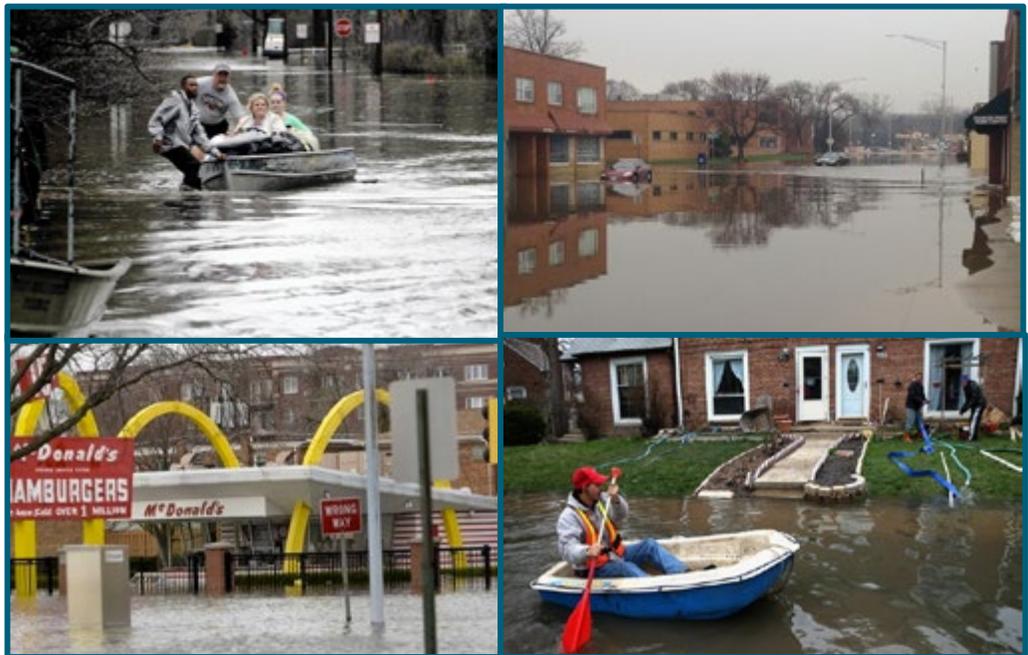


# State and Local Liability for Failure to Adapt to and Protect Against Recurrent Flooding: Applying Farmers Insurance's Legal Framework to Virginia Circumstances

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## About the Author

James Andris, J.D. recently graduated with honors from William & Mary Law School. During his years at William & Mary, he served as a staff member on William and Mary Law Review, competed with his school's National Trial Team, participated in the Virginia Coastal Policy and the Lewis B. Puller, Jr Veterans Benefits Clinics, completed internships with the Philadelphia District Attorney's Office, Clean Air Council, and Hill Wallack LLP, and served as a judicial extern for the Supreme Court of Virginia and Virginia Court of Appeals. Originally from Philadelphia, he graduated from Elon University in 2012 with a B.A. in Psychology.

## About the Virginia Coastal Policy Center

The Virginia Coastal Policy Center (VCPC) at the College of William & Mary Law School provides science-based legal and policy analysis of ecological issues affecting the state's coastal resources, providing education and advice to a host of Virginia's decision-makers, from government officials and legal scholars to non-profit and business leaders.

With two nationally prominent science partners – the Virginia Institute of Marine Science, one of the largest marine research and education centers in the United States, and Virginia Sea Grant, a nationally recognized broker of scientific information – VCPC works with scientists, local and state political figures, community leaders, the military, and others to integrate the latest science with legal and policy analysis to solve coastal resource management issues. VCPC activities are inherently interdisciplinary, drawing on scientific, economic, public policy, sociological, and other expertise from within the College and across the country. With access to internationally recognized scientists at VIMS, to Sea Grant's national network of legal and science scholars, and to elected and appointed officials across the nation, VCPC engages in a host of information exchanges and collaborative partnerships.

VCPC grounds its pedagogical goals in the law school's philosophy of the citizen lawyer. VCPC students' highly diverse interactions beyond the borders of the legal community provide the framework for their efforts in solving the complex coastal resource management issues that currently face Virginia and the nation. Whether it is working to understand the underlying realities of local zoning policies or attempting to identify and reconcile the concerns of multiple stakeholders, VCPC students experience the breadth of environmental lawyering while gaining skills that will serve them well regardless of the legal career they pursue upon graduation.

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## Introduction

In April 2013, more than five inches of rain fell upon the city within twenty-four hours.<sup>1</sup> The precipitation turned major expressways into concrete-bottomed ponds, submerged hundreds of roads and homes, filled the city's flood control system past its 2.3 billion gallon limit, and forced the governor to declare a state of emergency.<sup>2</sup> Surprisingly, this disaster did not happen in New Orleans, Norfolk, or any other city that the United States expects to see featured as flooded on the news. Instead, Chicago found itself thrust into an unfamiliar limelight.

That April storm set a number of new records in Chicago and in the country. For example, the National Weather Service recorded record-high crests for five rivers at nine different sites in northern Illinois.<sup>3</sup> More pertinent to the legal community was the suit that Farmers Insurance Group subsequently filed against the City of Chicago and ninety-nine (99) other municipalities and organizations ("Chicago Municipalities").<sup>4</sup> According to the complaint, Chicago Municipalities "knew or should have known that climate change . . . [had] resulted in greater rain fall volume, greater rainfall intensity and greater rainfall duration . . . resulting in greater stormwater runoff . . ."<sup>5</sup> Consequently, Farmers Insurance argued that Chicago Municipalities should have increased the capacity of or updated its sewer and stormwater storage systems to prevent the foreseeable flooding.<sup>6</sup>

Farmers Insurance eventually dropped the suit, telling the press that it "believe[d] it had] brought important issues to the attention of the respective cities and counties, and that policyholders' interests [would] be protected by the local governments moving forward."<sup>7</sup> However, Michal Gerard, the director of Columbia Law School's Center for Climate Change, stated that these class action suits, the first of their kind, would not be the last.<sup>8</sup> The Hampton Roads area, which is particularly vulnerable to recurrent flooding and sea level rise, represents a primed fuse for such a suit.

This paper analogizes Chicago's 2013 flood and the corresponding lawsuit to the circumstances that haunt Norfolk and other Virginia municipalities. This analysis includes discussions regarding Farmers Insurance's legal arguments, the Virginia equivalent of those arguments, and the associated obstacles and success rates for each legal theory.

## I. Farmers Insurance's Legal Framework

Simplified, Farmers Insurance attempted to hold Chicago Municipalities liable for flood damage through a class action lawsuit under three separate, but similar, causes of action—negligence, negligence per se, and unlawful government takings. The following subsections provide the fundamental elements of these liability theories, explain how Farmers Insurance used said theories, and apply Virginia legal analysis to Norfolk's situation.

## II. Negligence

Negligence, a tort liability theory, is defined as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . ."<sup>9</sup> Property owners in a successful negligence claim against a local government or municipality must prove four elements:

1. The municipality had a **duty**;
2. The municipality **breached** that duty;
3. The municipality's breach **caused the property owner harm**; and
4. The property owners incurred **damages** as a result of that harm.<sup>10</sup>

Although the existence of a duty is a question of law decided by a judge,<sup>11</sup> foreseeability is a persuasive factor in establishing that a duty exists.<sup>12</sup> Generally, a reasonable man, or a reasonable municipality, is only responsible for injuries or damages which are or could be reasonably foreseen. If a judge believes that a municipality owed a duty to property owners, then the trier of fact, usually a jury, must determine whether the property owners satisfied the remaining elements of the negligence claim.<sup>13</sup>

## A. Recognition of Climate Change as a Factor of Foreseeability Leading to Duty

In its complaint, Farmers Insurance maintained that Chicago Municipalities' formal recognition of climate change's scientific principles, specifically that it has caused increases in rainfall, intensity, and duration, created a basis to establish a "general duty" to properly maintain and improve upon sewer and stormwater storage systems.<sup>14</sup> As a result of that recognition, Farmers Insurance stated that Chicago Municipalities "knew or should have known" that climate change would result in greater stormwater runoff and flooding. According to Farmers Insurance, the foreseeability originated from the city of Chicago developing and adopting Chicago's Climate Change Action Plan ("CCAP").

### i. Chicago's Climate Change Action Plan

During his tenure as Mayor of Chicago, Richard M. Daley created a multi-stakeholder task force whose purpose, among other objectives, was to determine the challenges Chicago faced due to climate change and to describe the ways Chicago needed to adapt to the changes already affecting the region.<sup>15</sup> In 2008, that taskforce released the CCAP. In a report issued by Mayor Daley, he described the CCAP as "a road map of what [Chicago] hope[d] to achieve by 2020 to expand [Chicago's] successes in slowing the effects of climate change."<sup>16</sup>

Within the CCAP, the task force specifically identified that climate change would result in more frequent and intense rain and snowstorms.<sup>17</sup> Recognizing that "[f]looding and heavy rains ... create havoc with traffic and damage infrastructure,"<sup>18</sup> the CCAP stated that Chicago would both prepare a watershed plan which factored in projected climate changes and collaborate with other agencies to use available property, including vacant land and parking lots, to manage the resulting increase in stormwater runoff.<sup>19</sup> The CCAP also elaborated on Chicago's ongoing efforts to "support [its] aging water infrastructure" with onsite mechanisms that would help prevent future flooding.<sup>20</sup> Included in these efforts was the installation of permeable pavement, rooftop gardens, and other systems designed to catch stormwater runoff. Since issuing and adopting the CCAP, Mayor Daley and his taskforce have released at least one progress report, explaining that from 2008-2009 Chicago installed 1.8 million square feet of green roofs and 120 green alleys.<sup>21</sup>

Using these observations, Farmers Insurance alleged that Chicago Municipalities should have known that climate would result in a need for an increase in stormwater

storage capacity to prevent flooding. Although its complaint did not specifically argue that Chicago municipalities were negligent, this premise set an aggressive and somewhat forward-thinking tone to the rest of the document

### *ii. Virginia’s Governor’s Commission on Climate Change and the Commonwealth’s Climate Change Action Plan*

Similar to the CCAP, Virginia’s Governor’s Commission on Climate Change released a Climate Change Action Plan (“VaCCAP”) that recognized the dangers of climate change and severe weather events. In fact, the VaCCAP specifically states “Hampton Roads is particularly vulnerable [to the effects of climate change] due to the low elevation of the land and the existence of civilian and military ports, buildings, and infrastructure. *Stormwater systems will need to be designed to handle larger flows with increased storm intensity.*”<sup>22</sup> Unlike the CCAP, the VaCCAP does not promise that the Commonwealth or any of its municipalities will account for climate change in future watershed plans. Instead, it provides *recommendations* that would help Virginia agencies and local governments prepare for and adapt to the impacts of climate change.<sup>23</sup>

### **B. Virginia Municipalities Have a Duty to Maintain Sewer Systems**

There is no way of knowing if a judge would consider the statements from either the CCAP or VaCCAP determinative of foreseeability and indicative of a duty to property owners. However, it is clear that **Virginia municipalities have a common law duty to maintain sewer services.**<sup>24</sup> For example, in *Robertson v. Western Virginia Water Authority*, a sewer line burst causing the partial collapse of a retaining wall that bordered private property and caused extensive property damage. The Virginia Supreme Court ruled “there is a municipal liability where the property of a private persons is flooded, whether directly or by water being set back, when [the flood is] the result of . . . the negligent failure to keep [sewers] in repair and free from obstructions.” As seen in the 2013 Chicago flood, improperly maintained sewer systems have the potential to back up and flood roads, private residences, and cause damage to private property (e.g., cars in private or public parking lots). Furthermore, climate change may result in sewer systems encountering saltwater, which may corrode or otherwise deteriorate Norfolk’s existing sewer system. If Norfolk property owners could demonstrate that such corrosion contributed to floods, or that recurrent flooding otherwise caused damage to Norfolk’s sewer system which then contributed to flood damage, then property owners may be able to establish the necessary duty to move forward with a negligence claim. This argument does not parallel the argument made by Farmers Insurance, but is based on the same underlying principle—negligence.

## **III. Negligence Per Se**

Contrasting with negligence, the doctrine of negligence per se replaces the reasonable person standard with a standard enunciated in a legislative act.<sup>25</sup> Plaintiffs in a lawsuit can use both theories of liability in actions that involve personal injury or property damage. Property owners in successful negligence per se claims brought against a municipality must prove the following three elements:

1. The municipality **violated a statute enacted for public safety**;
2. The **property owners belong to the class of people** that the statute was enacted to protect; and
3. The **property owners incurred damage** as a result of the municipality’s violation.<sup>26</sup>

The first and second of these elements are issues of law that are decided by the trial court, while the final element is a factual issue that is decided by the trier of fact.<sup>27</sup> This means that if property owners request a jury trial, then a judge will decide if legislators enacted a statute for public safety meant to protect property owners, but a jury will determine whether the property owners actually incurred the alleged damage as a result of the municipality's violation.

### **A. Farmers Insurance's Statutory Sources of Liability**

Farmers Insurance identified two separate statutes that it claimed Illinois enacted to protect public safety. These statutes laid the foundation for two separate counts, or two separate factual situations that allow for a potential legal remedy.

Farmers Insurance first alleged that Chicago Municipalities owed Farmers Insurance policyholders a duty to safely and properly maintain sewer systems under 745 ILCS §3-102(1).<sup>38</sup> Under that statute:

[L]ocal public entit[ies have] the duty to exercise ordinary care to maintain [their property] in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entit[ies] intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used...<sup>29</sup>

Farmers Insurance alleged that because Chicago Municipalities knew that its policyholders had experienced previous flooding from sewer and stormwater storage systems, that they were aware that the systems, as they existed, posed a risk to policyholders' "health, safety and welfare..."<sup>30</sup>

In its second count, Farmers Insurance cited to 745 ILCS § 3-103(a), which states that local public entities are not liable for injuries caused by the adoption of a plan or improvement to public property where a legislative body, or other entity exercising discretionary authority, has approved of the plan.<sup>31</sup> *However*, if, after the entity executes the plan, "it appears . . . that [the entity] has created a condition that is not reasonably safe," then public entities may be held liable.<sup>32</sup> Again, using the CCAP, Farmers Insurance argued that Chicago Municipalities knew, or should have known, that the various sewer and stormwater storage systems serving policyholders were defective and failed to employ flood mitigation strategies during the 2013 flood.<sup>33</sup> The complaint included a lengthy list of such strategies, such as raising the banks of nearby rivers with quickly-inflatable property protection systems or sandbags, increasing the capacity of stormwater storage structures using the same types of techniques, and failing to provide temporary stormwater-protection levees or walls.<sup>34</sup> Farmers Insurance alleged that Chicago Municipalities created conditions that were not reasonably safe because it did not implement these strategies.

### **B. Virginia Municipalities Do Not Have a Statutory Duty to Maintain Stormwater Storage or Flood Control Mechanisms**

Virginia municipalities do not have a duty to build or maintain stormwater storage systems, or any structure or device whose purpose is to prevent flooding of the municipality.<sup>35</sup> Virginia Code § 15.2-970 states that 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].”<sup>36</sup> Consequently, *municipalities do not have to build* such structures. Additionally, Code § 15.2-970 protects municipalities, such as Norfolk, whose stormwater storage systems might not serve their purpose by barring “any action at law or suit in equity . . . because of, or arising out of, the design, maintenance, performance, operation or existence of [such systems].”<sup>37</sup> Thus, unlike Illinois’ legal atmosphere, which includes potential statutory sources of liability for failure to construct flood-prevention structures, there is no authority that obligates Virginia municipalities to mitigate flooding.

Code § 15.2-970 does not shield municipalities from all liability theories. The section specifically allows for lawsuits premised upon a written contract between a municipality and property owners when a local government, governed by such a contract, chooses to exercise its permissive authority to take action to control flooding.<sup>38</sup> However, Virginia courts have not utilized this exception in any identified case. This could be because municipalities have not violated this type of contract or because municipalities simply do not enter into contracts that expose them to liability. Code § 15.2-970 also does not immunize improper government takings, which will be discussed later in this paper.<sup>39</sup>

#### *i. Protection From Common Law Claims—Sovereign Immunity*

After Farmers Insurance filed its claim, lawyers for Chicago Municipalities immediately informed the press that they were protected from prosecution by sovereign immunity.<sup>40</sup> If Norfolk property owners attempted to hold the city liable for flood damage, then Norfolk would most likely raise the same defense. The Virginia Supreme Court has described sovereign immunity as “a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities.”<sup>41</sup> When pled correctly, sovereign immunity bars recovery.<sup>42</sup>

In Virginia, municipalities perform two types of functions—governmental and proprietary. A governmental function is one that directly relates to the general health, safety, and welfare of a municipality’s citizens,<sup>43</sup> and one that involves a municipality utilizing its political, discretionary or legislative authority.<sup>44</sup> Municipalities are immune from liability for negligence when exercising a government function *and* for failing to exercise a government function.<sup>45</sup> Therefore, if property owners attempted to hold Norfolk liable for negligently planning or designing a sewer system, Norfolk could successfully use sovereign immunity to shield itself from liability.<sup>46</sup>

However, a municipality may be held liable when private property is flooded as a result of negligently maintained sewer systems.<sup>47</sup> This possibility exists because an allegedly negligent act that involves the routine maintenance or operation of a service provided by a municipality is considered proprietary, not governmental.<sup>48</sup> A proprietary function involves a privilege and power performed primarily for the benefit of the municipality. Municipalities are not immune from liability for negligence in the exercise of proprietary functions. When a municipality’s function is both governmental and proprietary, Virginia courts apply sovereign immunity using the rationale that “the governmental function is the overriding factor.”<sup>49</sup>

Because courts ultimately decide to apply sovereign immunity premised upon their own interpretation of a municipality’s actions, there is no way of predicting how

or when the defense would bar a negligence claim. If Norfolk property owners, like Farmers Insurance, argued that Norfolk failed to design an adequate sewer system, or even failed to update its sewer system, then courts would most likely apply the doctrine.

## IV. Unlawful Takings

Farmers Insurance’s last liability theory is grounded in the constitutional principle of government takings. At the federal level the Fifth Amendment guides takings claims, which reads “nor shall private property be taken for public use, without just compensation.”<sup>50</sup> Although Farmers Insurance cited the United States Constitution, the following subsections discuss the application of state takings clauses.

### A. Illinois’ Takings Clause

Unlike the Fifth Amendment, Article I, Section 15 of Illinois’ Constitution prohibits “seizing *and damaging*” private property without just compensation. Utilizing that language, Farmers Insurance asserted that its policyholders “suffered a direct encroachment upon their real properties when stormwater and/or sewer water invaded their real properties from [Chicago Municipalities’] sewers and subjected [their policy holders’] properties . . . to . . . public use as retention basins and/or detention basins...”<sup>52</sup> Farmers Insurance further asserted that “[the] properties became partially and/or totally uninhabitable and/or unstable as a result of . . . [the] sewer water invasions.”<sup>53</sup> Consequently, Farmers Insurance sought just compensation for policyholders whose property was damaged or “taken” as a result of the 2013 flood.<sup>54</sup>

### B. Virginia’s Takings Clause

Like Illinois’ takings clause, Article 1, Section 11 of the Virginia Constitution provides that “[n]o private property shall be damaged or taken for public use without just compensation to the owner thereof.”<sup>55</sup> To qualify as damage within the meaning of Virginia’s Constitution, the government does not need to have actually invaded or disturbed an individual’s property.<sup>56</sup> Instead, the government needs only to have adversely affected the individual’s ability to exercise his or her rights as a property owner.<sup>57</sup>

Virginia property owners have initiated unlawful takings claims, which are also called inverse condemnation claims, against Virginia municipalities as a result of flood damage on several occasions. For example, in *Kitchen v. the City of Newport News*, Robert Kitchen (“Kitchen”) alleged that Newport News permitted the over development of land above his residence, “which substantially, dramatically, and critically increased the amount of water flowing from the watershed through [a creek] and into [a pond] conveyance system.”<sup>58</sup> Kitchen further maintained that Newport News knew that the conveyance system was not designed to withstand the corresponding increase in use. He argued that “the City’s actions and conduct . . . created and caused” his residence to be “converted into a retention or detention pond” for public use and sought just compensation for the City’s taking.<sup>60</sup> Although the trial court initially dismissed his case for failure to state a cause of action, the Supreme Court of Virginia reversed that decision and remanded his case back to trial, explaining that Kitchen had “alleged specific, factual actions of [Newport News] which resulted in a taking of property.”<sup>61</sup>

Similarly, in *Livingston v. the Virginia Department of Transportation*, 134 homeowners (“Homeowners”) brought an inverse condemnation claim against the Virginia Department of Transportation (“VDOT”). In that case, Homeowners claimed that their homes flooded because VDOT straightened a curved section of a local stream, relocated the stream roughly 1,000 feet closer to their residences, and reduced the stream’s width by 38%.<sup>62</sup> They also argued that VDOT failed to maintain the manufactured channel, which resulted in their homes flooding substantially more than they would have but for VDOT’s project.<sup>63</sup> Once again, the trial court initially dismissed the claim, but the Supreme Court of Virginia reversed and remanded, holding that the stream’s relocation constituted a public use that could form the basis of an inverse condemnation claim.<sup>64</sup>

Neither the *Kitchen* nor *Livingston* case demonstrate a wholly successful inverse condemnation claim—any amount of money awarded to the plaintiffs could not be found on public record. However, they do allow Virginia residents the possibility of bringing municipalities to court without an immediate dismissal provided they allege specific municipal actions that led to an increase in flooding.

## V. Conclusion

Farmers Insurance undoubtedly attracted national attention to an international problem—recurrent flooding and increased severe weather events resulting from climate change. The corresponding complaint, which served as the legal catalyst for that attention, contained creative and complex arguments that attempted to hold Chicago Municipalities liable for flood damage through negligence, negligence per se, and unlawful takings liability theories. If Virginia property owners filed an analogous claim against Norfolk or other Virginia municipalities, they would have the highest likelihood of success with an unlawful takings claim, an unknown likelihood of success with a negligence claim, and the least likelihood of success with a negligence per se claim.

## References

- <sup>1</sup> NATIONAL WEATHER SERVICE WEATHER FORECAST OFFICE, <http://www.crh.noaa.gov/lot/?n=13apr1718> (last visited Dec. 15, 2014).
- <sup>2</sup> *State of Emergency: Massive Rains Create Widespread*, CBS NEWS (Apr. 18, 2013, 6:17 AM), <http://chicago.cbslocal.com/2013/04/18/massive-rains-leads-to-widespread-flooding-delays/>.
- <sup>3</sup> NATIONAL WEATHER SERVICE, *supra* note 1 (identifying the Des Plaines, Vermillion, Chicago, Du Page, Fox, and Illinois Rivers).
- <sup>4</sup> Original Class Action Complaint and Demand for Jury Trial, *Illinois Farmers Insurance Company v. Metropolitan Water Reclamation District of Greater Chicago* at 1-3, No. 1:14-cv-03251 *available at* <http://common-resources.org/wp-content/uploads/2014/05/Chicago-Flood-Insurance-Suit-.pdf#sthash.KNLUPSar.dpuf> [hereinafter *Farmers Insurance Complaint*].
- <sup>5</sup> *Id.* at 20.
- <sup>6</sup> *Id.* at p.21.
- <sup>7</sup> Robert McChoppin, *'Insurance Company Drops Suits Over Chicago-area Flooding*, CHI. TRIB. (June 3, 2014, 6:52 PM), <http://www.chicagotribune.com/news/local/breaking/chi-chicago-flooding-insurance-lawsuit-20140603-story.html>.
- <sup>8</sup> Mica Rosenberg, *Insurer's Climate Change Class Actions: More to Come?*, INS. J. (May 19, 2014), <http://www.insurancejournal.com/news/national/2014/05/19/329506.htm>.
- <sup>9</sup> Black's Law Dictionary (9th ed. 2009), negligence.
- <sup>10</sup> *McGuire v. Hodges*, 273 Va. 199, 205-06, 639 S.E.2d 284, 287 (2007) ("To establish negligence sufficient to sustain a judgment . . . [the plaintiff] was required to show the existence of a legal duty, a breach of that duty, and proximate causation resulting in damage.") (internal quotation marks omitted).
- <sup>11</sup> *Kellerman v. McDonough*, 278 Va. 478, 487 (2009).
- <sup>12</sup> See *N. & W. Ry. Co. v. Witt*, 110 Va. 117, 65 S.E. 489, 490 (1909) ("Negligence must be established by affirmative evidence, which must show more than a probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and, in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen.").
- <sup>13</sup> *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 106, 540 S.E.2d 134, 139 (2001).
- <sup>14</sup> *Farmers Insurance Complaint*, *supra* note 4 at 26.
- <sup>15</sup> CHICAGO CLIMATE CHANGE TASKFORCE, CHICAGO CLIMATE ACTION PLAN 1 (2008), *available at* <http://www.chicagoclimateaction.org/filebin/pdf/finalreport/CCAP-REPORTFINALv2.pdf> [hereinafter CHICAGO CLIMATE ACTION PLAN].
- <sup>16</sup> *Id.* at 3.
- <sup>17</sup> *Id.* at 40.
- <sup>18</sup> *Id.* at 43.
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> PROGRESS REPORT: FIRST TWO YEARS 1 (2010), *available at* <http://www.chicagoclimateaction.org/filebin/pdf/CCAPProgressReportv3.pdf>.
- <sup>22</sup> GOVERNOR'S COMMISSION ON CLIMATE CHANGE, FINAL REPORT: A CLIMATE CHANGE ACTION PLAN 27 (Dec. 15, 2008), *available at* [http://www.sealevelrisevirginia.net/docs/homepage/CCC\\_Final\\_Report-Final\\_12152008.pdf](http://www.sealevelrisevirginia.net/docs/homepage/CCC_Final_Report-Final_12152008.pdf) [hereinafter VIRGINIA CLIMATE CHANGE ACTION PLAN].
- <sup>23</sup> *Id.* at 34-38.
- <sup>24</sup> *Robertson v. Western Virginia Water Authority*, 278 Va. 158, 752 S.E.2d 875 (2014) (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.”) (alteration in original) (internal quotation marks omitted); *City of Richmond v. Gallego Mills Co.*, 102 Va. 165, 45 S.E. 877, 881 (1903) (“It is the duty of a city, from the time it acquires a sewer, to maintain it in a reasonably proper condition, without regard to what may have been the attitude of a former owner of the land through which it passes with respect to it.”).

<sup>25</sup> *Butler v. Frieden*, 208 Va. 352, 353, 158 S.E. 2d 121, 122 (1967).

<sup>26</sup> *Kaltman v. All American Pest Control, Inc.*, 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011) (citations omitted).

<sup>27</sup> *Schlimmer v. Poverty Hunt Club*, 268 Va. 74, 79, 597 S.E.2d 43, 46 (2004).

<sup>28</sup> *Farmers Insurance Complaint*, *supra* note 4 at 26.

<sup>29</sup> 745 IL §3-102(1).

<sup>30</sup> *Id.*

<sup>31</sup> 745 IL §3-103(a).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 29-31.

<sup>34</sup> *Id.*

<sup>35</sup> Va. Code Ann. § 15.2-970(a) (2012).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* Many Virginia court cases support the application of Virginia Code § 15.2-970 to stormwater control systems. See, e.g., *Peerless Ins. Co. v. County of Fairfax*, 274 Va. 236, 239, 645 S.E.2d 478, 480 (2007) (holding sovereign immunity protected a municipality from a personal injury suit when a child fell and injured herself in a stormwater detention pond); *Mitcham v. City of Winchester*, 63 Va. Cir. 427, 427 (“Under the doctrine of sovereign immunity, a municipality is immune from liability for negligence in the exercise of its governmental functions. The design and operation of a municipal storm drainage system is a governmental function.”) (citations omitted).

<sup>38</sup> Va. Code Ann. § 15.2-970(b) (“[B]ut nothing herein shall prevent any such action or suit based upon a written contract.”).

<sup>39</sup> *Id.* (“This provision shall not be construed to authorize the taking of private property without just compensation therefor and provided further that the tidal erosion, flooding or inundation of any lands of any other person by the construction of a dam levee to impound or control fresh water shall be a taking of such land within the meaning of the foregoing provision.”).

<sup>40</sup> *Rosenberg*, *supra* note (“Lawyers for the localities will argue government immunity protects them from prosecution, said Daniel Jasica of the State’s Attorney’s Office in Lake County, which is named in the Illinois state court suit.”).

<sup>41</sup> *City of Virginia Beach v. Carmichael Dev. Co.*, 259 Va. 493, 499, 527 S.E.2d 778, 781 (2000) (internal quotation marks omitted).

<sup>42</sup> *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996).

<sup>43</sup> *Robertson v. Western Virginia Water Authority*, 287 Va. 158, 158, 752 S.E.2d 875, 876 (2014).

<sup>44</sup> *Carter v. Chesterfield County Health Comm’n*, 259 Va. 588, 590-591, 527 S.E.2d 783, 785 (2000).

<sup>45</sup> *Robertson*, 287 Va. 158, 158, 752 S.E.2d 876.

<sup>46</sup> *Id.* (“Thus, if the issue was negligence in the plan or design of the sewer system, the [municipality] would be immune from liability.”).

<sup>47</sup> *Id.*, 752 S.E.2d at 877.

<sup>48</sup> *Chalkley v. City of Richmond*, 88 Va. 402, 408, 14 S.E. 339, 341 (1891) (recognizing that “the obligation to establish and open sewers is a legislative duty, while the obligation to keep them in repair is ministerial.”).

<sup>49</sup> *Bialk v. City of Hampton*, 242 Va. 56, 58, 405 S.E.2d 619, 620-21 (1991).

<sup>50</sup> U.S. CONST. amend V.

<sup>51</sup> II. Const. Art. 1, § 15 (“Private property shall not be taken or damaged for public use without just compensation as provided by law. Such compensation shall be deter-

mined by a jury as provided by law.”).

<sup>52</sup> CHICAGO CLIMATE ACTION PLAN C, *supra* note 15 at 33.

<sup>53</sup> *Id.* at 35.

<sup>54</sup> *Id.* at 34.

<sup>55</sup> Va. Const. art. I, § 11.

<sup>56</sup> Prince William County v. Omni Homes, 253 Va. 59, 72, 481 S.E.2d 460, 467 (1997).

<sup>57</sup> *Id.*

<sup>58</sup> *Kitchen v. City of Newport News*, 275 Va. 378, 382, 657 S.E.2d 132, 134 (2008)

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 388, 65 S.E.2d at 137.

<sup>61</sup> *Id.* at 389, 65 S.E.2d at 138.

<sup>62</sup> 284 Va. 140, 146, 726 S.E.2d 264, 267-68 (2012)

<sup>63</sup> *Id.* at 148, 726 S.E.2d at 268-69.

<sup>64</sup> *Id.* at 159, 726 S.E.2d at 275.