Maryland Municipal Attorneys Association

Quarterly Newsletter – Winter 2018/2019

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Maryland Municipal Attorney Association News and Updates

This quarterly newsletter gives brief updates and notes on select legal issues affecting Maryland municipalities. Share this with anyone who may be interested or want to join MMAA. Our webpage on the MML website (under "Departments") is also updated with information on past and upcoming meetings. Send any changes or suggestions to Frank Johnson via email at frank.johnson@gaithersburgmd.gov.

Emerging Trends Police Liability and Personnel Claims and Litigation

Our fall meeting was the first joint meeting with the MACo Civil County Attorneys. With so many issues affecting all local governments at the county and municipal level, a key outcome of this meeting was to continue at least annual joint meetings.

This meeting included a presentation by two Local Government Insurance Trust (LGIT) attorneys on two key issues most local governments face – personnel and police. John Breads from LGIT spoke on police liability issues. He had three main points. First, he said that while many thought body cameras might revolutionize defense of police, they did not, as they cannot conclusively capture everything that happens. He reported that many Circuit Court judges say that even with a body camera tape, issues of fact remain unresolved, and must go to the jury. John also suggested that the existence of body cameras should be used as an opportunity to teach officers how their statements and actions can be perceived, long after the incident has occurred.

As to qualified immunity, John reported that the courts increasingly want to see some effort to resolve the issues and de-escalate the dispute before police use the Taser, and that when it is used repeatedly, it can in some cases lead to removal of immunity. John also noted that if there is no immediate threat to officers, even if a defendant is armed, deadly force will almost always be considered excessive force, which recently included putting a compliant child in handcuffs.

Finally, John noted that for federal claims, Federal Rule of Civil Procedure 68, concerning attorney's fees, is becoming very critical in fee-shifting cases. That rule is, he explained, a risk-shifting tool to encourage settlements for reasonable amounts, such that it penalizes parties who opt for litigation after a reasonable offer. He noted that all costs can be assessed to a party after a reasonable offer is refused, in addition to the removal of qualified immunity in some cases. Thus, early offers of judgement are sensible in many cases.

Matt Peter spoke to personnel and employment cases. He also said it's better for local government to contact LGIT with the first claim so that LGIT can coordinate the initial response and defense from that point. As to discrimination charges, he noted the Maryland Commission on Civil Rights now convenes more of formal fact findings than interviews, allowing everyone, including witnesses, the right to attend and cross-examine or ask other questions, and even allowing advocacy by claims attorneys. He said the Commission also now prefers attorneys to be present with some settlement authority in order to resolve cases. Matt also noted the Equal Employment Opportunity Commission (EEOC) at the federal level is now, in many cases, simply issuing "right to sue" letters even before LGIT has been able to file any response to a claim.

Finally, Matt noted that the Supreme Court has issued a ruling that the prohibition on age discrimination applies to all local governments, effectively removing the 20-employee exemption for smaller jurisdictions, finding that exemption was never intended to apply to local governments.

An Update on the FCC, Small Cells and Wireless Networks

Especially as to small cell installations, the Federal Communications Commission (FCC) has been extremely active recently. On August 3, 2018, the FCC issued an overall ban on any state or local moratorium on small cell installations, FCC Order 18-111, as part of the overall FCC goal to accelerate wireless broadband deployment by "removing barriers to infrastructure investment." The Order made it clear that the FCC generally considers state and local governments as a primary impediment to wireless infrastructure, and followed that line of reasoning with their next proposed order on September 26, 2018, FCC Order 18-133, which took further steps to shorten shot clocks, limit fees and restrict local authority to regulate right of way installations. Shot clocks for "small wireless facilities" of as little as 60 days for "co-locations" on existing wireless infrastructure, and 90 days for new installations were proposed, along with a new definition of "small wireless facilities" consisting of an antenna not larger than 3 cubic feet and equipment up to 28 cubic feet.

While the prior rule that certain applications would be "deemed granted" upon the applicable deadline were withdrawn, the new proposed order also proposes that shot clock overruns are considered overall prohibitions on the provision of services, allowing expedited injunctive relief.

The Order would go into effect on January 13, 2019, and appeals may be filed until December 14, 2018. Given the dramatic impact this would have on local authority, appeals and requests for reconsideration are under way. The August 3 moratoria order is under appeal in the 9th Circuit. As to the September 26 proposed order, a stay request has been filed with the FCC, and at least four separate appeals have been filed in four different circuits (including the D.C. Circuit, 1st Circuit, 9th Circuit and 10th Circuit Court of Appeals). The Judicial Panel on Multidistrict Litigation has designated the 10th Circuit to consider the consolidated case, but that order will likely be subject to a motion in favor of the 9th Circuit.

On top of all of this, there is also much action at the state level. In the last General Assembly session, Senate Bill 1188 and the cross-file, House Bill 1767, would have imposed industry-supported restrictions along the same lines. The bills were, after substantial citizen and local government opposition, withdrawn. But it is expected that similar bills will be proposed again in the next General Assembly session. Indeed, the industry is arguing that they will bring substantial economic investment, and seek four key priorities, effectively pre-empting local authority. These include, on top of the FCC order already in place, unrestricted right of way access, standardization of all processes, firm shot clocks, limited fees – and incorporation of the FCC order as state law. The Maryland Municipal League has designated this issue as their key legislative priority for the 2019 General Assembly session. So stay tuned!

Court Finds Local Zoning Pre-Empted for Solar Panel Farm

The Court of Special Appeals has issued a reported decision finding Public Service Commission approval of a power generating stations, including solar panel farm, pre-empts all local zoning authority. In *Board of County Commissioners of Washington County, et al. v. Perennial Solar, LLC*, Court of Special Appeals No. 1022, Sept. Term 2016, ___ Md. App. ____ (2018), Perennial Solar had applied for a special exception to allow siting of a Solar Panel farm in Washington County, Maryland, after receiving a certificate of public use and necessity from the Public Service Commission.

The Washington County Board of Zoning Appeals, after hearing from aggrieved residents, denied the special exception. But the Circuit Court and, on appeal, the Court of Special Appeals found that Public Utilities Article §7-207 was so comprehensive in scope in allowing generating stations as to pre-empt, by implication, any local zoning authority. The Court cited *Howard County v. Potomac Electric Power Company*, 319 Md. 511 (1990), which didn't address solar panels. We understand Washington County plans to seek certiorari from the Court of Appeals.