



Gregory J. Swain, County Attorney

MEMORANDUM

Attorney-Client/Work-Product Privileged Communication

To: Christine M. Anderson, Chief Administrative Officer

From: Gregory J. Swain, County Attorney /s/

Date: June 7, 2024

Subject: Resilience Authority – Insurance Pooling Agreement

I have reviewed the emails on the Resilience Authority and pooling agreements, the Memo concerning Tipton Airport and whether that entity is a “unit” of local government for the purposes of insurance pooling, and particularly the provisions of *Insurance* Article § 19-601 *et. seq.* As applicable to the Resilience Authority, that subtitle provides that “public entities” can enter into insurance pooling agreement, and defines “public entity” as:

- (a) In this section, “public entity” means:
 - (1) a political subdivision of the State;
 - (2) a unit of the State or a local government; or
 - (3) a nonprofit or nonstock corporation that:
 - (i) receives 50% or more of its annual operating budget from the State or a local government; and
 - (ii) is exempt from taxation under § 501(c)(3) or (4) of the Internal Revenue Code.

Md. Code Ann., *Insurance* Art., § 19-602(a).

The Resilience Authority is incorporated as a body corporate and politic and an instrumentality of Anne Arundel County and the City of Annapolis. Md. Code, *Local Gov.* Art., § 22-102(e)(2)(i); County Code, § 3-8A-102(a)(2). It is a nonprofit and nonstock limited liability company, and does receive 50% or more of its operating budget from the County, but it is exempt from taxation under a different section of the Internal Revenue Code (§ 115), and therefore

cannot qualify under § 19-602(a)(3). It is not a political subdivision of the State, so the question becomes whether it may qualify as a “unit” of a local government under §19-602(a)(2).

While the term “unit” of state or local government is used regularly throughout the State Code, there is no general definition that is provided to define exactly what that means. The County Code, in Title 4 (“Records Management”), defines “unit” as “any department, office, bureau, committee, board, commission, or other organizational unit of County government.” § 1-4-101(3). The Resilience Authority is codified in Article 3 of the County Code (“Boards and Commissions”). All members of the Resilience Authority are appointed by the County Executive or Mayor of Annapolis, and all members are required to take a constitutional oath of office. County Code, § 3-8A-103(a) & (b). The County Executive or Mayor have a right of removal of the members, § 3-8A-103(d), and the County Executive appoints the Director. § 3-8A-107. There is, therefore, significant control by the incorporating local governments.

Some entities, such as a Board of Education, are considered a state “agency” for some purposes but not others. *See Mont. County Public Schools v. Donlon*, 233 Md. App. 646, 660 (2017). The Administrative Procedures Act, which is only applicable to certain State entities, excludes certain State “units” from the application of the APA and lists the following characteristics of a State “unit”:

- (4) an officer or unit not part of a principal department of State government that:
 - (i) is created by or pursuant to the Maryland Constitution or general or local law;
 - (ii) operates in only 1 county; and
 - (iii) is subject to the control of a local government or is funded wholly or partly from local funds;

Md. Code Ann., State Gov't § 10-203(a)(4). The Resilience Authority has these same characteristics.

The authority of a county to establish a resilience authority is enabled by Title 22 of the *Local Government* of the State Code. While Title 22 does not provide a general definition of a “unit” of local government, § 22-105 does provide:

- (b) A Resilience Authority has and may exercise all powers necessary or convenient to undertake, finance, manage, acquire, own, convey, or support resilience infrastructure projects, including the power to:
 - (1) acquire by purchase, lease, or other legal means, but not by eminent domain, property for resilience infrastructure;
 - (2) establish, construct, alter, improve, equip, repair, maintain, operate, and regulate resilience infrastructure owned by the incorporating local government or the Resilience Authority;
 - (3) receive money from its incorporating local government, the State, other governmental units, or private organizations;

- (4) charge and collect fees for its services;
- (5) subject to the approval of the local governing body, charge and collect fees to back its bond issuances;
- (6) have employees and consultants as it considers necessary;
- (7) **use the services of other governmental units**; and
- (8) act as necessary or convenient to carry out the powers granted to it by law.

Md. Code Ann., Local Gov't § 22-105(b). The corresponding section of the Anne Arundel County Code, adopted after the State law was enacted, includes similar language:

(b) **Enumerated.** The Resilience Authority has and may exercise all powers necessary or convenient to undertake, finance, manage, acquire, own, convey, or support resilience infrastructure projects, including, but not limited to, the power to:

* * * * *

- (7) engage the services of **other governmental units**;

County Code, § 3-8A-110(b)(7). The plain meaning of “other” in this context is inclusive - that a resilience authority may engage the services of other (or additional) “units” of local governments, and implies that a resilience authority is not only an instrumentality of local government, it is also a “unit” of local government. This reading is also generally consistent with the meaning of “unit” set out in the State APA, as a resilience authority is created by local law (as enabled by State law), operates in one county, and is funded by local government. This is also generally consistent with the subsection (3) of the insurance pooling definition, as the Resilience Authority is a nonprofit and nonstock corporation funded 50% or more with local funds and is exempt from taxation (albeit, not under 28 USC 501(c)). Yet this language must be contrasted with the same State and local law designating the resilience authority as an instrumentality of the County. *See* Md. Code, *Local Gov. Art.*, § 22-102(e)(2)(i); County Code, § 3-8A-102(a)(2).

It is noted that reference in State law is often made to an entity being a “unit or instrumentality” of state or local government, which implies a difference between the two. *See, e.g.,* Md. Code, *General Provisions Art.*, § 4-101(j)(public records are documentary material made by a “unit or instrumentality” of local government). In light of the identification of the resilience authority as both an instrumentality of the County and as a unit of local government, it is not entirely clear whether a resilience authority is a unit of local government meeting the qualification of a “public entity” so as to allow pooling insurance under the standard set forth in § 19-602(a). An argument can be made that a resilience authority is a unit of local government, based on the various standards for “units” set out in different sections of State Code, the degree of local government control over the Resilience Authority, and the grant of power in both State and local law for a resilience authority to engage “other” governmental units.” An argument can also be made that a residence authority is an instrumentality (not a unit) of local government,

based on that express designation in both State and local law. As with the Board of Education, taking into account the considerations discussed above, it is possible that a resilience authority may be considered an instrumentality of the County for some purposes, and a unit of the County for other purposes.

With this background, the answer as to whether the Resilience Authority qualifies as a “public entity” qualified to participate in insurance pooling agreements is not clear. As noted above, there are arguments to support either interpretation, based on State law and the language of the enabling legislation. The express designation of the Resilience Authority as an instrumentality of the County probably weighs in favor of that interpretation. If a decision is made to allow pooling, a prudent move would be to also seek an amendment to State law to resolve any ambiguity and expressly allow pooling agreements:

Local Government Article

§ 22-103. Officers and employees

(a) Officers governing the Resilience Authority and employees of a Resilience Authority shall be appointed or hired as provided by local law.

(b) Except as otherwise provided in this title or the local law establishing the Resilience Authority, the procedures of the incorporating local government control any personnel matter relating to the internal administration of the Resilience Authority.

(c) A RESILIENCE AUTHORITY SHALL BE CONSIDERED A UNIT OF LOCAL GOVERNMENT FOR THE PURPOSES OF § 19-602 OF THE INSURANCE ARTICLE.

Alternately, the same State law change could be sought and insurance for the Resilience Authority be funded by the County until the change is approved.