they do not consider the increased frequency and extent of future flooding, storm surge, and erosion that will affect Virginia in the coming years.<sup>14</sup> Therefore, current floodplain-regulation requirements in Poquoson do not accurately account for the increased flooding the community is likely to face as sea levels rise, especially considering the fact that 90 percent of Poquoson—including 100 percent of its critical facilities--lies within the 100-year floodplain.<sup>15</sup>

### How Poquoson Currently Regulates the Use and Development of Land

Poquoson’s Comprehensive Plan acknowledges climate change and encourages development that protects wetlands, controls erosion, elevates buildings and homes, and monitors sea level rise.<sup>16</sup> Poquoson has already implemented several ordinances relating to sea level rise adaptation and planning. The table below describes some of these selected ordinances:

Ordinance Number	Code Section	Function
1187	11.4-1 to 15	Environmental Management Area overlay district regulations; Chesapeake Bay Act compliance
1051	11.5-1 to 8	Floodplain Management zoning overlay district regulations
1099; 1265	34-151 to 181	Wetlands zoning ordinance regulating wetland development, permitting process
1120	34-71 to 78	Erosion and sediment control plans required for land disturbing activities
1408	42-31 to 33	Special Flood Hazard Area permitting requirements and creation authority
1408	42-71 to 76	Freeboard, construction, certification, and anchoring requirements for new /rebuilt homes
1408	42-101 to 108	Building and coastal protection regulations for new development in certain flood zones

## The Dillon Rule: Does it Pose a Problem to Local Action Concerning Future Projections of Sea Level Rise?

### A. The Dillon Rule

Virginia is a Dillon Rule state—as opposed to a Home Rule state<sup>17</sup>—which means that its localities and governing bodies can only take action where they have been delegated authority to do so by the Virginia Assembly.<sup>18</sup> In order to implement adaptation policies based on sea level rise, such as zoning, raising homes, tax incentives, or mandatory setbacks, local authorities must have enabling statutes authorizing their actions. Attempts to change development patterns through measures such as these may be limited by the Dillon Rule. Therefore, it’s important that this issue be resolved in order for Virginia’s localities to adequately address sea level rise.

A Dillon Rule analysis has two steps: first, it must be determined “whether the locality is enabled under any State law.”<sup>19</sup> This means that local governments may only exercise those powers that are either: (1) expressly granted by the legislature, (2) implied from an express grant, or (3) are essential in exercising those expressly granted powers.<sup>20</sup> One question that may arise is the level of specificity required in the enabling authority: must it enable the specific activity in question or is a general power to regulate land use sufficient?<sup>21</sup> At least in some circumstances, the Virginia Supreme Court has stated that “specificity is not necessary even under the Dillon Rule.”<sup>22</sup> If a power is not expressly granted, it can be implied from the express powers granted by the statute.<sup>23</sup> Questions of implied authority are analyzed by looking to legislative intent, which is “determined from the plain meaning of the words used.”<sup>24</sup>

The second step in a Dillon Rule analysis involves considering whether, when exercising its authority, the locality chose a method that is consistent with the statutory authorization.<sup>25</sup> If the enabling authority specifies the manner in which the authority is to be exercised, a locality may not use a different method than the one specified.<sup>26</sup> The Virginia General Assembly has identified the manner in which a locality may exercise its zoning power with great specificity in a number of statutes, including the following:

Code Section	Provision
VA. CODE § 15.2-2286.1	Clustering single-family dwellings
VA. CODE § 15.2-2296 et seq	Conditional zoning (proffers)
VA. CODE § 15.2-2305	Affordable housing programs
VA. CODE § 15.2-2316	Transfer development rights
VA. CODE § 15.2-2241-2242	Subdivision housing

Therefore, it’s important that a locality pay close attention to these specific methods of implementation when enacting its ordinances. If it exercises powers outside its delegated authority, it can be sued for violating the Dillon Rule, causing courts to invalidate its actions.<sup>27</sup>

Conversely, when the legislature has granted authority, but has not specified a method for implementing that power, localities have discretion to choose any reasonable method that is consistent with the statute’s purpose.<sup>28</sup> An example of state-enabling authority that is silent as to the method in which a locality can execute its granted power is Va. Code § 15.2-2280 concerning zoning ordinances. This statute broadly enables localities to “regulate, restrict, permit, prohibit, and determine” the use of land and structures, leaving the choice of implementation up to the locality, as long as the method chosen is reasonable.<sup>29</sup>

**B. The Delegations of Authority to Local Governments, Including Poquoson, to Regulate Land Use**

Virginia localities already have specific authority to construct dams, levees, and seawalls for the purpose of preventing flooding or tidal erosion.”<sup>30</sup> Structural adaptation measures such as these are expensive to build and maintain, however, and can also cause damage to neighboring properties and the environment by eroding beaches and inundating wetlands. Nonstructural measures, on the other hand, such as regulating land use, may be more valuable for local governments to use when adapting to sea-level rise.

Virginia’s localities have sufficient enabling authority to revise land use regulations to account for both present and future projections of sea level rise so that the Dillon Rule should not be a barrier to implementing most adaptation measures. The following chart lists statutes that provide the legal authority for local governments to enact regulations related to problems caused by sea level rise:

Statutory Authority	Description
VA. CODE § 15.2-970(A)	Construction of dams, levees, seawalls, etc.
VA. CODE § 15.2-2223	Comprehensive plan to be prepared and adopted; scope and purpose
VA. CODE § 15.2-2283	Purpose of zoning ordinances
VA. CODE § 15.2-2284	Matters to be considered in drawing and applying zoning ordinances and districts
VA. CODE § 15.2-2280	Zoning ordinances generally, including flood plains
VA. CODE § 15.2-2286(A)(7)	Amending/Repealing Zoning Ordinances and Maps

Some of these delegations of authority include:

- In formulating comprehensive plans, local governments should consider “surveys and studies of the existing conditions and *trends of growth* and of the probable *future requirements* of [the] territory.”<sup>31</sup> Plans may also designate areas for “conservation; ... recreation; ...flood plain and drainage; and other areas.”<sup>32</sup>
- Local governments may zone for the “general purpose of promoting the health, safety or general welfare of the public.”<sup>33</sup> In addition, ordinances should be designed to consider the following purposes: “to facilitate the creation of a convenient, attractive

and harmonious community”; “to protect against ... the loss of life, health or property from ... flood ... or other dangers”; and “to provide for the preservation of ... lands of significance for the protection of the natural environment.”<sup>34</sup>

- When creating zoning ordinances, local governments may consider “the current and future requirements of the community ... , the conservation of natural resources, the preservation of flood plains, ... and the conservation of properties and their values and the encouragement of the most appropriate use of land throughout the locality.”<sup>35</sup>
- Within each district, local governments can regulate the use and development of land and may specifically regulate the development in floodplains.<sup>36</sup>
- Authorizing that, “whenever the public necessity, convenience, general welfare, or good zoning practice requires, the governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or classifications of property.”<sup>37</sup>

Consequently, local governments have explicit authority to zone and plan for flooding—one of the major effects of sea level rise—as the Virginia Code grants local governments broad authority to consider flood risks when planning and zoning. Localities are urged to consider the “future requirements of the community” and the “conservation of natural resources” when drawing zoning ordinances. Sea level rise will increase flooding, storm surge, and erosion, so considering future projections of sea level rise when exercising zoning powers is consistent with the legislature’s intent to “promote the health, safety, [and] general welfare of the public.”

Moreover, the Virginia General Assembly has recognized the state interest in flood control and “the management of flood-prone areas in a manner which prevents injuries to persons, damage to property and pollution of state waters... and supports and encourages those measures which prevent, mitigate and alleviate the effects of stormwater surges and flooding.”<sup>38</sup> The inclusion of the word “prevent” indicates a clear legislative intent for localities to consider future flood risks in their flood management programs.

Additionally, the Code does not describe the method in which flood risks should be calculated; flood plains are simply defined as “those areas ... which are likely to be covered by floodwaters” and flood hazard areas are those areas susceptible to flooding.<sup>40</sup> Thus, according to the second step of the Dillon Rule, localities can choose any reasonable method for assessing flood risks, as long as the method is consistent with the statute’s purpose of reducing the harmful effects of flooding. Accounting for future risks of sea level rise fulfills the statutory purposes to consider the future needs of the community,<sup>41</sup> protect people and property from damage or harm,<sup>42</sup> and conserve natural resources.<sup>43</sup>

### **C. Virginia Courts Generally Defer to Localities When Applying the Dillon Rule**

Virginia localities, particularly Poquoson, may fear that the Dillon Rule limits their ability to prepare for the harmful effects of sea level rise. In practice, however, “Virginia’s courts are generally deferential to localities when they regulate land use to protect the public health, safety, and welfare.”<sup>44</sup> The Supreme Court of Virginia has been reluctant to constrain localities in their regulation of land use<sup>45</sup> and have

described the authority delegated to localities in Virginia Code § 15.2-2280, the general zoning provision, as “broad authority.”<sup>46</sup> According to one study, “Virginia courts have only struck down land use ordinances when localities have either implied a power<sup>47</sup> or used a criterion not authorized by the statute.”<sup>48</sup> As has already been discussed, implementing adaptation measures in anticipation of sea level rise would be within the powers and criteria delegated by statute.<sup>49</sup> Therefore, although there is no explicit instruction from the legislature to mitigate the impacts of sea level rise, the Dillon Rule is unlikely to prohibit localities such as Poquoson from implementing adaptive measures.

Localities’ consideration of sea level rise in their zoning ordinances may still be challenged by opponents citing case law in which Virginia courts have found a Dillon Rule violation. Opponents might argue that preparing for sea level rise was not considered by the state legislature when flood plain provisions were enacted, and so therefore, state legislatures cannot regulate according to predicted flood risks. In *Commonwealth v. County Board of Arlington*, for example, the Virginia Supreme Court held that the county exceeded its delegated power to supervise schools by entering into collective bargaining agreements with labor organizations.<sup>50</sup> This case, however, involved a provision of benefits that was not part of the legislature’s consideration when it delegated power to supervise schools, whereas updating flood regulations is an exercise of a locality’s police power.<sup>51</sup> Additionally, the county tried to imply a power not traditionally granted to it, whereas mitigating the effects of sea level rise involves exercising traditional land use powers.

It also appears that the Virginia Supreme Court would allow a locality to implement regulations based on future flood risks associated with sea level rise. In *Board of Supervisors of Fairfax County v. Robertson*, the Court upheld a county zoning regulation that required a 200 foot setback, based on projected noise and traffic increases.<sup>52</sup> The residential home builder who applied to be exempt from this setback requirement argued that the county’s denial of their application was “arbitrary, capricious, and unreasonable”.<sup>53</sup> The court disagreed, stating that the county presented sufficient evidence, including projected noise and traffic levels, which would make the denial of the application reasonable and within their authority.<sup>54</sup>

There may also be a Dillon Rule issue when a statute provides with great specificity the manner in which the power must be exercised. For example, in *Sinclair v. New Cingular Wireless*, the Albemarle County zoning ordinance authorized the planning commission to approve “critical slopes waivers.”<sup>55</sup> The Virginia Supreme Court concluded that the broad authority granted in Va. Code § 15.2-2280 did not allow the board of supervisors to delegate a legislative function, such as the approval of critical slope waivers, to the planning commission. The General Assembly, does allow a board of supervisors to delegate certain legislative functions, but only if specified by statute.<sup>56</sup> For example, a board of supervisors is authorized to delegate approval of zoning modifications to a zoning administrator in Va. Code § 15.2-2286(A)(4).<sup>57</sup>

Similarly, in *Board of Supervisors of Augusta County v. Countryside Investment Co.*, the court invalidated a subdivision ordinance establishing the lot size and floor space of parcels that was not based on the enabling authority in Virginia Code § 15.2-2241 or 15.2-2242 for violating the Dillon Rule.<sup>58</sup> The subdivision enabling authority, however, in those provisions provides with great specificity the powers granted to a

board of supervisors under the Virginia Land Subdivision and Development Act,<sup>59</sup> as opposed to Va. Code 15.2-2280, which grants localities broad authority in the regulation of land.

When an enabling statute states with specificity the criteria to be considered, a locality must be sure that it does not enact ordinances that are more expansive than the enumerated requirements stated in the statute. For example, in *Marble Technologies v. City of Hampton*, the city's zoning ordinance used criteria established by the federal government for designating areas as resource protection areas under the Chesapeake Bay Preservation Act.<sup>60</sup> The issue was whether the city was authorized to use this federal criterion under the state enabling authority even though Va. Code § 10.1-2200(A)(ii) and 10.1-2109 required that localities use the criteria established by the State.<sup>61</sup> The court concluded that the city "lacked express or implied authority to consider" federal criterion and therefore exceeded its authority under the Act.<sup>62</sup> This should not pose a problem for Poquoson when enacting ordinances related to sea level rise, however, since the state has not yet established a criterion for sea level rise. It is therefore unlikely that a court would prohibit a local government from regulating for the increased risk of flooding posed by sea level rise.

### Supporting Zoning Changes with Sufficient Evidence

When updating zoning ordinances to account for anticipated projections of sea level rise, local governments must ensure that the ordinance does "not arbitrarily or capriciously deprive a person of the legitimate use of his or her property,"<sup>63</sup> or else they may violate a person's substantive due process rights. In the context of land use, substantive due process does not forbid reasonable regulation of the use of private property, but instead ensures "fairness in the scope and implementation of the zoning regulation."<sup>64</sup> Localities must justify their regulations with a legitimate governmental interest.

Courts presume that land use regulations are valid. Because of its narrow scope, it is very difficult to maintain a substantive due process claim.<sup>65</sup> Its protection covers only an action that is "so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or by any post-deprivation state remedies."<sup>66</sup> Substantive due process claims are decided under higher standards than procedural due process, and are thus, more difficult to prove.

If challenged on substantive due process grounds, however, localities must show evidence that the more stringent zoning regulations will protect the health and welfare of the community from the dangers of floods.<sup>67</sup> It is unclear what type of evidence is specifically needed to justify floodplain regulations: possible types could include professional opinion, findings that the regulation protects public safety, that it conserves resources, or is based on newly discovered environmental hazards or climate data.<sup>68</sup>

Climate data may be challenged in court as being unreliable or uncertain. In order to successfully rely on this data and ensure compliance, localities should "confirm that their zoning regulations and zoning decisions advance at least one of the purposes of zoning in Va. Code § 15.2-2283 and are supported by at least one of the relevant factual considerations in § 15.2-2284, including, in particular, the comprehensive

plan.”<sup>69</sup> Poquoson is likely to meet substantive due process requirements as long as it advances evidence establishing a reasonable relationship between the zoning ordinance and a legitimate state interest--such as protection from flood impacts.

### Specific Land Use Tools that Poquoson Could Use to Adapt to Sea Level Rise

Poquoson has numerous land use tools at its disposal to mitigate flood risks from sea level rise, including setbacks, transfer development rights, tax incentives, and condemnation; some of which have already been implemented through ordinances

Land Use Tool	Statutory Authority
Setbacks <ul style="list-style-type: none"> <li>Establish a minimum distance development must be from a flood hazard boundary</li> </ul>	VA. CODE § 15.2-2279: “regulate the building of houses in the locality, including... minimum setbacks” The Chesapeake Bay Preservation Act: requires development adjacent to the Bay to include a 100 foot buffer from the edge of wetlands, shores, or streams. Va. Code 10.2-2100, et seq. <ul style="list-style-type: none"> <li>Poquoson is complying with CBPA in Code of Ordinances, sec. 11.4-1 to 4-15.</li> </ul>
Transfer Development Rights <ul style="list-style-type: none"> <li>Localities may designate areas as “sending” and “receiving” zones, where property owners in sending zones can sell development credits to property owners in receiving zones</li> </ul>	VA. CODE § 15.2-2316.1: “Any locality... may...establish... standards for the transfer of development rights...”
Nonconforming Use Provisions <ul style="list-style-type: none"> <li>Require buildings in floodplain to come into compliance with standards</li> </ul>	Poquoson Ordinance Number 1187, sec. 11.4-1 to 15
Down Zoning	VA. CODE § 15.2-2286
Condemnation	VA. CODE § 15.2-2284
Use value assessments	VA. CODE § 58.1-3230.
<ul style="list-style-type: none"> <li>Wetlands tax exemptions</li> </ul>	VA. CODE § 58.1-3666.
<ul style="list-style-type: none"> <li>Voluntary agreements</li> </ul>	VA. CODE § 15.2-2286(11): “A zoning ordinance may include...provisions for allowing the locality to enter into a voluntary agreement with a landowner that would result in the downzoning of [his] ...property in exchange for a tax credit”
<ul style="list-style-type: none"> <li>TDR tax credits</li> </ul>	VA. CODE § 15.2-2316.2(C)(3): “A locality may in its ordinance for the owner of such development rights to make application to the locality for a real estate tax abatement for a period of 25 years.”
<ul style="list-style-type: none"> <li>Rolling Easements</li> </ul>	VA. CODE ANN. § 15.2-1800

## Conclusion

There are many sources of legal authority that enable localities to update their comprehensive plans and zoning ordinances to consider the current and future effects of sea level rise. Sea level rise will cause tremendous damage to buildings, homes, and other city infrastructure, as well as destroy natural resources that provide numerous “ecological, recreational, and economic benefits.”<sup>70</sup> Using land use powers to mitigate these impacts is consistent with the goals and criteria articulated by the Virginia Code, especially since the Virginia General Assembly has recognized the threat of sea level rise and supports measures that prevent or mitigate its impacts. Therefore, the Dillon Rule will not pose a problem to Poquoson in its adaptation to sea level rise.

## Notes

- 1 VIRGINIA INSTITUTE OF MARINE SCIENCE, RECURRENT FLOODING STUDY FOR TIDEWATER VIRGINIA, S.J.R. 76, at 8-13 (2013).
- 2 CITY OF POQUOSON, MULTI-HAZARD MITIGATION PLAN 31 (2009) [hereinafter MULTI-HAZARD MITIGATION PLAN].
- 3 The Dillon Rule is discussed in-depth *infra* Part III.
- 4 See *infra* Part III.b & III.c and accompanying text.
- 5 See VA. CODE § 15.2-2283, 15.2-2284.
- 6 *Id.*
- 7 See VA. CODE § 15.2-2283.
- 8 ANDREW C. SILTON & JESSICA GRANNIS, GEORGETOWN CLIMATE CENTER, VIRGINIA CASE STUDY: STEMMING THE TIDE: HOW LOCAL GOVERNMENTS CAN MANAGE RISING FLOOD RISKS 2 (May 2010, rev. Jan. 2013) [hereinafter GEORGETOWN CLIMATE]; see also VA. CODE § 15.2-2223 (comprehensive plan process).
- 9 GEORGETOWN CLIMATE, *supra* note vi, at 2.
- 10 *Id.*
- 11 A Special Flood Hazard Area is defined as any land that “would be inundated by a flood having a 1-percent chance of occurring in a given year.” FEDERAL EMERGENCY MANAGEMENT AGENCY, ANSWERS TO QUESTIONS ABOUT THE NFIP, 2 (Mar. 2011).
- 12 GEORGETOWN CLIMATE *supra* note vi, at 3.
- 13 *Id.*; see also 42 U.S.C. § 4022(b)(1)(A).
- 14 GEORGETOWN CLIMATE, *supra* note vi, at 3.
- 15 MULTI-HAZARD MITIGATION PLAN, *supra* note ii, at 40.
- 16 CITY OF POQUOSON, COMPREHENSIVE PLAN 2008-2028, at 5-2 to 5-3 (2008).
- 17 By contrast, localities in a Home Rule state are found to possess broad authority to address matters of local concern even if they are not expressly enabled from the state legislature. GEORGETOWN CLIMATE, *supra* note vi, at FN 19.
- 18 *Id.*
- 19 GREG KAMPTNER & LARRY DAVIS, THE ALBEMARLE COUNTY LAND USE LAW HANDBOOK 5-2 (Mar. 2012) [hereinafter ALBEMARLE HANDBOOK].
- 20 City of Virginia Beach v. Hay, 258 Va. 217, 222 (1999); Commonwealth v. County Board of Arlington County, 217 Va. 558, 575 (1997) (“Municipal governments have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable.”).
- 21 ALBEMARLE HANDBOOK, *supra* note xvii, at 5-2.
- 22 Res. Conservation Mgmt., Inc. v. Bd. Of Supervisors of Prince William County, 238 Va. 15, 22 (1989) (upholding a zoning ordinance that prohibited landfills in certain districts even though the enabling statute did not specifically list this criteria).
- 23 ALBEMARLE HANDBOOK, *supra* note xvii, at 5-2; see also Marble Techs. v. City of Hampton, 279 Va. 409, 418 (2010).
- 24 City of Richmond v. Confere Club of Richmond, 239 Va. 77, 80 (1990).
- 25 ALBEMARLE HANDBOOK, *supra* note xvi, at 5-3.
- 26 If the enabling authority specifies the manner in which the authority is to be exercised, a locality may not select any other method. *Id.*
- 27 Arlington County v. White, 259 Va. 708, 714 (2000).
- 28 See *Id.* at 712; see also Hay, 258 Va. at 221.
- 29 See Advanced Towing Co., LLC v. Fairfax County Board of Supervisors, 280 Va. 187, 193 (2010).
- 30 VA. CODE § 15.2-970(A). However, this provision does not authorize the taking of private property without just compensation.
- 31 VA. CODE § 15.2-2223(A) (emphasis added).

- 32 VA. CODE § 15.2-2223(C)(1).
- 33 VA. CODE § 15.2-2283.
- 34 *Id.*
- 35 VA. CODE § 15.2-2284.
- 36 VA. CODE § 15.2-2280.
- 37 VA. CODE § 15.2-2286 (A)(7).
- 38 VA. CODE § 10.1-658.
- 39 VA. CODE § 10.1-600.
- 40 ALBEMARLE HANDBOOK, *supra* note xvii, at 5-3.
- 41 *See supra* note xxxi.
- 42 *Id.*
- 43 *See supra* note xxxiii.
- 44 GEORGETOWN CLIMATE, *supra* note vi, at 6.
- 45 City of Chesapeake v. Gardner Enter., 253 Va. 243, 247 (1997) (“The statute must be given a rational interpretation consistent with its purposes, and not one which will substantially defeat its objectives.”).
- 46 Tribble v. Bland, 250 Va. 20, 24 (1995).
- 47 *See* Cupp v. Bd. Of Supervisors of Fairfax County, 227 Va. 580 (1984); *see also* Bd. Of Supervisors of Augusta County v. Countryside Inv. Co., 258 Va. 497 (1999).
- 48 GEORGETOWN CLIMATE, *supra* note vi, at 6.
- 49 *See supra* Part III.b.
- 50 Commonwealth v. County Board of Arlington County, 217 Va. 558, 576-81 (1977).
- 51 VA. CODE § 15.2-2283.
- 52 Bd. of Sup’rs of Fairfax Cnty. v. Robertson, 266 Va. 525, 528 (2003). The Court held that the county acted within their authority when mandating a 200-foot setback requirement on land zoned as Z-3, based on several factors, including future noise levels and increased traffic.
- 53 *Id.* at 538.
- 54 *Id.*
- 55 Sinclair v. New Cingular Wireless PCS, LLC, 283 Va. 567, 577 (2012).
- 56 *Id.* at 582.
- 57 VA. CODE § 15.2-2286(A)(4); *See also*, Sinclair v. New Cingular Wireless PCS, LLC, 283 Va. 567, 582 (2012).
- 58 Bd. Of Supervisors of Augusta County v. Countryside Inv. Co., 258 Va. 497 (1999).
- 59 Bd. of Sup’rs of Augusta Cnty. v. Countryside Inv. Co., L.C., 258 Va. 497, 504 (1999).
- 60 Marble Techs. v. City of Hampton., 279 Va. 409, 421 (2010).
- 61 ALBEMARLE HANDBOOK, *supra* note xvii, at 5-5.
- 62 *Id.*
- 63 The Virginia Constitution states that “no person shall be deprived of his life, liberty, or property without due process of law.” VA. CONST. ART. 1, § 11; *see* ALBEMARLE HANDBOOK, *supra* note xvii, at 6-1, 6-4.
- 64 ALBEMARLE HANDBOOK, *supra* note xvii, at 6-1.
- 65 *See* Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 67 (4<sup>th</sup> Cir. 1992) (dismissing substantive due process claim arising from the city’s subdivision regulations).
- 66 Rucker v. Hartford County, 946 F.2d 278, 281 (4<sup>th</sup> Cir. 1991); *see also* ALBEMARLE HANDBOOK, *supra* note xvii, at 6-4.
- 67 *Rucker*, 946 F.2d at 281.
- 68 GEORGETOWN CLIMATE, *supra* note vi, at FN 66.
- 69 ALBEMARLE HANDBOOK, *supra* note xvii, at 6-4.
- 70 *Id.* at 3-5

Cover Image Source:  
National Weather Service,  
Hurricane Isabel Photo  
Gallery