

OP. NO. 05-008

**GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS –
GENERAL PROVISIONS.**

Landowners receiving fee for use of their property from political subdivision are covered by indemnification provisions of § 29.1-509(E). Political subdivisions are not indemnified except when they enter into arrangement with agency of Commonwealth. Political subdivisions that control private property by lease or contract to provide free public recreational use are entitled to reduced liability under § 29.1-509(B) and (C).

The Honorable Clarence E. (Bud) Phillips
Member, House of Delegates
March 29, 2005

Issues Presented

You ask two questions regarding the application of § 29.1-509, which governs a landowner's duty of care and liability for certain activities. You first inquire whether § 29.1-509 provides indemnification for landowners who receive rental or other remuneration from a political subdivision in return for allowing use of their land for public recreational purposes. You also ask whether § 29.1-509 provides indemnification for political subdivisions which are leasing or managing private property for public recreational use.

Response

It is my opinion that landowners who receive a fee for the use of their property from a political subdivision are covered by the indemnification provisions of § 29.1-509(E). It is further my opinion that political subdivisions¹ are not covered by those provisions except when they enter into an arrangement with an agency of the Commonwealth. At the same time, political subdivisions which control private property by lease or contract in order to provide free public recreational use are entitled to the benefit of reduced liability under the provisions of § 29.1-509(B) and (C).

Applicable Law and Discussion

Section 29.1-509 is central to your inquiry and provides as follows:

A. For the purpose of this section:

"Fee" means any payment or payments of money to a landowner for use of the premises or in order to engage in any activity described in subsections B and C of this section, but does not include rentals or similar fees received by a landowner from governmental sources or payments received by a landowner from incidental sales of forest products to an individual for his personal use, or any action taken by another to improve the land or access to the land for the purposes set forth in subsections B and C of this section or remedying damage caused by such uses.

"Land" or *"premises"* means real property, whether rural or urban, waters, boats, private ways, natural growth, trees and any

building or structure which might be located on such real property, waters, boats, private ways and natural growth.

"Landowner" means the legal title holder, lessee, occupant or any other person in control of land or premises.

B. A landowner shall owe no duty of care to keep land or premises safe for entry or use by others for hunting, fishing, trapping, camping, participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, foxhunting, racing, bicycle riding or collecting, gathering, cutting or removing firewood, for any other recreational use, or for use of an easement granted to the Commonwealth or any agency thereof to permit public passage across such land for access to a public park, historic site, or other public recreational area. No landowner shall be required to give any warning of hazardous conditions or uses of, structures on, or activities on such land or premises to any person entering on the land or premises for such purposes, except as provided in subsection D.

C. Any landowner who gives permission, express or implied, to another person to hunt, fish, launch and retrieve boats, swim, ride, foxhunt, trap, camp, hike, rock climb, hang glide, skydive, sightsee, engage in races, to collect, gather, cut or remove forest products upon land or premises for the personal use of such person, or for the use of an easement as set forth in subsection B does not thereby:

1. Impliedly or expressly represent that the premises are safe for such purposes; or
2. Constitute the person to whom such permission has been granted an invitee to whom a duty of care is owed; or
3. Assume responsibility for or incur liability for any intentional or negligent acts of such person or any other person, except as provided in subsection D.

D. Nothing contained in this section, except as provided in subsection E, shall limit the liability of a landowner which may otherwise arise or exist by reason of his gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. The provisions of this section shall not limit the liability of a landowner which may otherwise arise or exist when the landowner receives a fee for use of the premises or to engage in any activity described in subsections B and C of this section. Nothing contained in this section shall relieve any sponsor or operator of any sporting event or competition including but not limited to a race or triathlon of the duty to exercise ordinary care in such events.

E. For purposes of this section, whenever any person enters into an agreement with, or grants an easement to, the Commonwealth or any agency thereof, any county, city, or town, or with any local or regional authority created by law for public park, historic site or recreational purposes, concerning the use of, or access over, his land by the public for any of the purposes enumerated in subsections B and C of this section, the government, agency, county, city, town, or authority with which the agreement is made shall hold a person harmless from all liability and be responsible for providing, or for paying the cost of, all reasonable legal services required by any person entitled to

the benefit of this section as the result of a claim or suit attempting to impose liability. Any action against the Commonwealth, or any agency, thereof, for negligence arising out of a use of land covered by this section shall be subject to the provisions of the Virginia Tort Claims Act (§ 8.01-195.1 et seq.). Any provisions in a lease or other agreement which purports to waive the benefits of this section shall be invalid, and any action against any county, city, town, or local or regional authority shall be subject to the provisions of § 15.2-1809, where applicable.

1. Indemnification of Landowners Receiving Payments

You first ask whether § 29.1-509 provides indemnification of landowners who receive rentals or other financial remuneration from a political subdivision in return for allowing the use of their land for recreational purposes, including use by off-highway vehicles.

Section 29.1-509 is designed to encourage landowners to open their lands for public recreational use by reducing the standard of care and duties owed to those who engage in such use. Together, subsections B and C of § 29.1-509 provide that landowners who allow recreational uses owe no duty of care to such users, are not required to warn of hazardous conditions, and do not make any representations to those users about the conditions of the premises. Subsection D then provides that the duty of care applicable to landowners in such a situation is “gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.”² Section 29.1-509(D) further provides that the reduced duty of care provided by subsections B and C does not apply to landowners who receive a “fee” for use of the premises or to engage in the recreational uses described in subsections B and C.³ But because § 29.1-509(A) defines “fee” to exclude “rentals or similar fees received by a landowner from governmental sources,” subsection D does not apply to the question you present. Should a landowner, however, receive a “fee” as that term is defined in § 29.1-509(A) from a political subdivision for the use of his land, the reduced duty of care would not apply.

Subsection E of § 29.1-509 governs when a landowner enters into an easement or agreement with any state or local governmental agency to allow public access to his lands for the purposes set out in subsections B and C. Subsection E provides that the governmental agency “shall hold [the landowner] harmless from all liability and ..., pay[] the cost of, all reasonable legal services” in defending against claims of liability.⁴

Subsection E initially was added by the 1989 Session of the General Assembly.⁵ At the same time the legislature added subsection E, it added the phrase, “except as provided in subsection E,” to the first line of subsection D.⁶ Under basic principles of statutory construction, the intent of the General Assembly must be determined from the words contained in the statute.⁷ Thus, subsection E clearly provides a landowner contracting with a governmental agency indemnification regardless of the applicable duty of care or whether or not he is paid a fee.

2. Indemnification of Political Subdivisions

You also ask whether political subdivisions, including local governments, may be held harmless from liability when they manage or lease property for public recreational use.

As previously discussed, the indemnification provisions of § 29.1-509(E) run from governmental agencies to landowners. Under subsection E, a governmental agency cannot be the beneficiary of such indemnification with the possible exception of an arrangement between an agency of local government and an agency of the Commonwealth.⁸

Nevertheless, the Supreme Court of Virginia has ruled that a local government may be considered a landowner entitled to the reduced standard of care provided by § 29.1-509(B). In *City of Virginia Beach v. Flippen*,⁹ the Court considered a suit by a person injured while walking on a stairway over a bulkhead to a beach. By agreement with the private owners of the property, the city maintained such stairways to provide free public recreational beach access.¹⁰ The Court found that as a result of its activities in providing and maintaining such public access, the city was a “person in control of the premises”; thus, the city was a “landowner” as defined in subsection A.¹¹ As such, the city was entitled to the immunity from simple negligence provided in subsection B.¹² The Court added that § 29.1-509 was intended to encourage the opening of private lands to public use and that a broad interpretation of the definition of “landowner” was appropriate.¹³ As a result, a political subdivision that leases or manages lands intended for public recreational use would fall within the scope of the foregoing ruling.¹⁴

Conclusion

Accordingly, it is my opinion that landowners who receive a fee for the use of their property from a political subdivision are covered by the indemnification provisions of § 29.1-509(E). It is further my opinion that political subdivisions¹⁵ are not covered by those provisions except when they enter into an arrangement with an agency of the Commonwealth. At the same time, political subdivisions which control private property by lease or contract in order to provide free public recreational use are entitled to the benefit of reduced liability under the provisions of § 29.1-509(B) and (C).

¹A political subdivision may be considered a state agency for limited purposes. See 2002 Op. Va. Att’y Gen. 281, 283. Whether a political subdivision may in some circumstance be a state agency for the purposes of § 29.1-509 would be a question of fact not addressed herein.

²The effect of this language absolves the landowners of liability for simple negligence and replaces the duty of care with “gross negligence” and the limited liability in § 29.1-509(D).

³Subsections B and C of § 29.1-509 do not specifically list “off-highway vehicles” among the uses covered. Subsection B, however, includes as uses racing, bicycle riding, and any other recreational use. Such language is broad enough to encompass the use of off-highway vehicles for recreational purposes.

⁴In fact, any agreement that does not so provide is declared invalid. See VA. CODE ANN. § 29.1-509(E) (LexisNexis Supp. 2004). The liability of the Commonwealth or its agencies is limited by the Virginia Tort Claims Act. See §§ 8.01-195.1 to 8.01-195.9 (Michie Repl. Vol. 2000 & LexisNexis Supp. 2004). The liability of localities is subject to the provisions of § 15.2-1809, where applicable.

⁵1989 Va. Acts ch. 500, at 733, 734.

⁶*Id.* at 734.

⁷See *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

⁸A local government could, for example, lease its property to an agency of the Commonwealth for recreational purposes and take advantage of the hold harmless provisions of § 29.1-509(E).

⁹251 Va. 358, 467 S.E. 2d 471 (1996).

¹⁰*Id.* at 360, 467 S.E. 2d at 472.

¹¹*Id.* at 361-62, 467 S.E. 2d at 473-74.

¹²*Id.*

¹³*Id.* at 362, 467 S.E.2d at 474.

¹⁴You imply and I assume that the local government does not charge fees for public recreational uses. If it did, the provisions of § 29.1-509(D) as discussed herein might well cancel the reduced duty of care and limitation of liability provided by subsections B and C.

¹⁵See *supra* note 1.

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