



Maryland Municipal Attorneys Association

Quarterly Newsletter – Fall 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 Summer Meeting on July 16

With the ongoing COVID-19 pandemic, the MML Summer Convention was held online June 29 and 30. MMAA opted to hold its summer meeting (its second virtual one) on July 16. The roundtable discussion focused on concerns municipalities may be facing with re-openings or continued closures, even in the midst of ongoing calls for service.

Members reported that many municipalities remained closed, with staff working from home to the extent possible, with most towns and cities using virtual meeting platforms as well. Lynn noted that Gaithersburg was open but limited to appointment-only, with many employees continuing to work from home. Everyone continues to provide services – virtually, to the extent possible, but some members noted that in-person service is sometimes required. With municipalities still issuing permits, building inspections are often required. While some can be provided virtually, when an in-person inspection is needed, staff are using the required personal protections. As to the courts, some cases were being held virtually but most in-person hearings, such as for municipal infractions, were likely to be scheduled after September. One member noted a hearing was mistakenly scheduled (and a request to postpone based on the pandemic was mistakenly denied), with the judge at the hearing apologizing for both errors.

An Optional, Short-Term Deferral on the Social Security Payroll Tax

On August 8, the President issued four memorandums and orders, including a temporary deferral of the Social Security payroll tax, which most directly affecting municipalities as employers. It directed the Treasury Department to issue an order implementing a temporary deferral, which the Internal Revenue Service on August 28, 2020 issued Notice 2020-65. There are 4 key aspects, noted below.

First, it is deferral, not a waiver of the payroll tax. The IRS Notice simply postpones the deadline for the employer payment of the payroll tax for a few months. Employers may therefore defer the employee payroll tax deduction from September 1 through December 31, 2020. The employer must still pay the employer portion and the employee’s portion, paid through the deduction; the deferral is until January 1 through April 30, 2021, with April 30 as the ultimate deferred payment deadline.

Second, while the deadline to pay the tax is deferred for the employer, deferring the deduction from employee pay is an employer option, not a requirement. The Secretary of Treasury issued the IRS Notice under 26 U.S.C. Sec. 7508A, which allows the Secretary to specify a deferral period during which the payroll tax “may be disregarded.” This means that while the employer payment deadline is postponed for a few months, the payroll deduction deferral is not a mandate but the employer’s option.

Third, the deferral would be available not across the board but, per the Presidential Order and the IRS Notice, only for employees whose bi-weekly pre-tax wages is less than \$4,000.

Fourth, the deadline deferral is as noted for a limited time. While 26 U.S.C. Sec. 7508A allowed the payment deadlines to be extended for up to a year, the IRS Notice only extends the employer payment deadline until April 30, 2021 at the latest.



A Partial Victory in Ninth Circuit FCC Appeal

While many support expanding wireless communications and ushering in the 5-G era, residents and communities have expressed outrage with proposed poles placed without regard to appearances or proximity to their homes, among other concerns. Local authorities have generally sought to control site locations and appearances as well as safety. The FCC has supported the wireless providers and sought to limit any local authority.

As such, the FCC issued orders in 2018, largely limiting local authority to regulate wireless installations, even in public rights of way. There were three key orders: (1) The “Small Cell Order,” imposes limits on local authority, including aesthetic requirements, and imposes sixty (60) day shot-clock orders for any additional location on an existing wireless facility (but not imposing them on a “deemed-granted” basis, which would make them automatic). (2) The FCC issued a “Moratoria Order” effectively prohibiting the imposition of any overall moratorium on small cell applications. (3) The third order, known as the “One-Touch Make-Ready Order,” was not directly targeted at local government, but restricts owners and operators of utility poles from denying or delaying wireless installations.

The Smart Communities Coalition includes counties and municipalities across the country, and was formed in response to FCC actions to limit any local authority. The Coalition and numerous counties and municipalities, including many MMAA members, appealed the three FCC orders, which the Ninth Circuit U.S. Court of Appeals denied in part, and granted in part, in *City of Portland v. United States* (Case No. 18-72689, August 12, 2020). The Court largely upheld the FCC’s orders, given the deference owed to the agency in interpreting its own regulations, thus upholding a number of restrictions as well as the FCC’s fee structure for public rights of ways as reasonable. But the Court overturned part of the Small Cell Order restriction on local authority in the area of aesthetic regulations. The Ninth Circuit found it was not unreasonable discrimination to

require different aesthetic requirements for various utility providers, and that the FCC’s requirement for any aesthetic criteria be “objective” was issued without a reasoned explanation. In allowing the shortening of the shot-clock, the Court did rule against the industry and ruled they are not to be deemed granted, but only establish a presumption, which local authorities can overcome if they can show additional time is necessary to process an application, such as one which is incomplete. The Coalition and other petitioners (as well as the FCC) will consider whether further appeal, such as requesting review by the full panel of the Ninth Circuit, is the next step.

Local Government Guide to Protests and Public Safety

The Institute for Constitutional Advocacy and Protection, part of Georgetown Law, has issued “Protests and Public Safety,” a guide for municipalities in protecting free speech and safety in the midst of protests and public rallies. The Institute refers to the Guide as a “tool kit,” and while it describes white supremacist and far-right protest events, it was also issued in the wake of protests after the George Floyd killing,

The Guide is a comprehensive review of the First and Second Amendments as related to public demonstrations in public areas, where the right to free speech is most highly protected. It starts by laying out the basic government right to impose reasonable time, place and manner restrictions, which are content-neutral, and can be upheld if “narrowly tailored to serve a significant government interest” and “leave open ample alternative channels for communication of the information,” citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), quoting *Clark v. Community. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). The Guide provides more than 120 pages of current guidance on restrictions, permit issuance and Second Amendment rights and restrictions as well. The International Municipal Lawyers Association has passed it along, and it’s also available on the MMAA webpage on the MML site.