



## Virginia Local Government Law

# Defamation at Public Meeting of Governing Body: No Absolute Privilege

**By: Andrew McRoberts. *This was posted Thursday, January 20th, 2011***

For years, Virginia local government attorneys believed that an absolute legislative privilege attached to reports and statements by staff and others to the elected officials at a meeting of a local governing body.

Legislative bodies like our local elected boards and councils should have an absolute privilege for good reason. Frank advice and reports from staff, and unconstrained comment from the public is important for our representative democracy. Dishonesty, error or even mean-spirited accusations can sometimes be an unfortunate part of the noise of democracy, just as honesty, truth and positive and well-meaning comments can be. Public policy suggests that letting the legislature weigh all the information and act in the best interests of its citizens is better than the legislature receiving half of the story from staff or the public for fear of a lawsuit.

Apparently, Virginia local government attorneys were right. But not entirely.

### **Isle of Wight County v. Nogiec *Decision***

In a recent opinion handed down on January 13, 2011 by the Virginia Supreme Court in the case of [Isle of Wight County v. Nogiec](#), the Court assumed without deciding that a local elected body had an absolute legislative privilege “when it is creating legislation,” but held that no absolute privilege exists when the governing body is acting “in its supervisory or administrative capacity.” In the latter case, only a qualified privilege exists, which can be overcome by allegation and proof of malice.

On the facts of this case, the Court went on to hold that no evidence had been presented that the Isle of Wight Board of Supervisors was considering legislation when it received the report in question from an assistant county administrator. To the contrary, the evidence showed that the “Board had convened to receive a report on the efforts being undertaken to repair County property....” (The Court did not reach the issue of whether a failure to plead absolute immunity as an affirmative defense constituted a waiver of that defense.)

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So under *Nogiec*, reports and statements to a local governing body can be absolutely privileged. But that absolute privilege only attaches if the governing body is acting legislatively.

### ***Concerns with Nogiec Rule***

There are concerns with *Nogiec*'s "sometimes but not always" approach to privilege in speech before a governing body. While the *Nogiec* rule plainly makes it easier for an allegedly harmed plaintiff to bring a defamation case to trial, it may harm the public process.

Whether a local governing body is acting legislatively is frequently not clear to the governing body and certainly not to those speaking to the body. And, since the question of whether a governing body is acting legislatively may not be decided until after trial, this could have a chilling effect on information flowing to elected officials.

### ***Is a Local Governing Body Acting Legislatively?***

Local elected bodies have lots of roles, as pointed out by the Supreme Court. They are not always obviously legislative or administrative, but frequently can be a blend of several roles. Acting legislatively may not be limited to "creating legislation" like an ordinance. And the true nature of the governing body's role at the time certainly may not be clear in the heat of the moment when a question is being asked by an elected official.

Backstopping all of its roles is the governing body's chief role as the local legislature, with the ability to craft and make the laws that govern the locality. Every report, every investigation, every answer, every record, and all information assists the local legislative body in determining whether its existing ordinances or new ordinances being considered are appropriate, need amending or adopting. While it is true that some items on the agenda may, on their face, appear to be supervisory or administrative, underlying them frequently is a legislative consideration or local law that is being applied or could be adopted.

Everything informs the legislature, even if an ordinance amendment may not be on the agenda at the moment. Potential legislation may be in the mind of the elected official when asking a question during a seemingly-unrelated agenda item. Is it less important for our elected officials to get the full picture before deciding to start "creating legislation" than after?

### ***The Possible Chilling Effect of Nogiec***

Unlike with an absolute privilege, a qualified privilege must be proven by the defendant. Therefore, a potential defendant might not know until trial whether a privilege exists or not. The ruling in *Nogiec*, then, could chill the comments of staff and even the public in significant matters before the governing body. If a plaintiff alleges malice, a full trial may be required before resolution of a qualified privilege defense. This gives potential plaintiffs a big stick to carry.

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As the Virginia Supreme Court has noted in its sovereign immunity jurisprudence, the threat of being dragged into litigation can have a serious detrimental effect on a public servant and his or her efforts on behalf of the public. *Messina v. Burden*, 228 Va. 301, 308, 321 S.E.2d 657 (1984) (describing “eliminating public inconvenience and danger that might spring from officials being fearful to act” and “preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation” as among the purposes of sovereign immunity).

For this reason, *Nogiec* could mean that a governing body will receive less than the full and candid thoughts of staff or the public in the future. Getting the complete story is arguably no less important for a governing body than for a court, before which an absolute privilege always applies.

In its opinion, the Court said it was striking a balance between the “public interest in free speech” and the “potential harm to an individual’s reputation.” What do you think? Did the Court strike the right balance?

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