Maryland Municipal Attorneys Association

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

MINUTES FOR OCTOBER 28, 2021 MEETING APPROVED FEBRUARY 10, 2022

The Thursday, October 28, 2021 MMAA meeting was held virtually, using "Zoom," for what is the seventh virtual meeting; this was also the fourth annual joint city-county attorney meeting, which is traditionally in the fall. The meeting convened at Noon. At that time, Lynn Board, MMAA President, called the meeting to order me and welcomed everyone, including the County attorneys. She noted she was turning over the running of the meeting to MMAA Vice President Todd Pounds, as she was not feeling well.

1. Todd then turned the meeting over to Chief Judge Getty and Judges Booth and Harrell.

Chief Judge Getty noted Judge Booth has been a valuable addition to the court, and also noted he would be joining Judge Harrell in retirement in a few months as well, and praised him for his work and analysis. He also noted he was honored to have been appointed Chief Judge last month and said he was a short-term caretaker. He said he wanted to preserve Chief Judge Barbera's legacy, and to preserve the professional team she left in place. He also said he saw himself as a transitional figure; he said many judges have been born before 1950, with common life experiences, and said the 1867 Constitution is now requiring these judges to retire. He thus sees generational changes under way, and said it is an exciting time even as a short-term caretaker for the Maryland judiciary.

He began the discussion by raising the decision in Mayor and City Council of Ocean City v. Commissioners of Worcester County, relating to tax setoffs and the relationship between counties and municipalities. He said the issue before the Court involved interpretation of Article 11-E and treatment of municipalities in an equal way. He saw it as a statutory issue, and the question was the control of the County delegations in the General Assembly. He noted he was a member of the Baltimore and Carroll County delegations in the General Assembly; and he said that was often a matter of the County delegation's judgment. Here, he said the County government had been able to prevail.

Judge Booth said in two cases she will discuss that everyone only looked at City Charters and left out consideration of the State Constitution, which runs the risk of missing the key analysis. She said the Court of Appeals had requested additional briefing on those additional issues. With that, the first case was Hovnanian Homes v. Mayor and City Council of Havre de Grace. She said Hovnanian looked at an annexation and development, installing infrastructure to service three parcels even as they focused on construction of only one, as two were developed by other developers. The intent, she explained, was that the other developers would reimburse Hovnanian, but did not. With the lack of agreement, Hovnanian submitted what they called a "Recoupment Agreement," allowing them to recoup fees from each house sold in the other two parcels. The Council approved it, but the owners in those parcels objected, and the City didn't collect the fee as the Mayor didn't sign the agreement. Hovnanian sued the City to enforce the agreement, seeking a Writ of Mandamus requiring the Mayor to sign, and damages as well. The trial court focused on the City Charter and found it wasn't enforceable. The Court of Special Appeals remanded for further Charter review, and on further review the Circuit Court found it was enforceable. The second time, the Court of Special Appeals disagreed and then found it unenforceable, finding the Mayor had to execute the agreement. On appeal to the Court of Appeals, the Court requested additional briefing on home rule and express powers. The Court found it wasn't enforceable, as under State law the local government didn't have the authority to enter the Recoupment Agreement and to impose a fee on property owners without doing so by ordinance which would be broadly applicable. Municipalities only have that authority granted by the State, which under Home Rule requires an ordinance to impose a fee, not a contract or agreement.

Judge Harrell spoke about Town of Riverdale Park v. Ashkar. He said the Court of Special Appeals opinion was upheld but on different grounds, and said it involved the granting of a towing contract for the Town. He said the Town had used Greg's Towing for decades and that Greg's Towing owned a convenient lot for the Town where towed vehicles could be towed. The owner retired, sold the business to Mr. Ashkar, but also neglected to renew Greg Towing's listing on approved contractors for the County, even as that was not a requirement to contract with the Town. Ashkar went to the Town to say he wanted to continue to do business. The deputy chief of police had been given the discretion over the towing contract, and was heard to refer to Mr. Ashkar in a negative way. After that, the contract was given to another contractor, on an interim basis. Mr. Ashkar asserted the reason for the change, and not allowing him to continue serving the Town, was discrimination against him as a Palestinian-American. He brought action against the Town, and a claim based on employment discrimination for national origin survived dismissal. The jury found judgment in favor of Mr. Ashkar for $244,000 and $15,000 in punitive damages as well. The Town sought a new trial and requested that the judgment be set aside; judgment notwithstanding the verdict was granted. The Court affirmed that decision, finding that the Council had delegated the contract decision to the police chief, who then delegated to his deputy, and said that was sufficient for the discrimination claim to be imputed to the Town – even as the Mayor and City Council had never acted in that way. But the Court sent the case back to the trial judge to consider the impact of the Local Government Tort Claims Act limitation of $200,000 and to clarify the judge's decision as to whether a new trial should be granted, as the original decision was unclear. Judge Harrell said the key element of the case was that the Town was held responsible even as the decision had been delegated downward to the deputy chief attorney.

Chief Judge Getty said the next case came out of the Maryland tax court, Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City. He noted the history of billboards included past efforts to beautify the country by removing them from highways. He said Baltimore City had decided to tax billboards, and that raised some potential first amendment issues to be aware of. Chief Judge Getty said the tax was imposed as an excise tax on the privilege of advertising on a billboard. The billboard owners argued it was not narrowly tailored and targeted certain groups. The trial court upheld the ordinance, as did the Circuit Court, and was appealed to the Court of Appeals. The Court upheld the ordinance as it was not focused on any particular opinion or small, identified group. As such, the Court found it wasn't subject to heightened "strict" scrutiny and under a rational basis analysis, found the ordinance did not violate the First Amendment. Judge Getty noted he had filed a dissenting opinion, as his analysis indicated that any restriction limited the ability to speak and that strict scrutiny would have been appropriate. He said Clear Channel did file *certiorari* with the U.S. Supreme Court, and that decision is still pending, while a similar case involving off-premises signs is being considered. He also said the Ohio Court of Appeals handled a similar case but found a similar tax was targeted at limited speakers, and overturned the ordinance after applying the strict-scrutiny analysis. Chief Judge Getty said such certiorari petitions are rare, but this one is pending.

Judge Booth discussed the final case, Angel Enterprises v. Talbot County. She said a property owner purchased a property near a state road, but a deed covenant prohibited access to the road unless both the state and county approved it. She said the owner got a permit to construct the residence but not permission to install a driveway reaching the state road. The owner built the driveway anyway, and both MDE and Talbot County issued citations and orders against the owner. The owner agreed with MDE to pay fines, but the County citation case remained. On the County side, Judge Booth explained, the County had issued six assessment notices with civil penalties of $1,000 each day until correction, subject to appeal to the County Board of Appeals. The owner appealed to the Board of Appeals and made several arguments, leading to a five-day trial over a five-month period. The Board of Appeals affirmed the fines but found they were stayed. On appeal to the Circuit Court, the Court authorized fines totaling over $700,000, which the Court of Special Appeals remanded to clarify the amount of the fines. She said the Court of Appeals considered whether the County actually had the authority to impose the fines. She said the issue was not the County ordinance, but whether the County Board of Appeals could consider and impose those fines. She said the Home Rule amendment and Express Powers Act specify they must follow State law, and

Counties can issue civil infractions and issue fines. But, State law provides that adjudication of such fines is part of the original jurisdiction of the courts – not a County agency or Board of Appeals.

Todd thanked the judges for their presentations and asked if there were any questions. One attorney asked if the state statute allowed different decisions for different counties, and Chief Judge Getty said that was the case, as tax setoffs are decided county by county, therefore. He said Frederick's statute, for example, requires a tax setoff, but the decision has been within the discretion of the County delegation to the General Assembly. Another question was focused on the Hovnanian case, where the judges were asked if in the annexation agreement such fees had been imposed, the Court would have upheld it. Judge Booth said if this was part of the annexation agreement and part of the land records before any sale or transfer, that the fees would have been imposed as part of the sales of each lot or development parcel.

2. Roscoe Leslie, for the County Attorneys, noted an upcoming training and an affiliate lunch for County Attorneys at the MACo winter conference in early December.

3. Lynn for MMAA said our next meeting will be in February and hopefully in person in Annapolis; Jason DeLoach moved approved of the MMAA minutes for the last meeting, which Todd Pounds seconded and which were unanimously approved. Jason also noted MMAA has a bit over $6,000 in the account after the last reduced dues.

4. Elissa then spoke about the Opioid litigation settlement, involving Maryland and many other jurisdictions. Said it involved distributors, including Johnson and Johnson, and many millions of dollars in settlement of the multi-jurisdiction litigation. She said the overall master settlement allows distribution of damages funds, but noted Maryland was not involved in the litigation directly. She said the agreement has a default in which a minimum of $215 million goes to the State, 70% in an abatement fund and 15% to local governments. The Master Agreement allows Attorney Generals to change that default in agreement with local governments, and in North Carolina, for example, locals are getting 85%; in New York, 60%. She said Maryland's Attorney General refused at first to discuss it, until more concerns were raised. She said her two litigating clients, Westminster and Bowie, have requested a change and allowing 85% to come to local governments. She said she felt the municipal and county attorneys have a collective interest in pressing for that change, and agrees Bruce Poole, an attorney serving Washington County and other municipalities, agrees. She noted there is a January 2, 2022 deadline for the Attorney General to obtain local government approval for the agreement, and suggested that the county and municipal groups need to act. Lynn Board, as MMAA President, also noted that in discussion with MML, the Attorney General is setting up a small negotiation group to work with municipalities, and said jurisdictions need to all press for more than the 15% distribution. One question was raised as to how to determine what 85% could involve and how that would be distributed, which was explained to include both an amount under the 15% and part of a request for the remaining 70% from the State. Elissa also noted local governments would be less restricted in how they could use the funds than the State. Another question was whether municipalities joining now would have an impact. Elissa explained she wasn't certain how filing now would have such an impact as she said current attorneys in the litigation aren't interested in making major changes in the Master Agreement, but said taking action to file now could create changes, which could be important if agreement isn't reached with the state.

5. Todd then turned it over to Angelica Bailey, Director of Government Relations for MML. She noted staff are working through the opioid litigation settlement. Otherwise, she said MML is gearing up for the next General Assembly session, adopting HUR and increasing municipal authority as well as climate change as the primary priorities. No one from MACo was present for an update.

With nothing further for the good of the order, Todd adjourned the meeting at 1:30 p.m.

Frank Johnson, Secretary