



Maryland Municipal Attorneys Association

Brynja Booth, President; Lynn Board, Vice President; Frank Johnson, Secretary; Jason DeLoach, Treasurer

MINUTES FOR NOVEMBER 9, 2018 MEETING

APPROVED FEBRUARY 7, 2019

The Thursday, November 9, 2018 MMAA meeting was held at Harry Browne's Restaurant on State Circle in Annapolis, Maryland. Lynn Board, Vice-President, standing in for President Brynja Booth, called the meeting to order at about 12:15 p.m. She noted this was the first joint city-county and thanked Les Knapp, Maryland Association of Counties (MACo) Legal and Policy Counsel for having the idea and pursuing it. As this was the first meeting joining county and municipal attorneys, she asked everyone to briefly introduce themselves.

1. For MACo's County Civil Attorneys Affiliate business, Tom Yeager, President, welcomed everyone. He noted the county's fall training conference next Wednesday at MACo offices, which will focus on the Maryland Public Information Act, the ongoing pre-emption issue and upcoming legislation, among other topics, and the County Attorneys would next meet at MACo's winter conference in January at Hyatt in Cambridge.
2. For MMAA's business, minutes of the May 3, 2018 were unanimously approved, on motion by Linda Perlman which was seconded by Todd Pounds; and minutes of the June 11, 2018 meeting were also unanimously approved, on motion by Jason DeLoach which was seconded by John Barr. Lynn also noted the next MMAA meeting would probably be scheduled for Thursday, February 7, 2019 and that state legislative issues are always a key issue.
3. John Breads, Director of Legal Services and Matt Peters from the Local Government Insurance Trust (LGIT) gave a presentation on police liability and personnel matters. John first thanked Lynn for her assistance in opposing the proposal to allow attorney's fees for constitutional claims and acknowledged Christine Altemus, an attorney with LGIT for 17 years. As an overall matter, John noted that failure to document can be a key issue, and that even repairs to sidewalks or vehicles can be important. Both complaints and such repair work must be recorded to be helpful in addressing these claims. It's also important that claims notices be taken seriously and LGIT be notified as soon as possible, so that LGIT can quickly assign an auditor and an attorney.

As to police misconduct claims, John noted the issues are similar regardless of the size of the jurisdiction. He said these often involve Taser use and qualified immunity. He noted that police officers may not know how to react when they are sued, and pointed out that LGIT has a summary to assist and encourages all police to be aware of it. John also offered that while many thought body cameras might revolutionize defense of police, they cannot conclusively capture everything that happens. As such, he noted that many Circuit Court judges say that even with a body camera tape, issues of fact remain unresolved, and must go to the jury. John also noted that the existence of body cameras should be used as an opportunity to teach officers how their statements and actions can be perceived.

As to qualified immunity, John reported that in multiple 4th Circuit cases, it's become clear that the courts are looking for some effort to resolve the issues and de-escalate the dispute before police use the Taser, and that when it is used repeatedly, it can lead to removal of immunity – especially if the person against whom it's being used is mentally deficient in some way. John also noted that if there is no immediate threat to officers, even if a defendant is armed, deadly force will almost always be considered excessive force, which recently included putting a compliant child in handcuffs. Finally, John noted that Federal Rule of Civil Procedure 68, concerning attorney's fees, is becoming very critical in fee-shifting cases. That Federal rule is, he explained, a risk-shifting tool to encourage settlements for reasonable amounts, such that it penalizes parties who opt for litigation after a reasonable offer. He noted that all costs can be assessed to a party after a reasonable offer is refused, in addition to the removal of qualified immunity in some cases. Thus, early offers of judgement are sensible in many cases.

Matt Peter spoke to personnel and employment cases. He also said it's better for local government to contact LGIT with the first claim so that LGIT can coordinate the initial response and defense from that point. He also noted that many local harassment policies are in need of updates, and that LGIT can offer training, both online and on demand. Matt noted that as to discrimination charges, the Maryland Commission on Civil Rights now convenes more formal fact findings than interviews, allowing everyone, including witnesses, the right to attend and cross-examine or ask other questions. This has also led to advocacy by claims attorneys. In addition, the Commission now prefers attorneys to be present with some settlement authority in order to resolve cases, a shift from past practice which, as noted, simply included interviews for fact finding purposes. As to the Equal Employment Opportunity Commission (EEOC) at the federal level, he said there is also a different approach. While EEOC cases can take three (3) years or more to investigate, now in many cases they are issuing "right to sue" letters even before LGIT has been able to file any response to a claim, thus not conducting any substantial investigation. Finally, Matt noted that the Supreme Court this week issued a ruling that the prohibition on age discrimination applies, without exception, to all local governments, effectively removing the 20-employee exemption for smaller jurisdictions based on the Court's ruling that it was never intended to apply to local governments.

4. MACo and MML legislative staff gave an update on small cell issues. As many know, the Federal Communications Commission (FCC) issued an order in September and state legislation is expected to arise again. The September 26 FCC order would go into effect on January 13, unless stayed by appeal. It is more favorable to the industry, making the "effective prohibition" rule applicable only on a claim of disparate treatment rather than requiring some gap in service. It would also limit allowable charges for right of way use to only those actual costs, limit local authority to control rights of way installations, and impose new 60 day shotlocks for co-locations, with 90 days for new installations. The FCC order did say "fair and reasonable" aesthetic limits can be imposed and removed the automatic "deemed granted" provision from. Litigation has resulted from at least 2 groups, including the Smart Communities Coalition, leading to an appeal in 9th Circuit. But the small cell industry also appealed, seeking to reimpose "deemed granted" for shotlocks, in the D.C. Circuit as well as the 10th and 1st. Preliminarily, the case may be assigned to the 10th Circuit, which may be further challenged in favor of the 9th Circuit.

As to statewide issues, the small cell issue is MML's only legislative priority. Candace Donoho, MML's Director of Government Relations, noted the broader issue is pre-emption in general, which local governments are now seeing as an issue across the board, in a new effort to eliminate all local control in favor of overall standardization at state and federal level. She also noted 39% turnover in the House of Delegates and 29% in the Senate, which many new committee chairs and vice-chairs. Natasha Mehu, Legislative Director for MACo, noted that while the statewide small cell bill was pulled last year, the industry intends to introduce another bill this year, and is arguing that they will bring substantial economic investment and much therefore be permitted full authority to install facilities. In particular she noted the industry seeks four priorities – on top of the FCC order already in place. They effectively seek local pre-emption, consisting of unrestricted right of way access, standardization of all processes, firm shotlocks and limited fees, as well as incorporation of the FCC order as well. Bill Jorge, Manager, Government Relations and Research for MML, noted that while last year's Senate Bill 1188 was seen as too favorable to the industry, it's likely the industry will seek essentially the same provisions this year. All agreed on the importance of passing local legislation, being aware of the FCC orders, and making sure local governments are using similar fee and process provisions to reduce the argument in favor of pre-emption.

5. As a final item, members present endorsed the idea of establishing an annual joint meeting between municipal and county attorneys, perhaps in the fall, and the groups will plan for the next year accordingly.

Lynn thanked the presenters and everyone for attending, and with no further issues for the good of the order, the meeting was adjourned at 2:21 p.m.

Frank Johnson, Secretary