



## NEW FEDERAL LAW REQUIRES IMMEDIATE CHANGES TO LOCAL ZONING RULES FOR WIRELESS ANTENNA SITINGS

On February 22, 2012 President Obama signed into law HR 3630, a bill passed by Congress primarily to extend unemployment benefits and the payroll tax deduction that included other provisions relevant to local governments, such as restrictions on siting of wireless facilities and changes to the public safety radio spectrum. The bill became effective upon signature, and this paper seeks to alert local governments that they need to take immediate action to review and possibly amend local ordinances to protect their interests and avoid lawsuits under the new law.<sup>1</sup>

### 1. Governing Law

Under Section 332(c)(7) of the Telecommunications Act, local governments have broad authority to control the siting of cellular and other wireless towers, antennas and related facilities. Many California cities and counties have ordinances that govern both the initial placement and modification of wireless facilities. If the bill is signed, the new law may require changes to those rules. It mandates local approval of certain applications for modification of “an existing wireless tower or base station.”

The new federal legislation states that “Notwithstanding [Section 332(c)(7)] or any other provision of law, a state or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”

An “eligible facilities request” is any modification request that “involves” collocation of new transmission equipment, or removal or replacement of existing transmission equipment.

Basic terms in the legislation, including “wireless tower,” “base station,” and “substantially change” are undefined, and will ultimately be defined by the courts or by the Federal Communications Commission.

BB&K are advising local governments that they should anticipate that representatives of tower companies will claim that cities and counties *must approve* many pending collocation applications unless the expansion adds significantly to the height or width of a facility. Entities that have placed wireless facilities on public light poles and other public property may argue they can now expand their facilities. BB&K expects providers to move quickly to challenge any local ordinance that considers any collocation factor other than “physical dimensions.” More aggressive applicants may claim the failure to “approve” subjects jurisdictions to damages and attorneys fees for failure to act.

BB&K is also suggesting that localities need not be intimidated by these claims, but do look seriously at their wireless siting ordinances. That is because the law does not require prevent a locality from reviewing a proposed installation. There are significant ambiguities in the new law that undercut claims that a locality “must act” on every collocation application...and suggest that localities may be able to protect legitimate interests. For example, the law only applies to “wireless towers” and under some FCC orders, wireless towers are facilities built for

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<sup>1</sup> This paper focuses on the collocation language of HR 3630. BB&K does have a paper that focuses on the public safety spectrum portions of the law that is available upon request.



the “sole or primary purpose of supporting antennas and their associated facilities used to provide FCC-licensed services.” Many applications localities receive will not be for “wireless towers,” if that definition applies. Also unclear is what is meant by a “substantial” change. Even a relatively small change in the size of a base station is arguably “substantial” if it creates a hazard to passerbys, blocks traffic views, or makes a sidewalk inaccessible to the disabled. Nor is it obvious that the new law even applies to light poles and other municipal property where the access is via contract.

2. ***Actions Items.***

BB&K recommends localities take the following action.

- Because the bill will become effective immediately, every local government should immediately review its local requirements for wireless facility collocations. Are its evaluation criteria and application forms consistent with the new “substantial change” in “physical dimension” standard in federal law? Also localities need to look at contracts and models for contracts for allowing access to public facilities.
- Localities should brief elected officials and boards immediately on the bill, so that any decisions granting or denying collocation are consistent with the new rules. *Most local interests should be protectable* – but only if collocation siting decisions are made in a manner that takes the new law into account.
- Localities should prepare for FCC action. The FCC has authority to interpret and implement the provisions of the new law. The FCC has made no announcements, but plan for FCC seeking public comments in the coming year. Industry will seek to have the FCC adopt rules that fit their view of the law, and if the FCC does so, it could have significant effects on local communities.

3. ***Other matters.***

With basic terms yet to be defined, the impact of the new law is difficult to predict. Development of a sound ordinance that protects local interests may raise complex legal and policy issues. Nonetheless:

- The law appears to substantially preempt many applications of state environmental requirements to requests for collocation;
- The law also may preempt much of law with respect to collocation (to the extent that state law conflicts with the federal law);
- The bill raises significant constitutional issues – Can the federal government require a state or locality to “approve” anything?