



Maryland Municipal Attorneys Association

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

MINUTES FOR FEBRUARY 7, 2019 MEETING

APPROVED 5/9/19

The Thursday, February 7 MMAA meeting was held at Harry Browne's Restaurant on State Circle in Annapolis, Maryland. Brynja Booth, President, called the meeting to order at 12:20 p.m. She welcomed everyone, and in noting this served as the MMAA's annual legislative meeting, indicated she may adjust the agenda as needed, as MML government relations staff (Justin Fiore, Director of Government Relations and Bill Jorge, Manager, Government Relations and Research) may have 1:00 pm legislative hearings.

1. Minutes of the November 8, 2018 meeting were unanimously approved, on motion by Jason DeLoach which was seconded by Lynn Board.
2. For the Treasurer's Report, Jason DeLoach reported \$3,336.00 in the MMAA bank account, which did not include a deduction for the cost of today's lunch, and noted membership would need to decide at the Spring meeting whether to continue the annual membership dues.
3. Secretary Frank Johnson noted that Fisherman's Inn at Kent Narrows, our traditional site for the Spring meeting, was available for lunch on Thursday, May 9, 2019, and would be selected unless there was any major conflict or objection. No objection was raised to the date or location.
4. Brynja introduced Bill Jorch from MML. He noted three main legislative issues had, so far, been apparent. The first was regarding small cells. He indicated that MML was part of a meeting yesterday with Delegate Dereck Davis, who is Chair of the House of Delegates Economic Matters Committee. About a dozen industry representatives participated, as well as himself, MMAA members Lynn Board (Gaithersburg), Victor Tervalá (Baltimore City) and Natasha Mehu, Legislative Director for the Maryland Association of Counties. He noted there is a broad difference between the industry bill, generally minimizing if not eliminating any local authority and the local government proposed bill, which would preserve local authority while establishing basic timelines and processes. Each side was asked to review the other proposals and meet again next Wednesday. Bill noted that Chairman Davis did remark to the industry that appearances of the facility installations, aesthetics and co-locations (rather than separate poles for each provider) would be critical for General Assembly members. He underscored members were concerned with the possibility of creating significant visual blight and large numbers of poles in communities. He also indicated that as to local authority he had concern with distinct processes for each locality and would prefer certain set standards. Clearly, this legislation will continue to be a work in progress.

As to the two other key issues, Bill noted that the issue of attorney's fees being awarded in constitutional claims had arisen again, as it has year after year. No bill is yet introduced but he said MML would reiterate its opposition. He also noted that as in past years they will, even while opposing the bill, seek to add in offer of judgment provisions as exist in Federal law. The third upcoming issue will involve a proposal to substitute comparative negligence for contributory negligence. The different in impact is that a finding of contributory negligence, as is now the law in Maryland, results in an outright denial of a liability claim, such as after an auto accident, while comparative negligence would not result in outright denial. Instead, comparative negligence would result in an award, thus leaving local governments in a potential lurch in trying to cover costs, and would be very highly pro plaintiff. He asked for help with testimony and comment as the bill moves forward.

Eliot Schaefer, MMAA's representative on the MML Legislative Committee, noted two other bills raising local concerns. One would limit local taxing authority, which MML would oppose. A second is a proposed amendment to the forest conservation act to limit local ability to charge or collect "fees in lieu" only if an identified program for them immediately (could not hold in the meantime or go to general fund).

4. Brynja introduced Gerard (Gerry) Lederer with Best, Best and Krieger, who has been leading litigation on Federal Communications Committee (FCC) and small cell issues, especially involving local zoning authority and local authority to regulate rights of way. Gerry first complimented MML and local officials in their efforts to educate and inform local officials as to why local authority is needed to protect communities.

He first outlined 4 main elements of the FCC order. The first is the new legal standard to establish an effective prohibition. The new FCC order says that if a local government materially inhibits their ability to provide service, we may face a challenge. He said the key problem is that, as the 9th Circuit found, anything may "materially inhibit" the ability to install facilities, including requiring any review or permit at any level. Second, as of January 14, new shot clocks are in place. For small cells, the first shot clock is that local governments have 10 days to determine if the application is incomplete. Gerry noted that any time we return an application for incompleteness, we are limited to the issues identified initially and can't come up with anything else, meaning, local officials have one bite of the apple to note an incomplete application. And if the application is not for a small cell, the deadline is 30 days to determine if the application is incomplete. The overall shot clock for small cell on existing structure is 60 days to decide, as well as for a co-location under Sec. 6409. The deadline is 90 days if the installation is on a new structure, and it's 150 for a non-small cell facility installed on a new structure.

The third area of the FCC order included fees, where the standard is a reasonable recovery of costs. Thus, he noted that the FCC numbers are not mandated limits, but are provided as safe harbors. Thus, he underscored that local officials can recover full costs for review of an application, even if they are more than the safe harbors provided. Rates have the same recovery of costs standard as well, he noted. He noted that while the FCC says \$270 is a safe harbor for a permit for use of right of way, in Maryland costs are much more than that. He noted some agreement language in which local officials reserve the right demand full market value after future court decision if the FCC order is overturned. Finally, he noted the FCC rules on aesthetics, undergrounding and spacing are in effect on April 15. He noted the requirements are that they be reasonable, in writing and applied across the board. In writing, he noted, doesn't mean an ordinance; can be policy, permit, or anything applicable in writing.

As to the current status, Gerry first noted that Maryland has been extremely helpful and that Lynn Board has helped provide leadership in addressing these issues both in Maryland and nationwide. He highlighted that in the House of Representatives, HR 530 was introduced which would erase both the August order (on moratoria) and the September order on standards, shotclocks, fees and aesthetic regulations. As to litigation challenging the FCC order as beyond legislation approved by Congress as well as Constitutional limits, he noted suit was filed in 10 days after FCC published the order in order, and filed in the 9th Circuit. But providers filed in other circuits, including the 1st and 10th, and after the initial stay was denied, the case was transferred to the 9th Circuit. Lynn noted in conclusion that there are two Maryland bills, one being the joint MML/MACo bill protecting local rights; and the industry bill attempting to codify the FCC order into Maryland law and then adds more restrictions such as limiting zoning and right of way authority. She urged members to certainly talk to local delegations as well.

Gerry also noted that as to cable TV, the FCC is saying providers can offset the market value of any non-cash benefits, such as PEG, from their fees. Thus, free services to schools and communities would cost the fees.

Brynja thanked the presenters and everyone for attending, and with no further issues for the good of the order, a motion was made, seconded and passed to close the meeting, and the meeting was thus adjourned at 1:55 p.m.

Frank Johnson, Secretary