



Maryland Municipal Attorneys Association

Brynja Booth, President; Lynn Board, Vice President; Frank Johnson, Secretary; Jason DeLoach, Treasurer

MINUTES FOR JUNE 11, 2018 MEETING

APPROVED NOVEMBER 8, 2018

The Monday, June 11, 2018 MMAA meeting was held at the MML Summer Convention, in Room 210 at the Convention Center in Ocean City, Maryland. Brynja Booth, President, called the meeting to order and welcomed everyone at about 12:25 p.m., after giving members a chance to have lunch.

1. Brynja noted the next meeting is planned as a joint municipal/county attorney meeting, as we've previously agreed, and will be on Thursday, November 8, 2018, most likely at Harry Browne's in Annapolis. Tom Yeagher, who serves as the MACo County Attorney President, said the topics for discussion and a speaker were being discussed but should be finalized soon; past suggested topics have included policing issues and the use of body-worn cameras by police.

2. Brynja also noted that MML had been asked by the Town of Forest Heights to file an Amicus brief in the appeal of the Prince George's Circuit Court which nullified two annexation resolutions in the case of *Town of Forest Heights v. Maryland-National Capital Park and Planning Commission and Prince George's County*. The issue involves the question of whether the owner of tax-exempt land within the proposed annexation area must be included in the Local Government article requirement that 25% of all landowners assent to the annexation. While a Court of Special Appeals case from 1974, *City of Salisbury v. Banker's Life*, 21 Md. App. 396 (1974), which held that tax-exempt landowner consent was not required, based on legislative history. But the Circuit Court did not follow that holding and found, for the first time, that tax-exempt landowner consent was now required as part of the mandated 25% before any annexation could proceed. The request for MML participation in the appeal was considered in May by the MML Executive Committee, which referred it to MMAA to establish a panel to review and draft an analysis, with a recommendation, for the MML Board. Brynja asked MMAA Secretary Frank Johnson to serve with her on the panel. Before they were able to make their report and recommendation to the MML Board of Directors at their June 10 meeting, the Maryland Court of Appeals granted the Forest Heights petition for certiorari, meaning the decision will almost certainly be published and will have precedential effect in Maryland. As such, the MML Board of Directors voted to accept MMAA's recommendation that MML participate in the Court of Appeals briefing by filing an Amicus Brief. Kevin Best, who is representing Forest Heights along with Fred Sussman, noted the petitioner's brief would be due in late July and oral argument will be scheduled in early October of this year.

3. Jason DeLoach, Treasurer, noted that dues payments had been sent out for FY 2018/2019 and members should expect to receive them soon, if they haven't already.

4. Brynja then presented information on the *Waterman Family Limited Partnership, et al. v. Kathleen Boomer, et al.* case involving the county's density waiver regarding an annexation. She handled this case for the Town of Queenstown at the Circuit Court level and then before the Court of Appeals after they granted certiorari. In this case, she explained the area annexed had been included in the Town's Master Plan growth area for at least 10 years, and that the Queen Anne's County Planning Commission and Commissioners had granted the waiver. This allowed density on the annexed area at a rate more than 50% higher than the existing county zoning – which, since it was agricultural, would have allowed little to no building at all at least for 5 years. But, an election was held just after the waiver was granted, and the new county commissioners as their first order of business reversed the waiver. The issue on appeal was whether that reversal was valid. Brynja argued that the Town's right was effectively vested with the County's grant of a waiver, as with the annexation proceeding, all zoning authority and

control passed to the municipality – which was indeed the point of the annexation. But the Court of Appeals disregarded the Town’s vesting, focusing instead on the fact that the developer’s rights have not yet vested, as no building permits had been issued nor, therefore, any substantial construction on the site. As such, the Court found that common law grants local governments the right to reconsider and reverse their decisions, and thus they can rescind even a resolution granting the 5-year waiver in this case. She explained that, effectively, that decision eliminates the waiver provision, but imposes a 5-year hold on any increase in density in annexed land, at least beyond the 50% limit allowed by the prior county zoning.

5. Lynn Board, MMAA Vice President, reported on the FCC and small cell regulation changes. She reported that the FCC has asked for a meeting with the small cell coalition to discuss municipal regulation processes, which is a shift from issuing stringent regulations pre-empting local authority, which some had expected. She noted that this FCC inquiry may be related to the recent *Murphy* decision from the Supreme Court, which invalidated the federal Professional and Amateur Sports Protection Act’s restriction on states allowing gambling and wagering on competitive sports events. The Court in that case recognized a 10th Amendment right for states and local governments to regulate actions of their residents and businesses. The Supreme Court held that federal pre-emption could remove all local authority for areas in which the federal government chooses to occupy or regulate. But short of issuing their own regulatory laws in a given area, Congress can’t simply prohibit states and local governments from doing so. This recognition of the power of the 10th Amendment would not be limited to sports gambling, and could indeed limit the authority of the FCC to issue rules restricting local government authority. Lynn and Candace Donoho, MML Director of Government Relations, also noted that while state legislation to pre-empt local authority to regulate small cell installations did not proceed to a hearing, the issue is likely to arise again in the next General Assembly. It will therefore be important, in the meantime, for municipalities as well as counties to update their legislation and, where necessary, regulations to put a workable process in place which imposes restrictions on small cell installations but, at the same time, establishes a workable process for such applications. Candace noted MML has several examples of sample legislation for municipalities to use in putting these laws in place. They noted that the absence of such enabling laws would give providers an argument that local government isn’t acting and state law is therefore necessary to allow them to proceed.

6. Candace also warned us about a few pre-emption issues that arose during the last General Assembly session, One was the small cell bill, which provided industry standards that would have largely eliminated any local authority, including zoning authority, over any small cell facility. But another one involved medical marijuana and the placement of dispensaries; at one point, Senator Hershey had proposed allowing a county to override any municipal zoning or permitting process allowing a dispensary within the municipality, if the county wished to prevent any dispensary in the county. Doing so would be in stark contradiction to state provisions specifying that the municipality has land use control over land within the municipality and the general rule that municipalities are independent government entities. While that proposal did not proceed, Candace warned that such pre-emption efforts could recur in future General Assemblies, especially given the large turnover of as much as 30 to 40% which is predicted after the 2018 elections.

Brynja thanked members for their attendance, and with no further issues for the good of the order, the meeting was adjourned at 1:10 p.m.

Frank Johnson, Secretary