



Legislative UPDATE

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FCC Denies Cities' Small Cell Motion

The Federal Communications Commission has [denied](#) a city coalition's motion to stay the commission's preemptive "small cell" order. The order, discussed in a [previous article](#), would federalize municipal right-of-way authority and compensation.

In support of a [lawsuit](#) to overturn the order, the coalition also filed the "[motion for stay](#)" at the FCC. The motion's likelihood of success was very low, so the commission's decision isn't surprising. It was filed to provide evidence that the coalition had first sought relief at the FCC by seeking to delay the implementation of the order until substantive legal issues can be litigated.

As a reminder, the order contains at least three key differences from S.B. 1004, the state law that passed last year. The order:

1. Limits application fees for all small wireless facilities to \$500 for up to five sites, and \$100 per site for each site thereafter.

(Editor's note: The \$500 is the same as the Texas small cell legislation passed last session, but the \$100 is a lower cap.)

2. Limits recurring fees for small cells in the rights-of-way, such as rights-of-way access fees or lease fees, to a "reasonable approximation" of the city's "objectively reasonable costs" for maintaining the rights-of-way or a structure within the rights-of-way, which must be no higher than fees for similar actors.

The FCC finds a presumptively reasonable recurring fee to be \$270 per site, per year. Cities are expressly prohibited from recovering any cost not directly related to rights-of-way maintenance, charging fees above cost recovery, or recovering “unreasonable” costs, such as excessive contractor or consultant fees. The FCC finds gross revenue fees to be presumptively unreasonable, and existing agreements are not grandfathered.

(Editor’s note: The \$270 is similar to the amount in the Texas small cell legislation, but the Texas cap is currently in litigation.)

3. Limits allowable local aesthetic requirements, including minimum spacing requirements, to those that “are: (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) published in advance.” The FCC notes that undergrounding requirements for all wireless facilities would constitute an illegal prohibition of service by a city, but it does not clarify whether local governments may require auxiliary equipment for small cell sites, such as equipment cabinets and fiber backhaul, to be undergrounded.

Items 1 and 2, above, will go into effect on January 14, 2019. The commission, in its denial of the motion for stay, extended the effective date of item 3 to April 15, 2019. As a practical matter, this means that cities will have additional time to enact or modify aesthetic standards in accordance with state law and the order.

In the meantime, the coalition – with support from the Texas Municipal League – has filed a judicial motion to stay at the federal Tenth Circuit Court of Appeals, at which a number of other lawsuits related to the order are pending. The judicial motion makes [similar arguments](#) to the motion made to the commission. Even with litigation pending, city officials may want to review their small cell regulations with local counsel in anticipation of the order’s upcoming effective dates.

Interim Report: House Committee on Transportation

On November 27, 2018, the House Committee on Transportation released its [interim report](#). A summary of the charges and the committee’s recommendations relevant to cities are provided below.

- **Charge 1:** Review the state’s response to Hurricane Harvey and natural disaster preparedness with respect to the transportation system and transportation infrastructure. Make recommendations for improving agency operations related to emergency preparedness and response.

Committee Recommendations:

1. TxDOT should identify existing evacuation routes on the state highway system which were impassable during Hurricane Harvey and determine whether limited elevation of

flooded sections could alleviate evacuation concerns. If this is a viable solution, then elevation of these key sections should be incorporated into state highway planning and funding at the earliest possible time.

2. TxDOT should work with local governmental entities affected by disasters to ensure that traffic signs, signals, and lights are able to be replaced as soon as possible following the event and to share available resources as necessary to fulfill this function.
 3. TxDOT should work with city and county emergency management information systems to ensure that information regarding road conditions and closures is able to be relayed to these entities and shared with their citizens in an effective manner.
 4. TxDOT in cooperation with the Texas Division of Emergency Management (TDEM) should identify and evaluate key civilian infrastructure such as the Texas Medical Center that must remain accessible to vehicle traffic and determine if there are any steps that could be taken on state highways to ensure that access. TxDOT should then incorporate these steps into state highway planning and funding.
 5. Texas Maritime Ports should be supported in their efforts to obtain federal funding for the clearing and dredging of critical waterways that have been limited due to the effects of Hurricane Harvey.
- **Charge 3:** Study the efficacy of existing transportation finance mechanisms from state, regional, and local perspectives. Identify opportunities to improve existing transportation finance mechanisms and investigate the feasibility of developing new ones.

Committee Recommendations:

1. The Sunset provision from the enabling statute for Proposition 1 should be removed.*
2. The Sunset provision from the enabling statute for Proposition 7 should be removed.*
3. A constitutional amendment should be proposed to allow counties to create Transportation Reinvestment Zones and use the proceeds as necessary for the purposes set forth for the creation of the TRZ, including the authority to secure debt with TRZ revenues.
4. TxDOT, Regional Mobility Authorities, and county and regional toll authorities should be authorized to enter into comprehensive development agreements that would require Texas Transportation Commission approval for projects which are able to attract new federal funding made available through federal legislation and which require public/private partnerships.
5. TxDMV should study the most effective mechanism for collecting appropriate road use fees for owners of electric vehicles and the appropriate amount of those fees and report back to the legislature by October 2020.

**(Editor's Note: Propositions 1 and 7 were constitutional amendments that dedicated certain state oil and gas and motor vehicle sales tax revenues to state transportation purposes.)*

- **Charge 6:** Study emerging issues in transportation related to technology and evaluate the state's preparedness for addressing challenges and opportunities posed by technological

advances. Review the implementation of state and federal programs and legislation related to intelligent transportation systems, autonomous vehicles, unmanned aircraft systems (i.e., drones), and other technological changes.

Committee Recommendations:

1. The implementation of highly autonomous vehicles should be closely monitored to ensure that further action to protect the public may be taken as needed.
2. TxDOT should continue to expand its programs related to the use of dynamic messaging signs to improve safety and provide greater driver knowledge of road conditions, weather events and safety announcements.
3. Any regulation of unmanned aerial systems should provide the public with appropriate protections, while allowing the commercial development of new innovations.
4. The attachment, carrying, or use of weapons, explosives, or hazardous chemicals on Unmanned Aerial Systems by non-military individuals or entities should be prohibited.

Don't Forget:
Mandatory Eminent Domain Reporting

The comptroller will be sending reminders to cities to file their annual eminent domain report as required by law. Legislation passed in 2015 requires cities to annually fill out a [web-based form](#) with the comptroller relating to each city's statutory eminent domain authority. (The failure to fill out the form could result in a \$1,000 penalty against a city.)

The 2018 reporting window opens on November 1. The entry should be, for almost every city, just an update of previously-filed information, including whether the city exercised its eminent domain authority in the preceding calendar year by filing a condemnation petition under Section 21.012, Property Code.

Of course, any city that never filled out the form as required should do so now. Detailed instructions on doing so are available in this [previous article](#). Questions should be directed to Ty Myrick, with the comptroller's data analysis and transparency division, at transparency@cpa.texas.gov

City-Related Bills Filed

Property Tax

No city-related property tax bills were filed this week.

Sales Tax

No city-related sales tax bills were filed this week.

Purchasing

No city-related purchasing bills were filed this week.

Elections

H.B. 526 (Israel) – Voter Identification: would, among other things, eliminate the photo identification requirement and expand the types of documentation that are considered acceptable forms of identification for purposes of voting. (Companion bill is **S.B. 104** by **Menendez**.)

H.B. 530 (Miller) – Application for Mail Ballot: would: (1) provide that an application for a ballot to be voted by mail by an elderly or disabled voter that does not specify the election for which a ballot is requested, or is for more than one election, is considered to be an application for a ballot for each election, including any ensuing runoff, that occurs before the earlier of January 1 of the first odd-numbered year after the calendar year in which the application was submitted; and (2) provide that an application described by (1) that is submitted in the last 60 days of an even-numbered year is considered to be submitted in the following calendar year.

S.B. 231 (Menendez) – Voter Identification: would, among other things, expand the list of acceptable forms of identification for the purposes of voting and allow a voter to present two forms of identification from the expanded list if the identification documents were issued or delivered to the voter as proof of identification, so long as one form of identification contains the name and address of the voter.

Open Government

No city-related open government bills were filed this week.

Other Finance and Administration

S.B. 230 (Perry) – Rock Climbing: would include rock climbing in the recreational use statute for tort liability purposes.

S.B. 248 (Seliger) – Public Funds Investment Act: provides that the treasurer, chief financial officer, or investment officer of a school district or city must take only the initial 10 hour training under the Public Funds Investment Act but no continuing investment training if the school district or city: (1) does not invest district or city funds; or (2) only deposits district or city funds in interest-bearing deposit accounts or certificates of deposit.

Municipal Courts

No municipal court bills were filed this week.

Community and Economic Development

H.B. 514 (Hinojosa) – Plastic Bag Regulations: would provide that the term “container or package” in Health and Safety Code Section 361.0961 (the statute that is construed by the Texas Supreme Court to preempt city plastic bag regulations) does not include a single-use bag provided by a retail business to a customer at the point of sale for the purpose of transporting purchases.

Personnel

No city-related personnel bills were filed this week.

Public Safety

H.B. 516 (Springer) – Handgun License: would provide that there is no cause of action against an owner, lessee, or manager of property based on their decision not to exercise the option to forbid the carrying of handguns by a license holder on the property by providing notice under Sections 30.06 and 30.07, Penal Code.

H.B. 518 (Springer) – Fire Safety Inspections: would allow a fire safety inspection required by state or local law, rule, or ordinance to be conducted by an individual trained in accordance with the Standard for Professional Qualifications for Fire Inspector and Plan Examiner and certified by the Texas Commission on Fire Protection, the State Firemen’s and Fire Marshals’ Association, the National Fire Protection Association, the International Code Council, or any other state agency with authority over fire safety inspections.

H.B. 534 (Geren) – Court Program: would expand the definition of a public safety employee, for the purpose of participating in a public safety employee treatment court program, to include an emergency service dispatcher.

S.B. 247 (Hinojosa) – Forfeiture Proceeding: would: (1) raise the state’s burden of proof from preponderance of the evidence to clear and convincing evidence in proceedings related to the seizure of property and forfeiture hearings; (2) limit the transfer of forfeitable property to the federal government; and (3) limit law enforcement agency or Texas National Guard cooperation in federal forfeiture actions. (Companion bill is **H.B. 182** by **Canales**.)

Transportation

No city-related transportation bills were filed this week.

Utilities and Environment

H.B. 522 (Allen) – Air Contaminant Permitting: would require the Texas Commission on Environmental Quality, when issuing a permit to construct or modify a facility that emits air contaminants or renewing a preconstruction permit, to consider the cumulative effects on public health and the physical property of expected air contaminant emissions from the facility or proposed facility and from other facilities located less than three miles from the facility or proposed facility.

H.B. 523 (Allen) – Solid Waste Facility Permitting: would require applicants for solid waste facilities to: (1) mail an explanation of the site's proposed operations and a questionnaire to each resident living within one mile or less from the site and each community organization, nonprofit organization, or civic club located three miles or less from the site; and (2) include any comments made by residents, organizations, or clubs in response to the application.

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