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2013, Adaptive Planning for Flooding and  
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Virginia Coastal Policy Center Annual  
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### Maintaining Services: A Duty Today, Potential Issues Tomorrow?

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# ADAPTING TO SEA LEVEL RISE

LEGAL ISSUES FOR LOCAL GOVERNMENTS



# ISSUE SPOTTING

- Dillon Rule
- Tort
- “Takings”
- ADA?



# DUTY TO MAINTAIN SERVICES

A City <u>May</u> be Liable For ....	A City Is <u>Unlikely</u> to be Liable For ....
Failure to maintain roads*	Failure to maintain discontinued roads
Failure to maintain sewer services	Failure to maintain drainage, erosion, and flood control works
Failure to maintain water services	Discretionary decisions about roads, water, sewer, and emergency services
Failure to maintain emergency services	Failure to provide emergency services.

\*There is a process for discontinuing roads under Va. Code §15.2-2006.

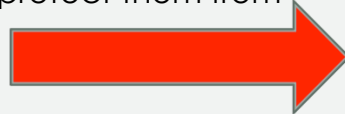
## A City May be Liable For ....

### **Failure to maintain roads.**

Cities have a duty to maintain roads in safe condition under the common law. The duty extends to dangerous conditions adjacent to a road that could affect road travel. A city does not have to ensure road safety immediately after emergencies.

### **Failure to maintain sewer services.**

Virginia courts require cities to maintain sewer systems. While sovereign immunity protects cities from liability for planning and design, it doesn't protect them from failure to maintain.



### **Failure to maintain water services.**

Virginia courts require cities to maintain water services.

**Failure to maintain emergency services.** Va. Code §15.2-955 requires localities to "seek to ensure emergency medical services are maintained throughout the entire locality." *Note: this statute was enacted after the most recent Va. Supreme Court case on this issue, which held that the city should have sovereign immunity in this instance.*

## A City Is Unlikely to be Liable For ....

**Failure to maintain a discontinued road.** (While discontinuing a road should not incur tort liability, takings – if complete access is lost – should be analyzed.)

### **Failure to maintain drainage, erosion, and flood control works.**

**SOVEREIGN IMMUNITY.** Va. Code § 15.2-970 immunizes cities from negligent design, construction, performance, **maintenance**, and operation of these works.

### **Discretionary decisions about roads, water, sewer, and emergency services.**

**SOVEREIGN IMMUNITY.** Cities can claim sovereign immunity for governmental functions but not proprietary functions. Governmental functions are discretionary or performed for the public's benefit; proprietary functions are ministerial or performed for the muni's benefit.

### **Failure to provide emergency services.**

**SOVEREIGN IMMUNITY.** Although Va. Code §15.2-955 requires localities to "seek to ensure emergency medical services are maintained throughout the entire locality," this statute was enacted after the most recent Va. Supreme Court case on this issue, which held that the city should have sovereign immunity if services are not delivered in time. So a little unclear, although courts cite *Edwards* with approval.



## *BACKGROUND*



- Fairfax homeowners sued County and VDOT after homes flooded during a severe storm in 2006
- Subdivision located on Cameron Run, a tributary stream of the Potomac
- In less than two hours, flow increased from under 2 feet to 14 feet
- Floodwaters blocked on the north by concrete Beltway
- Flooding “engulfed” subdivision, “filling basements with sewage-laced water”

# PLAINTIFFS ALLEGE....

- Flood was caused by the acts or omissions of the County and VDOT....



# BECAUSE....

- In 1960s, VDOT straightened a curved section of Cameron Run, relocated it 1150 feet closer to the subdivision, reducing its width by 38%
- VDOT “removed the natural sponge” (marsh and wetlands) for floodwater by adding solid fill and draining, and the presence of the beltway created a berm, forcing water south.... AND
- Flooding worsened by the accumulation of sediment due to VDOT and the County’s **failure to dredge or otherwise maintain the channel**, the construction of Rt. 1, and the encroachment on the flood plain caused by commercial and other development



## AND....

A 2007 Army Corps of Engineers Report found that 5 to 6 ft of sediment had accumulated from 1965-1999 and without such accumulation:

- Flood elevations would have been 1.2 to 2 ft lower
- Construction of Rt. 1 contributed 1 ft
- Commercial development contributed 2.5 to 5 in.

Court finds that VDOT and the County were aware of the problem by “multiple reports and memoranda....”

## VA. SUPREME COURT

- A single occurrence of flooding can support a “takings” claim
- Not an “Act of God” because it was foreseeable that the channel was subject to heavy flows
- Concluded the Plaintiff’s had standing to sue because their allegation rests on VDOT’s ***failure to maintain the channel***

## VA. SUPREME COURT

“When the government constructs a public improvement, it does not thereby become an insurer in perpetuity against flood damage to neighboring property. And nothing in today’s opinion should be read as imposing such an obligation on VDOT. But under our precedents, a property owner may be entitled to compensation if the government’s operation of a public improvement damages his property.”

# DISSENT

You are allowing ordinary tort claims, which are barred by sovereign immunity, to proceed as constitutional damage claims – and “the actions permissible against the government now appear limitless....”

What's next? We'll see....

This case is an outlier. Only Arkansas has a similar holding under similar facts.

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