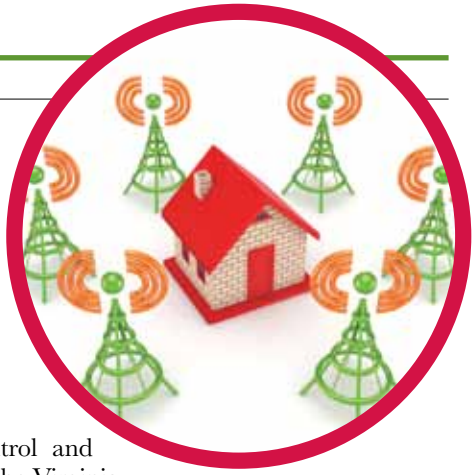
By Michelle Gowdy, Esq.

5G wireless bill would bulldoze local authority

What local officials needs to know



WHILE LOCALITIES ARE WORKING to bury public utilities to enhance the beauty of their communities, wireless providers want to inundate rights of way and public property with towers and unsightly structures. The wireless communications carriers are beginning to rollout various types of technology that will assist with 5G technology, which are also referred to as "small cells." These small cells may be placed on towers up to 120 feet tall and will have bulky cabinets along with antennae attached. They will also have to be built in close proximity to each other. The wireless carriers say that these aren't cell towers, but to an ordinary eye, they sure look like them.

And what is 5G technology to begin with? It would allow more people to use more mobile devices at a greater speed in areas where mobile devices can already be used. Most of us have encountered a slow-down in the speed in which a cell phone or tablet can play a video or even open an email. 5G technology is supposed to speed up that service. My limited knowledge of 5G is that is it designed to support current networks and allow them additional capacity or densification of the network. It was made very clear that 5G will not expand service to underserved areas in any way.

Legislation introduced by Delegate Steve Heretick at the request of Sprint in the 2016 General Assembly session would have gutted the ability of localities to exercise land use control over the placement of these small cells as well as limited the fees that localities can collect. In lieu of passing the bill, however, a Virginia Wireless Communications Infrastructure Work Group was created to work out the issues with it. The work group includes four legislative members: Delegate R. Lee Ware, Jr. (chair), Delegate Terry G. Kilgore (ex officio), Delegate Danny Marshall III and Delegate Kaye Kory. In addition, 12 other people representing localities, broadband interests, Verizon, AT&T and Sprint serve on the body.

VML, the Virginia Association of Counties, our resident expert from Albemarle County, Chief of Special Projects Bill Fritz, and industry representatives (Sprint, Verizon) met numerous times over the summer attempting to compromise on this legislation or find some common ground.

Unfortunately, the industry failed to recognize the need for local land use control and the applicability of the Virginia Constitution. Although the current draft of HB1347 does not address local concerns, legislators clearly expect that a wireless infrastructure bill will be passed in the upcoming session. For that reason, local officials need to be ready to make the case for local control.

Things the draft bill does to localities:

1. Restricts fees that localities can charge
2. Restricts local permit processes
3. Requires that localities offer unfettered use of public right-of-way to wireless carriers

State law could mandate the fees that localities can charge

Overall, the intent of the draft is to make fees consistent throughout the Commonwealth and to ensure that there is inexpensive access to public property and rights of way (collectively "public lands"). VML has consistently explained that the cost of doing business varies greatly throughout the state and localities need the ability to set their fees based upon their unique circumstances. Wireless carriers are not public utilities as defined in the Virginia Code (56.265.1) and therefore should not be given more access to public lands and/or given special treatment than public utilities.

5G will not expand service to underserved areas in any way.

"This bill grants special privileges to a single industry at the expense of the local taxpayers," said Newport News Deputy City Attorney Joe Durant. "Forced use of public property and right of way without adequate compensation forces taxpayers to subsidize a single industry."

Proposed law would amount to blind permit approvals

The complaints from the industry were that current local permitting processes are too onerous and time consuming. This bill would limit the items that localities could consider in reviewing applications.

"The bill is an invasion of localities' police powers, in that it allows the industry the right to locate any infrastructure where it pleases without any consideration given to health and safety concerns (such as blocking the view of traffic), interference with public communications infrastructure or legitimate concerns

allowed under the localities' zoning laws," Durant added.

Under the draft bill, localities are prohibited from requiring information on the applicant's business decisions with respect to service, customer demand, quality of service or choice of a location or the specific need for the wireless support structure. The locality cannot evaluate an application based on the availability of other potential locations or co-location or require the removal of an existing structure as a condition of approving a new application, such as requirements relating to the appearance of the facilities. And this is just a short list of the "cannots"!

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Things that a locality "shall do" include allowing consolidated applications and single permits for multiple facilities and rendering a decision in a single administrative proceeding unless the governing body needs to make the decision.

After the locality navigates all the "cannot do's" and if it fails to make a decision in the Federal Communications Commission (FCC) timelines, the application shall be deemed approved.

Bill would give wireless industry unrestricted access to public rights of way

Perhaps the most disturbing aspects of the bill relate to public rights of way.

According to the current draft of HB1347, "Any domestic or foreign telecommunications provider or broadband provider authorized to do business under the laws of this state shall have the right to construct, maintain, and operate conduit, poles, cable, switches and related appurtenances and facilities along, across, upon and under any public highway or rights-of-way in this state; and the construction, maintenance, operation and regulation of such facilities, including the right to occupy and utilize the public rights-of-way, by telecommunications providers and broadband providers are hereby declared to be matters of statewide concern. Such facilities shall be so constructed and maintained as to not obstruct or hinder the usual travel on or by such highway or rights of way."

How thoughtful that the facilities will not obstruct or hinder usual travel.

Numerous statutes and the Virginia Constitution seem to be in conflict with this very broad authority in the draft bill. My personal favorite is Virginia Code Section 15.2-2017, entitled "Public utilities not to use streets without consent." This bill provides more access to a private money-making company than public utilities. Is faster wireless coverage better than a working sewer system or running water?

VML is opposed to the mandated use of public highways or rights of way. Localities should have the flexibility to exercise their land use authority in these areas.

FCC has long provided a framework for localities to allow 5G technology

Two federal acts under the jurisdiction of the Federal Communications Commission already provide a framework for local governments to regulate wireless facility siting.

Under the 2012 Spectrum Act, Section 6409(a), local governments are required to approve eligible facilities' requests for access to existing wireless towers or base stations if there is no substantial change to the physical dimensions of either. When approving a new structure, it is useful to keep in mind that 6409(a) can be used at a later date to expand the new structure as well. Applications under the 6409(a) review will be deemed approved if there is no action taken within the specified time period.

The Telecommunications Act of 1996 outlines the so-called shot clock rules that govern the time periods that localities have to approve various applications, as well as when the shot clock can be tolled and start ticking again. It also prohibits discrimination and the effect of denying service.

Meanwhile, a host of wireless issues remain up in the air

Localities that are dealing with 5G telecom siting issues currently have operated within their current land use authority and have been able to accomplish multi-facility approvals, use of public buildings and substantial change modifications. Current local land use processes are effective for these types of facilities.

In addition to problems with this issue just at the state level, rumors are swirling about 5G, including the question of whether the FCC will pre-empt state and local authority. Will the state pre-empt local government and how does 5G interplay with FirstNet and Broadband expansion? FirstNet is a new nationwide public-safety broadband network that is still in the planning stages, but will also require infrastructure. Broadband expansion is something that Virginia needs greatly and will also require a significant amount of additional infrastructure. Will there be interplay between all of these needs? Localities need to be mindful of these questions as they consider various applications.

Another rumor is that the FCC may release a Notice of Proposed Rulemaking to begin discussion with localities on how to regulate 5G. There is no question that the FCC has the authority to preempt localities under Sections 253 and 332 of the Telecommunications Act. Should this Notice come out, it would further confuse this issue in Virginia.

VML will continue to work on this issue and welcomes any input and assistance that you can provide. In the meantime, start getting ready to make calls to your legislators in support of local land use and fee-setting authority.

About the author: *Michelle Gowdy is General Counsel for the Virginia Municipal League.*