

SMALL WIRELESS FACILITIES IN PUBLIC RIGHTS-OF-WAY

Challenges and Opportunities for Municipalities

Introduction

Wireless service providers and infrastructure owners are seeking authorization to locate "small cell networks" in public rights-of-way (ROW). Local elected officials understand that decisions about broadband facilities deployment occur within the broader responsibilities they have to protect public health and safety and manage public property. As industry seeks local permits for small cell networks, it is also advocating at the Federal Communications Commission (FCC) and in state legislatures, seeking laws to limit local authority and authorize easier access to the ROW.

Earlier this year, the Colorado General Assembly passed HB 1193, which creates a "use by right" for small cell facilities in any zoning district, subject to local police powers. This article describes the regulatory framework for small cell facilities and suggests how local governments should be proactively addressing land use and street codes and permitting procedures to both facilitate small cell deployment and responsibly manage the ROW.

What Are Small Cells?

The term "small cells" refers to smaller geographic coverage areas, and not the physical size of the facilities. These networks generally involve

small cell antennas mounted on light poles, traffic signal poles, or stand-alone poles at similar heights. A small cell facility mounted on a traditional street light typically will have an antenna, which could vary in size from a 10- by 24-inch panel antenna to something significantly smaller and narrower. The facility will have two radios attached to the pole, wiring, and a utility meter. Depending upon the structure, everything except the antenna might be located inside of the pole, resulting in a deployment that a passerby would barely notice. Some companies also are seeking to deploy much taller, visually intrusive towers in the ROW. The FCC defines a small cell site as the collective equipment that would fit within an imaginary space of 17 cubic feet. Von Miller could fit inside that imaginary structure, so remember that a small cell facility is not necessarily "small."

State Regulatory Framework

HB 1193 amended C.R.S. 38-5.5-101, et seq. addressing rights of way, and 29-28-401, et seq. addressing wireless broadband facilities. Similar bills have been passed or are being debated in many other states. While it is always distasteful when the legislature tells local governments how to manage public property, for a variety of reasons, the Colorado bill is not nearly as bad as some of the legislation being passed or considered elsewhere.

While space does not allow for a comprehensive description, the siting of small cell facilities is now a use by right in any zoning district. Applications for small cell facilities are no longer subject to public hearings, review, and approval by planning commissions and city councils/town boards. They are however, subject to the regulations within zoning districts, so it is essential to examine your code and make sure that regulations are in place to address this kind of deployment.

The new law also shortens the time in which one must act. The prior shot clock was 150 days for any new facility. HB 1193 requires action on new small cell applications within 90 days of a completed application. There is no "deemed granted" remedy for failure to act within the time limits. Failure to act simply allows an applicant to file a court action alleging that the local government has failed to act within a reasonable period of time as required by the federal Telecommunications Act of 1996.

Federal Regulatory Framework: Existing Statutes and Rules

As noted, federal law requires decisions on complete applications for wireless facilities in "a reasonable period of time," and the FCC has adopted "shot clock" rules implementing that requirement. Generally, for a new tower or other

new vertical structure for wireless facilities, or to locate wireless facilities on a structure that has not previously been approved for these kinds of attachments, the shot clock is 150 days. For a collocation request on many (but not all) sites, the time period is 90 days. Failure to act by the deadline creates a presumption that the local government has not acted within a reasonable period of time, and permits the applicant to file suit to compel a decision.

In 2014, the FCC adopted rules interpreting the mandatory collocation requirements of the Middle Class Tax Relief and Job Creation Act of 2012. Those rules alone could be the subject of an entirely separate article. Suffice it to say that for collocations in what the statute calls an “eligible support structure,” a local government shall approve the collocation within 60 days or the application will be deemed approved.

Today, an application for small cell facilities involving a new pole in the ROW or attaching equipment to an existing pole with no other wireless facilities would be subject to the 90-day shot clock under HB 1193. A request to collocate small cells on poles that have been previously approved for wireless facilities may, depending upon conditions of the original approval, be subject to the federal 60-day mandatory collocation requirement.



Federal Regulatory Framework: Pending Rulemakings

There are two FCC Notices of Proposed Rulemaking pending today that address the regulatory framework for small cells in the ROW, as well as a host of other ROW control matters. These proceedings also have raised the possibility of expanding the FCC's regulatory reach to cover the siting (and ability to charge rent) for wireless facilities of all kinds on local government property outside of the ROW. Many in the wireless industry blame local regulatory processes for holding up network deployment, and are advocating for federal preemptory rules further limiting local authority. The FCC might limit permit fees, adopt new shot clocks with applications "deemed granted" if not acted upon (under a theory that if a local government fails to act within an arbitrary time frame set by the FCC, it has "abandoned" its regulatory authority to the federal government), and even impose new restrictions on local authority over wireless facilities outside of the ROW. FCC leadership appears to want to act quickly, and we may see a ruling in two to six months. The Colorado Municipal League, together with the Colorado Communications and Utility Alliance, is participating in this proceeding, advocating on behalf of Colorado's local governments.

Conclusion and Recommendations

While it is impossible to know what the scope of local authority will be a year from now, there are actions municipalities should take now to facilitate deployment of small cell networks in a manner that addresses public safety, aesthetic, and other local concerns.

Review and, if Necessary, Amend Municipal Code

Most land use codes address siting of cell towers. If yours does not also address small cells in the ROW, consider adding specific provisions allowing administrative approval of small cells attached to existing infrastructure and the possibility of new, stand-alone poles, where existing poles are not available and where aesthetic concerns, such as camouflaging and separation distances, are addressed. If, for example, the maximum height in a residential district might be 30 feet, and the municipality has 30-foot light poles in the ROW, given the new state law making siting of small cells a use by right, the criteria for administrative approval for wireless attachments to these poles should be clear.

Encouraging attachments to existing vertical infrastructure minimizes demand for new stand-alone poles. Make sure, however, that the code's height restrictions apply to public as well as private property and extend to the ROW. You should similarly examine the section of the code relating to street access and determine where best to include provisions about siting these facilities in the ROW. A process for administrative approval of attachments to existing infrastructure, while maintaining public hearing review for stand-alone facilities that require conditional uses or variances, should minimize demand for taller, visually objectionable towers and encourage deployment of less visually intrusive structures.

ROW License Agreements

Consider developing a standard license agreement for permitting small cell facilities in the ROW. A master license can address conditions

applying to any facility in the ROW, with a supplemental or individual site license that covers each site requested. At the time of the request, the appropriate government official reviews the application, and if the license and code criteria are met, the site is approved.

Understand the scope of your authority with respect to small cells and remember that, depending upon the facts, you can say "no." A 100-foot pole in the ROW is likely incompatible in almost any zoning district.

Applicants seeking these sites should continue to have to seek special use permission, or variances, and these proceedings necessarily require public hearings with citizen input. Make sure your code addresses the issues in a manner that is reasonable to citizens, applicants, and staff. Recognize that requests for ROW use will increase. Having the right code language and an appropriate agreement to govern the permitting process will help you address applications for small cells effectively and efficiently.

Remember also that at some point, all wireless facilities connect to a fiber backbone. It is important to understand this when preparing the terms of a master license or permit agreement. You certainly could address installation of fiber optic infrastructure in the ROW in the same agreement, although many jurisdictions prefer to address wireless applications for street access in a separate permit.

The deployment of small cells in the ROW will continue to be a major issue for local governments as we address broadband in our communities. Workshops on this topic and other communications issues of interest will be part of CBCcon — the Colorado Communications and Utility Alliance's Annual Conference in Denver on Oct. 26–27. For more information, see www.coloradocua.org/conference.