



Maryland Municipal Attorneys' Association

Quarterly Newsletter – Winter 2014/2015

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Newsletter Suggestions

This quarterly newsletter highlights key court decisions and legislation and provides members with general updates. If you have ideas for upcoming issues, let editor Frank Johnson know at: fjohnson@gaitthersburgmd.gov.

We welcome new members! Most town and city attorneys in Maryland are members, and it's a good opportunity to share information and collaborate. There's no cost to join, so send me an email if you're interested, and I will forward it to our officers.

Fall MMAA Lunch Meeting Is December 4 in Annapolis

Our fall lunch meeting will be at Harry Browne's in Annapolis. We will have a panel discussion on master plan approvals followed by a roundtable discussion. There's no cost for members; guest admission is \$35. If you haven't RSVP'd but want to attend, please let us know *right away* via email at fjohnson@gaitthersburgmd.gov.

The Conscience of a Municipality

Municipal attorneys are guides, advisers and problem solvers. And Stephen H. Sachs, Maryland's Attorney General from 1979 to 1987, thinks there's even more, pointing out that we serve in many ways as the conscience of the municipalities we serve. As such, we have to "tell it like it is" in our advice, encourage people to work together, and help ensure officials follow the law.

At the International Municipal Lawyers Association (IMLA) Conference, held in Baltimore in September, former AG Sachs spoke about our role as "lawyers for the people," and how in that role we can be the conscience of our municipality. And we know our advice isn't just about legalities, but often includes perception, practicality and the concept of the "right thing to do," even if not explicitly stated. In carrying out our municipal service, former AG

Sachs also laid out seven basic principles to consider – which many of us will see as part of our day-to-day work. These principles include:

- In giving advice, tell it like it is.
- Municipalities can serve as teachers, so we should ensure our town or city follows the law. General Sachs' point was that if we allow the law to be broken, then we can breed contempt for the law and for our own municipality.
- Admit mistakes – because credibility counts. And candor is not only disarming, but given the changes in cities and imperfections of research, mistakes sometimes can't be avoided.
- No mean spirited litigation; in other words, never engage in "smash-mouth" tactics. I don't know of any municipal attorneys who do this, but the point is, don't rush to take advantage of your adversary's mistakes. That's another tactic that can be tempting, but usually doesn't work.
- Practice open government, and don't be stingy in complying with discovery requests. General Sachs said we ultimately serve the public, and thus should not try to conceal information. And the PIA often ensures this, even beyond discovery in the midst of litigation.
- Don't keep secrets or rely on the attorney/client privilege. Indeed, General Sachs said the public's right to know should trump any effort to use the attorney/client privilege.

This isn't a different path for municipal attorneys; indeed, former AG Sachs simply pointed out many aspects of the work we handle every day. But it's helpful to be reminded of our public service roles, and how, in many ways, we may indeed serve as the conscience of our city or town as we advocate sensible actions. His principles encourage candor, openness and decency, but also reflect the meaning of the work we do every day.



Zoning Amendments and Delays Can Constitute a Taking

Maryland is a “late vesting” state for zoning rights. Both a valid permit and substantial construction is required before an owner has a vested right in a zoning use. *Powell v. Calvert County*, 386 Md. 400, 411-12 (2002). Thus, a town or city can generally change zoning, even after plan approval, until construction has commenced. But a First Amendment takings claim, asserting that a municipality has effectively exercised eminent domain, may arise when an owner or developer is unable to make any use of a land parcel.

The Maryland Court of Appeals requires a “final and authoritative” decision on a permit request before a zoning decision can be challenged. *Casey v. Mayor of Rockville*, 400 Md. 259 (2006). But a recent U.S. Court of Appeals decision from the Second Circuit, *Sherman v. Town of Chester*, No. 13-1503-CV, (May 16, 2014), found a taking had occurred even where no final permit denial had been issued. The Court found the owner was thwarted by five zoning changes over ten years, on top of delays, including a moratorium and requests for more studies. In analyzing the Supreme Court’s takings ruling in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Second Circuit found that the delays showed it would have been futile for the owner to seek a final decision. The Court held that the delays effectively prevented the owner from making any economic use of the property.

While not precedent in Maryland, the case shows that futility in awaiting final action – i.e., long delays and procedural hurdles – may open the door to a takings claim under *Williamson County*.

“Disorderly House” Laws, Including Ordinances Limiting Service Calls, May Violate First Amendment

Emergency services, such as police, ambulance and fire and rescue, are provided or assisted by most municipalities. Indeed, they can be a major budget item, based annually on projections from

the previous year’s calls. Thus many cities and towns have some provisions to address excessive service calls, usually allowing a civil fine for repeated calls to the same address which turn out not to involve emergencies, or are repetitions of the same issue even after it has been addressed. Such repeated calls can have a number of negative effects. For example, while the police or emergency services are at the location making the excessive calls, they aren’t available to assist with other calls that may be valid. And such excessive calls can require more service personnel overall, thus skewing service numbers and increasing budget costs.

Norristown, Pennsylvania took additional steps to prevent excessive calls, imposing penalties on property owners when their tenants requested police assistance, apparently without regard to whether the address made repeated calls or the calls were related to a need for service. A tenant who faced domestic violence threats recently filed a federal lawsuit against Norristown after facing eviction for having placed emergency calls. Claims included not only the First Amendment but also the Fair Housing Act, Violence Against Women Act and several state laws. That case was settled after the city repealed the ordinance and agreed to pay the plaintiff \$495,000. Similar outcomes were the result of challenges to such ordinances in East Rochester and Hornell, New York.

Code Revision: Ethics, the PIA and Open Meetings Act Have Been Moved –*Not Repealed!*

While code revisions have been rewriting the old numbered articles into updated named articles, some important sections for our municipal work have also changed their named articles. In fact, the Public Ethics Law, Public Information Act and Open Meetings Act have not been repealed! These provisions have been taken out of the State Government Article and have been recodified in a new “General Provisions” article. The Ethics provisions start at §5-101 of the General Provisions Article; the Public Information Act starts at §4-101, and the Open Meetings Act begins at §3-101.