LEAGUE OF MINNESOTA CITIES

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2017 Telecommunications Right-of-Way User Amendments Permitting Process for Small Wireless Facilities

Publication Date: August 1, 2017

(For information on related federal laws see LMC Information Memo "Cell Towers, Small Cell Technologies, and Distributed Antenna Systems")

Introduction:

On May 30, 2017, Gov. Dayton signed into law a bill[1] amending Minnesota's Telecommunications Right-of-Way User Law[2]. The amendments cleared up any confusion about whether wireless providers are treated the same as other telecommunications right-of-way users under state law, but created a separate, streamlined permitting system for placement of small wireless facilities on city-owned structures in rights of way. Most of the bill provisions became effective on May 31, 2017, with the exception that the prohibition on moratoria does not take effect until January 1, 2018 for those cities that did not have a right-of-way ordinance in place on or before May 18, 2017, to give those cities an opportunity to enact an ordinance regulating their public rights-of-way. Also, the amendments allow cities to enter collocation agreements with telecommunications right-of-way users, if they choose, as long as the collocation agreement for small wireless facilities is made available in a substantially complete form no later than six months after the effective date of this act or three months after receiving a small wireless facility permit application from a wireless service provider.

Where can I read the new law?

Until revisions of the state statute occur to include bills passed this session, cities can find the amendments at 2017 Laws, Chapter 94.

Does the law require cities to do anything differently when regulating wireless providers attaching their equipment to city structures in the rights of way?

Yes, the amendments create a separate permit process for small wireless facilities. The below checklist was prepared to serve as a guide for cities to use when amending existing telecommunications ordinances, but does necessarily cover all nuances of the new law and should not replace working with city attorneys to draft or amend existing ordinances.

What is the purpose of Minnesota's Telecommunication Right-of-Way User Law?

[1] Chapter 94, Article 9 of the 2017 Regular Session, effective May 31, 2017.
[2] Minn. Stat. §§ 237.162, 237.163.

In 1997, the Minnesota Legislature recognized the need for a state law providing local government units with the authority to regulate the use of public rights of way by telecommunications right-of-way users. The resulting Minnesota Telecommunications Right-of-Way User Law allows telecommunications right-of-way users to construct, maintain, and operate conduit, cable, switches (and now small wireless facilities), and related appurtenances and facilities along, across, upon, above, and under any public right of way, but subjects those users to local regulations by cities to manage their rights of way and to recover management costs.

Can a city manage its right of way without doing anything?

No, the city must adopt an enabling ordinance**.** A local government unit is not required to manage its rights of way, but most want to do so. As such, the local government authority must pass an ordinance exercising this authority. Many cities find that having a separate telecommunications right-of-way user ordinance (in addition to a general right-of-way ordinance) allows for better regulation of cell towers, small cell and other telecommunications equipment.

Did the amendments in the 2017 laws impact all telecommunications right-of-way users?

Some of the amendments impacted cities' regulations on all telecommunications right-of-way users, but the amendments also created a distinct set of regulations specifically for placement of small wireless facilities. With respect to the regulations that apply to all telecommunications right-of-way users, the law:

- ✓ Requires all telecommunications right-of-way users seeking to excavate or obstruct a public right of way to obtain a right-of-way permit to do so.
- ✓ Requires a telecommunications right-of-way user using, occupying, or seeking to use or occupy a public right of way for providing telecommunications services to register with the local government unit by providing the local government unit with specific information (set forth in the statute), and including authorization for periodic updates.
- ✓ Requires telecommunications right-of-way users to submit plans for construction and major maintenance, to provide reasonable notice of projects that may require excavation and obstruction of public rights of way.
- ✓ Provides for restoration by the telecommunication right-of-way user after excavation occurs, either in the form of doing the restoration work or reimbursing the local governmental unit for the cost of the restoration work.
- ✓ Allows recovery of right-of-way management costs through a fee for registration, a fee for each right-of-way permit or, when appropriate, a fee applicable to a telecommunications right-of-way user when that user causes the local government unit to incur costs because of actions or inactions of that user.

Can a city charge a fee for using the right of way?

Yes, because when cities manage rights of way, they incur costs. However, when cities charge right-of-way users, the fees must be calculated on a competitively neutral basis, and based on the actual costs incurred by the city in managing the public right of way. A fee for the cost of managing the right-of-way should reflect an allocation among all users of the public right-of-way, including the city itself.

Can a city charge rent if a right-of-way user places equipment in the right of way?

Yes. Nothing in the law prohibits a city from charging rent for the placement of technology or equipment by a telecommunications right-of-way user on a city owned structure. However, cities are limited in the amount

of rent they can charge for collocation of small wireless facilities on city-owned structures. Fee limitations are described in the statute.

If a city does not have an ordinance, can it pass a moratorium on processing any applications it receives until it can pass an ordinance?

Probably not. The law prohibits cities from establishing a moratorium with respect to filing, receiving, or processing applications for right-of-way or small wireless facility permits, or for issuing or approving right-of-way or small wireless facility permits. However, for cities that did not have an ordinance enabling it to manage its right-of-way before or on May 18, 2017, the prohibition on moratoria does not take effect until January 1, 2018, giving those cities an opportunity to enact an ordinance regulating its public rights-of-way.

Can a city still deny applications for siting of telecommunications equipment in its right of way?

Generally, yes, however, any denial or revocation of either a right-of-way permit or a small wireless facility permit must be done in writing and must document the basis for the denial, including the health, safety and welfare reasons for the denial. The local government unit must notify the telecommunications right-of-way user, in writing, within three business days of the decision to deny or revoke a permit. If the city denies a permit application, the telecommunications right-of-way user may cure the deficiencies identified by the local government unit and resubmit its application. If the telecommunications right-of-way user resubmits the application within 30 days of receiving written notice of the denial, the city may not charge an additional filing or processing fee. The local government unit must approve or deny the revised application within 30 days after the submission of the revised application, or it is deemed granted.

Can cities treat the siting of all cell equipment the same?

It depends. If the city plans to regulate cell sitings and require telecommunications right-of-way users to get permits, then the 2017 amendments to the law create a separate permit system for small wireless facility technology that places additional limitations on a city's ability to regulate those specific types of technology.

Does the new law mean our city cannot enter into a separate agreement with telecommunications right-of-way users who want to place equipment on city owned structures?

The amendments do not require cities to have separate agreements, and some cities may choose to put these provisions in their ordinance or permit instead. For cities that want a separate 'collocation agreement' in place, they must develop and make that collocation agreement available no later than six months after May 31, 2017 (the effective date of the act) or three months after receiving a small wireless facility permit application from a wireless service provider. "Collocate" or "collocation" means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit. The template of the agreement must be made available in a substantially complete form. The parties to the separate small wireless facility collocation agreement always may incorporate additional mutually agreed upon terms and conditions. Also, the law now clearly classifies any small wireless facility collocation agreement between a local government unit and a wireless service provider as public data accessible to the public under Minnesota's Data Practices Law.

What type of equipment is subject to the special requirements on small cell technology?

The statute defines type of equipment, which include:

"Small wireless facility":

(1) A wireless facility that meets both following qualifications:

(i) Each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all its exposed elements could fit within an enclosure of no more than six cubic feet.

(ii) All other wireless equipment associated with the small wireless facility, excluding electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment, is in aggregate no more than 28 cubic feet in volume.

(2) A micro wireless facility.

"Wireless support structure" means a new or existing structure in a public right of way designed to support or capable of supporting small wireless facilities, as reasonably determined by a local government unit.

"Collocate" or "collocation" means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit.

What additional requirements must cities consider to comply with Minnesota's Telecommunications Right-of-Way User Law, as amended?

The law sets forth specific requirements related to placement of small wireless facilities or installation of new wireless support structures. The below information highlights items cities will want to consider when drafting an ordinance or amending an existing ordinance. Again, cities should work with their city attorneys to ensure full compliance with the law.

NEW STATE LAW REQUIREMENTS

GOVERNING PLACEMENT OF SMALL WIRELESS FACILITIES IN RIGHTS OF WAY

If a city decides to regulate or require permits for placement of a new wireless support structure or collocation of a small wireless facility, then the city should be aware that:

- ☐ Small wireless facilities and wireless support structures are a permitted use, except that in districts zoned as single-family residential use or district identified as historic (either by federal law or ordinance), a local government unit can require a conditional use permit.

- ☐ Cities must not require an applicant for a small wireless facility permit to provide any information that the applicant previously had provided to the city in a different application for a small wireless permit (which the applicant must identify by specific reference number).
- ☐ Cities must not require an application to provide information that is not reasonably necessary to review a permit application for compliance with generally applicable and reasonable health, safety, and welfare regulations, or to demonstrate compliance with applicable Federal Communications Commission regulations governing radio frequency exposure, or other information required by this section.
- ☐ Permits for small cell facility collocation or placement of a new wireless support structure must specify that the term of a small wireless facility permit equals the length of time that small wireless facility is in use, unless the permit is revoked under this section.
- ☐ The total application fee for a small wireless facility permit must comply with the statutory requirement regarding costs related to the permit.
- ☐ The city must allow applicants for small wireless facility permits to file a consolidated permit application to collocate up to 15 small wireless facilities (or a greater number if agreed to by a local government unit), provided that all the small wireless facilities in the application are located within a two-mile radius, consist of substantially similar equipment, and are to be placed on similar types of wireless support structures.
- ☐ The city has 90 days after the date a small wireless facility permit application is filed to issue or deny the permit, or the permit is automatically issued.
- ☐ To toll the 90-day clock, the city must provide a written notice of incompleteness to the applicant within 30 days of receipt of the application, identifying all missing documents or information, and providing the applicant with a time to cure that complies with the statute[3].
- ☐ If the city receives applications within a single seven-day period from one or more applicants seeking approval of permits for more than 30 small wireless facilities, the city may extend the 90-day deadline by an additional 30 days. If a city elects to invoke this extension, it must inform in writing any applicant to whom the extension will be applied.
- ☐ A city cannot require placement of small wireless facilities on any specific wireless support structure other than the one proposed in the permit application.
- ☐ A city must not limit the placement of *small wireless facilities*, either by minimum separation distances between small wireless facilities or maximum height limitations, except that each wireless support structure installed in the right of way after the effective date of this act shall not exceed 50 feet above ground level (unless the local government unit agrees to a greater height).

[3]Minn. Stat. §237.163, Subd. 3c(b).

☐ A city can set forth in its ordinance separation requirements for placement of wireless support structures in relation to other wireless support structures.

☐ A city still may deny permit for health, safety, and welfare reasons or for noncompliance with decorative wireless support structures or signs.

☐ A city cannot require a person to pay a small wireless facility permit fee, obtain a small wireless facility permit, or enter into a small wireless facility collocation agreement solely in order to conduct routine maintenance of a small wireless facility; replace a small wireless facility with a new facility that is substantially similar or smaller in size, weight, height, and wind or structural loading; or install, place, maintain, operate, or replace micro wireless facilities suspended on cables strung between existing utility poles in compliance with national safety codes.

☐ A city cannot require an applicant to apply for or enter any individual license, franchise, or other agreement with the local government unit or any other entity, other than the optional standard small wireless facility collocation agreement.

☐ A city may require notice of any work that will obstruct a public right of way.

OPTIONAL PROVISIONS FOR SMALL WIRELESS FACILITIES

☐ A city is not required to have a separate agreement, but can choose to enter collocation agreements with applicants locating small wireless facilities onto city owned structures to address terms and conditions of the use of the structures. If a city chooses to do so, then it must make the agreement available to the public in a substantially complete format no later than six months after the effective date or three months after receiving a small wireless facility permit application from a wireless service provider.

☐ A city may elect to charge each small wireless facility attached to a wireless support structure owned by the local government unit a fee (rental fee), in addition to other fees or charges allowed under the law, consisting of: (1) up to $150 per year for rent to occupy space on a wireless support structure; (2) up to $25 per year for maintenance associated with the space occupied on a wireless support structure; and (3) an additional monthly fee for electricity used to operate a small wireless facility, if not purchased directly from a utility, at the rate set forth in the statute.[4]

[4] Minn. Stat. 237.163, Subd. 6 (d).

INFORMATION MEMO

Cell Towers, Small Cell Technologies & Distributed Antenna Systems

Learn about large and small cell tower deployment and siting requests for small cell, small wireless and distributed antenna systems (DAS) technology. Better understand the trend of the addition of DAS, small wireless or small cell equipment on existing utility equipment. Be aware of common gaps in city zoning, impact of federal and state law, reasons for collocation agreements and some best practices for dealing with large and small cell towers, small wireless facilities and DAS.

RELEVANT LINKS:

47 U.S.C. § 253 (commonly known as Section 253 of Telecommunications Act).

47 U.S.C. §332 (commonly known as Section 332 of Telecommunications Act).

FCC Website.

I. Deployment of large cell towers or antennas

A cell site or cell tower creates a "cell" in a cellular network and typically supports antennas plus other equipment, such as one or more sets of transceivers, digital signal processors, control electronics, GPS equipment, primary and backup electrical power and sheltering. Only a finite number of calls or data can go through these facilities at once and the working range of the cell site varies based on any number of factors, including height of the antenna. The Federal Communications Commission (FCC) has stated that cellular or personal communications services (PCS) towers typically range anywhere from 50 to 200 feet high.

The emergence of personal communications services, the increased number of cell providers, and the growing demand for better coverage have spurred requests for new cell towers, small cell equipment, and distributed antenna systems (DAS) nationwide. Thus, some cellular carriers, telecommunications wholesalers or tower companies, have attempted to quickly deploy telecommunications systems or personal wireless service facilities, and, in doing so, often claim federal law requires cities to allow construction or placement of towers, equipment, or antennas in rights of way. Such claims generally have no basis. Although not completely unfettered, cities can feel assured that, in general, federal law preserves local zoning and land use authority.

A. The Telecommunications Act and the FCC

47 U.S.C. § 253 (commonly known as Section 253 of Telecommunications Act).

47 U.S.C. § 332 (commonly known as Section 332 of Telecommunications Act).

The Telecommunications Act of 1996 (TCA) represented America's first successful attempt to reform regulations on telecommunications in more than 60 years, and was the first piece of legislation to address internet access. Congress enacted the TCA to promote competition and higher quality in American telecommunications services and to encourage rapid deployment of new telecommunications technologies.

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RELEVANT LINKS:

FCC website interpreting Telecommunications Act of 1996.

The FCC is the federal agency charged with creating rules and policies under the TCA and other telecommunications laws.

The FCC also manages and licenses commercial users (like cell providers and tower companies), as well as non-commercial users (like local governments). As a result, both the TCA and FCC rulings impact interactions between the cell industry and local government.

The significant changes in the wireless industry and its related shared wireless infrastructures, along with consumer demand for fast and reliable service on mobile devices, have fueled a frenzy of requests for large and small cell/DAS site development and/or deployment. As a part of this, cities find themselves facing cell industry arguments that federal law requires cities to approve tower siting requests.

47 U.S.C. § 253 (Section 253 of Telecommunications Act).

47 U.S.C. § 332(c)(7).

FCC 09-99, Declaratory Ruling (Nov. 18, 2009).

Companies making these claims most often cite Section 253 or Section 332 of the TCA as support. Section 253 states "no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 332 has a similar provision ensuring the entry of commercial mobile services into desired geographic markets to establish personal wireless service facilities.

47 U.S.C. § 253(c)(e) (Section 253 of Telecommunications Act).

47 U.S.C. § 332(c)(7).

FCC 09-99, Declaratory Ruling (Nov. 18, 2009).

These provisions should not, however, be read out of context. When reviewing the relevant sections in their entirety, it becomes clear that federal law does not pre-empt local municipal regulations and land use controls. Specifically, the law states "[n]othing in this section affects the authority of a state or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights of way …" and that "nothing in this chapter shall limit or affect the authority of … local government … over decisions regarding the placement, construction, and modification of personal wireless service facilities".

Sprint Spectrum v. Mills, 283 F.3d 404 (2nd Cir. 2002).

USCOC of Greater Missouri v. Vill. Of Marlborough, 618 F.Supp.2d 1055 (E.D. Mo. 2009).

FCC 09-99, Declaratory Ruling (Nov. 18, 2009).

Courts consistently have agreed that local governments retain their regulatory authority and, when faced with making decisions on placement of towers, antenna or ***new*** telecommunication service equipment on city facilities, they generally have the same rights that private individuals have to deny or permit placement of a cellular tower on their property. This means cities can regulate and permit placement of towers and other personal wireless service facilities, including, in most situations (though some state law restrictions exist regarding regulations of small wireless support structures), controlling height, exterior materials, accessory buildings, and even location. Cities should be careful to make sure that local regulations don't have the effect of completely banning all cell towers or personal wireless service facilities. Such regulation could run afoul of federal law (not to mention state law as well).

RELEVANT LINKS:

Vertical Broadcasting v. Town of Southampton, 84 F. Supp.2d 379 (E.D.N.Y. 2000).

Some cellular companies try to gain unfettered access to city right of way by claiming they are utilities. The basis for such a claim usually follows one of two themes—either that, as a utility, federal law entitles them to entry; or, in the alternative, under the city's ordinances, they get the same treatment as other utilities. Courts have rejected the first argument of entitlement, citing to the specific directive that local municipalities retain traditional zoning discretion.

B. State law

Paging v. Bd. of Zoning Appeals for Montgomery Cty., 957 F.Supp. 805 (W.D. Va. 1997).

In the alternative, the argument that a city's local ordinances include towers as a utility has, on occasion and in different states, carried more weight with a court. To counter such arguments, cities may consider specifically excluding towers, antenna, small cell, and DAS equipment from their ordinance's definition of utilities. The Minnesota Department of Commerce, in a letter to a wireless infrastructure provider, cautioned one infrastructure company that its certificate of authority to provide a local niche service did not authorize it to claim an exemption from local zoning. The Minnesota Department of Commerce additionally requested that the offending company cease from making those assertions.

Letter from Minnesota Department of Commerce to Mobilitie.

Minn. Stat. § 237.162
Minn. Stat. § 237.163
Chapter 94, Art. 9, 2017 Regular Session.

Minnesota Public Utilities Commission, Meeting Agenda (Nov. 3, 2016).

In Minnesota, to clear up confusion about whether wireless providers represent telecommunications right-of-way users under state law and to address concerns about deployment of small wireless technology, the Legislature amended Minnesota's Telecommunications Right-of-Way User statutes, or Minnesota Telecom ROW Law, in the 2017 legislative session to specifically address small wireless facilities and the support structures on which those facilities may attach.

Because of these amendments, effective May 31, 2017 additional specific state statutory provisions apply when cities, through an ordinance, manage their rights of way, recover their right-of-way management costs (subject to certain restrictions), and charge rent for attaching to city-owned structures in public rights of way. Rent, however, is capped for collocation of small wireless facilities. State law defines "collocate" or "collocation" as a means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure that is owned privately or by a local government unit.

Minn. Stat. § 237.162.
Minn. Stat. § 237.163
Chapter 94, Art. 9, 2017 Regular Session.

The Minnesota Telecom ROW Law allows cities to require telecommunications right-of-way users to get a permit for use of the right of way; however, it creates a separate permitting structure for the siting of small wireless facilities.

RELEVANT LINKS:

Because of the recent significant changes in the state law and the specific requirements for deployment of small wireless facilities that do not apply to other telecommunications right-of-way users, cities should work with their city attorneys to review and update their ordinances.

C. Limitations on cities' authority

1. Federal law

Although federal law expressly preserves local governmental regulatory authority, it does place several substantive and procedural limits on that authority. Specifically, a city:

- Cannot unreasonably discriminate among providers of functionally equivalent services.
- Cannot regulate those providers in a manner that prohibits or has the effect of prohibiting the provision of telecommunications services or personal wireless services.
- Must act on applications within a reasonable time.
- Must document denial of an application in writing supported by "substantial evidence."

USCOC of Greater Missouri v. Vill. Of Marlborough, 618 F.Supp.2d 1055 (E.D. Mo. 2009).

Minnesota Towers Inc. v. City of Duluth, 474 F.3d 1052 (8th Cir. 2007).

NE Colorado Cellular, Inc. v. City of North Platte, 764 F.3d 929 (8th Cir. 2014) (denial of CUP for tower must be "in writing" but need not be a separate finding from the reasons in the denial).

Proof that the local zoning authority's decision furthers the applicable local zoning requirements or ordinances satisfies the substantial evidence test. Municipalities cannot cite environmental concerns as a reason for denial, however, when the antennas comply with FCC rules on radio emissions. In the alternative, cities can request proof of compliance with the FCC rules.

Smith Comm. V. Washington Cty, Ark., 785 F.3d 1253 (8th Cir. 2015) (substantial evidence' analysis involves whether the local zoning authority's decision is consistent with the applicable local zoning requirements and can include aesthetic reasons).

Bringing an action in federal court represents the recourse available to the cellular industry if challenging the denial of a siting request under federal law. Based on the limitations set forth in the federal law on local land use and zoning authority, most often, when cities deny siting requests, the challenges to those denials claim one of the following:

- The municipal action has the effect of "prohibiting the provision of personal wireless service."
- The municipal action unreasonably discriminates among providers of functionally equivalent services (i.e., cell providers claiming to be a type of utility so they can get the same treatment as a utility under city ordinance).

FCC 09-99, Declaratory Ruling, Nov. 18, 2009.

Tower and Antenna Siting FAQ sheet from FCC.

T-Mobile West V. Crow, No. CV08-1337 (D. AZ. Dec. 16, 2009).

RELEVANT LINKS:

2. State law

Minn. Stat. § 237.162
Minn. Stat. § 237.163
Chapter 94, Art. 9, 2017 Regular Session.

In addition to mirroring some of the federal law requirements, such as the requirement of equal treatment of all like providers, state law permits cities, by ordinance, to further regulate "telecommunications right-of-way users."

Minnesota's Telecom ROW Law expressly includes wireless service providers as telecommunications right-of-way users, making the law applicable to the siting of both large and small, wire-lined or wireless telecommunications equipment and facilities, in the rights of way.

See further discussion of state law restrictions in Section II-A, below

State law places additional restrictions on the permitting and regulating of small wireless facilities and wireless support structure placement. Accordingly, cities should work with city attorneys when drafting, adopting, or amending their ordinance. The Telecom ROW Law still expressly protects local control, allowing cities to deny permits for reasonable public health, welfare, and safety reasons, with no definitions of or limitations on what qualifies as health, welfare, and safety reasons.

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D. Court decisions

Minnesota Towers Inc. v. City of Duluth, 474 F.3d 1052 (8th Cir. 2007). *Smith Comm. V. Washington Cty, Ark.*, 785 F.3d 1253 (8th Cir. 2015).

The 8th U.S. Circuit Court of Appeals (controlling law for Minnesota) recognizes that cities do indeed retain local authority over decisions regarding the placement and construction of towers and personal wireless service facilities.

Voicestream PCSII Corp. v. City of St. Louis, No. 4:04CV732 (E.D.Mo. August 3, 2005) (city interpretation of city ordinance treats communication facility as a utility).

The 8th Circuit also has heard cases where a carrier or other telecommunications company argued they are a utility and should be treated as such under local ordinances. Absent a local ordinance that includes this type of equipment within its definition of utilities, courts do not necessarily deem cell towers or other personal communications services equipment functionally equivalent to utilities.

USCOC of Greater Missouri v. Vill. Of Marlborough, 618 F.Supp2d 1055, 1064 (E.D. Mo. 2009) (TCA explicitly contemplates some discrimination amount providers of functionally equivalent services).

Additionally, courts have found that the federal law anticipates some disparate application of the law, even among those deemed functionally equivalent. For example, courts determined it reasonable to consider the location of a cell tower when deciding whether to approve tower construction (finding it okay to treat different locations differently), so long as cities do not allow one company to build a tower at a specific location at the exclusion of other providers.

RELEVANT LINKS:

For regulation of telecommunications right-of-way users, see Appendix A, Sample Ordinances and Agreements.
For regulation of city right-of-way generally, see LMC information memo, *Regulating City Rights of Way*, and *Right of Way Regulation*, LMC Model Ordinance.

E. City approaches

Regulation of placement of cell towers and personal wireless services can occur through an ordinance. The Minnesota Telecom ROW Law provides cities with comprehensive authority to manage their rights of way. With the unique application of federal law to telecommunications and the recent changes to state law, along with siting requests for locations both in and out of rights of way, many cities find having a separate telecommunications right-of-way user ordinance (in addition to a right-of-way ordinance) allows cities to better regulate towers and other telecommunications equipment, as well as collocation of small wireless facilities and support structures.

Some cities also have modified the definitions in their ordinances to exclude cell towers, telecommunications, wireless systems, DAS, small cell equipment, and more from utilities to counter the cell industry's requests for equal treatment or more lenient zoning under the city's zoning ordinances.

In addition to adopting specific regulations, many city zoning ordinances recognize structures as conditional uses requiring a permit (or many of these regulations include a provision for variances, if needed). While cities may require special permits or variances to their zoning for siting of large cell facilities, under state law, small wireless facilities and wireless support structures accommodating those small wireless facilities are deemed a permitted use. The only exception to the presumed, permitted use for small wireless is that a city may require a special or conditional land use permit to install a new wireless support structure in a residentially zoned or historic district. Cities will want to review their zoning to make sure it complies with the Minnesota Telecom ROW Law.

Minn. Stat. 237.163, Subd. 2 (f). Chapter 94, Art. 9, 2017 Regular Session.

II. Deployment of small cell technologies and DAS

Small cell equipment and DAS both transmit wireless signals to and from a defined area to a larger cell tower. They are often installed at sites that support cell coverage either within a large cell area that has high coverage needs or at sites within large geographic areas that have poor cell coverage overall.

RELEVANT LINKS:

Situational needs dictate when cell providers use small cell towers, as opposed to DAS technology. Generally, cell providers install small cell towers when they need to target specific indoor or outdoor areas like stadiums, hospitals, or shopping malls. DAS technology, alternatively, uses a small radio unit and an antenna (that directly link to an existing large cell tower via fiber optics). Installation of a DAS often involves cell providers using the fiber within existing utility structures to link to its larger cell tower. Cities sometimes are asked to provide the power needed for the radios, which the city can negotiate into the leasing agreement with the cell provider.

A. Additional zoning and permitting needs under state law

Minn. Stat. § 237.162.
Minn. Stat. § 237.163.
Chapter 94, Art. 9, 2017 Regular Session.
See Appendix A, Sample Ordinances and Agreements.

Historically, many cities' ordinances address large cell sites, but not small cell towers or DAS. With the recent changes to state law, cities should work with their city attorney to review their ordinances in consideration of the new statutory permit process for the siting of small wireless facilities.

See League FAQ on Minnesota 2017 Telecommunication Right of Way User Amendments (July 2017).

Cities can charge rent (up to a cap for small wireless siting) under the statute for placement of cell technology or DAS on existing or newly installed support structures, like poles or water towers; and, also, can enter into a separate agreement to address issues not covered by state law or ordinance. Cities should work with their city attorney to get assistance with drafting these agreements and any additional documents, like a bill of sale (for transfer of pole from carrier to city), if necessary.

See Appendix A, Sample Ordinances and Agreements

The terms and conditions of these agreements, called collocation agreements, for siting of small wireless facilities, most likely will mirror agreements formerly referred to as master licensing agreements, often including provisions such as:

- Definitions of scope of permitted uses.
- Establishment of right-of-way rental fee (note statutory limitations).
- Protection of city resources.
- Provision of contract term (note statutory limitations).
- Statement of general provisions.
- Maintenance and repair terms.
- Indemnity provisions.
- Insurance and casualty.
- Limitation of liability provision.
- Terms for removal.

RELEVANT LINKS:

State law does not require a separate agreement, and some cities have chosen to put these provisions in their ordinance or permit instead. For cities that choose to have a separate agreement in place, they must develop and make that agreement publicly available no later than November 31, 2017 (six months after the effective date of this act) or three months after receiving a small wireless facility permit application from a wireless service provider. The agreement must be made available in a substantially complete form; however, the parties to the small wireless facility collocation agreement can incorporate additional mutually agreed upon terms and conditions. The law classifies any small wireless facility collocation agreement between a local government unit and a wireless service provider as public data, not on individuals, making those agreements accessible to the public under Minnesota's Data Practices Law.

Minn. Stat. § 237.162
Minn. Stat. § 237.163
Chapter 94, Art. 9, 2017 Regular Session.

Additionally, the new amendments to Minnesota's Telecom ROW Law set forth other requirements that apply only to small cell wireless facility deployment. The 2017 amendments changed Minnesota's Telecom ROW Law significantly, the details, of which, can be found in the League's FAQ on *Minnesota 2017 Telecommunication Right of Way User Amendments* (July 2017). However, after the amendments, the law now generally provides:

See League FAQ on Minnesota 2017 Telecommunication Right of Way User Amendments (July 2017).

- A presumption of permitted use in all zoning districts, except in districts zoned residential or historical districts.
- The requirement that cities issue or deny small wireless facility requests within 90 days, with a tolling period allowed upon written notice to the applicant, within 30 days of receipt of the application.
- An allowance to batch applications (simultaneously submit a group of applications), with the limitation to not exceed 15 small wireless requests for substantially similar equipment on similar types of wireless support structures within a two-mile radius.
- Rent not to exceed $150 per year with option of an additional $25 for maintenance and allowances for electricity, if cities do not require separate metering.
- The limitation that cities cannot ask for information already provided by the same applicant in another small cell wireless facility application, as identified by the applicant, by reference number to those other applications.
- A restriction that the height of wireless support structures cannot exceed 50 feet, unless the city agrees otherwise.
- A restriction that wireless facilities constructed in the right of way may not extend more than 10 feet above an existing wireless support structure in place.

RELEVANT LINKS:

- A prohibition on moratoriums with respect to filing, receiving, or processing applications for right-of-way or small wireless facility permits; or issuing or approving right-of-way or small wireless facility permits. For cities that did not have a right-of-way ordinance in place on or before May 18, 2017, the prohibition on moratoria does not take effect until January 1, 2018, giving those cities an opportunity to enact an ordinance regulating its public rights-of-way.

NOTE: These additional state law requirements do NOT apply to collocation on structures owned, operated maintained or served by municipal utilities. Also, the small wireless statutory requirements do not invalidate agreements in place at the time of enactment of the 2017 amendments (May 31, 2017).

47 U.S.C. § 332 (commonly known as Section332 of Telecommunications Act).

The siting of DAS or new small cell technologies also must comply with the same restrictions under federal law that apply to large cell sitings. Specifically, a city:

FCC 09-99, Declaratory Ruling (Nov. 18, 2009).

FCC 14-153, Report & Order (October 21, 2014).

- May not unreasonably discriminate among providers of functionally equivalent services.
- May not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services.
- Must act on applications within a reasonable time.
- Must make any denial of an application in writing supported by substantial evidence in a written record.

Because of the complexities in the state law and the overlay of federal regulations, some cities have found it a best practice to adopt or amend a telecommunications right-of-way ordinance separate from their general right-of-way management ordinance. Cities that do not choose to adopt separate ordinances, at a minimum, should work with their attorney to review and amend their existing right-of-way ordinances, if necessary, to accommodate for telecommunications right-of-way users and the recent state law amendments for small wireless facilities. For example, since state law now recognizes small wireless facilities as a permitted use, zoning ordinances that require conditional use permits for these facilities likely will need amending.

Since wireless providers seek to attach their small cell and DAS equipment to city-owned structures, many cities choose to have a separate agreement in place to address terms and conditions not included in ordinances or permits. If the city chooses to do so, the law requires the city to have these agreements available in a substantial form so applicants can anticipate the terms and conditions. Again, cities should work with the city attorney to draft a template agreement governing attachment of wireless facilities to municipally owned structures in the right of way.

Minn. Stat. § 237.163, Subd.3a(f).
Chapter 94, Art. 9, 2017 Regular Session.

See Appendix A, Sample Ordinances and Agreements.

RELEVANT LINKS:

With the nationwide trend encouraging deployment of these new technologies, if a city denies an application, it must do so in writing and provide detailed reasonable findings that document the health, welfare, and safety reasons for the denial. With the unique circumstances of each community often raising concerns about sitings, cities may benefit from proactively working with providers.

B. Modifications of existing telecommunication structures

Section 6409(a) of the Middle Class Tax Relief and Joe Creation Act of 2012, *codified at* 47 U.S.C. § 1455.

If a siting request proposes *modifications to and/or collocations of wireless transmission equipment on existing FCC-regulated towers or base stations*, then federal law further limits local municipal control. Specifically, federal law requires cities to grant requests for modifications or collocation to existing *FCC-regulated structures* when that modification would not "substantially change" the physical dimensions of the tower or base station.

FCC Public Notice AD 12-2047 (January 25, 2013).

FCC 14-153, Report & Order (October 21, 2014).

The FCC has established guidelines on what "substantially change the physical dimensions" means and what constitutes a "wireless tower or base station."

FCC Public Notice AD 12-2047 (January 25, 2013).

Once small cell equipment or antennas gets placed on that pole, then the pole becomes a telecommunication structure subject to federal law and FCC regulations. Accordingly, after allowing collocation once, the city then must comply with the more restrictive federal laws that allow modifications to these structures that do not substantially change the physical dimensions of the pole, like having equipment from the other cell carriers.

FCC Public Notice AD 12-2047 (January 25, 2013).

City of Arlington Texas, et. al. V. FCC, et. al., 133 S.Ct. 1863, 1867 (2013) (90 days to process collocation application and 150 days to process all other applications, relying on §332(c)(7)(B)(ii)).

Under this law, it appears cities cannot ask an applicant who is requesting modification for documentation information other than how the modification impacts the physical dimensions of the structure. Accordingly, documentation illustrating the need for such wireless facilities or justifying the business decision likely cannot be requested. Of course, as with the other siting requests, state and local zoning authorities must take prompt action on these siting applications for wireless facilities (60-day shot clock rule).

This model ordinance and other information can be found at National Association of Counties Website.

Two wireless industry associations, the WIA (formerly known as the PCIA) and CTIA, collaborated with the National League of Cities, the National Association of Counties, and the National Association of Telecommunications Officers and Advisors to: (1) develop a model ordinance and application for reviewing eligible small cell/DAS facilities requests under federal law; (2) discuss and distribute wireless siting best practices; (3) create a checklist that local government officials can use to help streamline the review process; and (4) hold webinars regarding the application process.

RELEVANT LINKS:

III. Moratoriums

The cellular industry often challenges moratoriums used to stall placement of cell towers, as well as small cell/DAS technology, until cities can address regulation of these structures. Generally, these providers argue that these moratoriums do one of the following:

- Prohibit or have the effect of prohibiting the provision of personal wireless services.
- Violate federal law by failing to act on an application within a reasonable time.

Minn. Stat. § 237.163, Subd. 2(d). Chapter 94, Art. 9, 2017 Regular Session.

State law now prohibits moratoriums with respect to: (1) filing, receiving, or processing applications for right-of-way or small wireless facility permits; or (2) issuing or approving right-of-way or small wireless facility permits. For cities that did not have an ordinance enabling it to manage its right-of-way on or before May 18, 2017, the prohibition on moratoria does not take effect until January 1, 2018, giving those cities an opportunity to enact an ordinance regulating its public rights-of-way.

IV. Conclusion

With the greater use of calls and data associated with mobile technology, cities likely will see more new cell towers, as well as small cell technology/DAS requests. Consequently, it would make sense to proactively review city regulations to ensure consistency with federal and state law, while still retaining control over the deployment of structures and the use of rights of way.