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 both on the MMAA and our meetings, and also has an archive of past newsletters. Send any changes or suggestions to Frank Johnson at frank.johnson@gaithersburgmd.gov.

Municipalities and Counties Need to Urge Fair Distribution of Opioid Litigation Settlement Proceeds

The Opioid epidemic has devastated individuals and whole communities for more than a decade, leading to multi-jurisdictional litigation against pharmacies and distributors with claims reaching into the millions. After years of litigation, the claims across jurisdictions have led to a broad settlement, directing millions of dollars in settlement proceeds towards each state – which is then intended for distribution to state agencies, counties and municipalities that have borne extensive additional costs as a result of the addiction epidemic.

Maryland is currently slated to receive at least $215 million, according to MMAA member Elissa Levan, who has been involved on behalf of Westminster and Bowie, which have also taken part in the litigation. How the total amount is distributed varies from state to state, but the established default – if no one protects or suggests another distribution – is 15% to the state, 15% to local governments overall, and 70% into a state abatement fund, to be used to fund specific projects and for further distribution.

The point is those distributions can be changed by agreement between each state and its counties and municipalities. 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%. But such changes need to be established by the January 2, 2022 Master Agreement deadline for each state Attorney General to finalize the exact distribution in their state. As Elissa has pointed out, that means now is the time for municipalities to act, to demand a more fair distribution than the 15% default – which would presumably be shared, in Maryland, between 24 counties and 157 municipalities.

Lynn Board, MMAA President, noted that in discussion with MML, Brian Frosh, Maryland’s Attorney General, has agreed to set up a small negotiation group to work with municipalities, and agreed jurisdictions need to all press for more than the 15% distribution. Elissa has also noted that local governments would be less restricted in how they could use the funds than the State. As an update, the AG, MML and MACo have established weekly meetings to negotiate the distribution in Maryland.

Save the Date: Winter Meeting Planned for February 10 (in Annapolis if in-person)

The MMAA is planning the winter meeting for Thursday, February 10, 2022, at noon. As it is during the annual General Assembly, it will be largely dedicated to a legislative update on MML priorities and legislative actions affecting municipalities. Skip Cornbrooks, MMAA’s liaison to the MML Legislative Committee, plans to offer an update. And, as the legislative hearing schedule allows, we’ll hope to have updates from Angelica Bailey, MML’s Director of Government Affairs, and other MML Staff.

Our last in-person meeting was in February 2020, at Carrol’s Creek Café in Annapolis. If safety (and personal distance rules) allow, the February 10 meeting to be in-person at the same location. Watch this space (and your email) for updates!
Municipal-County Attorney Meeting
Includes Case Summaries by Court of Appeals Chief Judge Getty, Judge Booth and Judge Harrell

Based on safety concerns related to the pandemic, the annual joint Municipal-County Attorney meeting was held as a virtual meeting on October 28. The Chief Judge of the Maryland Court of Appeals, Judge Joseph Getty, as well as Judges Brynja Booth and retired Judge Glenn Harrell, presented discussions on five key cases.

Chief Judge Getty first discussed Mayor and City Council of Ocean City v. Commissioners of Worcester County, raising the question whether county tax setoffs in favor of municipalities should be mandated. He said the issue involved an interpretation of Article 11-E of the Maryland Constitution’s requirement that all municipalities be treated in an equal way. The court’s decision indicated that the decision would remain discretionary, and largely within the County delegation’s judgment.

Judge Booth said Hovnanian Homes v. Mayor and City Council of Havre de Grace, resulted from a developer installing infrastructure to serve three parcels after an annexation, but focused on construction of only one – expecting reimbursement from developers of the other two. When that didn’t happen, Hovnanian submitted to the City Council a “Recoupment Agreement,” allowing them to recoup fees from each house sold in the other two parcels. While the Council approved it, the owners in those parcels objected, and the City didn’t collect the fee as the Mayor didn’t sign the agreement. After multiple rounds of appeals, the Court of Appeals found the “Recoupment Agreement” wasn’t enforceable, as under State law the local government could only impose a fee on property owners by ordinance, not by agreement.

Judge Harrell spoke about Town of Riverdale Park v. Ashkar. He said this involved granting a towing contract. The Town had used Greg’s Towing for decades, but the owner retired, selling the business to Mr. Ashkar. The Deputy Chief of Police had been given discretion over the towing contract, and decided not to renew it with Mr. Ashkar. In doing so, he was heard to refer to Mr. Ashkar in a racially insulting way. Mr. Ashkar sued the Town, claiming discrimination as a Palestinian-American. The jury found judgment in favor of Mr. Ashkar for $244,000 and $15,000 in punitive damages. The Court eventually affirmed, finding the City Council had delegated the decision to the Police Chief, who then delegated to his deputy, and said that imputed the discrimination to the Town. 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.

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. Here, Baltimore City had decided to tax billboards as an excise tax on the privilege of advertising on a billboard. The billboard owners argued it was not narrowly tailored and it targeted certain groups, thus violating the First Amendment. Even as Judge Getty said he dissented, the Court upheld the ordinance as it was not focused on any particular opinion or small, identified group, and thus was not subject to heightened “strict” scrutiny. He said Clear Channel did file certiorari with the U.S. Supreme Court, which is still is pending.

Judge Booth discussed the final case, Angel Enterprises v. Talbot County. She said a property owner installed a driveway, reaching the nearby state road without required state or county permission. The owner paid the fines to the Maryland Department of Environment, but Talbot County had issued citations and six assessment notices with civil penalties of $1,000 each day until correction, which by County ordinance could be appealed to the County Board of Appeals, which affirmed the fines, totaling over $700,000. After further appeal, the Court of Appeals changed the focus from the interpretation of the county’s ordinance to the county’s authority under state law. She said the Court found that while counties can issue civil infractions and impose fines, 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.