HB 1258 / SB405 "Wireless" Talking Points

HB1258 (Kilgore) and SB405 (McDougle) would eliminate most local control over the installation and operation of new wireless structures. The legislation removes the ability of local elected officials, residents and businesses to have input into decisions affecting the character of their own communities. The legislation is being promoted by the wireless industry.

Major changes that affect local authority are pointed out below.

Changes in Definitions

The bills add the terms (but not working definitions) of two types of wireless infrastructure projects: Administrative Review-Eligible Project and Standard Process Project.

"Administrative Review-Eligible Project" includes:

- All co-locations on any existing structure that is not a small cell facility
- Installation or construction of a new structure that is not more than 50 feet tall, if the structure is not more than 10 feet above the tallest existing utility pole located within 500 feet of a new structure, is not located in an historic district and is designed to support small cell facilities.

"Standard process project" is defined as any project other than an administrative review-eligible project.

Talking points:

- These are not standard zoning terms in Virginia. Working definitions either would have to be included in the bill or determined by litigation.
- The bills would treat the wireless industry differently from all other private profit-making industries, thus leaving localities (and the state) open to charges of discrimination against other industries.
- The likelihood is high that other industries will expect the same or similar treatment.
- Zoning decisions should be made based upon the best interests of the community. The health, safety and welfare of the citizens should outweigh the profitability of corporations.

Changes in the Zoning Process

The locality may not require a special exception, special use permit or variance for "Administrative Review-Eligible Projects."

The locality must provide guidance on incomplete application within 10 days or application is "Deemed Approved" which takes a legislative decision away from local elected officials.

If application is disapproved, the locality:

- Must provide a written statement explaining the rejection of the application
- Explain any modifications in writing (this may be used by the applicant as evidence that the locality's disapproval was arbitrary and capricious)

- May not discriminate between the applicant and other service providers
- Must explain the disapproval by a substantial record evidence contained in a written record publicly released within 30 days.

If the application is disapproved, the applicant has the right to appeal.

The locality cannot:

- Require proprietary, confidential or other business information from the applicant
- Condition approval on the removal of another structure
- Impose surety requirements that are not similar to other permits for similar development. Surety requirements are limited to the direct cost of the removal of the wireless facilities
- Discriminate on the basis of ownership
- Impose unreasonable screening
- Impose that the applicant use services owned by a particular company
- Require co-location
- Limit duration of approval
- Require services unrelated to be performed, including restoration work on some surfaces.

A locality may disapprove a standard process project if:

- Its proposed height is over 50 feet, if there is no discrimination between the applicant and other service providers
- All utility facilities are underground if:
    - Undergrounding requirement was in place 3 months prior to submission
    - Locality allows co-location on existing poles
    - Locality allows replacement of existing poles

HB 1258/SB405 set an aggressive timetable for approvals; If the timetable is not met, the project is "Deemed Approved". The timetable is:

- 150 days for a new structure
- 90 days or timelines as established by the FCC, whichever is shorter.

Talking Points:

- Local land use authority rests with locally elected officials who best know their communities and their citizens' needs.
- Local zoning takes into consideration that the economic, social, cultural, and other conditions are not one-size fits-all.
- Local zoning recognizes the importance of citizen input. The bills' provisions remove the ability of our citizens to have meaningful input into decisions affecting the character of their communities.
- The bills create a paradigm shift in authority, moving the decision-making process away from the community and its elected officials to FOR-PROFIT companies who care about their bottom line, not about our citizens' welfare.

- Specifically, the "Deemed Approved" language strikes down the legislative process. These bills take away the ability of a locality to ask questions of the applicant or negotiate with the industry about a specific location or type of equipment or screening.
- This is not the process for a typical zoning application and there is no compelling justification for this industry to be treated in a special manner.

FEES SET IN STATUTE

The legislation requires that the fee for Administrative Review Eligible Project shall not exceed $500.

The fee for a Standard Process Project is set at "the actual direct costs to process the application…"

Talking points:

- Placing a fee in the Code is problematic because every time that there is a proposed change, legislation has to be enacted.
- The fees will never be in tune with actual costs. A state-determined fee does not account for the differences in workloads as well as the costs and availability of professional services costs that occur throughout the Commonwealth.
- Actual Direct Costs are not typically calculated by localities; this unfunded mandate would place an additional burden on local taxpayers who will end up subsidizing the applicants.
- The alternative is that the applications will be automatically approved because localities won't have the resources to review the projects within the arbitrary deadlines.