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June 4, 2015

SENT VIA U.S. POST AND E-MAIL: senator.mcguire@senate.ca.gov

The Honorable Michael McGuire
Member, California State Senate
1303 10th Street, Room 5064
Sacramento, CA 95814

Re: AB 57 (Quirk): Wireless Telecommunications Facilities (amended 04/06/15) Letter in opposition

Dear Senator McGuire:

On behalf of the Town Council of the Town of Fairfax, I write to you today to register our strong opposition to Assembly Bill 57, "Telecommunications: wireless telecommunication facilities," authored by Assembly Member Bill Quirk. We urge you to vote 'no' on the adoption of this bill.

The bill (I) directly conflicts with existing federal and state law, (II) contains ill-drafted and unnecessarily ambiguous provisions, and (III) transforms a settled and effective regulatory scheme designed to promote reasonableness, cooperation and accommodation in wireless tower siting into a zero-sum game. For all of these reasons and more, the Town of Fairfax joins the California Chapter of the American Planning Association, the California State Association of Counties, the Urban Counties Caucus and the League of California Cities in strong and direct opposition to AB 57.

I. AB 57 Upsets Carefully Balanced Policies in Federal Wireless Deployment Regulations

Federal wireless infrastructure deployment policies *balance* the broader interest in wireless services with the legitimate local interest land-use control over how carriers deploy cell site facilities.[1] Rather than impose rigid procedural deadlines, Congress directed State and local governments to act on a wireless permit application within a "reasonable" time "taking into account the nature and scope of such request."[2] Wireless facilities come in all shapes and sizes, and their impacts depend on location and local conditions, so no one-size-fits-all rule such as proposed in AB 57 can strike that appropriate balance between national and local interests.

AB 57 intends to do something the FCC *twice* refused to do, specifically to impose a "deemed-approved" remedy for failures to act on wireless permit applications for new sites and substantial changes to existing ones. In its *2009 Declaratory Ruling*, the same ruling cited in AB 57, the FCC

[1] *See* 47 U.S.C. § 332(c)(7)(A).
[2] *See id.* § 332(c)(7)(B)(ii).

established presumptively reasonable timeframes for review, but carefully crafted exceptions to toll the shot clock and intentionally declined to impose a "deemed approved" remedy sought by the wireless industry.

The FCC specifically rejected the notion that a failure to act within a reasonable time should automatically deem a permit granted because:

> The case law does not establish that an injunction granting the application is always or presumptively appropriate when a "failure to act" occurs. To the contrary, in those cases where courts have issued such injunctions upon finding a failure to act within a reasonable time, they have done so only after examining all the facts in the case.[3]

In January of this year, the FCC reiterated that applications that take longer than the FCC's presumptively reasonable deadlines "should be a matter for the courts to decide in light of the specific facts of individual applications."[4] Flexible timeframes balance the national interest in rapid infrastructure development with the local interest in carefully planned development in accordance with community values. The FCC recognizes that there will be cases where delays are justified, and judges are best equipped to determine whether a jurisdiction has acted reasonably after a fair hearing.

AB 57, in contrast, would destroy the existing careful balance between important national and local interests with an unprecedented and unwarranted deemed-approved result for new and substantially changed wireless sites. No matter how intrusive the proposal to the community and your constituents, and no matter how extreme the impact to the local environmental, aesthetic, historic and cultural resources, AB 57 would deem-approved a permit application for a new or substantially changed wireless site based on the single fact that the local government took longer to act than the "presumptively" reasonable times that the FCC acknowledged might not be reasonable in all cases.

II. The "Deemed-Approval" in AB 57 is Redundant of Existing State Law, Constitutionally Suspect and Likely to Cause More Delays than it Prevents

The California Permit Streamlining Act ("PSA") already provides a "deemed-approval" when a local government fails to act within a prescribed time, but only after the "public notice *required by law* has occurred."[5] The "public notice required by law" includes both notice required for the application and notice required under California due process protections.[6]

The Ninth Circuit has found that "California due process protections require reasonable notice and an *opportunity to be heard* before a lead agency makes an adjudicatory land use decision that

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[3] *2009 Declaratory Ruling*, 24 FCC Rcd. 13994, 14009, ¶ 39 (internal citations omitted).
[4] *See 2015 Infrastructure Order* at ¶ 284 (quoting *2009 Declaratory Ruling*, 24 FCC Rcd. at 14009, ¶ 39) (internal quotations omitted).
[5] *See* California Government Code § 65956(b).
[6] *See American Tower Corp. v. City of San Diego* (9th Cir. 2014) 763 F.3d 1035, 1051.

constitutes a substantial or significant deprivation of other landowners' property rights."[7] Wireless facilities, especially new or substantial facilities, can trigger due process protections.[8]

Unlike the fairness protections built into the PSA, AB 57 would deem a cell site permit approved so long as the public notice "*require[d] for the application*" has occurred. The proposed language excludes the California due process protections "required by law" under the PSA. Worse still, AB 57 specifically targets wireless applications for new sites and substantial changes to existing sites that are most likely to trigger due process requirements.

Although localities could require a public hearing for all wireless permit applications to protect constitutional rights, this transforms the current exception into the rule and creates potentially wasteful delays for projects that do not implicate due process rights. Localities may also feel pressured to deny a permit simply because the time for review is about to expire. Thus, the deemed-approval under AB 57 is redundant, constitutionally suspect and most likely to cause more delays than it prevents.

III. AB 57 "Hides the Ball" and Inappropriately Attempts to Govern through Incorporation by Reference to a Federal Administrative Adjudication

The proposed text in AB 57 is as unclear as its policies are in conflict with existing law. Rather than plainly state the rules that the legislature intended to adopt, AB 57 incorporates the time periods for review by reference to the *2009 Declaratory Ruling*. This document was so replete with murky provisions that, six years after its release, the FCC later issued clarifications as to its meaning. These 'clarifications' may be found, along with a host of new regulations, in a 155-page Report & Order issued by the FCC last October.[9] Are these clarifications likewise meant to be incorporated into the new statute?

As drafted, AB 57 would require localities to find, read and understand the 2009 federal adjudication to understand the state statute—and then continuously monitor each FCC action that might alter those time periods. The state legislature should not govern through incorporation by reference, especially a reference that omits critical safeguards that the FCC, the governing federal agency, found necessary in its own ruling. Such a circuitous approach obscures the rule, undermines fair notice about what the law requires and disadvantages local jurisdictions and constituents by bypassing federal safeguards designed to fairly balance federal and local interests. It also leaves substantial questions unanswered, such as the effect of current legal challenges to the October 2014 FCC Report & Order.

To adopt some—but not all—of the FCC's rules begs the question: what else does the legislature decline to adopt from the *2009 Declaratory Ruling*? AB 57 is silent as to the FCC's other rules that toll the time limits for incomplete applications and through mutual agreements between

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[7] *Id.* at 1050 (citing *Horn v. Cnty. of Ventura* (Cal. 1979) 596 P.2d 1134, 1140).

[8] *See id.* at 1050–51.

[9] *See 2015 Infrastructure Order in the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies (WT Docket No. 13-238) and Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting (WC Docket No. 11-59) and 2012 Biennial Review of Telecommunications Regulations (WT Docket No. 13-32)*, adopted October 17, 2014; released October 21, 2014.

applicants and governments. The FCC created these exceptions to promote cooperation and avoid harsh results when a particular project legitimately requires additional time. For what purpose might AB 57 seek to eliminate them?

IV. Individual Wireless Sites Trigger Predominantly Local Concerns

AB 57 declares that a single "wireless telecommunications facility . . . is not a municipal affair . . . but is a matter of statewide concern." Other making a perfunctory attempt to justify undermining local authority over land use matters, what does the legislature intend this language to mean? California courts consistently hold that zoning and land-use decisions constitute municipal affairs.[10] Does the legislature intend to preempt *all* local police powers over each *individual* wireless site? Loose language such as this will engender confusion, conflict and wasteful litigation.

Moreover, this provision ignores the complex inter-governmental interests implicated in infrastructure policies. The provision of wireless *services* in general might rise to a statewide concern, but each and every *individual wireless site* triggers predominantly local concerns. Localities are in the best position to determine whether and how to mitigate potential impacts to local environmental (not related to preempted considerations such as RF emissions), aesthetic historic and cultural resources. Indeed, the California Constitution confers upon towns and cities the power to make and enforce within their limits all local police, sanitary, and other ordinances and regulations not in conflict with general laws.[11] This authority, known as the police power, is the legal basis for all land use regulation and provides towns and cities with the means to protect the public health, safety, and welfare of their residents.[12] As the California Supreme Court has opined, a given land use regulation lies within the police power if it is reasonably related to the public welfare.[13] And no less an authority than the United States Supreme Court has illuminated the scope of this power by finding that:

> The concept of the public welfare is broad and inclusive. [Citation omitted.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[14]

The Senate should preserve local authority to handle what are clearly local matters and reject AB 57.

V. Conclusion

You can support wireless infrastructure deployment and oppose AB 57. Local governments in California acknowledge the incredible economic and social benefits promised in these services,

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[10] *See, e.g., Brougher v. Board of Public Works* (1928) 205 Cal. 426, 440
[11] Cal. Const. Art. XI, § 7.
[12] *Berman v. Parker* (1954) 348 U.S. 26, 32-33.
[13] *Associated Home Builders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 600-601.
[14] *Berman,* 348 U.S. at 33.

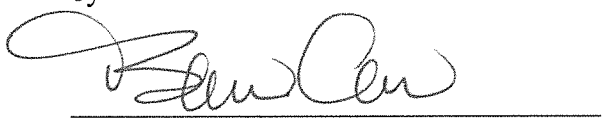
and the need for infrastructure to deliver them. However, AB 57 does not promote rational deployment policies.

Rational wireless deployment policies require a partnership between wireless providers and local governments. AB 57 undermines that partnership and mutates the permit process into a zero-sum game with high stakes under unreasonable time pressure. AB 57 conflicts with existing federal and state law, it contains ambiguous and constitutionally suspect provisions, and it will ultimately cause more conflict and delays than it prevents.

The Town of Fairfax urges you in the strongest terms possible to vote against this ill-conceived industry proposal that will not benefit your constituents.

Respectfully submitted,

The Town of Fairfax
by



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