

SMALL CELL AESTHETIC REGULATION DEADLINE

Municipal Law Alert
February 27, 2019

With the progressive shift to the 5G wireless network, local governments are seeing an increase in applications for the installation of small cell wireless facilities (“small cells”). Small cells are required for the higher-frequency 5G network and are frequently attached to existing structures such as buildings or utility poles. Because these small cells are often installed in the public right-of-way, there is increased concern about their impact on the community character, and a corresponding increase in local government regulation of small cell siting and aesthetics.

Partially in response to these concerns, the Federal Communications Commission (“FCC”) issued a Declaratory Ruling and Third Report and Order (the “Ruling”) on September 26, 2018 pursuant to its authority under the Telecommunications Act of 1996 (the “TCA”). One of the provisions of the TCA prevents local and state government from “effective prohibition” of wireless services, and the Ruling clarifies that overly stringent aesthetic requirements for wireless facilities, including small cells, can result in such unlawful prohibition of services.

However, local authority over rights-of-way means that some aesthetic requirements are acceptable. The Ruling recognizes this authority and requires that any aesthetic provisions in local codes must be reasonable; not more burdensome than requirements applied to other infrastructure; objectively applied; and published in advance, in order to provide a mode of predictability for applicants.

Although many associations, towns, cities, states, utilities, and other interested entities challenged and petitioned for a stay of the Ruling, the FCC denied that petition. The Ruling has also been challenged in the 10th Circuit, which on January 10, 2019 denied a stay and allowed the petitioners to transfer the matter to the 9th Circuit for the substantive challenge to the Ruling. Subsequent to these denials, the Ruling went into effect on January 14, 2019.

Local governments should work to publish compliant aesthetic standards by **April 15, 2019**, the deadline provided by the FCC. It is important that local governments take advantage of this opportunity to control the process ahead of the inevitable influx of small cell siting applications.

Please contact one of the attorneys listed below, or any other member of the Municipal Practice, to obtain assistance with updating your local code to be in compliance with the Ruling, or for assistance or advice regarding any other aspect of the TCA.

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