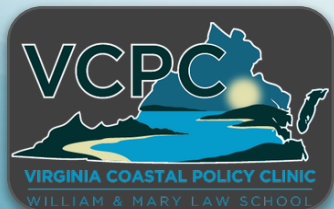




# Potential Liability for Failure to Adapt to Recurrent Flooding

*Applying the Legal Framework of the Farmers Insurance Group's Lawsuit Against Chicago and Chicago Municipalities to Norfolk and Virginia*

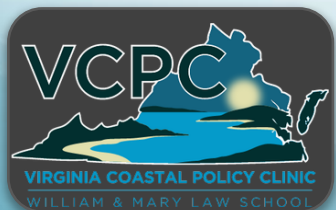


Virginia Coastal Policy Clinic Intern  
James M. Andris, Jr.

# FARMERS' LAWSUIT

## Legal Framework

1. Negligence
2. Negligence Per Se
3. Unlawful Government Takings

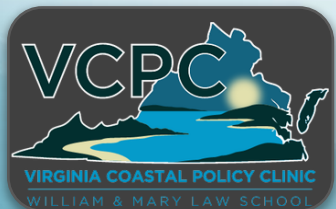


# NEGLIGENCE:

## ESTABLISHING THE MUNICIPALITY'S DUTY

### Chicago's Climate Change Action Plan

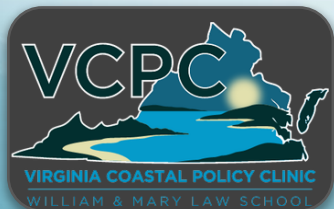
- Authorized by Mayor Daley
- Product of a multi-stakeholder task force
- Made several *promises*, including:
  - Development of a new watershed plan, and
  - Additional support to the “aging water infrastructure”



# NEGLIGENCE:

## ESTABLISHING THE MUNICIPALITY'S DUTY

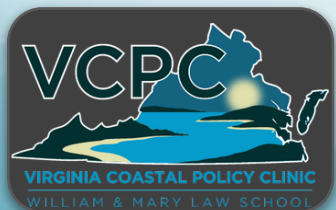
Argument: Formal recognition of climate change and a commitment to act should serve as a factor of foreseeability, leading to the creation of a duty.



# NEGLIGENCE: ESTABLISHING THE MUNICIPALITY'S DUTY

## Governor's Commission on Climate Change

- Makes *recommendations*, but still recognizes the dangers of increased severe weather events and climate change
  - e.g., “Stormwater systems will need to be designed to handle larger flows with increased stormwater intensity”

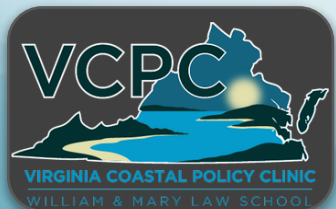


# NEGLIGENCE:

## RELEVANT COMMON LAW DUTY IN VA

- At common law, Virginia municipalities have a *common law duty to maintain sewer systems*
  - “There is a municipal liability where the property of private persons is flooded, either directly or by **water** being set back, when this is the result of ... the negligent failure to keep [sewers] in repair and free from obstructions.”

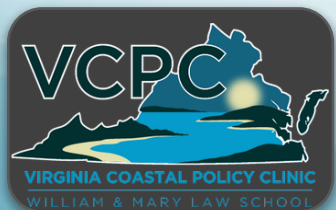
-Robertson v. Western Virginia Water Authority, 287 Va. 158, 752 S.E.2d 875 (2014)





# NEGLIGENCE PER SE:

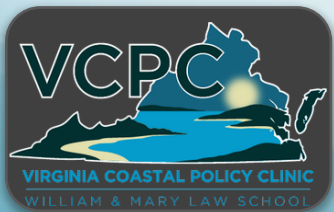
- Virginia Code § 15.2-970-
  - Municipalities “*may* construct a dam, levee, seawall, or other structure or device . . . the purpose of which is to prevent tidal erosion, flooding or inundation [of the municipality].”
  - Also bars “any action at law or suit in equity . . . because of, or arising out of, the design, maintenance, performance, operation or existence of [such systems].”





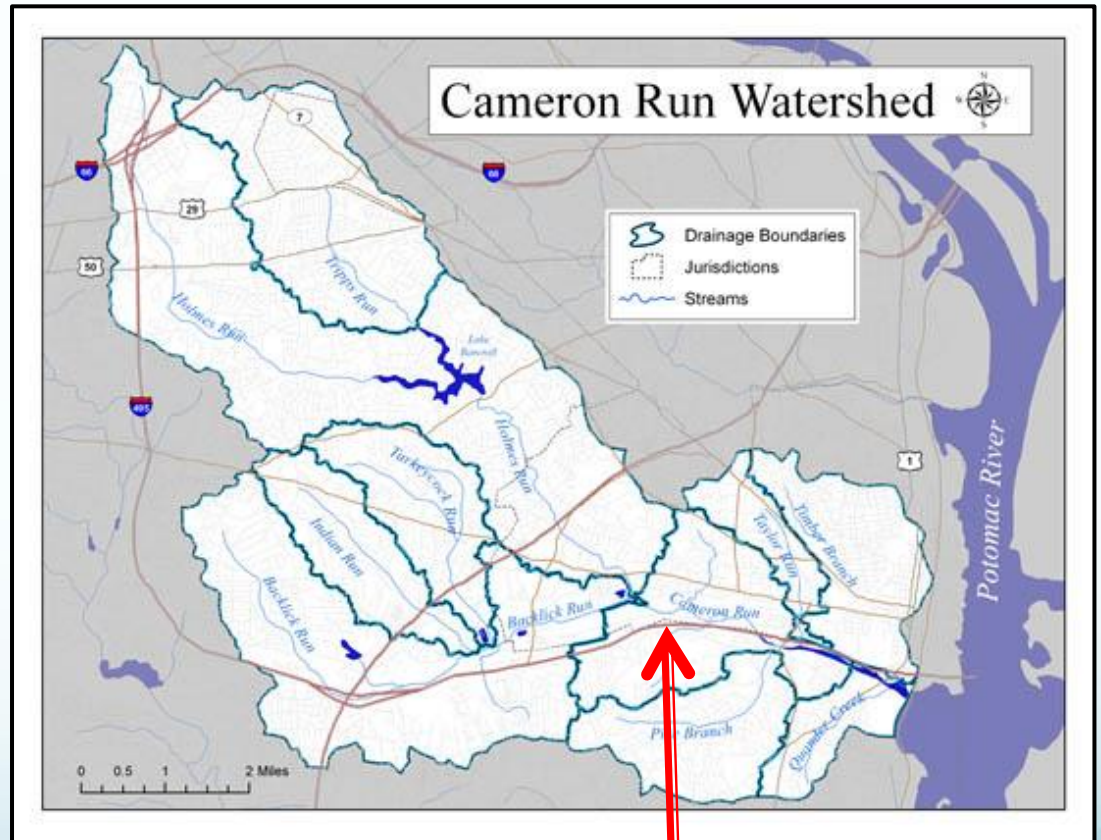
# TAKINGS CLAIM:

- Virginia Constitution Article 1, Section 11-
  - “No private property shall be damaged or taken for public use without just compensation to the owner thereof.”
- Relevant Case Law
  - Livingston v. Va. Dep’t of Transp., 284 Va. 140, 726 S.E.2d 264 (2012).
  - Jenkins v. County of Shenandoah, 236 Va. 467, 436 S.E.2d 607 (1993).
  - Hampton Roads Sanitation District v. McDonnell, 234 Va. 235, 360 S.E.2d 841 (1987).



# THE LIVINGSTON DECISION

- VDOT & Beltway Construction-
  - Straightened river curve,
  - Relocated curve more than 1,000 feet closer to Huntington,
  - Filled in marshes and wetlands with solid soil, and
  - Failed to dredge/maintain the new channel.



Cameron Run

# IN CONCLUSION



# THANK YOU

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Re: VCPC Presentation

