



Maryland Municipal Attorneys Association

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

MINUTES FOR MAY 6, 2021 MEETING

APPROVED JULY 15, 2021

The Thursday, May 6, 2021 MMAA meeting was held virtually, using “Zoom,” for the fifth virtual meeting. The meeting convened at Noon and Lynn Board, President, called the meeting to order at that time, noted we have much on the agenda, and welcomed everyone.

1. Minutes of the February 11, 2021 virtual meeting were unanimously approved, on motion by Todd Pounds which was seconded by Jason DeLoach.
2. Jason DeLoach, Treasurer, gave a summary of our account balance and said MMAA had about \$5,179.95, which was more than normal, and said he thought since we had more than \$5,000 we were fully funded. He said it would go up with dues, which would go out July 1, and said he would want to make sure there’s no problem with any tax implications. Lynn said it raised the question of reducing dues for the year or waiving them. He said he’d check on tax advice and could discuss at the next meeting perhaps in June or July, which would be in time before the invoices.
3. Lynn noted that in the virtual online voting last Wednesday and Thursday (April 28 and 29), all officers were re-elected and will go into effect with the end of June. She noted this included herself, Lynn Board for President, Todd Pounds for Vice-President, Jason DeLoach for Treasurer, Frank Johnson for Secretary, E.J. (Skip) Cornbrooks as MMAA’s MML Legislative Committee representative, and Elissa Levan as MMAA’s MML Board of Directors representative. She noted this will be her third and final year as President, and noted officers and MML Board representatives were re-elected.
4. Gerry Lederer, Best, Best and Krieger, gave us an update on the FCC and small cells, cable franchises and federal legislation. He first noted the small cell appeal was not a total victory in the 9th Circuit, as most of the FCC order was upheld, but the court did specify that local governments do not have to treat small cell providers in rights of way like everyone else, which is an important distinction. Gerry said this allows regulation of small cells within the rights of way more extensively than for other utilities. He noted the group of local governments did file a petition of certiorari with the Supreme Court last month; it has been listed as “one to watch,” but cannot predict how the Court will react beyond that. He said he was also grateful that IMLA and State and Local Legal Center filed Amicus briefs.

As to another case, *City of Eugene v. FCC*, the cable-in-kind FCC order appeal, he said April 15, 2021 was the hearing date. Gerry said local governments didn’t seem to get much traction on the argument that in-kind obligations should not be subject to the 5% cap, but the court did challenge the FCC counsel on the issue of profits. Gerry said that even if we lose on the 5% limit issue for in-kind, if such costs are considered at actual cost and not including profit, it could result in an effective “win” for local governments, as the courtesy bypass for PEG channels is already built into the fees and there may be limited or no additional charge for such services. He said the court was also critical of pre-empting local authority over other unrelated services. Gerry said a decision is expected before the year is out.

Gerry also noted they are working with the FCC to examine how both the small cell and cable orders could be revisited once the President appoints a third Democrat (as the FCC is now split 2 to 2). He said the third appeal concerned the 6409 concealment order, which provided for co-locations not substantially changing the size or

attributes of the tower. He said at one time there was a requirement that the co-location be consistent with prior requirements, which could include concealment, but the FCC order changed that provision. He said the FCC has agreed to postpone argument before the court to allow them to re-examine this order. Gerry advised municipalities to review local codes to address Sec. 6409 and to ensure concealment and the permission of the local government is required. He also said such locations could otherwise be allowed to grow with co-locations with very little control. He emphasized especially the need for concealment requirements to be in place.

At the FCC, Gerry said the FCC in late December issued an order allowing expansion of any cell tower site outside of the right of way by 30 feet on either side, which includes cabinets within those 30 feet. He said the local government group is asking for reconsideration; but he also noted that even with a regulatory right, that cannot be considered a transfer of real estate rights or ownership, especially important if the municipality owns the site. He noted that other FCC action concerns broadband funding, where there is now \$10 billion available for connectivity. He said many states, including Maryland, have also created broadband funds. Gerry said the \$10 billion federal funds is not infrastructure funds but subsidy funding for eligible households. He noted both Verizon and Comcast are providing this service and it is a way to connect those who would otherwise not be connected. He future funding may also be available for outside expansion through schools and libraries. He also said some limited “e-rate” emergency funding could be used to support a local network. Gerry also reported that general revenue sharing provided to local governments directly (or to small municipalities via the state) as part of the American Rescue Plan could be used for this purpose. He also said additional funding may be provided with a future infrastructure bill, if and when that is passed, and that he may also provide a seminar on funding availability.

Gerry finally noted the FCC issued two orders making state and local governments subject to the robo-call rules, especially concerning emergency management; he said they are easy to follow but that local officials need to be aware that they exist and that they do apply.

One question was as to the current makeup of the FCC and whether they may modify orders to be more friendly to local government. He said he expected the FCC would be willing to do so, noting the 2 democrats now on the 4-member committee both dissented from the orders which are now being appealed. He said there is a fifth member to be appointed by President Biden and thus he expects the orders will be revised with the 5th appointment and hopes that appointment will be made soon. Gerry said he expected at that time the net neutrality issue would also be readdressed. Another question was whether 6409 applied to local government-owned poles; Gerry said it is partly correct, as 6409 could apply but the City as the landlord gets the extra right to say “no.” Thus, the rule applies but the local government remains in control as the owner. He also advised that this right needs to be specifically reserved in ordinances or regulations, as well as in the lease agreements with the providers. At core, he said to be especially sure not to allow co-locations in agreements without the local government’s permission.

4. Sara Klemm, Assistant Attorney General, represents Public Information Ombudsman and the Public Information Act Compliance Board, and presented information on recently passed General Assembly legislation. Sara said there was a handful of legislation introduced but only 3 bills passed, and 2 of those will create changes under the PIA affecting local governments.

She first focused on Senate Bill 178, which she said addresses the exemption for police misconduct files, including IAD files. She said that bill was amended to include no-knock warrants. She said the Governor vetoed it, but the veto was immediately overridden and the bill will take effect in October of this year. She said currently the PIA would prohibit access, as personnel records, for any such files except for the officer themselves. The bill, however, removes those investigation records from the definition of otherwise private personnel records, and now characterizes them under a discretionary exemption under Sec. 4-331. Sara said a technical infraction not involving interaction with the public, supervision or public concern still remains a personnel record, but all other investigatory records now fall within the discretionary exemption. Sara said that means the custodian can deny a request, but that discretion is limited only to the extent inspection is contrary to the public interest, and the

custodian would have the burden to explain how such a release would be contrary to the public interest. She said the bill includes limitations on that discretion as well, noting there is no discretion to deny if the request is from the state's attorney or attorney general, for example. If released, she said the custodian would need to redact any private medical information or personal contact information of the person in interest or witnesses, as well as related to the family of the witness. Sara also noted the custodian must also notify the officer when the records are inspected, but the officer has no right to know who inspected the records. Sara said these changes could lead to a larger volume of requests. While the bill did not allow denial of records related to unfounded or unsubstantiated claims against an officer, Sara noted that of the seven factors to be considered, the right of the accused to get a fair trial and the unwarranted invasion of privacy could both be implicated by unsubstantiated claims and thus could lead to denial in that case.

House Bill 183 was the second bill leading to major changes, as it relates to enforcement of the PIA and the Board. She said that a PIA claimant can now file an action in Circuit Court or go to the Public Information Act Compliance Board for a fee dispute, or the Ombudsman for other disputes. She said the Board has limited jurisdiction and focuses only on fees, while the Ombudsman handles other disputes, but is entirely voluntary. She said House Bill 183, which will take effect in July of 2022, will create new enforcement rights. She said the bill will allow either the person requesting or the custodian to take their complaint to the Ombudsman for resolution, who will have 90 days to resolve it, or, if not resolved, can then go the Board. In that case, the Ombudsman will certify the dispute is unresolved and either party can file a complaint to the Board. Sara said the Board will hear disputes on fees, denials, redaction, failure to respond, or a custodian request to find the PIA request as frivolous. She noted the complaint has to be filed with the Board 30 days after the Ombudsman's certification that the dispute could not be resolved. The Board, she noted, has 150 days to issue an order, and in the meantime can ask for an informal conference, ask the custodian for more information or even inspect the records (except where prohibited by federal law). Sara reported that the Board will have authority to require inspection or a response, and while not authorized to review fee waiver, will be able to require, for an improper delay, waiver of all or part of a fee, and can require a response to the request, as well. She said an appeal from the Board decision can be filed to the Circuit Court which also stays the Compliance Board decision. She finally noted this bill also contains "proactive disclosure" provisions, requiring proactive disclosure of some documents, such as on the website or prior disclosures after PIA requests as well, as part of an annual PIA report.

She finally reported that the third bill that passed, House Bill 23, will affect MVA records and federal requests regarding immigration enforcement. She notes this is interesting primarily as this is the only provision focusing on the purpose of the PIA request, which is normally not part of any PIA response.

From MML, Angelica Bailey, the Director of Government Relations, and Bill Jorch, the Manager of Government Relations and Research, offered a quick update on the General Assembly session and MML's priorities. Bill said two pieces of broadband legislation were passed to expand opportunities. First, House Bill 97 creates a new Office of Digital Inclusion with some funding to assist municipalities seeking to expand the broadband reach in their jurisdiction, but Bill noted the new fund will not impact or restrict the rural broadband fund in any way. Second, is House Bill 1328 affects right of way trenching and coordination of work in rights of ways when multiple utilities and other users are involved. He said the bill pertains to broadband providers but incentivizes them to install infrastructure at the same time they disturb a right of way for any reason. He noted it is up to the municipality to alert other providers of cost-sharing chances for such multiple installations.

Angelica spoke on Highway User Revenues, and noted that while a funding bill sought by MML passed the Senate, it did not pass the House this year. She said restored funding is in place until 2024, and MML will plan to focus on that again next year. She said one climate change bill did not pass, which would have required net-zero greenhouse gases, energy life cycle costs for all new buildings after 2022 and other steps but will probably be considered next year. She said House Bill 991 did pass regarding forest conservation, with reforestation credit maximums and a ratio for mitigation down to 2 to 1, but said this will be an ongoing conversation. Finally, she

noted that police reform was a major issue. She said the houses took different approaches, several bills were considered, and House Bill 670 will have the most major impact. She said the aspect of the bill which MML focused on concerned the increased government liability caps for police activity, which was raised from \$400,000 per incident to \$800,000, but the increase will be limited to intentional constitutional violations, which LGIT has reported will have a less dramatic impact. Finally, she noted that police body camera usage was mandated for County police departments, but cautioned this could be easily changed to impact municipalities and very well might be changed in the future.

5. Summer meeting discussion: Lynn noted the MML convention this year won't be able to accommodate lunch meetings such as the MMAA, and membership by municipalities will be limited due to the safety concerns. She asked if members were interested in having a virtual meeting or an in person meeting, and five members indicated they would be present. Lynn indicated the executive committee would decide whether to set an in person or virtual meeting and let everyone know as part of the meeting announcement.

6. Frank provided a brief update on the MSBA State and Local Government Section Council, noting the Annual Meeting will be set virtually at noon on May 26, 2021 and Tom Yeager noted the MSBA will be meeting virtually this year for its annual meeting in June.

With nothing further for the good of the order, Lynn adjourned the meeting at 1:20 p.m.

Frank Johnson, Secretary