



Maryland Municipal Attorneys Association

Quarterly Newsletter – Summer 2020

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

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Maryland Municipal Attorney Association Updates

This quarterly newsletter provides brief updates on key state and federal legal issues affecting Maryland municipalities. Our webpage (under “Departments” on the Maryland Municipal League (MML) website), provides more detail on the MMAA and our meetings, and it has an archive of past newsletters. Send any changes or suggestions to Frank Johnson at frank.johnson@gaithersburgmd.gov.

Virtual Meeting on May 7

In the midst of the COVID-19 epidemic, MMAA held its first virtual meeting on May 7 to allow members to reconnect and share some of the key issues they’re facing. Lynn noted that 20 MMAA members voted through the electronic platform or sent their PDF ballot to approve the current officers continuing for FY21, as well as Elissa Levan on the MML Board of Directors, and Debra Daniels on the MML Legislative Committee. Members also voted to continue with the \$50 dues per member, for which Jason DeLoach (Treasurer) will bill us as of July 1.

In the roundtable discussion, many touched on the challenges of conducting virtual council and board meetings, and it is clear that these meetings are being handled in different ways. Some are using conference calls, others conduct virtual meetings, such as through Zoom or other platforms, and others meet in person (with appropriate social distancing) and broadcast the meeting. All noted steps taken for prior notice and to assure public access. Public hearings was noted as especially challenging, including the need to arrange for public comment in advance to allow scheduling. Particular concerns were raised with adversarial hearings involving the right of cross examination. Some noted they have scheduled hearings for various boards, but would avoid controversial or highly contested hearings to the extent possible.

Deprivation of All Beneficial Use Required for Zoning Takings Claim

In *Maryland Reclamation Associates, Inc. v Harford County*, ___ Md. ___, 2020 WL 1969948 (April 24, 2020) the Court of Appeals dismissed a property owner’s claim that Harford County zoning was a constitutional taking, as the owner failed to exhaust by first presenting the claim to the Board of Appeals. The Court stated that such a claim “must be raised within the context of the administrative remedy.” *Id.* at 29, citing *Maryland Reclamation Associates, Inc. v. Harford County*, 382 Md. 348, 366 (2004) (MRA III). The Court also underscored that any takings claim based on a zoning regulation must show that it “deprives [the owner] of all beneficial use of the property.” *Id.* at 25, citing *City of Baltimore v. Borinsky*, 239 Md. 611, 622 (1965).

This claim started more than 30 years ago, in 1989, with the appellant’s purchase of land area in Harford County, where it intended to create a rubble landfill. The Court referred to a “tortuous litigation history,” *Maryland Reclamation Associates*, 2020 WL 1969948, at 4, and the record included four prior appellate decisions involving the same parties, named MRA I, II, III and IV respectively. The cases variously addressed estoppel, zoning estoppel, substantial evidence to support a Board of Appeals variance denial, prior failures to exhaust administrative remedies, and violation of substantive due process through ordinances which were argued to be “arbitrary and capricious,” *Id.* at 4. The current part of the litigation had begun when Maryland Reclamation Associates filed a complaint in Circuit Court against Harford County for a taking by eminent domain without just compensation, amended in 2015 to include inverse condemnation. A jury returned a verdict in excess of \$45 million, which Harford County had appealed. The decision was written by Court of Appeals Judge Brynja Booth, former MMAA president.



CARES Act and FFCRA Impacts on Local Government Payroll Processing and Deductions

The two main federal laws passed with the pandemic, the Coronavirus Aid, Relief and Economic Security (CARES) Act and the Families First Coronavirus Response Act (FFCRA) provide for several mandates for sick leave and paid Family and Medical Leave Act (FMLA) leave.

The Emergency Paid Sick Leave portions consist of up to 80 hours of additional paid sick leave at the employee's full rate of pay where the employee can't work (or telework) due to quarantine or COVID-19 symptoms. Alternatively, up to 80 hours of additional paid sick leave at two-thirds of the employee's rate of pay is permitted for time off to care for a person subject to a quarantine, or care for a child whose school is closed or their child care provider is unavailable due to COVID-19. The Emergency Family and Medical Leave Expansion portion extends FMLA leave to allow up to 10 weeks of paid leave at two-thirds the employee's regular rate of pay (capped at \$200 per day or \$10,000 overall) where the employee must care for a child whose school is closed or the child care provider is unavailable due to COVID-19. This does not extend the 12-week-maximum annual FMLA leave.

But while subject to the mandates, state and local governments are generally not eligible for any credits, whether against the federal tax, Medicare, or Social Security. There are two key credits, and each specifically excludes government entities. One employer tax credit is provided by Section 2301 of the CARES Act. This provides businesses or nonprofits with an "employee retention tax credit," consisting of a refundable payroll tax credit for 50% of wages (and health costs) paid by employers during the pandemic. The deductions can include federal income taxes, Social Security, Medicare and the employee's share of Social Security and Medicare as well. But subsection (f) specifically excludes "any State or political subdivision thereof" as employers subject to the credit. Section

7001 of the FFCRA allows a private or nonprofit entity to deduct as a credit against payroll taxes 100% of the funds needed to pay federally mandated sick leave or emergency FMLA leave, as well as the employer payments for Social Security and Medicare. But subsection (e)(4) explicitly states that the credits "shall not apply . . . to the government of any State or political subdivision thereof . . ."

There are two benefits local governments can use. First, Section 2302 of the CARES Act allows all employers – including local governments – to defer timely payment of the employer portion of the Social Security and the Railroad Retirement Tax until December 31, 2020. This is not a credit, but only a deferral; it requires payment of half of the deferred employer Social Security portion by December 31, 2021, and the other half by December 31, 2022. The IRS Guidance on Deferral, at Section 3, specifies it applies to all employers.

Second, there is one exclusion for the employer social Security portion of any FFCRA payments (for sick leave or emergency FMLA). For those payments as required by the FFCRA, the employer Social Security payment for those specific wages is waived. Sec. 7005 of the FFCRA specifically exempts all of those wages from being subject to the employer Social Security tax under Sec. 3111(a) of the IRS Code. There's no state or local government exclusion; Section 7005 simply provides that those required FFCRA wages aren't considered "wages" for purposes of the employer portion of the Social Security tax. That's not a credit, but simply means the requirement to pay the employer portion of the Social Security tax doesn't apply to those required FFCRA wage payments.

Upcoming Virtual Meeting in Place of Summer Convention Luncheon

MMAA typically has a lunch meeting at the MML Summer Convention. This year, however, MML is scheduling a limited virtual convention on June 29 and 30, with more limited time planned for member participation. MMAA will plan a virtual meeting in early July, so watch for more information!