MEMORANDUM

TO: Dane County Towns Association

FROM: Eric J. Larson

DATE: September 30, 2019

RE: 2019 Wisconsin Act 14
Wisconsin Small Wireless Facility Law

On or about July 10, 2019 the State of Wisconsin adopted 2019 Wisconsin Act 14, which made a number of statutory changes concerning small wireless facilities. In this memorandum I will outline the significant issues that your members should know concerning their authority over small wireless facilities as a result of these laws.

1. Setback Requirements for Telecommunications Facilities. The new law gives municipalities certain authority regarding setback requirements for telecommunications facilities. This applies to all telecommunications facilities not only small cell facilities. Specifically, this Act creates Wisconsin Statutes Section 66.0404(4e) that allows you to regulate new construction or substantial modification of telecommunications facilities and support structures as follows:

    a. *Distance equals height of tower*. "A setback requirement must be based on the height of the proposed mobile service support structure, and the setback requirement may not be a distance that is greater than the height of the proposed structure."

    b. *Only for structures on or adjacent to parcels that permit single-family*. "The setback requirement may apply only to a mobile service support structure that is constructed on or adjacent to a parcel of land that is subject to a zoning ordinance that permits single-family residential use on that parcel."

    c. *Does not apply to existing structures or small wireless facilities structures in a right-of-way*. "A setback requirement does not apply to an existing or new utility pole, or wireless support structure in a right-of-way that supports a small wireless facility, if the pole or facility meets the height limitation in Section 66.0414(2)(e) 2. and 3."

    d. *Measurement*. "The setback requirement ... for a mobile service support structure on a parcel shall be measured from the lot lines of other adjacent and nonadjacent parcels for which single-family residential use is a permitted use under a zoning ordinance."

2. "Small Wireless Facility" Defined. The Act creates Section 66.0414 of Wisconsin Statutes which does many things, which will be subject the remainder of this memorandum. I note, first, that the Act defines dozens of terms, the most important of which is the term "small wireless facility," which the Act defines as follows:

    a. A wireless facility that is mounted on a structure 50 feet or less in height including any antenna; or

    b. Is mounted on a structure no more than 10% taller than any other adjacent structure; or

    c. Which does not increase the height of an existing structure on which the wireless facility is located to a height of more than 50 feet or by 10%, whichever is greater.

    d. In each case, the antenna associated with the wireless facility must be no more than 3 cubic feet in volume; and

    e. All wireless equipment associated with the antenna and any preexisting associated equipment on the structure must be no more than 28 cubic feet in volume; and

    f. The wireless facility does not require registration as an antenna structure under federal law (47 CFR Part 17), is not located on tribal land and does not result in human exposure to radio frequency in excess of federal standards (47 CFR 1.1307).

3. Rights-of-Way. The new law allows for the installation of small wireless facilities within public right-of-way. I note several aspects of the law in this regard as follows:

    a. *Definition*. The law defines a right-of-way in part to include, broadly, all areas on, below or above a highway, a sidewalk or a utility easement.

    b. *Exclusive use prohibited*. Your members cannot grant rights to one wireless facility user, to the exclusion of others.

    c. *Rates and fees*. Your members can establish rates and fees, provided that they charge other entities for use of the right-of-way and subject to the following:

        i. The fee or rate must be limited to no more than the direct and actual cost of managing the right-of-way.

        ii. The fee or rate must be competitively neutral.

iii. Your members cannot create a double recovery by overlapping fees.

iv. Franchise fees are prohibited.

v. The fee or rate must not exceed an annual amount equal to $20 multiplied by the number of small wireless facilities in the right-of-way in your jurisdiction.

vi. By October 1, 2019, or within 3 months after receiving your first request for access to the right-of-way by a wireless provider, you may implement rates, fees and terms for access that comply with this new law.

vii. If you have an agreement with a wireless provider concerning access to the right-of-way that includes rates and fees, that agreement can remain in effect through August 2021, but at that time, your members must adjust the rates to comply with this new law.

d. *Right of Access*. Small wireless facilities have a right of access to the public right-of-way. This right is subject to the following:

i. Your members may enact an ordinance to regulate this access, provided it is limited to the following issues.

ii. Your members can prohibit these installations from obstructing or hindering travel, drainage, maintenance or the public health, safety or general welfare on or around the right-of-way, and to prohibit the obstruction of legal use of the right-of-way for other communications providers, public utilities, cooperative associations or the like.

iii. Your members can regulate the height of new utility poles to prohibit a height that is more than 10% higher than the tallest existing utility pole as of July 12, 2019 that is located within 500 feet of the new or modified utility pole in the same right-of-way; or 50 feet above ground level, if higher. These limits can apply not only to the utility pole but also to the small wireless facility itself.

iv. Be careful, though because the law also includes this exception: if your members' zoning code allows heights that are taller than the foregoing limitations, the wireless provided may construct their facilities to the heights that are allowed by the zoning ordinance.

v. Your members can suggest that wireless providers place their facility at an alternate location for collocation, and the wireless

provider must use that alternate location if it has the right to use that location on reasonable terms and conditions and the alternate location is technically feasible and does not impose material additional costs.

vi. Your members can require the wireless provider to repair damage that is directly caused by their activities in the right-of-way.

vii. Your members must administer these regulations in a competitively neutral manner.

e. *Permitting process*. The new law creates a permitting process for small wireless facilities and I note the following in this regard:

i. Small wireless facilities are deemed to be a permitted use for zoning purposes, and they are not subject to your members' zoning ordinances "if the property is not zoned exclusively for single family residential use." Exceptions are also provided for consideration of aesthetic issues and historic preservation, as I will note in g. and h., below.

ii. Your members may require applicants to apply for a permit. The new law includes specific requests for information that they can require in their application, which I will not repeat here, but which are contained in Section 66.0414(3)(c)2.

iii. Your members must act on the application within 10 days to determine whether it is complete, and if they determine it is incomplete, they must notify the applicant of the information that is incomplete, and the 10-day time restarts at zero on the date the applicant submits the additional information.

iv. If the applicant seeks to install a new or replacement utility pole, your members must act on that application to grant or deny it within 90 days after receipt of the complete application.

v. If the application is to collocate on an existing structure, your members must act on that application to approve or deny within 60 days of receipt of the complete application.

vi. If your members fail to meet the foregoing deadlines, the applicant may consider its permit application to be approved.

vii. The foregoing deadlines apply to all aspects of the application, including any "construction, building, or encroachment permit" that may be required for the applicant to construct their facility.

viii. By mutual agreement, the foregoing deadlines can be extended.

ix. The application must be approved unless it does not meet applicable codes or the standards of your ordinance adopted pursuant to this new state law. If the application is denied, the applicant must be provided written documentation explaining the basis for the denial no later than the permit application is denied. An applicant may cure the deficiencies and resubmit the permit application no later than 30 days after receipt of the documentation. If such resubmittal is received, you have only 30 days to act on the resubmitted application.

x. Your members may condition approval of the permit on compliance with reasonable and nondiscriminatory "relocation, abandonment, or bonding requirements" if these are consistent with state law applicable to other occupiers of the right-of-way.

xi. Consolidated applications of up to 30 small wireless facilities are allowed.

xii. The applicant has one year from the date the application is approved to pursue work on the activity until completion.

f. *No moratorium*. Your members are prohibited from enacting a moratorium on filing, receiving or processing of applications, or issuing permits or other approvals.

g. *Aesthetic limitations*. Your members are permitted to adopt aesthetic requirements concerning deployment of small wireless facilities and associated antenna equipment and utility poles in the right-of-way, but this is limited by the following:

i. The aesthetic requirements must be technically feasible and reasonably directed to avoiding or remedying unsightly or out-of-character deployments; must be no more burdensome than those applied to other types of infrastructure; and must be objective and published in advance.

ii. Design or concealment measures are not considered in the size limitations for small wireless facilities.

iii. Your members can only deny an application for failure to meet aesthetic requirements if the denial "does not prohibit or have the effect of prohibiting the provision of wireless service."

h. *Historic district and underground district limitations*. Your members can enact an ordinance to prohibit wireless facilities in the right-of-way of a

historic district or an underground district subject to the following limitations:

i. Your members cannot prohibit collocations or the replacement of existing structures.

ii. An historic district for these purposes is an area designated as historic by the municipality, listed on the National Register of Historic Places in Wisconsin, or listed on the State Register of Historic Places.

iii. An underground district is an area designated by the municipality in which all pipes, pipelines, ducts, wires, lines, conduits or other equipment which are used by various utilities are located underground. Note: your members may want to review those locations in their municipality where utilities are currently underground, and formally establish those areas as underground districts, to protect them pursuant to this new law.

iv. Your members can require collocations or replacement of existing structures "to reasonably conform to the design aesthetics of the original structure in a historic or underground district."

v. Requirements your members impose under this section must be objective, technically feasible, no more burdensome than requirements applied to other types of infrastructure and reasonably directed at avoiding or remedying the intangible public harm of unsightly or out-of-character deployments. The result of their regulations cannot have the effect of prohibiting wireless service.

4. Application Fees. Your members can establish application fees that are nondiscriminatory and cover no more than their direct costs of processing the application, but their fees cannot exceed the following:

a. For an application that includes 5 or fewer small wireless facilities, $500.

b. For an application that includes more than 5 small wireless facilities, $500 plus $100 for each small wireless facility in excess of 5.

c. $1,000 for the installation or replacement of a utility pole, together with the collocation of associated small wireless facility.

d. Your members cannot require application approvals, however, for routine maintenance, or replacements that are substantially similar to the existing, or for "the installation, placement, maintenance, operation, or replacement

of micro wireless facilities that are strung on cables between existing utility poles in compliance with the National Electrical Safety Code."

5. Traffic Work Permits. Nothing in this law prohibits your members from requiring work permits for work that will unreasonably affect traffic patterns or obstruct vehicular traffic in a right-of-way. They should only apply such requirements to wireless providers to the extent that they would do so of any other occupant of the right-of-way, however.

6. Location of Wireless Facilities on Municipal Property. If your members own an electric utility that has utility poles in the right-of-way, or they have other municipal structures in the right-of-way, the law addresses their ability to control wireless providers access to their municipal facilities, as follows:

    a. Your members can impose a cost on the wireless provider to access their facilities.

    b. Your members rates cannot be discriminatory, and they cannot provide this access to one provider exclusively.

    c. The rate your members charge must be sufficient to recover the actual direct and reasonable costs related to the application, and may not exceed the lesser of the actual, direct and reasonable costs related to the collocation or $250 per year per small wireless facility.

    d. By October 1, 2019, or within 3 months after receiving your first request to locate a small wireless facility on a government pole, your members can implement rates, fees and terms for collocation on their governmental facilities.

    e. If your members have existing agreements with wireless providers, the terms of their agreement can apply through August 1, 2021, but beginning on that date they must bring their fees into compliance with the limitations of this new law.

7. Indemnification. Wireless providers are obligated to indemnify the municipality from any and all liability and loss from personal injury or property damage resulting from or arising out of, in whole or in part, the use or occupancy of rights-of-way by the wireless provider, unless solely caused by the municipality. Your members should require wireless providers to agree to indemnify their municipality pursuant to this statutory requirement.

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