RESEARCH MEMORANDUM

To: Lewie Lawrence, Executive Director, MPPDC

From: Elizabeth Andrews, Director, VCPC
Angela King, Assistant Director, VCPC

Date: January 2, 2018

Subject: Research re: Virginia Case Law and Stormwater Flooding

The Middle Peninsula Planning District Commission requested that the Virginia Coastal Policy Center research the ability of a downstream recipient of stormwater flooding to bring a claim under Virginia law against an upstream party, particularly a nuisance claim. The following memorandum summarizes our students' research on how Virginia courts determine stormwater flooding liability between two private parties.[1]

I. Overview

Stormwater runoff is water that diffuses across the surface of the land following precipitation events.[2] Although the initial research question focused specifically on nuisance actions, a review of Virginia case law showed that in these situations plaintiffs often bring some combination of trespass, nuisance, or negligence actions. Brief descriptions of each cause of action are below.

- "[T]o recover for trespass to land, a plaintiff must prove an invasion that interfered with the right of exclusive possession of the land, and that was a direct result of some act committed by the defendant. Any physical entry upon the surface of the land constitutes such an invasion, whether the entry is a walking upon it, flooding it with water, casting objects upon it, or otherwise."[3]

[1] Please note that causes of action where the upstream property owner is a governmental entity would require additional analysis beyond the scope of this memorandum, since sovereign immunity could come into play. It is also worth mentioning a fairly recent U.S. Supreme Court case addressing flooding as an unconstitutional taking of property without just compensation. In *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), the Court held that government-induced flooding that was temporary in duration gained no automatic exemption from Takings Clause inspection. *Id.*at 522. The Court especially noted a foreseeability factor for takings claims for flooding: "Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Id.* Thus, a property owner who is a recipient of temporary flooding from upstream governmental actions also could consider bringing a takings claim.

[2] Fraley, Jill M., *Water, Water, Everywhere: Surface Water Liability*, 5 Mich. J. Envtl. & Admin. L. 73, 92 (2015).

[3] *Collett v. Cordovana*, 290 Va. 139, 145 (2015) (internal citations and quotation marks omitted).

- "The term nuisance includes everything that endangers life or health, or obstructs the reasonable and comfortable use of property. [A]n occupant's right to the use and enjoyment of land [is broadly construed]."[4]
- "A plaintiff who seeks to establish actionable negligence must plead the existence of a legal duty, violation of that duty, and proximate causation which results in injury."[5]

There is a common law rule with respect to liability associated with surface water, which comes into play regardless of the specific cause of action chosen by a plaintiff.[6] Virginia applies a modified common law rule, in which "surface water is a common enemy, and each landowner may fight it off as best he can, [with the modification that the property owner must do] so reasonably and in good faith and not wantonly, unnecessarily or carelessly."[7] Property owners are generally allowed to improve their own property by grading it[8] or erecting permanent structures,[9] and will not become liable for discharging additional surface water so long as they do not act "wantonly, unnecessarily or carelessly."[10] Exceptions to this rule do exist. For example, a property owner cannot collect water in an artificial channel and pour it out onto another's land;[11] and a property owner cannot "injure another by interfering with the flow of surface water in a natural channel or watercourse which has been worn or cut into the soil."[12]

II. Virginia Case Law

This portion of the memorandum will further describe how Virginia courts have applied the modified common law rule – specifically the interpretation of (1) "wantonly, unnecessarily or carelessly"; (2) the collection of water into an artificial channel and pouring it out onto another's land; (3) interfering with the flow of surface water in a natural channel or watercourse; and (4) additional considerations such as the statute of limitations for bringing claims.

1. Wantonly, unnecessarily or carelessly

As noted above, while the common law rule treats surface water as a common enemy, the modification of that rule applied in Virginia requires that any actions taken by a property owner must be reasonable in order to avoid liability for flooding of another property. In *Collett v. Cordovana*,[13] the Supreme Court of Virginia upheld a lower court's ruling that plaintiff failed to plead facts from which the court could find that defendant acted recklessly or carelessly. Rather, plaintiff's complaint only contained allegations that the defendants had added gravel to their

[4] *Id.* at 145-46 (internal citations and quotation marks omitted). While there are both private and public nuisance actions, this memorandum focuses on private nuisance actions since that was the most common type of nuisance action in the cases researched and seems to be the type of situation addressed by the MPPDC's question.
[5] *Id.* at 146 (internal citations and quotation marks omitted).
[6] *Collett*, 290 Va. at 146.
[7] *Mullins v. Greer*, 266 Va. 587, 589 (1984) (quoting *McCauley v. Phillips*, 216 Va. 450, 453 (1975)).
[8] *Mason v. Lamb*, 189 Va. 348 (1949).
[9] *Motor Company v. Furn. Company*, 151 Va. 125 (1928).
[10] *Mullins*, 266 Va. at 589.
[11] *See, e.g., Seventeen, Inc. v. Pilot Life Ins. Co.*, 215 Va. 74, 77 (1974); *Howlett v. City of South Norfolk*, 193 Va. 564, 568-69 (1952).
[12] *Mullins*, 266 Va. at 589 (citing *McGehee v. Tidewater R. Co.*, 108 Va. 508 (1908); *Cook v. Seaboard Ry.*, 107 Va. 32 (1907); *Norfolk & W. R. Co. v. Carter*, 91 Va. 587 (1895)).
[13] 290 Va. 139 (2015).

property, graded it, laid mulch, and made some other modifications. In *Mason v. Lamb*,[14] the Supreme Court of Virginia noted that the burden is on the plaintiff to show that a defendant's actions are unreasonable. In that case, plaintiff could not show that all of the additional drainage causing damage to their property could be attributed solely to actions taken by the defendant.[15]

Alternatively, in *Kurpiel v. Hicks*,[16] the plaintiff pled sufficient facts to show that defendant's actions were unreasonable. For example, plaintiff alleged that defendant stripped his land of all vegetation, improperly disturbed protected areas (i.e., Resource Protection Areas required by the Chesapeake Bay Preservation Act), excessively cleared his land in violation of state and local laws and regulations, conducted extensive regrading, changed the property's elevation, brought in additional fill dirt, failed to use proper drainage controls, and failed to control sediment and silt running onto plaintiff's property.[17]

2. Artificial Channel

As noted above, one exception to the modified common law rule is that property owners may not collect surface water into an artificial channel and discharge it onto another's property. In *Third Buckingham Community, Inc. v. Anderson*,[18] the Supreme Court of Virginia affirmed a lower court's ruling which applied the artificial channel exception and found the defendant liable for flooding the plaintiff's property. In that case, in constructing apartment houses and grading streets on its property, the defendant installed a system of artificial drainage that came within a few inches of plaintiff's property and discharged the collected water onto plaintiff's property at that point, resulting in damage to his garden and plants. Similarly, in *Hodges Manor Corp. v. Mayflower Park Corp.*,[19] the Supreme Court of Virginia also affirmed a lower court's ruling which applied the artificial channel exception and found the defendant liable. In that case, plaintiff was able to show that they had not suffered damage from surface water flow prior to defendant's installation of the extensive drainage system that collected great quantities of surface water and discharged such concentration onto plaintiff's property.

In *Barry v. Steinschneider*,[20] plaintiff alleged that defendant's alteration of a downspout on his property created an artificial channel that caused plaintiff's property to flood. The Circuit Court did not apply the artificial channel exception because although the downspout was an artificial structure, it "is not pointed directly at [plaintiff's] property [and drains] directly into the ground."[21] In *Mason*,[22] discussed above, the Supreme Court of Virginia affirmed the lower court's refusal to apply the artificial channel exception because the surface water "is scattered and diffused over the comparatively level surface of the lot . . . [and then] drains partly toward plaintiffs' property and partly elsewhere."[23]

---

[14] 189 Va. 348 (1949).
[15] *Id.* at 354.
[16] 284 Va. 347 (2012).
[17] *Id.* at 355-56.
[18] 178 Va. 478 (1941).
[19] 197 Va. 344 (1955).
[20] 91 Va. Cir. 41 (2015).
[21] *Id.* at 46-7.
[22] 189 Va. 348 (1949).
[23] *Id.* at 356-57.

3. Natural Channel or Watercourse

As noted above, another exception to the modified common law rule applied in Virginia is that a property owner may not injure another by interfering with the flow of surface water in a natural channel or watercourse that has been worn or cut into the soil. This exception was first recognized in *Norfolk & W. R. Co. v. Carter*.[24] In that case, the defendant railroad company constructed a roadbed that altered the ability of surface water to flow via natural channels into a nearby river. The Supreme Court of Virginia affirmed the lower court's finding that the railroad company was liable for its failure to build culverts to carry away the surface water.[25] More recently, in *Mullins v. Greer*,[26] the Supreme Court of Virginia affirmed the lower court's order for defendant to remove an embankment he had constructed which diverted the flow of water from a natural channel causing plaintiff's property to flood.

4. Additional Considerations

Although the Rules of the Supreme Court of Virginia – specifically Rule 3:18, *General Provisions as to Pleadings* – state that "[a]n allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence", there is a heightened pleading standard with respect to cases that apply the modified common law rule regarding surface water. In the Virginia cases *Collett* and *Barry*, both discussed above, the courts noted that in surface water negligence cases the plaintiff must allege some negligent action or actions on the part of the defendant.[27]

On a procedural note, the standard five-year statute of limitations for injury to property applies to trespass and nuisance actions in Virginia.[28] In *Forest Lakes Community Assoc., Inc. v. United Land Corporation of America*,[29] the Supreme Court of Virginia held that the statute of limitations begins to run "when the first measurable damage occurs," rejecting the argument that where a nuisance runs at intervals, it constitutes a continuing nuisance.[30] "Subsequent, compounding or aggravating damage—if attributable to the original instrumentality or human agency—does not restart a new limitation period for each increment of additional damage."[31] Thus, if the first instance of flooding occurred more than five years prior, a potential claimant should examine the statute of limitations issue more closely to determine if the *Forest Lakes* reasoning would apply to their flooding situation.

III. Conclusion

Based upon the above analysis of Virginia case law, there are several considerations for a downstream recipient of stormwater flooding to keep in mind if they wish to explore a claim

[24] 91 Va. 587 (1895).
[25] *Id.* at 599.
[26] 226 Va. 587 (1984).
[27] *Collett*, 290 Va. at 588; *Barry*, 91 Va. Cir. at 44.
[28] VA. CODE ANN. § 8.01-243(B).
[29] 293 Va. 113 (2017).
[30] *Id.* at 124.
[31] *Id.*

against the upstream party. First, the downstream recipient should be aware that Virginia courts follow a modified common law rule with respect to surface water liability. Therefore, regardless of the type of action that the downstream recipient brings – trespass, nuisance or negligence – the downstream property owner must show that defendant acted unreasonably, created an artificial channel that discharged onto the downstream property, or altered the flow of a natural channel that caused the downstream property to flood. Additionally, the downstream property owner needs to be aware of the five-year statute of limitations and, with respect to negligence actions, the heightened pleading standard. Finally, if the upstream actor is a governmental body, then the impacted property owner also could consider a claim for an unconstitutional taking of property.

We hope that this answers your question thoroughly. Please let us know if you need additional information.