ASSOCIATION OF CALIFORNIA CITIES
ORANGE COUNTY
500 S. Main Street, Suite #410, Orange, CA 92868 | P: (714) 953-1300 | F: (714) 953-1302 | www.ACCOC.org

May 16, 2017

The Honorable Ben Hueso
State Capitol, Room 4035
Sacramento, CA 95814

RE: SB 649 (Hueso) Wireless telecommunications facilities. – OPPOSE AS AMENDED

Dear Senator Hueso:

The Association of California Cities – Orange County (ACC-OC) represents the interests of the 34 cities in Orange County and the County of Orange, and would like to express its opposition to the proposed legislation, Senate Bill 649 (Hueso). The bill would establish a streamlined permitting process for small cell wireless facilities, and limit the fees that local governments may charge for placement of small cells on city or county owned infrastructure. This is concerning to cities in Orange County and throughout the State, because it severely restricts the ability for cities to make necessary discretionary decisions related to the aesthetic and safety of small cell and wireless infrastructure within their jurisdictions.

Currently, telecommunications service providers must receive a permit from a city or county to build for their infrastructure deployment. Where equipment is being added to an already existing structure providers must request approval to collocate on those facilities. Cities and counties cannot hinder additions to pole attachment in the public right-of way, but can oversee when those projects are taking place to ensure public safety, and that day-to-day city business is not disrupted. SB 649 aims to change the permitting process for small cell sites by redefining small cells and removing discretionary permitting authority from cities and counties. This measure considers small cell technology as, equipment with all antennas on the structure (excluding associated equipment) that totals no more than six cubic feet in volume, associated equipment on pole structures not to exceed 21 cubic feet, and specified micro wireless facilities. This small cell definition would require a local government to provide streamlined permitted use if it's located in a public right-of-way in any zone or in any zone that includes a commercial or industrial use. Additionally, this bill would mandate that a city or county make its vertical infrastructure available for the placement of small cells, and require automatic renewal of permits for telecommunications facilities. Removing these important land use zoning decisions from local governments, and usurping the public input processes through the adoption of ministerial designations is detrimental to the overall community.

Further circumventing the jurisdiction of local governments is the restructure of facility use revenue collection. Right now, local entities are authorized to charge an annual fee for use of a pole structure, and can negotiate lease rates for small cell attachments on other publicly owned vertical infrastructure. Many cities use these proceeds to help offset costs for providing infrastructure to low-service areas or as another revenue source for their communities. This process is built on negotiations and years of relationship building between the city and the provider for a mutually beneficial cost-benefit. SB 649 would mandate cities to adopt a flat rate or tiered system between $100 to $850 per small cell, per year – significantly reducing the fees that a city or county may charge for the installation of a small cell telecommunications facilities. The measure would also eliminate the collection of any escrow or similar deposit for removal of such a facility. The revenue the revenues that a local government had been formally reliant on could change the level of services and prioritization of community projects that the had been offered based on this income. Ultimately, reducing the ability for cities and counties to negotiate for a productive and fair public benefit through lease, rent and maintenance agreements removes yet another economic development tool for our municipalities.

ACC-OC has been at the forefront of wireless infrastructure issues, working with local leaders, and industry representatives to ensure project coordination between municipalities and small cell stakeholders through our “Small Cell Working Group”. This ad hoc working group has been in operation since ACC-OC’s inception and has successfully drafted Model-Encroachment Permits, worked with the County on a Wireless Infrastructure Ordinance, and has implemented guidelines for fair and non-discriminatory processes to accomplish new technological deployments. Allowing industry representatives and city officials to negotiate ordinances, agreements, and fee structures at the local level breeds the most cooperative outcome for communities and the constituents of service providers. Over the last several months, our working group has developed a white paper on small cells, providing educational information to cities by working with providers to find balanced solutions to small cell technology challenges. Unfortunately, SB 649 moves in the opposite direction of this white paper. Instead, this bill is prescriptive, delivers untested mandates, and recommends an entirely uncooperative process. The attached white paper further outlines the best practices used by industry leaders and cities, here in Orange County. This model of negotiations is not unique to our County and has continued to be duplicated statewide, but this bill would hinder those efforts. The assurances that can be made between stakeholders through this process has the potential for positive outcome for local governments, constituents, industry and promotes the general well-being of communities.

Cities require full discretionary review of small cell implementation and the deployment process. Public benefits negotiated through an already existing fair and reasonable development structure makes this bill unnecessary and punitive towards cities. For this

and the reasons described above, the Association of California Cities – Orange County opposes SB 649. ACC-OC welcomes the opportunity to be used as a resource to you and your office on this bill, and encourages the adoption of our suggested best practices as this bill advances in the legislative process. Should you have any questions about our position, the attached white paper or about ACC-OC, please contact Diana Coronado, ACC-OC's Legislative Affairs Director, at (714) 953-1300 or at dcoronado@accoc.org.

Sincerely,

Heather Stratman

Heather Stratman
Chief Executive Officer
Association of California Cities – Orange County

cc:

The Honorable Ricardo Lara
The Honorable Senator Mark McGuire
Senate Appropriations Committee, Members
Senate Local Government and Finance Committee, Members
Orange County Legislative Delegation
ACC-OC Board of Directors

TO: ACC-OC Board of Directors

FROM: Kelsey Brewer, Policy Analyst

DATE: May 11, 2017

SUBJECT: Final Draft Small Cells

This white paper discusses the benefits and challenges of small cell sites, and lays out practical legal and policy considerations. It is intended to help local cities better understand one of the broadband connectivity solutions available to them.

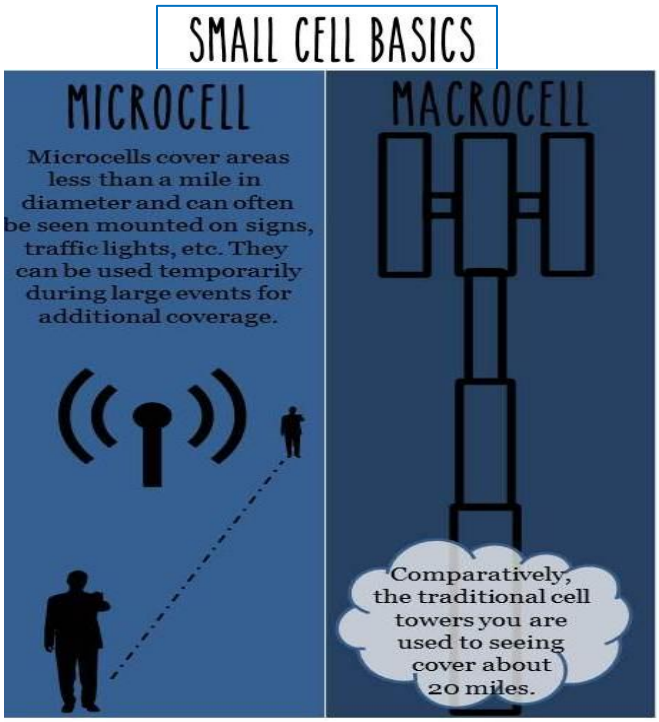
Introduction

In today's interconnected society, economic growth, business retention, and citizen satisfaction is undeniably linked to the accessibility of high quality, wireless broadband connectivity. Yet the infrastructure in cities, including many in Orange County, is at risk of failing to keep up with demand. Some experts estimate that in the next three years' mobile data consumption could increase a thousand-fold, and many Orange County Cities do not have the land, space, or desire to continue to construct large cell towers to meet the increasing demand. There is however, a second, lesser-known choice, for cities to consider when facing this problem: small cell sites.

This is not to say that small cell sites are the only solution to broadband connectivity issues. Bad actors in both the state of California and across the nation have taken advantage of lax policies that result in dangerous, ineffective, aesthetically unpleasing sites. As small cell sites continue to become a more popular solution to the network density issues, it is critical that cities engage with providers to find the best solution for all parties involved. The cost of cities choosing not to engage is evident below:

In this white paper ACC-OC will explore legal issues, regulations and permitting processes, and how proactive policy can preserve the aesthetic integrity of chosen sites.

What are Small Cell Sites



The term “cell site” refers to the antenna equipment and ground equipment that is used to transmit cell phone signals to and from the mobile phone back to the receiver. While the basic equipment is similar at most wireless communication sites, (a transmitter/receiver, antenna(s), coaxial or hybrid cables, power and backhaul), there are different types of cell sites. A macrocell is a ‘traditional’ cell tower of the sort people are most accustomed to seeing. The antennas for macrocells must be mounted at a height that provides a clear view over surrounding structures, in order to provide radio coverage to a large area of mobile network access.

A small cell is usually thought to be a femtocell, picocell, metrocell or microcell, all of which are concepts for small-scale cellular sites. These types of small cells often differ in terms of the technology they operate on and the number of users they support; however, their similarities are why they are often referenced together using the umbrella term “small cell”. Each of these types of small cells operates at lower power and supports a smaller number of users than a typical, large-scale cell site. They are often deployed by providers to strategically address specific capacity and density issues within their network. Common locations include: hospitals, malls, stadiums, universities, and other high density urban centers. As more and more users access the network with more devices per person and household, the deployment of small cell sites may become more common in residential and business zones, both on private and on public property.

Backhaul

The term “backhaul” refers to the transmission link between the small cell site and the network operator’s core network. For small cell sites, backhaul is needed to connect the various sites with the core network, internet, and other services. The importance of small cell sites maintaining low visual impact and integrating into the surroundings can occasionally make backhaul a challenge for carriers. While this topic can be highly technical, it is important for cities to have a basic grasp of the implications. More information about small cell backhaul can be found here.

Security

As with any technology, ensuring the security of the product is of the upmost importance for all parties involved. As a technology designed to carry data, it's important that small cells be trusted by both operators and users. User privacy, for example, has become a central concern for many thanks to high levels of exposure in the media. The wireless communication industry has a range of practices designed to safeguard small cell site traffic, including the use of encryption and Security Gateways.

The physical security of small cell site hardware is also important. Often, small cell sites are physically accessible to potentially hostile parties; however, a range of industry best practices have evolved to minimize this risk. These practices include making physical access difficult and making the boxes tamper-evident and/or tamper resistant, in addition to tamper detection reports sent to the Operator Network and the ability to disable the device

Legal Considerations

The Telecommunications Act (TCA) of 1996 was the first piece of federal legislation in nearly 60 years that successfully regulated the telecommunications industry. And even though the internet was still in its infancy stage compared to today's standards, the TCA addressed its potential by encouraging new telecommunications technology across the nation.

The TCA is relevant legislation when discussing the role of cities in permitting small cell technology within their municipalities. Section 253 and Section 332 both touch on the role local governments have in regulating and zoning over wireless communications facilities.

Section 253 states that "no state or local statue or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[1] This includes wireless services and providers. However, another part of Section 253 does affirm certain authority granted to local governments. Part C of Section 253 reads: "Nothing 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

[1] 47 U.S.C. § 253 (a)

providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis…"[2] Section 332 also affirms local control over city zoning codes that specify the location, building, and altering of wireless communication sites.[3]

Additionally, the TCA creates procedural rules for the permitting process that cities must follow. These procedural rules are below:

1. Decisions on Application Must Be Made within a Reasonable Period of Time[4]
2. Decision to Deny a Request Must Be in Writing
3. Decision to Deny Must Be Supported by Substantial Evidence
4. Decision May Not Be Based on or Regulate Radio Frequency Emissions
5. Cities May Not Unreasonably Discriminate Among Provider of Functionally Equivalent Services
6. Decision May Not Prohibit or Have the Effect of Prohibiting the Provision of Personal Wireless Services.

More in-depth analysis on the above mentioned limitations can be found here. Cities should also consult with their attorneys and consider the limitations outlined within California State law.

Police Power

Pg. 5, 2nd paragraph: [While small cell sites installed in the public right-of-way often leave cities with less discretion due to State Law regulations[5], a California State appeals court in 2016 did grant the ability of cities and counties to review, "*with limited & reasonable discretion",* wireless in the public right-of-way.[6]] As it relates to cities' local police power, the court wrote:

---

[2] 47 U.S.C. § 253 (c)

[3] Section 332(c)(7)(A) reads: "Except as provided in this paragraph, nothing in this chapter shall limit or effect the authority of a State of local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

[4] This is further emphasized by California Assembly Bill 57 (2015) which states that when a California City/County does not make a decision on a new wireless facility within either 90 days for collocation requests or 150 days for new siting applications, then the site is automatically approved.

[5] Wireless carriers are considered 'public utility telephone corporations' regulated and controlled by the California Utilities Commission, and have a right to use public rights-of-way pursuant to California Public Utilities Code § 7901. Under § 7901.1, a City is limited to regulating the "time, place and manner" in which a public utility telephone corporation occupies the right-of way.

[6] *T-MOBILE WEST LLC et al. vs CITY AND COUNTY OF SAN FRANCISCO et al.*

> "The question is really whether either section divests the City of its constitutional powers. Our review of the California Constitution, statutory provisions, and the relevant case law lead us to believe section 7901 is a limited grant of rights to telephone corporations, with a reservation of local police power that is broad enough to allow discretionary aesthetics-based regulation."

As stated in the court's ruling, local police power generally includes the power to adopt ordinances for aesthetic reasons.[7] Previous case law has also established that cities have the authority, under their police power, to regulate the manner of placing and maintaining poles so as to prevent unreasonable obstruction of travel.[8]

Regulations and Permitting Processes

Having established the significant power granted to local government to regulate the small cell site industry under the TCA, the next logical turn is to discuss *how* they can be regulated. The possibilities for cities on this front are substantial. From zoning ordinances, to right-of-way management ordinances, to specific cell tower/telecommunication ordinances, the options in how cities create broad regulatory schemes are numerous.

Due to the unique nature of federal law in this area, some cities nationwide have adopted a telecommunication ordinance alongside a right-of-way ordinance. This combination has allowed cities to better regulate telecommunications equipment, addressing issues like location, design, height, lighting, etc. Consideration of the right-of-way is especially critical when dealing with small cell sites. Carriers often prefer installing small cells in the public right-of-way, since it is more effective at delivering coverage to its intended customers and is usually cheaper than leasing on private property. While small cell sites installed in the public right-of-way often leave cities with less discretion due to State Law regulations[9], a California State appeals court in 2016 did grant the ability of cities and counties to review, "*with limited*

[7] Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 886 [imposition of aesthetic permit conditions "have long been held to be valid exercises of the city's traditional police power"]; Disney v. City of Concord (2011) 194 Cal.App.4th 1410, 1416 ["settled . that cities can use their police power to adopt ordinances for aesthetic reasons"].
[8] Id. at pp. 750–751.
[9] Wireless carriers are considered 'public utility telephone corporations' regulated and controlled by the California Utilities Commission, and have a right to use public rights-of-way pursuant to California Public Utilities Code § 7901. Under § 7901.1, a City is limited to regulating the "time, place and manner" in which a public utility telephone corporation occupies the right-of way.

& reasonable discretion", wireless in the public right-of-way.[10] Cities should review the implications of this ruling and evaluate its possible effects when considering new Right of Way ordinances or revising older ones.

Additionally, many existing telecommunications ordinances are out of date and do not address new technology, like small cell sites, specifically. This lack of clarity often slows down the permitting process. Since carriers have the ability rapidly deploy small cell technology at a higher rate than traditional, macro-towers, cities run the risk of being inundated with requests for permits. Strongly considering a model permitting ordinance like this one, may allow cities to more efficiently review requests and remain in compliance with federal and state law "Shot Clock". [11]

Please note that the wireless industry has in some cases challenged and sued cities over their wireless ordinances. Cities have prevailed often with the main issue being that cities have the right to regulate "time, place, and manner". Cities are often overwhelmed and intimidated with wireless applications being processed and presented by attorneys in lieu of typical applicants. As such it is important for cities to have legal and well-written regulations.

Additionally, many small cell sites are often placed on existing city-owned structures, which allows cities to rent out that space to carriers. This process often times requires a Master Licensing Agreement. When moving your city to being more small cell site friendly and prepared, it's important to make sure the elements of a Master Licensing Agreement are already in place. Some example provisions include:

1. provision of contract term[12]
2. definitions of scope of permitted uses

[10] *T-MOBILE WEST LLC et al. vs CITY AND COUNTY OF SAN FRANCISCO et al.*

[11] the FCC issued a ruling adopting what is referred to as the "Shot Clock", establishing "presumptively reasonable periods" for local action on a WCF siting application.4 Under the ruling, local governments must review WCF applications for completeness within thirty days from the time the application is submitted by the wireless carrier. Excluding time when the application is incomplete, the agency has ninety days to review and decide on collocation applications and one hundred fifty days to review and decide on all other siting applications.

[12] Most encroachment permits in the public rights-of-way do not expire. Cities should consider the regulatory implications of having permits expire, even after long periods of time. While this section specifically deals with master licensing agreements, the impact of expiring agreement could have impacts on other parts of the permitting process.

3. protection of city resources
4. specification of each installation subject to sublicense or lease
5. Fees to the city

Other elements may be necessary; city councils and city staff should consult with their attorneys when drafting Master Licensing Agreements.

Finally, cities should consider the establishment of an administrative procedure that does not require council approval on every permit request. As mentioned above, carriers and providers are able to deploy small cells at a higher rate than traditional city procedures are accustomed to. Cities can adopt an ordinance that establishes a permit in the Public Works Department (or related department), that can be issued by the City Engineer. Additionally, cities can adopt model templates for small cell site installation and authorize their City Managers to enter into agreements on the councils' behalf. These model templates and ordinances can outline specific design standards that satisfy both staff and council concerns. For example, the City of Long Beach has had some success with this model and has outlined the following design standards in their model agreements:

1. A requirement for installations on existing streetlight poles or pole replacement instead of new sites
2. An unobtrusive, aesthetically-appropriate design
3. Antennas no more than five feet tall
4. The placement of necessary base station equipment components either underground or above pedestrian height on the pole (such equipment should be no larger than a briefcase)
5. The replacement of poles would require the new pole to be no more than five feet taller than the existing pole
6. Heightened scrutiny for sites located in historic neighborhoods, neighborhoods with decorative light fixtures, or streetlights adjacent to parks.

Cities can also adopt similar design standards on non-City owned utility poles that are still located in a City's Right-of-Way, as to create a seamless regulatory scheme in terms of aesthetics. It should be noted that for some of Orange County's coastal cities, there may be some jurisdictional overlap with the California Coastal Commission. In most cases, carriers and providers would also need to obtain a Costal Development Permit, which would limit the efficiency of the process for some areas. This jurisdictional overlap could also apply when

the County of Orange, Caltrans, or other entities have competing regulations or processes. Caltrans, for example, has a Telecommunications (Wireless) Licensing Program for wireless facilities within freeway and access-controlled highway Right-of-Way, and the County of Orange has ordinances related to wireless communication facilities within County highways[13] and on private property[14].

Cities may also want to consider making a distinction between traditional wireless communications carrier equipment and the wireless technology used by public utilities. Cities can provide an exemption defining a 'data collection unit' (DCU) as separate from small cell sites. For example:

> DCU's are "wireless communication facilities comprised of a collection unit, a solar panel and whip antennas used for receiving and/or transmitting wireless signals from distributed gas and water data collector meters, which are stand-alone facilities not connected via fiber optic or other physical wiring to any other facility. No wireless communication facility operated by an electric corporation, a telephone corporation, a personal wireless service provider, a commercial mobile service provider or a mobile telephone service provider shall be considered a data collection unit."[15]

While federal and state law grants local government significant authority of *new* towers, cell sites, and other wireless communications facilities, regulation of modifications made to *existing* facilities is extremely limited. Federal law requires that cities 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.[16] Once small cell equipment or antennae is placed on a structure it becomes a telecommunications structure that is subject to federal law. Some changes that are considered substantial by the FCC include[17]:

1. Increases to the height of the tower that are more than 10%

[13] Ord. No. 15-020 , § 1, 11-10-15
[14] Ord. No. 15-019 , § 1, 10-27-15
[15] City of Huntington Beach Zoning Code 230.96 Wireless Communication Facilities
[16] Section 6409(a) of the Middle Class Tax Relief and Joe Creation Act of 2012, codified at 47 U.S.C. § 1455
[17] Order ¶188; 47 C.F.R. § 1.40001(b)(7)

2. Installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets
3. Modifications that would "defeat the concealment elements of" the wireless tower or base station.

Cities should take this into consideration when considering which city owned poles and structures should be approved as small cell sites, since future modifications could produce unintended, aesthetic consequences.

Additionally any administrative procedure should have the option for the defined staff member to send an application to a discretionary body, such as a Planning Commission, if there are perceived impacts that may not be acceptable. This is especially true in view areas in which a structure could create great impacts. This allows for the staff member to have the application more thoroughly vetted and does not put the staff in a position of risk.

SB 649

When enacting legislation to encourage technological infrastructure growth while maintaining local control, cities should be aware that state legislation can be implemented that preempts local authority. There is currently a bill — Senate Bill 649 — that if passed would have a significant impact on local control over the permitting of wireless and small cell telecommunications facilities. SB 649 would:

- Require local governments to approve small cell sites in all land use zones, including residential zones, through a ministerial permit.
- Require local governments to make available sites they own for the installation of small cells, and remove the ability of local government to deny a small cell site located on city property (except for fire department sites).
- Limit the rent a local government can charge a wireless company to place a small cell on public property to a "cost-based" fee.

Potential Benefits and Challenges

There are multiple reasons why small cell sites might be attractive to cities. Often, small cell sites are significantly less expensive and less disruptive to install than macro cell sites. Macro cell sites can no longer support the mobile network demand in crowded urban areas. Small cell technology can also increase network capacity in congested urban areas with high user density, resulting in an improved cellular experience for residents. And in addition to improving the end user experience, the installation of small cell sites helps keep cities technologically up-to-date. This cannot be undervalued, as ubiquitous, high speed mobile broadband is proven to have a significant impact on economic competitiveness and social prosperity.

Cities may face challenges related to the relative newness of small cell technology. While cities may be familiar with the steps involved in cell tower installation, for example, many6 will not have an established model for approving and building small cell sites. Cities will need to make sure they have a solid grasp on the technology and processes involved in small cell sites. Additionally, because of their limited range compared to macro sites, small cell sites must be deployed en mass to have maximum impact. This means cities will need to adopt ordinances and/or establish administrative procedures to deal with the high volume of permit requests. Cities may also face pushback from residents, even in the absence of a public notification requirement, and therefore must be prepared to reassure the public through the use of educational materials and open communication. While none of these challenges are prohibitive, they require concerted effort on the part of the city to embrace and adopt small cell technology.

Conclusion

While navigating the new world of small cell site technology can be challenging, it is surely worth the effort. Small Cell technology is a cost effective and innovative way to ensure that cities are maintaining a standard of technological infrastructure that will continue to draw businesses, professionals, and innovators to the region for years to come. By engaging with carriers and providers, cities have a greater opportunity to ensure that location, height, and design concerns are satisfied prior to construction and will serve the community’s interest both from an aesthetic and capability standpoint.