Maryland Municipal Attorneys Association

Quarterly Newsletter – Spring 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.

Email Communications and the Open Meetings Act

We welcomed Ann MacNeille and April Ishak to our winter meeting in Annapolis to speak about the Open Meetings Act, the Open Meetings Compliance Board, and the recent decision that imposed restrictions on certain uses of email by public bodies. Ann is the Assistant Attorney General who serves as counsel to the Compliance Board, and April, an MMAA member and City Attorney for Havre de Grace, serves as the Chair.

The Open Meetings Compliance Board, in a July 2019 decision, found that an email exchange among Talbot County Council members was considered a violation of the Open Meetings Act (13 OMCB Opinions 39). The Board found that an extended, continuous stream of emails among a quorum of the County Council constituted a deliberation on matters of public business that were subject to the Open Meetings Act, which generally requires that the public have the right to observe the deliberations of their elected officials.

April emphasized that the Talbot County case was very fact specific. For example, she noted that in a response to a simultaneous PIA request, the County had withheld information based on the argument the emails were deliberation, which could in itself be seen as conceding the Open Meetings point. The Board decision in Talbot County indeed emphasized that deliberation was the key issue. April pointed out that the record included a long string of emails, many "reply all," and that the actual issue was clearly one of public interest – deciding whether to take a position on legislation rather than an administrative issue not subject to the Open Meetings Act. She also noted that for many other similar issues, the Talbot County Council had historically held an open meeting.

April first noted that one-on-one communications were less of a concern, especially between staff and an individual board member. April also said the option of deferring to staff would work, and in an emergency that a telephone conference could be held as an open meeting. An audience member questioned a decision involving the municipality of Greensboro shortly after Talbot County, which was found not to violate the Open Meetings Act. April said the emails in the Greensboro case were not "reply all" and there was no deliberation or collaboration as in Talbot County. It was suggested that one key step is to avoid "reply all" emails.

Ann MacNeille noted that actual physical attendance at a meeting ensures that all members have the same facts and the same documents without changes. In response to a question on texting, she noted that if the text is personal, it's not an Open Meetings issue, but if it's on a public issue it could be deliberation, and the next question might be whether a quorum is involved. In response to a question on public body members attending a meeting together, she said no problem was posed if there is no deliberation, such as members only attending to hear the group's issues, but said a violation could be demonstrated if the meeting became a forum and discussion among board members on public business. Finally Ann said that local staff can brief councilmembers one-on-one as long as they do not act as a conduit, collecting votes or effectively conducting deliberations.

Implied Preemption of Local Law: Two Recent Appellate Decisions and Proposed Legislation to End It

Municipalities may have home rule powers, but Maryland law specifies that State law prevails, such that any local law conflicting with State law is prohibited. Article XI-E of the Maryland Constitution, §6, specifies that municipal law must be consistent with State law and is thus subject to any limits imposed by the General Assembly.

The Court of Appeals has thus held that local laws are preempted when State law specifies that any local law on a given issue is prohibited. *Worton Creek Marina. LLC v. Claggett*, 381 Md. 499, 512 n. 6 (2004). The Court has also held that any local law conflicting with State law is also preempted even without the express wording. *City of Baltimore v. Sitnick & Firey*, 254 Md. 303, 317 (1969). Thus, a local law is preempted if it "prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law." *County Council of Prince George's County v. Chaney Enterprises Limited Partnership*, 454 Md. 514, 541 n.19 (2017). Preemption by implication is a third basis under which a local law can be preempted, but even without a direct conflict or express statement. In considering implied preemption, the courts consider whether state law "occupies a particular field so extensively as to preclude local legislation." *Altadis U.S.A., Inc. v. Prince George's County, Maryland*, 431 Md. 307, 311 (2013).

Two recent appellate decisions have reached different conclusions on preemption by implication. In *Board of County Commissioners of Washington County, et al. v. Perennial Solar, LLC*, 464 Md. 610 (2019), the Court of Appeals found Washington County's local zoning laws were preempted from not permitting Public Service Commission (PSC) approved solar generating stations. Perennial Solar had applied for a Washington County special exception for a solar panel farm after receiving a certificate of public use and necessity from the PSC. The Board of Zoning Appeals denied the request, partly in the face of substantial public opposition. The Court of Appeals, noting "no particular formula" for implied preemption of local law, 464 Md. at 619, found that the Public Utilities Article §7-207, allowing generation stations, was so comprehensive in "vest[ing] final authority with the PSC for the siting and locations" of solar panel farms that any local authority that would limit a PSC-approved station was in conflict and thus preempted by implication. 464 Md. at 620.

The Court of Special Appeals in *Montgomery County, Maryland v. Complete Lawn Care, et al.*, 240 Md. App. 664 (2019) reached a different conclusion in interpreting the reach of state law on pesticide regulation. In that decision, over which the Court of Appeals denied *certiorar*i (*Goodman v. Montgomery County*, 464 Md. 585 (2019), Judge Zarnoch found the Pesticide Applicator's Law at Title 5 of the Md. Agriculture Article was not so comprehensive to preempt any local laws on the subject. The Court held that the State had not acted in a clearly comprehensive manner or imply no role for local expertise. 240 Md. App. at 694. Indeed, the Court overall found that state and federal pesticide regulations were not intended to eliminate all other restrictions, including those imposed by state and local law. 240 Md. at 693-94.

Many of us would prefer not facing the risk that a court may weigh a set of factors to find our local laws should be invalidated under the doctrine of preemption by implication. House Bill 1522 (and the cross file, SB 756) would simply eliminate that third option as a basis to invalidate local law, requiring either express preemption or a direct conflict with State law. The bill is a Maryland Association of Counties priority and is supported by MML.

Save the Date: Spring MMAA Meeting at Fisherman's Inn on May 7

Join us for lunch to consider the General Assembly session, look to have an appellate judge review cases, and elect MMAA officers for the next year.