



Maryland Municipal Attorneys Association

Quarterly Newsletter – Spring 2019

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Volume 5, Issue 4

March 2019

Maryland Municipal Attorney Association News and Updates

This quarterly newsletter gives brief updates on legal issues affecting Maryland municipalities. Share this with anyone who may be interested or want to join MMAA. Our webpage on the Maryland Municipal League (MML) website (under “Departments”) also provides information on past and upcoming meetings and has past issues of the newsletter and other material. Send any changes or suggestions to Frank Johnson via email at frank.johnson@gaithersburgmd.gov.

State Legislative Update

Our winter meeting is held in the early weeks of the General Assembly’s 90-day session, and as a result it focuses on key legislative proposals and related updates. This year the meeting covered a number of federal and state issues. On state legislative issues, members heard from Eliot Schaefer, MMAA’s representative on the MML Legislative Committee, as well as Justin Fiore, MML’s Director of Government Relations and Bill Jorge, MML’s Manager of Government Relations and Research.

While this year’s General Assembly session started slowly, more bills are expected to be drafted, and the speakers focused on three main issues that are now apparent. First is the MML priority – to address “small cell” legislation in order to preserve local authority to control wireless installations, whether in rights of way, on public property, or through zoning on private property. There are, in fact, two bills that effectively represent opposing points of view: the industry bill, HB 654, which would largely adopt the FCC’s most recent orders (see page two) by inculcating them into state law, and the bill supported by MML and the Maryland Association of Counties (MACo), HB 1020 (Senate cross-filed bills are SB 973 and SB713, respectively). In addition, the industry bill would adopt a “deemed granted”

standard for any application deadlines, thus allowing applicants to simply proceed once the deadlines are met without the need to request a court or FCC order, supersede local zoning authority by making application approvals by right, and further restrict local authority overall on substance and procedure.

Bill Jorch noted that the industry bill has been introduced in the House by Del. Davis, Chair of the Economic Matters Committee, and he has asked industry and local government representatives to try to bridge some compromise. The Chair has also noted that while sympathetic to the industry’s hope for a single set of procedures, he believes legislators share the concerns of residents about visual blight. Thus, the aesthetics of installations will be critical, along with the need to avoid large numbers of poles on streets (encouraging co-locations instead of separate poles for each provider).

The second issue is, like small cells, not a new one: that of attorneys’ fees being awarded in constitutional claims against the government. A bill is expected along the same lines as past years, which adopts an extremely broad standard lacking many of the protections even under federal attorneys’ fee provisions. MML will oppose the bill as in past years, while also seeking to add in offer of judgment (settlement) provisions and others.

The third key issue, like the others, has been raised in past General Assembly sessions: adopting comparative negligence in place of the contributory negligence standard now in place in Maryland. Currently, a finding of contributory negligence, as is now the law in Maryland, results in an outright denial of a liability claim. But under comparative negligence, an award could still be issued, even as it may be less than the full amount sought. This could leave local governments in a potential lurch in trying to cover a sudden expansion of costs, and would be very highly pro plaintiff.



A Continuing Federal Update on the FCC Regulations and Litigation on Small Cells and Wireless Networks

This newsletter has often mentioned small cells and wireless network facilities, based so much on ongoing action at both the regulatory and litigation level. At our February meeting, Gerard (Gerry) Lederer with Best, Best and Krieger, who has been leading litigation on Federal Communications Committee (FCC) and small cell issues, joined us again to give us the latest update.

I will note that Gerry first complimented MML and local officials in their efforts to educate and inform local officials as to why local authority is needed to protect communities. He noted that especially as to state legislation, that can make a major difference, as legislators who are aware of concerns with appearances and local authority are more likely to protect both.

For the sake of clarity, Gerry outlined four main elements of the FCC order:

- First is the new legal standard to establish an effective prohibition. The FCC now says that if a locality materially inhibits a provider's ability to provide service, that action can be challenged.
- Second, as of January 14, 2019, new shot clocks are in place. For small cells, the first shot clock is that local governments have 10 days to determine if the application is incomplete; and the local government is limited to the issues identified initially. If the application is not for a small cell, the deadline is 30 days to determine if the application is incomplete. The overall shot clock for small cell on existing structure is 60 days to decide, as well as for a co-location, but is 90 days if the installation is on a new structure, and 150 for a non-small cell facility installed on a new structure.
- Third, the FCC order included fees, where the standard is a reasonable recovery of costs.

Thus, the FCC numbers (such as \$270 for a permit for use of a right of way) are not mandated limits, but are provided as safe harbors, meaning that local officials can recover full costs for review of an application, even if they are more than the safe harbors provided.

- Fourth, the FCC rules on aesthetics, undergrounding and spacing take effect on April 15, 2019. The requirements are that they be reasonable, in writing (such as policy or permit) and applied across the board.

For the update, Gerry first noted that Maryland has been extremely helpful and that Lynn Board has provided leadership in addressing these issues. He highlighted that HR 530 was introduced in the U.S. House, which would erase both the August order on moratoria and the September order on shot clocks. As to litigation challenging the FCC order as beyond legislation approved by Congress (or allowed by the Constitution), Gerry reported that suit was filed in the 9th Circuit within 10 days of the FCC-published order. But providers filed in other circuits, including the 1st and 10th. After the initial stay was denied, the case was transferred to the 9th Circuit. More news will be forthcoming as this litigation develops. Gerry also noted that as to cable TV, the FCC is saying providers can offset the market value of any non-cash benefits, such as PEG, from their fees. Thus, free services to schools and communities would cost the fees.

Set Your Calendar: Judge Kehoe to Speak at Spring Meeting at Fisherman's Inn, Kent Narrows

At MMAA President Booth's invitation, Maryland Court of Special Appeals Judge Christopher Kehoe will speak at MMAA's spring lunch on Thursday, May 9 at Fisherman's Inn at Kent Narrows. Judge Kehoe has served on the bench since 2009; before then he served more than 20 years as the Town of Easton's attorney, and understands local issues. We look forward to his perspective on the municipal impacts of some recent appellate decisions. So please be sure to mark your calendars!