



Maryland Municipal Attorneys Association

Quarterly Newsletter – Fall 2021

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

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Maryland Municipal Attorneys Association Quarterly Update

This newsletter provides brief updates four times each year on key 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 has an archive of past newsletters. Send any changes or suggestions to Frank Johnson at frank.johnson@gaitHERsburgmd.gov.

Employment Issues Raised by COVID-19 and Working from Home

The MMAA met for its sixth virtual meeting via Zoom on July 15, 2021. Matt Peter, Director of Human Resources and a trial attorney for the Local Government Insurance Trust (LGIT), spoke to members about several key employment law issues related to COVID-19.

Questioning Employees. Matt noted that taking employee temperatures is acceptable, but there can be privacy concerns if the results are widely disclosed. He advised keeping that information private for each employee rather than allowing it to be generally known within the office. He also said asking whether any family member has tested positive for COVID-19 could raise genetic discrimination concerns, and advised more broad questions focused on anyone with whom an employee has direct contact, or any household members.

Vaccinations. Matt said that while vaccinations can be required, that leads to several additional steps and allowances under the Americans with Disabilities Act, but also noted an additional right to refuse a vaccine based on religious beliefs, under Title 7 of the Civil Rights Act. He said a person on disability could seek an accommodation not to take the vaccine, and noted this requires careful review of the concern and determination of what accommodations are reasonable, such as telework, mask

wearing, and the like. He emphasized that extra costs do not always prove an undue burden, unless clearly excessive. As to religious claims for an exemption, Matt reported that the claims can be questioned to ensure they are based on *bona fide* religious beliefs, such as religious-based concerns with vaccinations. He warned, however, that such questioning can be difficult, unless it can be demonstrated that the person’s stated religion does not have vaccination concerns. It was noted that a few municipalities are requiring vaccinations, and at least one requires an affidavit if an exception is requested based on religious beliefs; Matt said requiring persons to certify their beliefs was acceptable to verify the belief, but warned against probing or challenging specific religious beliefs.

Beyond any protected claim, some persons hold political or personal objections to the vaccine, which Matt said could force local governments to face potentially difficult decisions as to enforcement or employee discipline upon refusal. Matt said some have explored offering an incentive to employees to obtain a vaccine, but warned that in doing so, employers must also give that same incentive to employees who are disabled and can’t get the vaccine, per recent U.S. Equal Employment Opportunity Commission (EEOC) guidelines.

Work from Home. Matt noted the same employment laws apply if employees are working from home. Indeed, he said working from home may lead to new Fair Labor Standards Act claims, as the 40-hour work week still applies for “nonexempt” employees. Remote employees may not watch their hours as carefully as when they are on site, and could be subjecting their employers to overtime and other fair labor claims. Matt also noted worker’s compensation claims can result from working from home, even as the employer can’t control the home environment. He finally noted that employees have the same Family Medical Leave Act rights as well, even when working from home.



Local Zoning Authority Does Not Extend to Government Authorities

It is well established that federal land is exempt from any state or local land use laws. As the Maryland Court of Appeals stated in *Pan American Health Organization v. Montgomery County*, 338 Md. 214, 226 (1995), “[u]nder the Supremacy Clause of the United States Constitution, U.S. Constitution, Article VI, Clause 2, the federal government is exempt from any exercise of state or local power,” citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), where the Supreme Court largely likened the Supremacy Clause exemption to the core concept of sovereign immunity and the ability to exercise “fundamental and essential powers” to maintain the government. *McCulloch*, 17 U.S. (4 Wheat) at 327-330.

The State of Maryland has a similar exemption. The Land Use Article, §4-104(a)(4), specifies that local zoning and planning authority does not “preempt or supersede the regulatory authority of the State under any public general law.” That establishes that State land is, like federal land, exempt from local zoning authority. Moreover, the Court of Appeals has held, in *Mayor and City Council of Baltimore v. State*, 281 Md. 217, 223 (1977) that as a constitutional matter, specified language subjecting the State to local authority would be required in an applicable State statute. The Court held that “it is a basic and long-standing principle of statutory construction that the State” is not bound by its own laws, or local zoning laws it has authorized, without a “clear and indisputable intention that the State is to be bound.” *Id.* The Court further cited the basic concept of sovereign immunity, see *State v. Milburn*, 9 Gill. 105, 117 (1850), which cited U.S. Supreme Court Justice Story, who was serving on the Supreme Court when the *McCulloch* decision cited above was issued in 1819.

Further, the state exemption from local zoning authority extends to county Boards of Education, as they are considered State authorities. *Board of Child Care of Methodist Church v. Harker*, 316 Md. 683, 690-91 (1989). But other local governments are otherwise exempt from such authority. The Court of Appeals in *Glascock v. Baltimore County*,

Maryland, 321 Md. 118, 121 (1990) found that a “city or county is [an] instrumentality of state government, and, as such, is immune from complying with [local] zoning regulations,” citing *Edelen v. Nelson County*, 723 S.W.2d 887,890 (Ky. App. 1987). As confirmed in *Pan-American*, 338 Md. at 226, the Court in *Glascock* thus concluded that the State exemption from zoning regulations extends to county or municipal-owned land in public use. *Glascock*, 321 Md. at 121.

The core concept of sovereign immunity has led courts for the last two hundred years to find that federal and state land is not subject to local zoning laws, and Maryland courts have extended that concept to Boards of Education, municipalities and counties as instrumentalities of the state. It’s thus clear that a town or city’s zoning authority does not extend to itself, other local governments, the State, or the federal government.

An Early Look at the 2022 General Assembly

At our July 15 virtual meeting, Angelica Bailey, the MML Director of Government Relations, said she has heard a special session to deal with redistricting may be called later this year. She also reported that as to future legislation in 2022, environmental issues may be a big priority, with an emphasis on seeking compromise to ensure legislation passes. Angelica also said she’s not heard plans for handling the 2022 General Assembly in person or remotely, but said she knows many want to have it conducted in person. Even so, she said she expected the live streaming and electronic submission of testimony will remain in place.

Annual Joint Municipal-County Meeting Planned for October 28

MMAA officers and Tom Yeager, president of the County Attorneys, are planning the fourth joint municipal-county attorney meeting for Thursday, October 28. Court of Appeals Judges Brynja Booth and Joseph Getty have agreed to update us on key cases over the last year, and Judge Harrell will also take part in the panel. We are hoping to have this meeting in person at Carrol’s Creek Café in Annapolis – so watch this space for updates!