

## Chapter 31

### Civil Liability of the County and Its Officials Arising from Land Use Decisions

#### 31-100 Introduction

This chapter provides a brief summary of the potential civil liability of county officers and employees in the performance of their duties under Virginia and federal law. It is not an exhaustive analysis of the law because this is a subject that could easily consume volumes in statutory and case law analysis.

#### 31-200 Sovereign immunity of the county<sup>1</sup> for torts under Virginia law

In *Seabolt v. County of Albemarle*, 283 Va. 717, 719, 724 S.E.2d 715, 716 (2012), the Virginia Supreme Court summarized the county's liability for torts as follows:

“At common law, the Commonwealth was immune from liability for torts committed by its officers, employees and agents.... [T]hat immunity continues to apply in the absence of a legislative waiver by which the Commonwealth consents to be sued in its own courts.” *Doud v. Commonwealth*, 282 Va. 317, 320, 717 S.E.2d 124, 125 (2011) (citations omitted). Counties, as political subdivisions of the Commonwealth, enjoy the same tort immunity as does the sovereign. *Mann v. County Bd. of Arlington County*, 199 Va. 169, 175, 98 S.E.2d 515, 519 (1957); *Fry v. County of Albemarle*, 86 Va. 195, 197–99, 9 S.E. 1004, 1005–06 (1889). Consequently, “a county cannot be sued unless and until that right and liability be conferred by law.” *Mann*, 199 Va. at 174, 98 S.E.2d at 518–19

In short, a county is not liable for tortious injuries caused by the negligence of its officers, servants or employees. *Mann v. Arlington County Board*, 199 Va. 169, 98 S.E.2d 515 (1957). This *sovereign immunity* exists because counties are integral parts of the State, created for civil administration. In the absence of a statute waiving immunity, counties enjoy the same immunity as the State. *Mann, supra*.

However, a county is not immune from liability on an implied contract theory when it wrongfully takes, damages, or converts to its use the property of the plaintiff. *Bell Atlantic-Virginia, Inc. v. Arlington County*, 254 Va. 60, 486 S.E.2d 297 (1997) (company adequately alleged inverse condemnation against county resulting from damage to company's underground utility facilities resulting from county's installation and maintenance of its waterworks and sewage disposal systems); *Nelson County v. Coleman*, 126 Va. 275, 101 S.E. 413 (1919) (county took plaintiff's land without just compensation where it condemned portion of plaintiff's land for public road, but the road was mistakenly constructed on portion of plaintiff's land that was not condemned); *Kitchen v. City of Newport News*, 275 Va. 378, 657 S.E.2d 132 (2008) (inverse condemnation claim against city resulting from flooding). For example, a county may be liable under this theory where it fails to maintain its own drainage easement, resulting in damage to private property caused by flooding. *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993).

#### 31-300 Official immunity for a county's officers and employees for torts under Virginia law

In order to allow county officers and employees to act free of fear from liability for every mistake, error or omission, an official immunity is provided under State law that applies except in the most egregious situations, as discussed below.

#### 31-310 Members of the county's boards and commissions

Members of the board of supervisors, planning commission, BZA and architectural review board are immune from liability for the exercise of discretion or governmental authority, and are immune from suit arising out of the exercise or failure to exercise their discretionary or governmental authority. *Virginia Code* § 15.2-1405. This immunity

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<sup>1</sup> Because this chapter emphasizes the County of Albemarle and counties generally, a discussion of cities, towns, and their governing bodies is not included.

is known as *official immunity*. However, the immunity does not apply to conduct constituting the misappropriation of funds, intentional or willful misconduct, or gross negligence. *Virginia Code § 15.2-1405*.

### 31-320 Employees

County employees enjoy official immunity from personal liability in certain circumstances. The Virginia Supreme Court has established a four-factor test for determining whether official immunity is available:

- *Nature of the function employee performs*: The employee must perform a vitally important public function.
- *Extent of the county's interest and involvement in the function*: The county must have an official interest and direct involvement in the function.
- *Degree of control and direction exercised over the employee*: The county must exercise control and direction over the employee.
- *Whether alleged or wrongful act involves the exercise of judgment and discretion*: The act must not be a mere ministerial act.

*Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984).

### 31-330 Factors that may eliminate official immunity

The courts have determined that official immunity does not apply to certain acts. The following factors may eliminate official immunity:

- *Performance of a ministerial duty*: Official immunity does not apply to the performance of a ministerial duty. *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190 (1991). A *ministerial duty* is defined as “one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.” *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945). For example, the review and approval of a subdivision plat or site plan that satisfies all applicable requirements of the county's subdivision and zoning ordinances is a ministerial duty.
- *Gross negligence*: Official immunity does not apply to gross negligence. *Glasco v. Ballard*, 249 Va. 61, 452 S.E.2d 854 (1995); *Meagher v. Johnson*, 239 Va. 380, 389 S.E.2d 310 (1990). Unlike *ordinary* or *simple* negligence, which is defined as the failure to exercise care of an ordinary person under the circumstances, *gross negligence* is the “utter disregard of prudence amounting to a complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care.” *Burns v. Gagnon*, 283 Va. 657, 678, 727 S.E.2d 634, 647 (2012). “It must be such a degree of negligence as would shock fair minded [people] although something less than willful recklessness.” *Green v. Ingram*, 269 Va. 281, 290-291, 608 S.E.2d 917, 922 (2005).
- *Intentional misconduct*: Official immunity does not apply to intentional misconduct. *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987). An official or employee engages in *intentional misconduct* when he or she understands the nature and consequences of conduct with the purpose and intent to cause harm to another.
- *Acting outside the scope of employment*: Official immunity does not apply when an employee acts outside the scope of employment. *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987). An official or employee acts outside the scope of employment when he or she performs acts that are not authorized, permitted or sanctioned in any way as part of one's employment duties and responsibilities.
- *Bad faith*: Official immunity does not apply when an employee acts in bad faith. *Tomlin v. McKenzie*, 251 Va. 478, 468 S.E.2d 882 (1996); *Schnupp v. Smith*, 249 Va. 353, 457 S.E.2d 42 (1995). *Bad faith* is not simply bad judgment

or negligence, but implies the conscious doing of a wrong because of a dishonest purpose or fraudulent or wrongful intent.

### 31-400 Liability under 42 U.S.C. § 1983 (“1983 actions”)

Actions under federal law which challenge local land use decisions are typically takings claims under 42 U.S.C. § 1983 (“section 1983”). Section 1983 was adopted by Congress as part of the Civil Rights Act of 1871, and it provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of 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 . . .

Section 1983 does not confer any substantive rights; rather, it supplies a remedy for rights conferred by federal statutes or by the Constitution. *Gonzaga University v. Doe*, 536 U.S. 273, 285, 122 S. Ct. 2268, 2276 (2002). The essential elements of a section 1983 claim require that the conduct must be committed by a person acting under color of state law, and the conduct must deprive the plaintiff of a constitutional right or a right created under federal law. Localities are *persons* within the meaning of section 1983. *Monell v. New York Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978).

#### 31-410 The nature of the rights protected in the land use context under section 1983

Property rights are protected under section 1983. Actions brought under section 1983 in the land use context may come in various forms, including the following:

- Claims alleging procedural due process and equal protection claims under the Fifth and Fourteenth Amendments arising from the adoption and implementation of land use regulations.
- Claims alleging the taking of private property arising from decisions on rezonings and the special use permits and variances where the decision denies the owner of all economically viable use of his land.
- Claims alleging the condemnation of private property (*i.e.*, the *taking* of private property) without compensation arising from an involuntary exaction of a physical interest in land as a precondition to approving a development permit, and the exaction is either not rationally related to the need or is excessive.

*See chapter 6 for a discussion of the standards and prerequisites for raising constitutional issues such as due process, equal protection and takings in the land use context.*

The federal courts, and in particular the Fourth Circuit Court of Appeals, have expressed an “extreme[] reluctant[ce] to upset the delicate political balance at play in local land-use disputes.” *Henry v. Jefferson County Commission*, 637 F.3d 269, 278 (4<sup>th</sup> Cir. 2011); *Shooting Point, L.L.C. v. Cumming*, 368 F.3d 379, 385 (4<sup>th</sup> Cir. 2004) (quotations omitted). Thus, the Fourth Circuit said in *Gardner v. Baltimore Mayor & City Council*, 969 F.2d 63, 68 (1992), that “Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every run of the mill dispute between a developer and a town planning agency. [internal quotations and citations omitted]. In most instances, therefore, decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately -- and intimately -- affected.” With these principles in mind, following is a general analysis of the standards for section 1983 actions.

### 31-420 Liability of a county

A county may be liable for damages under section 1983 in cases where local “policy or custom, whether made by its lawmakers or by those whose edicts represent official policy,” has “caused” or has been the “moving force” behind the alleged federal constitutional or statutory violation. *Monell v. New York Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). This rule also applies to claims against a county seeking prospective relief such as injunctive or declaratory relief. *Los Angeles County v. Humphries*, 562 U.S. 29, 37, 131 S. Ct. 447, 452-453 (2010). Generally, a policy must be one that has been formally adopted by the board of supervisors. A *custom* is a practice that is so permanent and well-settled as to have the force of law. *Monell, supra*. For example, the duration and frequency of a practice warrants a finding of either actual or constructive knowledge by the governing body that the practices are customary among the employees. *Spell v. McDaniel*, 824 F.2d 1380 (4<sup>th</sup> Cir. 1987).

In addition to a policy or custom, other theories available to establish section 1983 liability of a county include: (1) the conduct of an individual policymaker that is attributed to the county; and (2) the county’s failure to do something (e.g., to provide for the training, supervision or control of its employees, to use proper hiring techniques, to impose discipline upon employees). *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061 (1992); *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989).

If there is no federal constitutional or statutory violation, there is no county liability under section 1983. See *Temkin v. Frederick County Commissioners*, 945 F.2d 716 (4<sup>th</sup> Cir. 1991). In addition, the county is not vicariously liable under the doctrine of *respondeat superior* for money damages arising from the unconstitutional or illegal conduct of its officers or employees. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571 (1986).

However, with one exception noted below, a county does not enjoy any immunities that it might have under state law, or any of the immunities that attach to the county’s officers and employees. Thus, the county is unable to rely on the defense of sovereign immunity, or any other state statutory or common law immunities, in a section 1983 suit. In addition, the county does not share in the absolute or qualified immunities that may be available to its officers or employees (discussed below). In such a case, individual officers or employees may be dismissed from a section 1983 lawsuit based on absolute or qualified immunity, and the county may remain a defendant. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980).

A county’s lone immunity is its absolute immunity from an award of punitive damages. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981).

### 31-430 Liability of county officers and employees

When county officers and employees are sued in their *official* capacity, the lawsuit is treated as an action against the county itself, and liability exists only if it is shown that the alleged constitutional violation is shown to have been caused by a policy or custom of the local government. *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991); *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989). Any judgment runs against the county, not the individuals.

When county officers or employees are sued in their *personal* or *individual* capacity under section 1983, whether for damages or injunctive relief, the action is treated as one against the named individuals, and any judgment runs only against the individuals themselves. The existence of a governmental policy or custom that may have caused the individual employees’ conduct is irrelevant.

County officers and employees sued in their personal or individual capacity are afforded both absolute and qualified immunities under the circumstances described below. An absolute immunity provides complete and unconditional immunity from a section 1983 action seeking money damages, and the immunity extends not only to liability, but also the suit itself. Absolute immunity provides immunity regardless of the conduct or motive of the officer or employee involved.

In the land use context, absolute immunity exists when local legislative officials act in their legislative (as opposed to administrative or executive) capacities. *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966 (1998). The primary rationale for this immunity is that the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. *Bogan, supra*.

Qualified immunity may apply when county officers and employees are engaged in discretionary functions that do not violate clearly established statutory or constitutional rights about which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987); *Pennington v. Teufel*, 396 F. Supp. 2d 715 (N.D.W.V. 2005). The immunity depends on the objective reasonableness of the officer's or employee's conduct. The *Harlow* standard strives to strike a balance between: (1) the need to protect government officials from undue interference with their duties and from disabling threats of liability and to encourage public service; and (2) the need for the law to provide a remedy to persons whose constitutional or statutory rights have been violated by government officials. Under this standard, officials are held financially liable for their violations of federal rights only where they are genuinely culpable, *i.e.*, where the law governing the rights that they have in fact violated is so clear at the time of their conduct that a reasonably competent person, in the same position, would not have believed the conduct to be lawful. The scope of the immunity is broad, protecting "all but the official who is plainly incompetent, or knowingly violates the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096 (1986).

The *Harlow* standard requires that county officers and employees acknowledge their continuing responsibility to be aware of the prevailing legal standards applicable to the constitutional and statutory rights of citizens. As these standards change, officials need to stay knowledgeable and aware of them. Because certain rights are so clearly established, government officers and employees are deemed to have imputed knowledge of them and may be held personally liable for violating such rights in a section 1983 suit. As to whether a constitutional right is clearly established, the focus is not on the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged. *Pritchett v. Alford*, 973 F.2d 307 (4<sup>th</sup> Cir. 1992). In addition, the manner in which the clearly established right applies to the actions of the official must also be apparent. *Maciariello v. Sumner*, 973 F.2d 295 (4<sup>th</sup> Cir. 1992).

The United States Supreme Court explained in *Ashcroft v. Al-Kidd*, 563 U.S. \_\_\_, 131 S. Ct. 2074, 2083 (2011) that "a Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034 (1987). We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *See also Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508 (2002) (rejecting the proposition that qualified immunity is inapplicable only if the very action in question has previously been held unlawful); *Hutchinson v. Lemmon*, 2011 U.S. App. LEXIS 13617, 2011 WL 2580349 (4<sup>th</sup> Cir. 2011) (unpublished) (there is no requirement that the precise right allegedly violated already have been recognized specifically by a court before such right may be held "clearly established" for qualified immunity purposes). Thus, the absence of a court decision holding identical conduct to be unlawful does not prevent a court from denying a qualified immunity defense. *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4<sup>th</sup> Cir. 1999). "Officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516.

The breadth of the doctrine of qualified immunity gives public officials the necessary latitude to pursue their duties "without having to anticipate, on the pain of civil liability, future refinements or clarifications of constitutional law." *Tarantino v. Baker*, 825 F.2d 772 (4<sup>th</sup> Cir. 1987).

Finally, one of the most important defenses for county officers and employees in a section 1983 action in the land use context is the availability of an adequate state remedy. *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981), *overruled in part on other grounds in Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986). For example, a section 1983 action alleging a taking is defensible because an inverse condemnation remedy is available under Virginia law.

### 31-440 Liability of supervisory employees

Supervisory employees such as department heads may be sued based upon the alleged unconstitutional conduct of subordinate employees. In such actions, the supervisors are sued in their personal capacities based upon their own culpable action or inaction (*e.g.*, the failure to provide training for or to control their subordinates). These claims are made not against the county, but against the supervisory employees themselves. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985).

Like the county, supervisory employees are not vicariously liable under the doctrine of *respondeat superior* for the unconstitutional conduct of subordinate employees. Instead, supervisory liability will depend on whether: (1) the supervisory employee had actual or constructive knowledge that his/her subordinate was engaged in conduct that posed a *pervasive and unreasonable risk* of constitutional injury to citizens like the plaintiff; (2) the supervisory employee's response to that knowledge was so indifferent as to show *deliberate indifference* to or tacit authorization of the alleged offensive practices; and (3) there was an *affirmative causal link* between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff. *Shaw v. Stroud*, 13 F.3d 791 (4<sup>th</sup> Cir. 1994).

### 31-500 Insurance

Albemarle County participates in a group self insurance plan provided localities by the Virginia Association of Counties ("VACO"). Coverage extends to individual officers and employees of the county on both claims made and an occurrence basis.

The policy has a \$1 million liability limit, with a \$4 million umbrella policy limit. This means that this is the maximum amount the insurer will pay as compensation for any one claim. Under the policy, multiple claims arising from a single occurrence or series of related occurrences are considered as one claim for the purposes of the liability limit. However, claims having a common origin, but having different allegations, are considered as separate occurrences and have a separate liability limit applied. Intentional acts are covered, with an exclusion for willful and wanton acts. In addition to the liability limit, the policy pays for all expenses, including defense costs (attorney's fees), court costs applicable to the defense, and plaintiff's attorney's fees awarded pursuant to 42 U.S.C. § 1988 (federal civil rights attorney's fee recovery statute).

A county officer or employee is covered under the policy if he or she is an elected or appointed official, employee, agent or authorized volunteer of the county, acting in an authorized governmental or proprietary capacity and within the course and scope of employment or authorization. The policy does not cover any person who has: (1) gained any profit or advantage illegally; (2) acted in a fraudulent or dishonest manner; or (3) committed a willful or wanton act. However, the policy will defend covered parties where these allegations are made except where a legal determination is made that any of the three exclusionary acts described above has occurred.