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## Local Government Liability in Virginia for Negligent Inspection of Buildings, Structures and Equipment

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# COMMENTS

## LOCAL GOVERNMENT LIABILITY IN VIRGINIA FOR NEGLIGENT INSPECTION OF BUILDINGS, STRUCTURES AND EQUIPMENT

### I. INTRODUCTION

There is a growing trend in Virginia,<sup>1</sup> as well as in many other states,<sup>2</sup> for injured citizens to hold local governments<sup>3</sup> liable for personal injuries and loss of property resulting from the negligent inspection by building officials<sup>4</sup> of privately owned buildings<sup>5</sup> and structures.<sup>6</sup> The recent abrogation of the doctrine of sovereign immunity<sup>7</sup> in the majority of jurisdic-

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1. See *infra* note 106 and accompanying text.

2. See *infra* note 43 and accompanying text.

3. For purposes of this article the term "local government" is limited to a discussion of two distinct entities, municipal corporations and counties. For their respective definitions, see *infra* notes 16-17.

4. "Building Officials" are executive officials in charge of local building departments. VIRGINIA UNIFORM STATEWIDE BUILDING CODE art. I, § 102.2 (1981) [hereinafter cited as VUSBC].

5. In Virginia, the term

"Building" means a combination of any materials, whether portable or fixed, having a roof to form a structure for the use or occupancy by persons, or property; provided, however, that farm buildings not used for residential purposes and frequented generally by the owner, members of his family, and farm employees shall be exempt . . . , but such buildings lying within flood plain or in a mudslide-prone area shall be subject to flood proofing regulations or mudslide regulations, as applicable. The word 'building' shall be construed as though followed by the words 'or part or parts thereof' unless the context clearly requires a different meaning.

VA. CODE ANN. § 36-97(12) (Repl. Vol. 1984).

6. In Virginia the term "'Structure' means an assembly of materials forming a construction for occupancy or use including stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio towers, water tanks, trestles, piers, wharves, swimming pools, amusement devices, storage bins, and other structures of this general nature . . ." *Id.* § 36-97(18).

7. The term "sovereign immunity" represents a doctrine of law which traditionally precluded litigants from asserting "otherwise meritorious causes of action against a sovereign or a party with sovereign attributes." BLACK'S LAW DICTIONARY 1252 (5th ed. 1979). "Historically, the federal and state governments, and derivatively cities and towns, were immune from tort liability arising from activities which were governmental in nature." *Id.* The history of sovereign immunity in Virginia has been given exhaustive treatment in several recent articles devoted completely to that subject. See Eichner, *A Century of Tort Immunities in Virginia*, 4 U. RICH. L. REV. 238 (1970); Taylor, *A Re-examination of Sovereign Tort Immunity in Virginia*, 15 U. RICH. L. REV. 247 (1981); Comment, *Municipal Tort Immunity in*

tions<sup>8</sup> has served to encourage such litigation, but abrogation alone has proven to be no guarantee of recovery for negligent inspection.<sup>9</sup> Rather, the majority of jurisdictions have continued to enjoy immunity by asserting that building inspectors perform a discretionary governmental function for which no duty of care is owed to any specific individual or class of individuals.<sup>10</sup> This defense, often called the "public duty doctrine,"<sup>11</sup> has recently been attacked as a "'duty to all, duty to no-one' doctrine [which] is in reality a form of sovereign immunity . . . ."<sup>12</sup>

On July 1, 1982 the Virginia General Assembly enacted the Virginia Tort Claims Act<sup>13</sup> which expressly abrogated sovereign immunity for suits arising out of acts or omissions of state employees.<sup>14</sup> The Act specifically provides, however, that it shall not be construed so as to remove or diminish the sovereign immunity of Virginia municipalities or counties.<sup>15</sup>

Under Virginia law, municipalities<sup>16</sup> and counties<sup>17</sup> are treated as separate and distinct legal entities.<sup>18</sup> Therefore, to determine the respective

Virginia, 68 VA. L. REV. 639 (1982); J. Clough, Immunity of Virginia Local Government Employees (May 1984) (unpublished memorandum)(available in T.C. Williams Law School library).

8. See Taylor, *supra* note 7, at 262.

9. The mere fact that a governing body has abolished sovereign immunity does not mean that a negligently conducted inspection will result in liability. See *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 808 (Minn. 1979) ("The abolition of sovereign immunity created no new torts.").

10. See *infra* notes 92-111 and accompanying text.

11. See Comment, *Municipal Liability for Negligent Building Inspections — Demise of the Public Duty Doctrine?*, 65 IOWA L. REV. 1416, 1416 (1980).

12. *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976).

13. VA. CODE ANN. § 8.01-195.1 (Repl. Vol. 1984). See generally J. Clough, *supra* note 7.

14. VA. CODE ANN. § 8.01-195.3 (limiting liability to "\$25,000, or the maximum limits of any liability policy maintained to insure against such negligence or other tort . . .").

15. *Id.*

16. The term "municipality" is a general description used to describe local subdivisions of a state such as cities and towns. BALLENTINE'S LAW DICTIONARY 822-23 (3d ed. 1969). A municipality is "a legally incorporated or duly authorized association of inhabitants of limited area for local governmental or other public purposes. A body politic created by the incorporation of the people of a prescribed locality invested with subordinate powers of legislation to assist in the civil government of the state and to regulate and administer local and internal affairs of the community." BLACK'S LAW DICTIONARY 918 (5th ed. 1979).

17. The term "County" refers to the "largest territorial division" of a state for purposes of local government. BLACK'S LAW DICTIONARY 316 (5th ed. 1979). Counties, unlike municipalities, are created by the sovereign powers of the Commonwealth of Virginia "without the particular solicitation, consent, or concurrent action of the people who inhabit them." *Smith v. Kelley*, 162 Va. 645, 649-50, 174 S.E. 842, 844 (1934) (quoting *Hamilton County v. Mighels*, 7 Ohio St. 109 (1857)).

18. See generally *Obenshain v. Halliday*, 504 F. Supp. 946 (E.D. Va. 1980) (provision of Virginia law providing for immunity to counties but not to municipalities held not violative of Equal Protection Clause); *Mann v. County Board of Arlington County*, 199 Va. 169, 98 S.E.2d 515 (1957) (county held not liable in tort even though it had taken on characteristics similar to those of municipalities); *Smith v. Kelley*, 162 Va. 645, 174 S.E. 842 (1934) (Gen-

liability for negligent acts or omissions of municipal and county building officials, it is necessary to examine the distinct bodies of case law peculiar to each.

This article will begin with a brief explanation of local governments' duty to inspect buildings and structures. This will be followed by a discussion concerning whether Virginia municipalities and counties may be held liable for failure to adequately perform that duty in light of the Virginia Tort Claims Act and recent decisions from other states.

## II. LOCAL GOVERNMENT'S DUTY TO INSPECT BUILDINGS, STRUCTURES AND EQUIPMENT

On July 16, 1982, the Virginia Board of Housing and Community Development<sup>19</sup> adopted the 1981 edition of the Virginia Uniform Statewide Building Code<sup>20</sup> [hereinafter referred to as the VUSBC]. The VUSBC "supersedes the building codes and regulations of counties, municipalities and other political subdivisions and state agencies."<sup>21</sup>

The VUSBC prescribes building regulations which must be complied with in the construction of buildings, structures and equipment<sup>22</sup> within the Commonwealth.<sup>23</sup> In drafting the VUSBC the Virginia Board of Housing and Community Development incorporated by reference several nationally recognized model building codes.<sup>24</sup> Although the vast majority of technical regulations are contained in the model building codes, the VUSBC outlines several modifications designed to meet the peculiar needs of Virginia buildings, structures and equipment.<sup>25</sup>

While an important purpose of the VUSBC is "to enhance the safety of

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eral Assembly did not intend to give to counties all the powers, duties, and responsibilities granted to municipalities); *Fry v. County of Albemarle*, 86 Va. 195, 9 S.E. 1004 (1889) (noting that municipal corporation is created mainly for interest and advantage of its locality, while county organization is created with a view to the policy of the state at large).

19. The Virginia Board of Housing and Community Development was directed and empowered to promulgate, and keep current, a Uniform Statewide Building Code. See VA. CODE ANN. § 36-98 (Repl. Vol. 1984). The State Board of Housing and Community Development was formerly known as the "State Board of Housing." See *generally* Board of Supervisors v. Miller & Smith, Inc., 222 Va. 230, 279 S.E.2d 158 (1981).

20. VUSBC (1981).

21. VA. CODE ANN. § 36-98 (Repl. Vol. 1984).

22. The term "'Equipment' means plumbing, heating, electrical, ventilating, air-conditioning and refrigeration equipment, elevators, dumbwaiters, escalators, and other mechanical additions or installations." VA. CODE ANN. § 36-97(13) (Repl. Vol. 1984).

23. *Id.* § 36-99.

24. The VUSBC incorporates by reference the BOCA BASIC BUILDING CODE (1981), BOCA BASIC PLUMBING CODE (1981), BOCA BASIC MECHANICAL CODE (1981), the NFIPA NATIONAL ELECTRICAL CODE (1981), and the ONE AND TWO FAMILY DWELLING CODE (1979 & Supp. 1980).

25. See *generally* VUSBC § 101.2-.4 (1981).

the project itself[,] the dominant purpose . . . is to provide comprehensive protection of public health and safety."<sup>26</sup> To achieve these purposes the General Assembly made local building departments<sup>27</sup> responsible for the enforcement of the VUSBC.<sup>28</sup>

Local building department personnel, who are required to meet minimum qualifications,<sup>29</sup> are charged with the responsibility of conducting inspections to assure compliance with the VUSBC.<sup>30</sup> These inspections may occur before the issuance of a building permit,<sup>31</sup> at anytime before completion of the project,<sup>32</sup> and in some cases, even after its completion.<sup>33</sup> Although the preliminary inspection may be conducted at the discretion of the building inspector,<sup>34</sup> subsequent minimum inspections<sup>35</sup> are mandatory,<sup>36</sup> as is the maintenance of a record of such inspections.<sup>37</sup>

Upon discovery of VUSBC violations, the building inspector must serve notice<sup>38</sup> on the person responsible for the project, and if prompt compliance does not follow, the inspector may issue an immediate stop-work order,<sup>39</sup> or initiate legal proceedings against the violator.<sup>40</sup> Violation of any provision of the VUSBC constitutes a misdemeanor, punishable by a fine of not more than \$1,000.<sup>41</sup>

Although no plaintiff has been successful in a suit against a Virginia municipality or county for negligent inspection, litigation over the subject continues, and the VUSBC may be an important part of a potential plaintiff's case. This is true because a determination of a negligent inspection by a municipality or county will likely require: (1) evidence of a prior violation of a building code, (2) the building inspector's negligent act or omission in failing to notice or remedy the violation, and (3) injury or loss

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26. *Virginia Elec. & Power Co. v. Savoy Constr. Co.*, 224 Va. 36, 44, 294 S.E.2d 811, 817 (1982).

27. The term "Local building department" means the agency or agencies of any local governing body charged with the administration, supervision, or enforcement of building codes and regulations, approval of plans, inspection of buildings, or issuance of permits, licenses, certificates or similar documents prescribed or required by State and local building regulation." VA. CODE ANN. § 36-98(10) (Repl. Vol. 1984).

28. *Id.* § 36-105.

29. VUSBC § 102.4.

30. VA. CODE ANN. § 27-34.4 (Cum. Supp. 1984).

31. VUSBC § 111.1.

32. VA. CODE ANN. § 36-105 (Repl. Vol. 1984).

33. *Id.*

34. *See* VUSBC § 111.1.

35. *Id.* § 111.3.

36. *Id.* § 111.2.

37. *Id.*

38. *Id.* § 113.2.

39. *Id.* § 114.1.

40. *Id.* § 113.3.

41. VA. CODE ANN. § 36-106 (Repl. Vol. 1984).

of property to the plaintiff as a result of the inspector's negligence.<sup>42</sup>

There are approximately fifteen reported cases in which courts have either rendered judgment against a local government for the negligence of its building inspector, or intimated that such judgment could be rendered on the facts presented.<sup>43</sup> In none of these cases, however, has a plaintiff

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42. This test is a distillation of judicial and statutory authority. See *infra* notes 70-111 and accompanying text.

43. See, e.g., *State v. Jennings*, 555 P.2d 248, 250 (Alaska 1976) (building official negligently failed to enforce the building code after learning that a hotel, which subsequently burned down killing eleven people, contained serious violations, such as "inadequate fire escapes, obsolete fire extinguishers, substandard alarm system and exit signs, improper storage of combustibles, and unsafe construction, including sawdust insulation"); *Ellis v. City Council of City of Burlingame*, 222 Cal. App. 2d 490, 35 Cal. Rptr. 317 (1963) (building official arbitrarily and intentionally refused to issue plaintiff a swimming pool construction permit despite plaintiff's full compliance with the building code requirements for its issuance); *Thomas v. Mayor & Council of Wilmington*, 391 A.2d 203 (Del. 1978) (an action against a city and its building official by purchasers of city residence, based on failure to discover and inform plaintiffs of certain building code violations prior to the purchase of their residence, was improperly dismissed by lower court); *Trianon Park Condominium Ass'n v. City of Hialeah*, 423 So. 2d 911 (Fla. Dist. Ct. App. 1982) (building official's negligent acts of inspection and certification of the construction of a condominium building were not governmental functions to which tort immunity would apply); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979) (building official negligently inspected and certified an apartment building which subsequently caught fire due to building code violations); *Smullen v. City of New York*, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971) (special duty arose when city sewer inspector assured plaintiff's decedent that a trench he was working in was safe; decedent was killed when the trench collapsed shortly thereafter); *Sextone v. City of Rochester*, 32 App. Div. 2d 737, 301 N.Y.S.2d 887 (1969) (municipality that negligently inspected and issued a certificate of occupancy could be held liable because it knew, or should have known, that the person purchasing the property would rely on its actions); *Runkel v. City of New York*, 282 A.D. 173, 123 N.Y.S.2d 485 (1953) (city building inspector, contrary to building code safety requirements, negligently failed to remedy an inherently dangerous situation created by the existence of a dilapidated house; several trespassing children were injured); *Fitzgerald v. 667 Hotel Corp.*, 103 Misc. 2d 80, 426 N.Y.S.2d 368 (App. Term 1980) (building official, despite his personal knowledge of a crack in the weight-bearing wall of a hotel, failed to enforce building code provisions requiring that the violating building be repaired, vacated or demolished); *Gannon Personnel Agency, Inc. v. City of New York*, 103 Misc. 2d 60, 425 N.Y.S.2d 446 (App. Term 1979) (building official negligently inspected the installation of a new gas pipe line, which subsequently exploded); *Halvorson v. Dahl*, 89 Wash. 2d 673, 574 P.2d 1190 (1978) (building official was negligent in failing to abate building code violations which led to a hotel fire; evidence showed he had knowledge of the violations for at least six months prior to the fire, yet took no action); *Campbell v. City of Bellevue*, 85 Wash. 2d 1, 530 P.2d 234 (1975) (building official properly inspected an underwater lighting system, but after discovering dangerous code violations, failed to enforce provisions requiring immediate compliance or disconnection of the system; this failure led to the electrocution death of a mother attempting to save her son, *rev'd on other grounds sub nom.* *Campbell v. Saunders*, 86 Wash. 2d 572, 546 P.2d 922 (1976); *Rogers v. City of Toppenish*, 23 Wash. App. 554, 596 P.2d 1096 (1979) (building official negligently represented a zoning classification on which the plaintiff justifiably relied, to his economic detriment); *Georges v. Tudor*, 16 Wash. App. 407, 556 P.2d 564 (1976) (city and its building official could be liable for negligent inspection if a special relationship was shown to exist between the injured

recovered against a local government for an inspector's mere failure to conduct an inspection. The cases suggest a general rule that local governments will not be held liable for mere failure to inspect.<sup>44</sup> On the other hand, once an inspection occurs and the inspector discovers, or reasonably should have discovered, code violations for which he negligently fails to enforce future compliance, liability may attach.<sup>45</sup>

### III. MUNICIPAL CORPORATION'S LIABILITY FOR NEGLIGENT INSPECTION

As a general rule, municipalities are liable for the torts of their officers, agents and employees, provided:

- (1) the relationship of master and servant exists between the municipality and the tortfeasor; (2) the act is within the scope of duties or scope of employment of the officer or employee . . . ; and (3) the duty in which the tortfeasor is engaged is the exercise of a proprietary function rather than a governmental one.<sup>46</sup>

This last qualification is extremely important because in Virginia, municipalities act in a dual capacity; one governmental, the other proprietary.<sup>47</sup> Municipalities are immune from liability for negligent acts or omissions related to the performance of governmental functions, but are liable for negligent acts or omissions related to proprietary functions.<sup>48</sup>

While no absolute rule can be articulated for determining which functions are proprietary and which are governmental,<sup>49</sup> "the underlying test

plaintiff and the agents of the municipality); *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) (building official negligently inspected an office building's water supply system, which later proved defective while firefighters were trying to extinguish a fire).

44. 22 AM. JUR. PROOF OF FACTS 2D § 55, at 62 n.2 (1980) ("To date, the right to recover for failure to inspect has not been recognized in any jurisdiction."). At least one Virginia circuit court has rejected a claim against a municipality for mere failure to inspect. *Daniels v. Hamlett Constr. Co.*, Law No. 4277 (Cir. Ct. Roanoke, Va. Apr. 20, 1982).

One court recently made an observation which is applicable to all divisions of local governments:

Theoretically omniscient and omnipotent, the municipality is, in fact, neither. It observes and it acts through the eyes and presence of an always inadequate number of personnel. It cannot possibly . . . inspect every site that needs inspection . . . .

No citizen may successfully sue because damage or injury was sustained in a defective building or installation which city inspectors had not gotten around to checking out.

*Gannon Personnel Agency, Inc. v. City of New York*, 103 Misc. 2d 60, \_\_\_\_, 425 N.Y.S.2d 446, 451-52 (1979).

45. See *supra* note 43 and accompanying text.

46. C. RHYNE, *THE LAW OF LOCAL GOVERNMENT OPERATIONS* § 32.12, at 1052 (1980); see generally 18 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.02 (3d ed. 1984).

47. *Taylor v. City of Newport News*, 214 Va. 9, 10, 197 S.E.2d 209, 210 (1973).

48. *Id.*

49. The United States Supreme Court has observed that:

There probably is no topic of the law in respect of which the decisions of the state

is whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit. If it is, there is no liability, if it is not, there may be liability."<sup>50</sup>

For example, Virginia municipalities have been deemed to be performing a governmental function when engaged in the collection of garbage,<sup>51</sup> the removal of trees from the roadway after a hurricane,<sup>52</sup> and the maintenance of a police force<sup>53</sup> or city jail.<sup>54</sup> They have been deemed to be performing a proprietary function when engaged in the maintenance of a municipal housing project,<sup>55</sup> the operation of a public swimming pool,<sup>56</sup> and the maintenance of public streets and sidewalks.<sup>57</sup> Where governmental and proprietary functions coincide, the municipality will be deemed to be engaged in a governmental function.<sup>58</sup> Therefore, not only must a plaintiff who is seeking damages for negligent inspection argue that a building inspection is more like the maintenance of streets and sidewalks than it is like the maintenance of a police force, the plaintiff must also argue that there is no overlap of proprietary-governmental functions.

#### A. *The Governmental-Proprietary Distinction*

As indicated above, the outcome of a suit against a Virginia municipality largely depends on whether the activity which caused the injury or loss of property will be deemed governmental or proprietary. For example, in the 1949 case of *Masters v. Hart*,<sup>59</sup> the Virginia Supreme Court

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courts are in greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipal corporations. This condition of conflict and confusion is confined in the main to decisions relating to liability in tort for the negligence of officers and agents of municipalities. In that field, no definite rule can be extracted from the decision.

*Brush v. Commissioner of Internal Revenue*, 300 U.S. 352, 362 (1937).

50. *Fennon v. City of Norfolk*, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962) (removal of trees from the roadway after a hurricane was a governmental function) (citing *Bolster v. City of Lawrence*, 225 Mass. 387, \_\_\_\_, 114 N.E. 722, 724 (1917)).

51. *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973) (city was held not liable when plaintiff slipped and fell on grease negligently dropped by city garbage collectors).

52. See *Fennon*, 203 Va. 551, 125 S.E.2d 808.

53. *City of Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896).

54. *Franklin v. Town of Richlands*, 161 Va. 156, 170 S.E. 718 (1933).

55. *Virginia Elec. & Power Co. v. Hampton Redevelopment & Hous. Auth.*, 217 Va. 30, 225 S.E.2d 364 (1976).

56. *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939) (This holding has since been superseded by VA. CODE ANN. § 15.1-291 (Repl. Vol. 1981)).

57. *City of Norfolk v. Hall*, 175 Va. 545, 9 S.E.2d 356 (1940).

58. *Taylor*, 214 Va. at 10, 197 S.E.2d at 210. (Plaintiff contended that maintenance of sidewalks is proprietary function, but the court rejected the argument stating that "where governmental and proprietary functions coincide, the governmental function is the overriding factor.")

59. 189 Va. 969, 55 S.E.2d 205 (1949).



was called upon to decide whether the City of Harrisonburg could be held liable for the negligence of its building official in supervising and inspecting a gas pipe line connection which exploded, killing plaintiff's wife.<sup>60</sup> Because the City had assumed jurisdiction and supervision over the installation of gas pipe line connections, the plaintiff alleged that it was the City's failure to discover and remedy the improper connections that was "the direct cause of the explosion and resulting injuries . . . ."<sup>61</sup> Although the court did not reach the question of the City's liability,<sup>62</sup> it indicated that if there was sufficient evidence to show that the City was acting in a proprietary or ministerial capacity, it could be held liable for negligent inspection.<sup>63</sup>

The problem with this approach, however, is that the determination of whether a function is proprietary or governmental is not made until the court has rendered its decision in the particular case. This fact has caused some authors to severely criticize continued use of the governmental-proprietary distinction.<sup>64</sup> Although the Virginia Supreme Court has not yet decided if inspections by municipal officials are governmental or proprietary functions, other jurisdictions have.<sup>65</sup> The general rule has been that building, structures and equipment inspections are governmental functions for which a municipality is not liable. For example, in *City of Tyler v. Ingram*,<sup>66</sup> the Texas Supreme Court held that a municipality was not

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60. *Id.* at 971, 55 S.E.2d at 206.

61. *Id.* at 973, 55 S.E.2d at 207.

62. The court did not reach this issue because it refused to allow the impleading of the city due to the multiplicity of issues that would have arisen at trial. *Id.* at 981, 55 S.E.2d at 211.

63. *Id.* at 981, 55 S.E.2d at 211. *Cf. Coffey v. City of Milwaukee*, 74 Wis. 2d 526, \_\_\_, 247 N.W.2d 132, 137 (1976) (finding that a building inspector's duties were ministerial: "The duty to inspect is statutorily imposed. There is no discretion to inspect or not inspect. Violations exist or do not exist according to the dictates of the regulations governing the inspection, and not according to the discretion of the inspector.").

64. See 18 E. McQUILLIN, *supra* note 46, § 53.02, at 134 (judicial attempts to fit particular conduct into one category or another have resulted in a highly artificial and inconsistent application of a doctrine which has thereby become "unsound and unworkable."). *Cf. Comment, supra* note 7, at 641-43 (author explained that, although application of the governmental-proprietary distinction has produced inconsistent results in Virginia, Virginia courts have nevertheless uniformly accepted its use).

65. 18 E. McQUILLIN, *supra* note 46, § 53.88, at 500. McQuillin states:

A municipality is not liable for the negligence of its building department which is created by statute to perform a public service and in which the municipality itself has no private interest, and from which it receives no special benefit or advantage in its corporate capacity. Thus, since the performance of such duties is a governmental function, a city is generally not liable for the negligence of a building inspector in the performance of his duties, . . . .

*Id.*

66. 139 Tex. 600, 164 S.W.2d 516; *accord* *Fiduccia v. Summit Hill Constr. Co.*, 109 N.J. Super. 249, 262 A.2d 920 (1970) (court held that building official's negligent acts of inspecting and issuing a certificate of occupancy for plaintiff's new home were both discretionary-

liable for its building official's negligent inspection of a section of bleachers which subsequently collapsed, injuring the plaintiff.<sup>67</sup> Likewise, in *E. Eyring & Sons Co. v. City of Baltimore*,<sup>68</sup> the Maryland Court of Appeals held that a municipality was not liable for its building official's negligent inspection of a church roof which subsequently collapsed and caused injury to the plaintiff.<sup>69</sup>

## B. *Liability for Governmental Functions*

The general rule of non-liability for governmental functions is rapidly becoming less a barrier as jurisdictions abolish municipal sovereign immunity<sup>70</sup> and create exceptions to avoid the harshness of the rule.<sup>71</sup> Given the Virginia General Assembly's failure to abolish municipal sovereign immunity, injured citizens are forced to seek redress from the court, with the hope that the court will abolish municipal sovereign immunity, or that it will find an exception applicable to their particular set of facts.

### 1. The Inherently Dangerous Exception

Thirty years after the Virginia case of *Masters v. Hart*,<sup>72</sup> the New York courts had the opportunity to address issues similar to those raised in *Masters*. In *Gannon Personnel Agency v. City of New York*,<sup>73</sup> a building official approved design plans for the installation of a new gas line which was intended to service a three story commercial building. After approving the plans, the building official issued a work permit and workers began installing the pipe. The man in charge of the work had never installed such a system before. Consequently, he failed to install a shut-off valve inside the building where the gas could be turned off in the event of a leak; and he also left a gas pipe open-ended and uncapped. Both omissions were serious building code violations.<sup>74</sup> However, the building official who visited the project for the final inspection told the worker that he had done a good job, and that the work passed official inspection. Having been indirectly assured by the worker that the system was safe and ready for operation, the building owner arranged to have the gas company

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governmental duties which entitled the city to immunity).

67. *City of Tyler*, 139 Tex. at \_\_\_\_, 164 S.W.2d at 519.

68. 253 Md. 380, 252 A.2d 824 (1969).

69. *Id.*

70. See, e.g., *Wilson v. Nepstad*, 232 N.W.2d 664 (Iowa 1979) (municipality was treated like any other private individual or corporation because municipal immunity had been abrogated by statute).

71. See *infra* notes 107-09 and accompanying text.

72. 189 Va. 969, 55 S.E.2d 205 (1949). For a discussion of the facts of *Masters*, see *supra* text accompanying notes 59-63.

73. 103 Misc. 2d 60, 425 N.Y.S.2d 446 (1979).

74. *Id.* at \_\_\_\_, 425 N.Y.S.2d at 449.

turn on the gas. When the gas was turned on it flowed freely out of the open-ended pipe resulting in an explosion that left twelve people dead and many injured. If the building official had inspected the installation as the applicable building code required, he would have detected the extremely dangerous violations.<sup>75</sup>

Although the *Gannon* court recognized the general rule of non-liability for governmental functions, it reasoned that when the building official told the inexperienced worker that the system passed inspection and that it was a job well done, "he not only gave assurances of safety upon which laymen, and even a sophisticated utility were entitled to rely, but he virtually guaranteed that the forces would be set in motion which eventuated in the explosion."<sup>76</sup> The court found the building official's actions "irresponsible in the extreme . . . . He had to know of the improper installation—it was his job—and he was derelict in carrying out his duties."<sup>77</sup> Despite a general rule of non-liability for governmental functions, the *Gannon* court concluded that liability would attach where, as here, a building official so negligently carries out his duties that he fails to detect an "inherently dangerous or imminently hazardous condition . . . [which] is open, obvious and blatant . . . ."<sup>78</sup>

The facts of *Masters* and *Gannon* are strikingly similar. In factual situations similar to these, the "inherently dangerous" exception provides a viable legal theory on which a plaintiff may recover from a Virginia municipality.

## 2. The Special Relationship Exception

Some jurisdictions have chosen to make an exception to the general rule of non-liability for governmental functions where the building official was in a special relationship with the injured party which justifiably led the injured party to rely on the building official's representations.<sup>79</sup> For example, in *Campbell v. City of Bellevue*,<sup>80</sup> the plaintiff's wife was killed and his son injured by an exposed electric wire submerged beneath a creek on the property of an adjacent home.<sup>81</sup> The electric wire had been installed in the creek many years before to operate an underwater light-

75. *Id.* at \_\_\_\_, 425 N.Y.S.2d at 448-51.

76. *Id.* at \_\_\_\_, 425 N.Y.S.2d at 458.

77. *Id.*

78. *Id.* at \_\_\_\_, 425 N.Y.S.2d at 456.

79. *See, e.g.*, *Smullen v. City of New York*, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971) (special relationship found between injured individuals and city officials); *Campbell v. City of Bellevue*, 85 Wash. 2d 1, 530 P.2d 234 (1975) (finding a relationship between injured individuals and city officials, which created a duty to act for the benefit of individuals).

80. 85 Wash. 2d 1, 530 P.2d 234 (1975).

81. *Id.* at \_\_\_\_, 530 P.2d at 235.

ing system which had since fallen into disrepair. The exposed wire and dangerous condition were inspected by the City's building inspector after a neighbor was electrocuted when attempting to retrieve a dead racoon found in the creek. The building inspector observed the wiring leading from the house to the creek and determined that it was in violation of the applicable building code. At the time he inspected the system, however, the owner of the property was not at home so the inspector merely placed a note on the front door which informed the owner that the wiring constituted a threat to life which, if left uncorrected, would result in the disconnection of his electricity. When the caretaker returned home he was not sure what to do about the notice so he merely turned off the last two circuit breakers in his circuit breaker panel located in the home, thinking that one circuit breaker controlled the creek lights.<sup>82</sup>

Subsequent telephone conversations with the City's building department assured the neighbors that the problem had been corrected. However, the building inspector, who had a duty under the Building Code to immediately sever the unlawful electrical system, took no further action to assure both compliance with the Code and the safety of the community. Meanwhile, the circuit breakers remained in the off position until six months later when the caretaker turned on the switches to open the garage door. At that time, plaintiff's son fell into the water receiving a severe electrical shock; plaintiff's wife was killed while attempting to rescue him.<sup>83</sup>

The City's position was that it was immune from tort liability when carrying out its governmental duties under the Building Code.<sup>84</sup> Although the court agreed that the general rule for governmental duties was one of non-liability, it went on to explain that it would recognize an exception where a special relationship had developed between the injured plaintiff and the inspector.<sup>85</sup> The building official's assurance that the problem had been corrected, and his subsequent failure to verify that it had been corrected, caused a special group of people, i.e., plaintiff's son and wife, to rely on his representations, which in turn led to their respective injury and death.<sup>86</sup>

Other courts have agreed with the special relationship exception to the general rule of non-liability.<sup>87</sup> Based on its decision in *Stansbury v. City*

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82. *Id.* at —, 530 P.2d at 235-36.

83. *Id.* at —, 530 P.2d at 236-37.

84. *Id.* at —, 530 P.2d at 237.

85. *Id.* at —, 530 P.2d at 239.

86. *Id.* at —, 530 P.2d at 236.

87. *See, e.g.,* *Smullen v. City of New York*, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971) (shortly before a trench collapsed, killing plaintiff's decedent, decedent had relied on building inspector's assurance that trench did not need shoring, which was contrary to building code requirement); *Runkel v. Homelsky*, 286 A.D. 1101, 145 N.Y.S.2d 729 (1957)

of *Richmond*,<sup>88</sup> the Virginia Supreme Court may also be persuaded to allow an exception to the general rule when a special relationship is shown. In *Stansbury*, the City of Richmond was sued for negligent failure to provide the plaintiff with sufficient water for domestic and sanitary purposes. Plaintiff reported the insufficiency to the proper authorities and requested that his residence be connected to another water district; this request was not immediately granted. The City had recently negligently devised and adopted the water supply system from which plaintiff's residence received water.<sup>89</sup> The Virginia Supreme Court pointed out that as a general rule, the City cannot be held liable for the performance of activities which require the exercise of legislative duties involving judgment and discretion.<sup>90</sup> However, the court explained, "after the work has been completed, and experience has demonstrated that the system is inadequate and insufficient to meet requirements or to effect the objects for which it was intended, there can be no reason to exempt the municipality from damage suffered by an individual from its continued use."<sup>91</sup> This exception is directly applicable to a situation where a building official conducts an inspection, makes a determination that building code violations exist, but subsequently fails to perform his duty under the building code by assuring that such violations are abated.

### C. *The Public Duty Doctrine*

The most common defense which serves to insulate local government entities from liability is called the "public duty doctrine."<sup>92</sup> This doctrine provides that a municipality's duty to conduct inspections under the applicable building code is a "public duty" owed to the public at large, rather than a duty owed to a specific individual or class of individuals.<sup>93</sup>

An action for damages based on negligent inspection is, as its name suggests, an action based on a negligence theory which requires certain elements to be proven before a plaintiff can recover.<sup>94</sup> In Virginia, "[t]o constitute actionable negligence, there must be a legal duty, a breach thereof, and a consequent injury which could have been reasonably fore-

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(court allowed recovery when trespassing children were injured in what the court described as a dilapidated open structure which constituted a trap or inherently dangerous instrumentality which should have been abated), *modified and aff'd*, 286 A.D. 1101, 145 N.Y.S.2d 729 (1955) *aff'd*, 3 N.Y.2d 857, 145 N.E.2d 23, 166 N.Y.S.2d 307 (1957)).

88. 116 Va. 205, 81 S.E. 26 (1914).

89. *Id.* at 209, 81 S.E. at 27-28.

90. *Id.* at 209-10, 81 S.E. at 27-28.

91. *Id.* at 210, 81 S.E. at 28.

92. Comment, *supra* note 11, at 1424-25.

93. 18 E. McQUILLIN, *supra* note 46 § 53.04d. For a general discussion of the Public Duty Doctrine see C. RHYNE, *supra* note 46 § 32.9; Comment, *supra* note 11, at 1424-25; 22 AM. JUR. PROOF OF FACTS 2D § 6, at 55 (1980); Annot., 41 A.L.R.3d 567 (1972).

94. See generally Annot., 41 A.L.R.3d 567 (1972).

seen by the exercise of reasonable care and prudence."<sup>95</sup> Thus, the pivotal issue is whether a building official owes a legal duty to one who receives injuries as a result of the building official's negligent inspection.

Many states have embraced the public duty doctrine, holding that building inspections are conducted exclusively for the general public.<sup>96</sup> Other states have rejected the doctrine, holding that a special duty arises when a building official undertakes an inspection. This duty is owed to those particular individuals who could foreseeably be injured if the official inspection were negligently performed.<sup>97</sup>

Courts that have adopted the public duty doctrine justify their position by explaining that imposition of liability on a municipality for negligent inspection would discourage local governing entities from conducting inspections.<sup>98</sup> Courts that have rejected the public duty rule reason that it is better that the government not inspect at all than inspect negligently.<sup>99</sup>

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95. *Jordan v. Jordan*, 220 Va. 160, 162, 257 S.E.2d 761, 762 (1979) (citing *Bartlett v. Re-capping, Inc.*, 207 Va. 789, 793, 153 S.E.2d 193, 196 (1967)); *Atlantic Co. v. Morrisette*, 198 Va. 332, 333, 94 S.E.2d 220, 221-22 (1956). *Accord Williamson v. Southern Ry.*, 104 Va. 146, 149, 51 S.E. 195, 196 (1905) ("negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured").

96. *See, e.g., Duran v. Tucson*, 20 Ariz. App. 22, 509 P.2d 1059 (1973) (no municipal liability where building inspector's negligent failure to enforce fire prevention code prohibiting open flame heater in work area injured plaintiffs); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979) (no municipal liability where building official overlooked a drum of duplicating fluid located on a loading dock, which subsequently exploded, killing two boys and injuring a third); *Sanchez v. Village of Liberty*, 42 N.Y.2d 876, 366 N.E.2d 870, 397 N.Y.S.2d 782 (1977) (plaintiff's complaint failed to state a cause of action against a municipality for wrongful death of victims of a fire in a multiple dwelling because the statutes allegedly violated did not require the municipality to exercise care for the benefit of a particular class); *Georges v. Tudor*, 16 Wash. App. 407, 556 P.2d 564 (1976) (building official who negligently issued a building permit and inspected a building under renovation owed no duty to the individual plaintiff who was injured in subsequent collapse of building).

97. *See, e.g., City of Fairbanks v. Nordale Hotel, Inc.*, 555 P.2d 248 (Alaska 1976) (building official failed to detect fire code violations during an inspection of a hotel which subsequently caught fire); *Tranon Park Condominium Ass'n, Inc. v. City of Hialeah*, 423 So. 2d 911 (Fla. Dist. Ct. App. 1982) (court held that once municipality undertook to inspect the construction of condominium building, it owed a duty of care to those who could foreseeably be injured); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979) (court found that legislature intended to extend a duty of care to plaintiff injured in a fire as a result of building official's negligent inspection of an apartment building); *Fitzgerald v. 667 Hotel Corp.*, 103 Misc. 2d 80, 426 N.Y.S.2d 368 (App. Term. 1980) (building official breached duty of care owed to plaintiffs when he failed to enforce code provisions after knowledge of a crack in hotel wall); *Halvorson v. Dahl*, 89 Wash. 2d 673, 574 P.2d 1190 (1978) (court found that building code was enacted for general public as well as specific individual plaintiffs injured in a fire, when building official had been aware of building code violations for six months but failed to take remedial action).

98. Comment, *supra* note 11, at 1438.

99. *Wilson*, 282 N.W.2d at 667 (the court suggested that if the government abandoned the business of inspecting, the void might be filled by private enterprises whose certificates could be relied on by persons risking their lives and property). *Contra, Grogan v. Common-*

Fear that local governments may discontinue performing inspections may be unwarranted in light of modern day insurance policies, which are as readily available to government entities as they are to private individuals and corporations.<sup>100</sup> It seems more equitable to require local governments to spread the risk of loss uniformly among their citizens than to force the injured individuals to bear the entire burden.<sup>101</sup> Equally compelling, however, is the argument that the government simply has no duty to prevent the misconduct of third parties,<sup>102</sup> and "to hold otherwise would cause the city to become a guarantor of each and every construction project — a task not only beyond the scope of the building codes . . . , but also one that the City is incapable of performing."<sup>103</sup>

Plaintiffs in Virginia who seek recovery for negligent inspection must convince the court that the VUSBC<sup>104</sup> was enacted specifically for their protection. A plaintiff's case is strengthened by the Virginia Supreme Court's recent statement that, although the dominant purpose of the VUSBC is to provide comprehensive protection of the public's health and safety, "we perceive, however, that another important purpose of the Building Code, with which we are now concerned, is to enhance the safety of those working on the project and, indeed, the safety of the project itself."<sup>105</sup> Two recent Virginia circuit courts, however, failed to recognize duty created by the VUSBC to any specific individual or class of persons.<sup>106</sup>

wealth, 577 S.W.2d 4, 6 (Ky. 1979) (the court reasoned that any inspection capable of alerting landlords to potential hazards and motivating them to make needed repairs is better than no inspection at all).

100. See Taylor, *supra* note 7, at 261.

101. *Id.*

102. *Cracraft*, 279 N.W.2d at 804. This proposition is supported by RESTATEMENT (SECOND) OF TORTS § 315 (1977) which provides that:

There is no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other the right to protection.

However, this provision of the Restatement can also be used to support the special relationship exception adopted by some courts. See *supra* notes 79-91 and accompanying text.

103. *Georges*, 16 Wash. App. at \_\_\_\_, 556 P.2d at 566-67.

104. See *supra* notes 21-43 and accompanying text.

105. *Virginia Elec. & Power Co. v. Savoy Const. Co.*, 224 Va. 36, 44, 294 S.E.2d 811, 817 (1982).

106. See generally *Daniels v. Hamlett Constr. Co.*, Law No. 4277 (Cir. Ct. Roanoke, Va. Apr. 20, 1982) (building official's alleged failure to detect inherently dangerous code violations in an apartment building which later caught fire did not give plaintiffs a cause of action against the city because "neither the enactment nor the enforcement of the uniform statewide building code created any duty to any specific individuals"); *Hooks v. Stewart*, Law No. 79-1927 (Cir. Ct. Norfolk, Va. June 13, 1980) (plaintiff's allegation of negligent inspection of a dwelling did not state a cause of action because no duty was owed to plaintiff

Even in those jurisdictions which retain vestiges of the public duty doctrine, that doctrine has been severely undermined. For example, in some jurisdictions an exception is made when: (1) the building official has actual knowledge of an inherently dangerous code violation, yet fails to act;<sup>107</sup> (2) the building official's negligent representations cause the plaintiff to justifiably rely on them, to his subsequent injury;<sup>108</sup> or (3) when the applicable building code, by its own terms evidences a clear intent to identify and protect a particular individual or class of persons.<sup>109</sup>

Plaintiffs seeking to recover for injuries against a municipality may have a difficult task in convincing a Virginia court to ignore the governmental aspects of a building official's duties, and to find a duty owed to the individual plaintiff. However, the "emerging new rule,"<sup>110</sup> which is generally that building and housing codes impose an enforceable duty upon municipalities to adequately enforce the codes,<sup>111</sup> may be useful to injured plaintiffs seeking relief from governmental immunity.

#### IV. COUNTY'S LIABILITY FOR NEGLIGENT INSPECTIONS

As previously discussed,<sup>112</sup> Virginia counties and municipalities are distinctly different legal entities. A municipality is formed by the efforts of its inhabitants, whereas a county is formed with little or no input from its inhabitants.<sup>113</sup> A county is created by the sovereign power of the Com-

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as an individual).

107. See, e.g., *Runkel v. City of New York*, 282 A.D.2d 173, 123 N.Y.S.2d 485 (1953) (building official knew of violation for fifty days but failed to take corrective action); *Fitzgerald*, 103 Misc. 2d 80, 426 N.Y.S.2d 368 (building official knew of violation for six years); *Campbell v. City of Bellevue*, 85 Wash. 2d 1, 530 P.2d 234 (1975) (building official knew of violation for five months).

108. See, e.g., *Smullen v. City of New York*, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971) (plaintiff's decedent justifiably relied on building inspectors assurance that the trench was safe).

109. See, e.g., *Halvorson*, 89 Wash. 2d 673, 574 P.2d 1190 (housing code was enacted not only for the general public, but also for the benefit of a specifically identified group of persons, of which plaintiff was a member).

110. *Id.* at \_\_\_\_\_, 574 P.2d at 1192.

111. *Id.*

112. See *supra* text accompanying note 18.

113. See *Smith v. Kelley*, 162 Va. 645, 649-50, 174 S.E. 842, 844 (1934), where the Virginia Supreme Court explained that:

There is a fundamental distinction between municipal corporations and county organizations. "Municipal corporations proper are called into existence, either at the direct solicitation or by the free consent of the people who compose them. Counties are local subdivisions of a State, created by the sovereign powers of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization



monwealth of Virginia,<sup>114</sup> and most of its powers and functions are directly and exclusively derived from the general policies of the state.<sup>115</sup> Hence, the Virginia Supreme Court views counties as mere extensions of the general administrative arm of the Commonwealth.<sup>116</sup> Therefore, in order to determine the amenability of a county to suit for negligent inspection it is necessary to discuss the liability of the Commonwealth.

Both Virginia statutory law<sup>117</sup> and common law<sup>118</sup> provide that no suit can be maintained against the Commonwealth without its express consent. Because a county is considered a state agency, it enjoys similar immunity from suit.<sup>119</sup> In fact, the Virginia Supreme Court has ruled that not only is a county entitled to the immunity which is inherent in the Commonwealth, the county's immunity is "fundamental and jurisdictional and could not be waived" by the county even if it wanted to.<sup>120</sup>

### A. *Recent Decisions*

In 1890, "Virginia committed itself to the principle that counties were not liable for tortious personal injuries resulting from the negligence of its officers, servants and employees."<sup>121</sup> This principle of immunity was reaffirmed by the Virginia Supreme Court in the recent case of *Mann v. County Board of Arlington*.<sup>122</sup> In *Mann*, a pedestrian was struck by an automobile while walking down a county-maintained sidewalk. The pedestrian alleged that his injury occurred because the county negligently maintained a parking area which was adjacent to the sidewalk. The court

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is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

114. *Fry v. County of Albemarle*, 86 Va. 195, 9 S.E. 1004, 1005 (1890).

115. *Id.*

116. *See id.*

117. VA. CODE ANN. § 8.01-195 (Repl. Vol. 1984).

118. *Virginia Elec. & Power Co. v. Hampton Redevelopment & Hous. Auth.*, 217 Va. 30, 32, 225 S.E.2d 364, 367 (1976).

119. *Mann v. County Bd. of Arlington County*, 199 Va. 169, 173, 98 S.E.2d 515, 518-19 (1957).

120. *Id.* at 175, 98 S.E.2d at 519. The Virginia Supreme Court has recently explained that "it is clear that the General Assembly can create a separate entity as an agency of the Commonwealth to perform a function of state government and that such entity will be clothed with the Commonwealth's immunity from tort liability." *Virginia Elec. & Power Co. v. Hampton Redevelopment & Hous. Auth.*, 217 Va. at 32, 225 S.E.2d at 367.

121. *Fry v. County of Albemarle*, 86 Va. 195, 9 S.E. 1004 (1890). The position was recently reaffirmed in *Mann v. County Bd. of Arlington County*, 199 Va. 169, 174, 98 S.E.2d 515, 518 (1957).

122. *Mann*, 199 Va. 169, 98 S.E.2d 515.

stated that, even if it assumed the county negligently caused plaintiff's injury, no liability would attach because of "the principle that a county cannot be sued unless and until that right and liability be conferred by law."<sup>123</sup>

The Virginia Supreme Court's persistent adherence to the doctrine of county immunity is reflected in an expression of deference to the state legislature: "[I]f liability for negligent personal injuries is to be imposed upon it [the county], this should be accomplished through legislative action and not by judicial fiat."<sup>124</sup> Furthermore, the court stresses that the mere fact that the county has taken on characteristics of a municipality will "not justify our disturbance of a settled principle of law and departure from the doctrine of *stare decisis*."<sup>125</sup> Accordingly, it is not surprising that counties have continued to enjoy the shield of sovereign immunity when sued for negligent inspection.

In *Bergen v. Fourth Skyline Corp.*,<sup>126</sup> the Court of Appeals for the Fourth Circuit was asked to decide the liability of Fairfax County for negligent inspection. The county was sued when an apartment building, which had been previously inspected by a county building official, collapsed during construction. The plaintiff, a worker for a subcontractor at the construction site, was injured when struck by falling debris. The plaintiff sued Fairfax County, asserting that its building inspector failed to enforce the county's building code which in turn caused the building to collapse. The plaintiff alleged, in particular, that the county inspector had negligently allowed the use of inferior concrete in the construction of the building, and that this ultimately led to the injury. The court affirmed the trial court's dismissal of the suit against the county on the grounds of sovereign immunity.<sup>127</sup>

The *Bergen* rationale was recently affirmed and broadened in *Obenshain v. Halliday*.<sup>128</sup> The *Obenshain* case arose out of the death of Virginia politician Richard G. Obenshain, whose plane crashed while attempting to land at Chesterfield County Airport in Virginia on August 2, 1978.<sup>129</sup> The suit was instituted by Obenshain's executrix, who alleged that the plane crashed as a result of malfunctioning runway lights which caused the pilot to become disoriented and lose control of the plane. The plaintiff sought damages from the county for negligently failing to assure compliance with applicable Federal Aviation Administration lighting requirements, and for failure to discover and inform the pilot of the

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123. *Id.* at 174, 98 S.E.2d at 518-19.

124. *Id.* at 174, 98 S.E.2d at 519.

125. *Id.* at 175, 98 S.E.2d at 519.

126. 501 F.2d 1174 (4th Cir. 1974).

127. *Id.* (citing *Fry v. County of Albemarle*, 86 Va. 195, 9 S.E. 1004 (1890)).

128. 504 F. Supp. 946 (E.D. Va. 1980).

129. *Id.* at 948.

malfunction.<sup>130</sup>

The court disposed of the plaintiff's case by explaining that "in Virginia, counties are immune to actions in tort without statutory consent."<sup>131</sup> Because that immunity has not been waived by statute, and is not waivable by the county itself, the county stands immune from plaintiff's action against it in tort.<sup>132</sup>

The line of relevant Virginia case law strongly suggests that a plaintiff would not be able to recover directly from a county for the negligence of its building inspector. There is still the possibility, however, that "parties injured by tortious acts of a local government's officers or employees may now have a remedy directly against the state."<sup>133</sup>

### B. *The Virginia Tort Claims Act*

The Virginia Tort Claims Act<sup>134</sup> [hereinafter referred to as the Act], represents a significant change in Virginia law. It is precisely the type of consent that is needed before a plaintiff may sue the Commonwealth or an agency thereof. Under the Act, the Commonwealth has made itself amenable to suit for damages, based on "damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any state employee while acting within the scope of his employment under circumstances where the Commonwealth, if a private person, would be liable to claimant for such damage, loss, injury, or death . . . ."<sup>135</sup>

The argument that the Commonwealth may be liable for the negligence of a county building official stems from the following analysis of statutory and common law. The Act describes a "state employee" as "any officer, employee or agent of any state agency, or any person acting on behalf of a state agency . . . ."<sup>136</sup> The term "state agency" is defined as "any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth of Virginia . . . ."<sup>137</sup> As previously discussed,<sup>138</sup> the Virginia Supreme Court has described counties as "agencies of the State."<sup>139</sup> Therefore, if a county is a state

130. *Id.*

131. *Id.* at 953; see also J. Clough, *supra* note 7, at 9.

132. *Obenshain*, 504 F. Supp. at 954.

133. Hackney, Remarks at the Government Liability Issues Seminar 4 (Apr. 16 & 18, 1984) (available at University of Richmond Law Library reference desk) [hereinafter cited as Hackney].

134. VA. CODE ANN. §§ 8.01-195.1-.8 (Repl. Vol. 1984).

135. *Id.* § 8.01-195.3.

136. *Id.* § 8.01-195.2(2).

137. *Id.* § 8.01-195.2(1).

138. See *supra* text accompanying note 119.

139. *Mann*, 199 Va. at 173, 98 S.E.2d at 518.

agency, county building officials are, by definition, state employees. A cause of action which is barred against a county may lie against the Commonwealth.<sup>140</sup> The defect in this conclusion stems from the flush language within the Act itself, which provides that no provision of this article will be "applicable to any county, city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth."<sup>141</sup> Clearly, this language evidences an intent to preserve local government immunity. However, it is doubtful that the Virginia General Assembly has intended to render some state agencies amenable to suit, while allowing no remedy for torts committed by comparable employees in comparable agencies. The logical conclusion must be that the General Assembly intends that plaintiffs injured by negligent acts committed by county employees will name the Commonwealth, rather than a county, as defendant. This conclusion seems particularly sound in the area of negligent inspection, given the fact that the VUSBC is a state regulation imposed on counties for administration and enforcement.<sup>142</sup>

## V. CONCLUSION

Under traditional Virginia common law principles, a municipal corporation may be found liable for negligent inspection if enforcement of the VUSBC is to be deemed a proprietary function, for which a duty is owed to the individual plaintiff. A county will be entitled to non-waivable sovereign immunity, regardless of any duty owed to the plaintiff. Thus, application of traditional common law principles may yield grossly different results for the same negligent act, the difference being which branch of local government is named as defendant.<sup>143</sup>

Sovereign immunity is no longer based on sound public policy. State and local governments should bear the responsibility for the negligent acts of their employees by acquiring adequate insurance policies, thereby spreading the risk of loss evenly among all their citizens. Common sense suggests that a building official's duties require highly technical skills

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140. See Hackney, *supra* note 133. Although the state's liability for negligent inspection is a subject beyond the scope of this article, it should be noted that the mere abolition of sovereign immunity would create no new torts. See Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 808 (Minn. 1979). Thus, when bringing an action for negligent inspection against the state the plaintiff will have to be prepared to argue that the state owed him a duty as an individual, that the duty was breached, and that the breach caused the injury. See *supra* text accompanying note 112.

141. VA. CODE ANN. § 8.01-195.3 (Repl. Vol. 1984).

142. This analysis is equally applicable to suits arising out of negligent inspections by municipal building officials. Hackney, *supra* note 133, at 4.

143. This inequitable treatment was found not to violate the Equal Protection Clause of the fourteenth amendment in Obenshain v. Halliday, 504 F. Supp. 946, 954 (E.D. Va. 1980). See generally J. Clough, *supra* note 7.

which, if performed negligently, could result in great loss of property and human lives. Government, like any other employer, should be required to employ only well-trained inspectors, upon whose assurances of safety society can rely. If our government continues to monopolize the trade of "inspection," let it do so responsibly, or stand prepared to compensate the victims of its negligence. The recently enacted Virginia Tort Claims Act<sup>144</sup> may serve to remedy traditional inequitable treatment by providing Virginia plaintiffs who seek recovery for negligent inspection with a single and amenable defendant.

*Matthew W. Broughton*

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144. See *supra* notes 134-35 and accompanying text.