

The Potential Impact of Dillon's Rule Doctrine on Local Government Responses to Coastal Flooding and other Aspects of Sea Level Rise

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Identifying and Implementing Effective Adaption Policies Responding to Recurrent Coastal Flooding and Storm Damage

- Deciding the nature and degree of these problems.
- Devising strategies and techniques that will reduce future harms to local communities.
- Designing a multi-faceted strategy combining government, private industry, NGOs and academic efforts.
- Recognizing the primary importance of state and local governments in policy implementation.
- Identifying specific local government planning and actions that can be effective.



If Potentially-Effective Strategies are Identified, Will They be Put into Effect?

- Depending upon the political will of the local government.
- Depending upon the popular support for the particular strategy.
- Depending upon the capacity of the local government staff to carry out the plan.
- Depending upon the local government's array of legal authority to act. **KEY POINT.**



Local Governments as Legislatively-Dependent Entities

- Fundamental questions of municipal authority- the basic inquiry.
- Central point – local governments have no inherent powers to govern.
- Governing power exists through delegation from the Virginia General Assembly.
- Legislative control over local policy autonomy.
- Enabling statutes (and charter provisions).
- Limited power to address public policy concerns.
- Narrow scope of regulatory independence.

What Authority Does a Local Government Authority Have?

- Initially a focus on statutory interpretation - essentially a legal question and not a policy question.
- Not a general inquiry into statutory interpretation.
- Rather, a legal interpretation set against a preference for state legislative control and clear delegation.
- The legal analysis has been called “Dillon’s Rule.”
- Dillon’s Rule is a special form of legal analysis for grants of local government authority.
- Who was Dillon? Where did this rule come from? How does it work?



Dillon's Rule in America

- John Forrest Dillon was an Iowa Supreme Court and Eighth Circuit Court of Appeals judge in the 1860s & 1870s.
- Judge Dillon was also a professor at Columbia and Yale Law Schools and the President of the ABA in the 1890s.
- Dillon wrote an influential treatise on Local Government Law in 1872 called the Treatise on the Law of Municipal Corporations.
- This treatise was published in 5 editions and was relied on by the U. S. Supreme Court in *Hunter v. City of Pittsburgh* (1906).



Dillon's Rule in America

- Dillon's Rule was first expressed in an 1868 Iowa case:
 - “Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control.”
 - The principle of state supremacy over local governments.
 - A thoroughly 19th century view of local governments as agencies of state government.



The Application of Dillon's Rule in Virginia

- Judge Dillon's 19th Century treatise lives today in contemporary Virginia jurisprudence.
- First followed in *City of Winchester v. Redmond* (1896) holding that no city authority existed for a city council to give rewards leading to the conviction of arsonists.
- A court-made rule of law in Virginia.
- A non-constitutional, non-statutory rule for interpreting local government authority.
- An attempt to reverse Dillon's Rule for cities and certain counties by constitutional amendment failed in 1970.



Contemporary Application of Dillon's Rule in Virginia

- Strong affirmation of support for the doctrine in Virginia Supreme Court cases.
- Commonwealth v. County of Arlington (1977) is key case setting forth strong adherence in Virginia law.
- Many cases have since applied Dillon's Rule in response to challenges to local government actions.



The Dillon's Rule Canon

- Dillon's Rule grants localities and their governing bodies **ONLY** the following powers:
 - Those expressly granted by the General Assembly.
 - Those necessarily or fairly implied from express powers.
 - Those that are essential and indispensable to the exercise of express powers.
- When there is doubt concerning local governing powers, doubt will be resolved against the existence of the authority.



The Significance of the Dillon's Rule Challenge to Local Government Action to Combat Coastal Flooding and other Aspects of Sea Level Rise

- Scope of power is crucial to understand a local government's governing authority.
- Having a clear assessment of the limits of planning and regulatory authority is indispensable to effective action.
- Being aware that the exercise of an unauthorized power is a legal nullity or *ultra vires* action.
- Exercises of local government power outside of its authorized scope will be enjoined by courts.
- Steep political cost for officials who support local government actions that are found to exceed authority.
- Potential damage liability may exist for taking knowingly unauthorized governmental actions.



What Recent Dillon's Rule Jurisprudence Tells Us About the Scope of Local Government Authority

- Dillon's Rule challenges to Local Government action are common and seven cases have reached the Virginia Supreme Court in the last five years.
- Approximately half of recent Dillon's Rule challenges have been successful in rejecting local government assertions of authority.



The Factual Context for Recent Virginia Supreme Court Decisions Considering Dillon's Rule Issues

- Contexts for Dillon's Rule challenges litigated since 2000 include:
 - Planning Commission "waiver" power - Struck down.
 - Towing ordinance geographic limits - Upheld.
 - Chesapeake Bay Act RPA definitions - Struck down.
 - Extraterritorial planning powers - Struck down.
 - Payment of Board of Zoning Appeals legal fees - Struck down.
 - Planning Commission exceptions - Upheld.




Implications for Local Government Flooding and Sea Level Rise Programs

- Dillon’s Rule is a rule of “strict construction.”
- Without a clear delegation, there is no presumption that a local governing body has authority to enact an ordinance.
- The “reasonable selection of method” principle only applies when there is express authority to act.
- Courts will continue to closely interpret statutory language to discern the meaning of delegated authority.
- Future statutes need to be clearly drafted with precision reflecting important policy choices and delegating clear authority to local governments.



Marble Technologies, Inc. v. City of Hampton (2010): A Cautionary Tale for Consideration

- Implementation of the Chesapeake Bay Preservation Act by ordinance of the City of Hampton.
- Expansion of the Resource Protection Area (RPA) buffer area to include lands in the Coastal Barrier Resources System.
- Landowner challenge to the application of the Chesapeake Bay Act rules since their land fell within the new RPA.
- Landowner lawsuit against the City of Hampton alleged a “violation of Virginia law and Dillon’s Rule.”
- Circuit court found in favor of the City finding both express and implied authority to expand the RPA buffer.



Marble Technologies, Inc. v. City of Hampton (2010): A Cautionary Tale to Consider (continued)

- Supreme Court of Virginia reversed with judgment entered for the landowners.
- Strong language against local government autonomy (“no element of sovereignty” and “convenient agencies” for the state).
- Any “reasonable” doubt about whether local government power exists “must be resolved against the local governing body.”
- No express or implied authority to designate RPAs based on “criteria established by the federal govt.”
- City’s RPA amendments are “void.”



Marble Technologies, Inc. v. City of Hampton (2010): A Cautionary Tale to Consider (continued)

- The court completely ignored the text of the Chesapeake Bay Preservation Act's direction that the city follow the State's administrative regulations.
- The court failed to find any express or implied authority in the Chesapeake Bay Preservation Act to expand the RPA.
- No ability to employ the “reasonable selection of method” corollary to Dillon's Rule. Key point.
- No attempt to find local government authority in any general statutory language nor general city power.



Questions?

Thank you for your attention.

I will be happy to answer any questions.