

• **The Virginia Supreme Court's 2012**
• ***Livingston Case:***
• **Localities and the Risk of "Takings" Claims for**
• **Failure to Properly Maintain Flood Control**
• **Structures**

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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, 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 the Virginia Environmental Endowment for providing generous 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. For this paper, the students analyzed, *Livingston v. Virginia Department of Transportation*, a recent Virginia Supreme Court case that has the potential to impact localities across the state because of its holding. We have not identified all of the possible legal issues that may arise out of this case. Nor have we necessarily answered every possible legal question as part of the analysis that was conducted. We therefore welcome any feedback on our work.

Introduction

After the Supreme Court of Virginia issued its decision in a 2012 case, *Livingston v. Virginia Department of Transportation*,¹ inaction or a failure to properly design and maintain public works and flooding control structures can create liability under constitutional “takings” provisions that restrict the degree to which federal, state, and local governments regulate private property. The case broadened the interpretation of takings under the Virginia Constitution, providing that a damaging of private property for a public use, resulting from the government’s failure to properly design and maintain a public good, can result in takings liability.

While Virginia Code § 15.2-970 explicitly immunizes localities that do not maintain drainage, erosion, or flood control works from having to pay landowners for any resulting damage, the *Livingston* holding, however, tends to limit the protective power of this sovereign immunity, opening localities up to takings liability for failing to properly design, operate, and maintain public works. Specifically, if a locality installs flooding mitigation measures but fails to properly design or maintain them, and this failure causes flooding on private property, the City—protected from tort liability by sovereign immunity—may now be subject to liability under the takings clause of the Virginia Constitution. Although the full impact of the *Livingston* decision is not yet apparent, it likely will open local and state government entities to a broader range of takings claims than was previously permissible.

Key Points

- A locality may be liable for a “taking” under the just compensation provisions of the U.S. and Virginia constitutions if it fails to design or properly maintain a public works structure resulting in damage to an individual’s property.
- The holding in *Livingston* may limit the protective power of sovereign immunity for localities, permitting takings claims where the locality improperly designed public works.
- Although localities should be wary of the effects of *Livingston*, its facts are very sympathetic, which may limit its application in other situations. Nevertheless, in the context of recurrent flooding and sea level rise, local governments should strive to design flooding control structures to withstand future increases in sea level rise, or they risk being held liable for a taking if the structure fails.

Livingston v. VDOT²

In 2006, a severe storm hit the neighborhood of Huntington in Fairfax, Virginia. In two hours, the flow depth of Cameron Run, a stream that ordinarily runs just two feet deep, increased to nearly fourteen feet. The floodwaters were blocked by the beltway and instead rushed south into Huntington. Storm drains, culverts, and sewers could not adequately accommodate the excess capacity. Sewage mixed with the water and flooded the homes of Geoff Livingston and 134 other homeowners and renters. The plaintiffs collectively brought an inverse condemnation suit against Fairfax County and the Virginia Department of Transportation (VDOT), alleging that the flood was a taking under the

Virginia Constitution.

The plaintiffs' suit was based on the theory that the flood was "caused by the acts or omissions of the County and VDOT." The Virginia Department of Highways, which built the Beltway and was later succeeded by VDOT, straightened part of the waterway and moved it closer to the Huntington area. In doing so, VDOT narrowed the width channel by 62%. Construction of the Beltway also created a barrier to any northward flooding out of the channel and meant that any flooding that occurred would run directly into Huntington. Between five and six feet of sediment had accumulated in the flood channel between its relocation and 1999, and neither VDOT or the County had done anything to dredge or maintain the channel to keep it open, despite being aware of the hazard, and despite owning the land the channel runs through.

According to the plaintiffs, the failure to maintain the channel caused the flood and resulting damage to their property, and that the flood was functionally a conversion of private property to a public use—as a floodwater storage site—so the government should be liable for damages under the takings clause. The circuit court granted VDOT's and the County's motions for summary judgment on the grounds that a single incident of flooding could not be considered a taking and thus the plaintiffs did not have standing to sue, but the Virginia Supreme Court reversed. This reversal, and the reasoning behind it, could potentially impact Virginia localities by, in the words of the dissent, sanctioning "a constitutional tort" from which a locality is not protected by sovereign immunity.

Failure to Properly Design or Maintain a Flooding Control Structure as a Taking

The foundation for a takings claim in Virginia is provided by Article 1, Section 11 of the Virginia Constitution. In relevant part, that section provides that "[n]o private property shall be damaged or taken for public use without just compensation to the owner thereof."⁴

A taking can occur where (1) the government physically appropriates land, or (2) a government action negatively affects a landowner's ability to exercise a right connected with a property.⁵ For this second type of taking, the action need only interfere with a recognized property right—such as the right to use and enjoy the land—to warrant compensation.⁶ In *Livingston*, the government did not acquire the property at issue, so the landowners brought a takings claim of the second type, also known as an inverse condemnation suit.

According to *Livingston*, physical damage to a property by a government entity can underpin a valid takings claim by the landowner. In Virginia, property is damaged in the constitutional sense—damaged in a manner that may require compensation—only when "an appurtenant right connected with the property is directly and specially affected by a public use."⁷ In essence, a takings claim is permitted only where a government action impedes the landowner's ability to exercise a property right connected to a piece of property. *Livingston* decided explicitly that physical damage to a property affects an appurtenant right connected to that property, and therefore such damage supports an inverse condemnation suit on behalf of the aggrieved landowner.⁸

Further, *Livingston* affirmed that an act or an omission on the part of the government

can constitute a damage or a taking. In *Livingston*, the court decided that nothing in the Virginia Constitution “limits the government’s constitutional obligation to pay just compensation to only damages caused by its ‘affirmative and purposeful’ acts.”⁹ The court determined that VDOT’s failure to maintain Cameron Run and the resulting physical damage to nearby properties provided the affected landowners with standing to bring a takings claim.¹⁰

Following *Livingston*, where government action or inaction causes physical damage to a property, the landowners likely will have standing to bring a takings claim. Standing is a preliminary matter that is necessary in order to bring a claim before a court: it does not guarantee compensation or influence the amount of potential compensation. Indeed, the landowners in *Livingston* only demonstrated that they had a sufficient interest in the litigation to be permitted to bring suit, and must now show that their land was taken for a public use as well as establish the amount of compensation they are owed.¹¹

In the context of recurrent flooding and sea level rise, the decision in *Livingston* becomes more important. Local governments will need to design flooding control structures to withstand future increases in sea level rise and must maintain those structures without negligence, or risk being held liable for a taking if the structure fails. Before *Livingston*, the locality would have been freed from liability, under the doctrine of sovereign immunity, where it failed to properly design and operate a public improvement. Further, landowners would have been barred entirely from bringing a takings claim against an operator of public works if that structure failed and damaged the property. However, landowners now are permitted to bring takings lawsuits against government entities where the entity’s action or inaction caused physical damage to the property, without regard to sovereign immunity.³

Very Few Other States Follow this Understanding of Takings and Sovereign Immunity

Arkansas has also decided that flooding caused by a local government’s failure to properly design and maintain a public works could result in takings liability.¹² The Arkansas case went further than *Livingston*, requiring the government to pay the aggrieved landowner compensation after the landowner proved the government’s action or inaction was intentional: it did not simply decide upon the issue of standing.¹³ The decision in *Livingston* did not discuss any showing required on the part of the landowners in order to receive compensation. Thus, it is not clear if Virginia has adopted the Arkansas Rule in its entirety and it is too early to rely on the Rule for guidance in Virginia. Without further instruction from Virginia courts, the ultimate reach of *Livingston* is not clear.

Other states have declined to follow the Arkansas Rule.¹⁴ Those cases resisted opening up takings liability in cases where government inaction resulted in a single instance of flooding, instead reserving takings liability for cases involving recurrent flooding.¹⁵ Because few states have adopted the Arkansas and *Livingston* rule, it is difficult to predict *Livingston*’s impact in other factual situations.

Limitations on the Reach of Livingston

This case may have a limited impact for a variety of reasons. The most important is that only granted the residents standing to assert that there was a taking of their property. This stops short of proving that a taking occurred or determining compensation. In further proceedings, the residents may be awarded a variable amount of compensation or none at all.

Additionally, the case creates no affirmative duty for the government to protect properties from flooding; it merely recognizes a right to recover for damages that occur from inaction that arises during the design and operation of a public good. “When the government constructs a public improvement, it does not thereby become an insurer in perpetuity against flood damage to neighboring property. But under our precedents, a property owner may be entitled to compensation under . . . the Constitution of Virginia if the government’s operation of a public improvement damages his property.”¹⁶ Therefore, a locality may only run afoul of Livingston when it builds or maintains public works. Unfortunately, this may incentivize localities to avoid building public works at all out of concern that they may increase their “takings” liability exposure.

Finally, the facts of Livingston are very sympathetic, which likely affected the court’s decision to allow a takings claim. Other, minor flooding cases may not similarly result in a valid takings claim. Here, VDOT’s failure to maintain Cameron Run led to the flooding of a substantial number of homes and, had the court ruled otherwise, the residents would receive little to no compensation due to sovereign immunity. In other cases where the damage was less severe, it is possible that a court will not permit a takings claim and instead allow sovereign immunity to limit government liability. This also leaves open room for the legislature to enact a policy to compensate damaged landowners, rather than relying on takings to override the protections of sovereign immunity.

Conclusion

Following *Livingston*, landowners who lose property to flooding that results from government failure to maintain or properly design or operate mitigation structures like flood walls, flood gates, drains, diversionary channels, etc., *may* have a valid claim for compensation under the takings clause. If a government entity has a duty to maintain a flood control structure but fails to do so, damaged landowners now have standing to bring such a takings claim. Further, *Livingston* likely would allow a takings claim where a government entity—protected from tort liability by sovereign immunity—fails to properly design or operate a flood control structure. The global consequences of this decision are unclear because allowing a landowner to bring a suit does not establish his or her right to compensation. But, it is something that localities should watch as future cases invoke *Livingston*.

Acknowledgement

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Notes

- 1 Livingston v. Va. Dep't Transp., 284 Va. 140 (2012).
- 2 The facts are all taken from Livingston v. Va. Dep't of Transp., 284 Va. 140 (2012). Citations will be omitted in this section except in the case of direct quotations.
- 3 Id. at 162.
- 4 Va. Const. art. I, § 11.
- 5 Kitchen v. City of Newport News, 275 Va. 378, 386, 657 S.E.2d 132, 136 (2008).
- 6 Richmeade, L.P. v. City of Richmond, 267 Va. 598, 602, 594 S.E.2d 606, 609 (2004).
- 7 Bd. of Supervisors of Prince William Cnty. v. Omni Homes, 253 Va. 59, 72 (1997).
- 8 Livingston, 284 Va. at 155.
- 9 Id. at 157.
- 10 Id. at 162.
- 11 Id. at 154.
- 12 Robinson v. City of Ashdown, 301 Ark. 226 (1990).
- 13 Id.
- 14 See Alonso v. City of Hammond, 648 N.E.2d 1221 (Ind. App. 1995); Henderson v. City of Columbus, 285 Neb. 482 (2013).
- 15 Id.
- 16 Livingston, 284 Va. at 162.

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