



# Maryland Municipal Attorneys Association

## Quarterly Newsletter – Winter 2019/2020

Lynn Board, President; Todd Pounds, Vice President; Frank Johnson, Secretary; Jason DeLoach, Treasurer

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### Maryland Municipal Attorney Association News and Updates

This quarterly newsletter provides brief updates on state and federal legal issues affecting Maryland municipalities. Our webpage, under “Departments” on the Maryland Municipal League (MML) website, provides more information about MMAA and our meetings and newsletters. Send any changes or suggestions to Frank Johnson at [frank.johnson@gaitHERSBURGMD.GOV](mailto:frank.johnson@gaitHERSBURGMD.GOV).

### The Need for Ongoing Local Government Involvement in the Opioid Litigation

Our fall meeting was the second joint meeting with the Maryland Association of Counties (MACo) County Civil Attorneys. This meeting included a focus on the ongoing Opioid crisis impacting individuals and communities nationwide. The crisis has resulted in a raft of litigation, much between local governments and those who produce and distribute opioids.

Jonathan Novak led the discussion. He is from the Fears, Nachawati firm in Dallas, Texas, which is handling part of the opioid litigation for local governments, including 19 in Maryland, one of the most active states. He also formerly served in the U.S. Department of Justice Drug Enforcement Administration. Jonathan reported that there are roughly 2,500 cases on opioid claims in Federal multi-district cases, with another 500 in other state systems. If all counties and municipalities counted, there would be approximately 30,000 potential plaintiffs. In this regard, despite attention to certain settlements, he noted such settlement can't happen if the defendant has no peace of mind as to additional liability. He noted some trials are ongoing as well.

Jonathan told us that this crisis started when people were injured or otherwise went to doctors and doctors had been told opioids, which are painkillers,

are safe and not addictive. Thus, an average opioid prescription length in 2008 was for 30 days. And that 30-day prescription period led to much of the problem. It is now known that there is a 35% addiction rate for use of opioids for 30 days. For those 35% of addicted patients, when the prescription runs out, they will usually try to get more and may, Jonathan said, shift over to heroin when they can't, which often results in fatalities.

Jonathan said the evidence showed that manufacturers encouraged doctors to write prescriptions; distributors made sure the drugs were shipped to them. He said that even when it became known there was a problem with addictions, no significant changes were made, leading to much of the litigation now underway.

Jonathan indicated that pharmacies may have received the most revenue, and may have had the chance to limit the crisis, while manufacturers were not always directly involved in distribution. Jonathan reported that local government litigation has involved municipalities and counties trying to get the money back for the extra costs they've paid due to the crisis, but some state attorney generals have sought to eliminate any local reimbursements. Fortunately, he noted, Maryland's attorney general is not taking that approach!

Jonathan emphasized that class action notices are going out to local governments, and each has the option to opt out or stay in the class action. He said opting out eliminates any chance of recovery, while those staying in could receive as much as 25% more in reimbursement. He concluded that everyone could end up settling with manufacturers and distributors over time, but does not expect all to settle, and said litigation is and will be ongoing. As such, his firm is still taking new clients and advised local governments to stay abreast, stay involved and not opt out or close the door to any future recovery.



## MML Legislative Priorities for the 2020 General Assembly Session: (1) Extend Highway User Revenues, (2) Preserve Local Authority over Small Cells and (3) Begin Dialogue on 5-Year Rule

Bill Jorch, MML’s Manager of Government Relations and Research, reported at our fall meeting on legislative priorities adopted at the MML Fall Conference in October. While Highway User Revenues (HUR) were largely restored, Bill noted the 2018 legislation only provided funding through FY 2024. MML’s intent is to eliminate that sunset while returning to full funding in FY 2025, along with annual increases tied to the Consumer Price Index, which is used to adjust the gasoline tax rate to begin with.

Second, MML will again work to preserve local authority over small cell wireless facility installations, thus opposing expected industry efforts to restrict – if not eliminate – local authority over zoning, rights of way or the installation of poles or equipment almost anywhere. With the new push to encourage 5G wireless networking, which may require more installations given a smaller range, it will be important to ensure local authority remains in place to serve each community and municipality.

Third, MML adopted two strategic initiatives, one, to continue identifying new potential sources of municipal revenues, and a second to “open a dialogue” on alternatives to the “5-year rule” on annexations, which allows counties, in response to an annexation effort, to halt development for 5 years if the land is rezoned to allow 50% or more density, under Md. Local Government Code Ann., §4-416(b).

### The 5-Year Rule on Annexations

This 5-year rule was the result of negotiations decades ago between counties and municipalities to establish a process allowing annexation but ensuring some measure of predictability for all parties. The intent was to ensure county notice and input, but not allow an effective county veto prohibiting an annexation. As such, this 5-year or “substantially higher density” limit can be waived by the county,

and in many cases that waiver is a critical part of any annexation petition and resolution establishing initial zoning, effectively ensuring the county is part of the process.

But the goal of allowing predictability for all parties was recently confounded by the Court of Appeals in *Waterman Family Limited Partnership, et al. v. Boomer*, 456 Md. 330 (2017), in which the Court found that counties have the inherent authority to rescind that decision at any time prior to the end of the 5-year period. In many cases, such an ability to reverse the waiver may lead to no effective waiver, but an actual 5-year delay in any development exceeding the 50% limit. At any rate, the *Waterman* decision has certainly added a new level of uncertainty and risk to annexation re-zonings based on such 5-year waivers, as the only practical limit on a county reversal of such a waiver would be vested rights taking effect as development commences on the land under the new zoning. MML will look to open a dialogue with all concerned parties, including counties, to consider alternatives or adjustments to ensure county notice and involvement, but which preserves more certainty and confidence.

### Counties Will Focus on Eliminating Implied Pre-Emption

Les Knapp, Legal and Policy Counsel for MACo, reported at our fall meeting that MACo would be seeking to legislatively eliminate implied pre-emption of local laws. Currently, any local law conflicting with state law is pre-empted, but pre-emption can also be express or implied. *East Star, LLC v. County Commissioners of Queen Anne’s County*, 203 Md. App. 477, 485 (2012). Express pre-emption occurs when state law specifically prohibits local law. Implied pre-emption occurs when the court finds the state acts “with such force” to occupy an entire area of the law that the court implies the state intends “to occupy the entire field,” leaving no room for local authority. *Talbot County v. Skipper*, 329 Md. 481, 488 (1993). There is no set formula, but the court instead must consider a series of factors. MACo seeks to require either a conflict or express pre-emption to eliminate local authority.