

Preempting Local Authority Over Wireless Facilities Siting in Order to (Supposedly) Close Gaps in Coverage - Colorado's New House Bill 1056

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CML Annual Conference
Breckenridge, CO
June 25, 2025



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Your Presenter ...



as he looked many CML conferences ago

- ▶ I retired in January after practicing law in Colorado for 44 years (municipal law for 42 years)
- ▶ My first CML conference was in 1985 in Vail
- ▶ My practice has focused in large part in telecommunications and utilities – I negotiated the 2nd cable franchise in Colorado after the passage of the 1984 Cable Act
- ▶ I was privileged to serve as a local elected official in Arvada for 14 years
- ▶ I am a wanna-be rock guitarist with a particular affinity for the Boss



Our challenge today: how to have fun explaining a bad law that preempts local authority

- ▶ We're going to talk about a bill that had good intentions, missed opportunities to make it effective, a few local government "saves," and how municipalities will need to address the preemptions through changes in your codes and permitting practices
- ▶ And we're going to do that while identifying how many Bruce Springsteen songs I mention during the presentation
 - ▶ When you see a slide with a Springsteen song title (except for one time, there won't be more than 1 per slide), write it down
 - ▶ There are 15 song titles on this and the next 23 slides – we'll collect your papers after the presentation and the winner will get a prize
 - ▶ There will be 2 quiz questions during the presentation to ensure that you are paying attention and not just looking for song titles from the Boss
- ▶ Let's step into the fire

2024 Legislative Session

- ▶ Interim Committee created to study where the gaps are in wireless coverage in Colorado and how to close them
- ▶ Committee included legislators, 3 industry reps, state government reps (but no one from the Colorado Broadband Office!)
- ▶ What could possibly be the reason we have a wireless darkness on the edge of town in rural Colorado and lower income urban and suburban areas?
 - ▶ Oh, wait ... it always comes to me – it's due to unreasonable delays in local government permitting!

Wireless Facilities Shot Clocks Today – Federal and State Law



Photo by T. Dorante

- ▶ New structures – 150 days
- ▶ Locating on existing structures or any small cell application – 90 days
- ▶ Eligible Facilities Requests (“EFRs” – existing sites under federal law that are not seeking “substantial changes” – 90 days (under state law); 60 days (under federal law)
- ▶ Shot clocks start when complete application is filed, except for EFRs, where they start at the earlier of
 - ▶ when the application is filed or
 - ▶ applicant takes “first procedural step” in the application process AND submits written documentation showing that a proposed modification is an eligible facilities request (even if the actual application does not see the light of day until weeks later)



Tolling the Shot Clocks Today

- ▶ By mutual agreement
- ▶ If application is incomplete and notice is received within 30 days
- ▶ For EFRs, must provide notice within 10 days
- ▶ And if I should fall behind and miss the shot clock, what's the remedy?



Courtesy of Wiki Commons:
https://upload.wikimedia.org/wikipedia/commons/3/31/NBA_shot_clock.jpg

The Price You Pay for Missing the Shot Clock

- ▶ Except for EFRs, shot clock violation creates presumption that local government has unreasonably delayed consideration, and applicant may now bring suit
- ▶ For EFRs, shot clock violation results in a “deemed granted” remedy and applicant can send notice to local government and pull a construction permit

House Bill 25-1056

- ▶ The bill amends C.R.S. 29-27-401 (Legislative Declaration) and 402 (Definitions)
- ▶ Repeals and reenacts 29-27-403 (Deemed Approval of Facilities)
- ▶ Adds a new section 29-27-405 (addressing the kinds of applications for which permitting is prohibited)
- ▶ Also makes a clarifying amendment to C.R.S. 38-5.5-104.5 to make the cross references to Title 29 consistent with the new statutory language

HB 1056 as Introduced

- ▶ Shot clock for all applications – 60 days
- ▶ Remedy for missing the deadline (all application types) – the promised land for the industry – permit is deemed granted
- ▶ Shot clock begins
 - ▶ at filing of application OR
 - ▶ when applicant takes first procedural step in the application process
- ▶ Local government must identify an adopted “regulation,” as opposed to permit requirements, in order to toll the shot clock due to an application being incomplete

Certain Local Permitting **Prohibited**

- ▶ No permits for EFRs:
 - ▶ replacing equipment of the same size;
 - ▶ taking down equipment;
 - ▶ the rising of the height of the facility by no more than 20 feet or 20% of existing height, whichever is greater (or 10 feet or 10% for facilities in the rights of way);
 - ▶ new equipment protruding no more than 20 feet (or more than 6 feet for facilities in the rights of way);
 - ▶ installation of the standard number of new equipment cabinets for the technology involved, not to exceed 4 cabinets; or
 - ▶ excavation or deployment within the current site.
- ▶ But ... the prohibition doesn't alter generally applicable building, electrical, fire or other safety requirements.



Source: Seattle City Light

Quiz Question #1

WHAT IMPORTANT STATE AGENCY
DID NOT HAVE A SEAT ON THE
INTERIM COMMITTEE IN 2024 THAT
LED TO HOUSE BILL 1056

Will Deemed Granted Remedies and Prohibition of Permits for EFRs Cause Coverage Gaps to Close?

- ▶ We asked the Industry:
 - ▶ what jurisdictions in Colorado are having problems?
 - ▶ in return for you getting special rules, will you commit to increasing your capital investment by some percentage in areas of Colorado with gaps in coverage?
 - ▶ Will you meet with us to explain the legal basis for wireless industry representatives telling House members that a proposed local government amendment violates the Telecom Act (it didn't)

Will Deemed Granted Remedies and Prohibition of Permits for EFRs Cause Coverage Gaps to Close?

- ▶ Questions to Sponsors (House)
 - ▶ will you meet with local government organizations to discuss the issues?
- ▶ Questions to Sponsors (Both House and Senate)
 - ▶ Given that thousand of miles of rural roads where wireless facilities can be sited are owned by the State (you can drive all night on many State roads and not see a cell site), and we can close coverage gaps by getting small cells out in the street everywhere in Colorado, can we make the bill applicable to CDOT?

Another Key Issue

- ▶ If there are problems in only certain areas of the State, why preempt every local government?
- ▶ Why not create preemptive siting rules to specifically incent (and demonstrate) deployment in areas where coverage gaps are proven to exist?
 - ▶ Because the industry goal is to bring a wrecking ball to local control

HB 1056 as Adopted – Shot Clocks

- ▶ 90 days for new small cells and collocations on macro sites; or
- ▶ 150 days for new structures that are not for small cells, and new installations on existing structures where no wireless facilities exist; and
- ▶ For all applications it is 90 or 150 days after the application is filed AND after all public notices required under applicable law have been given

HB 1056 as Adopted – Shot Clocks

- ▶ Remedy for missing the shot clock – deemed granted (applies to any kind of application)
- ▶ Shot clock starts upon ... submission of application
- ▶ But ... there is also language that says nothing relieves the obligations to comply with federal timelines, and federal law imposes a 60-day shot clock on small cell applications for existing poles

HB 1056 as Adopted – Tolling the Shot Clock

- ▶ By notification of incomplete application within 30 days of filing
 - ▶ You must identify the specific regulation creating the requirement to provide the missing documentation or information
- ▶ If local government determines it lacks resources to review within the time frame due to other pending land use application(s) intended to address affordable or attainable housing, renewable energy, projects of governmental entities, or any other project where the law provides a deadline for action.
 - ▶ In these cases, can extend shot clock by up to 45 days

HB 1056 as Adopted

- ▶ Prohibitions on local permitting of any EFR stay in the bill ... we think
- ▶ C.R.S 29-27-405 (1)(a) and (b) - no permitting required for EFRs, but ...
- ▶ C.R.S. 29-27-405 (2) – Nothing in this Section supersedes, nullifies, or otherwise alters generally applicable and nondiscriminatory building, electrical, fire, or other safety requirements
- ▶ Some good news – all other local authority preserved – does not touch ability to regulate aesthetics
- ▶ EFFECTIVE DATE: January 1, 2026

Photos courtesy of Dr. Jonathan L. Kramer, Esq. www.celltowerphotos.com



Reminder: Important Differences Between State and Federal Requirements

- ▶ Federal shot clock of 60 days (state – 90 days) for small cell applications to locate on existing poles
- ▶ Federal government does not allow for tolling the shot clock if the local government demonstrates a lack of capacity due to work on other issues per amendment CML had added to HB 1056
- ▶ Under federal law, if a small cell application is incomplete, to toll the shot clock, written notice must be given within 10 days after application is filed (state law – 30 days)
- ▶ Under federal law, shot clock on EFRs can begin before you see an application

Quiz Question #2

TO TOLL THE SHOT CLOCK WHEN AN APPLICATION THAT IS NOT AN EFR IS INCOMPLETE, UNDER STATE LAW, WITHIN HOW MANY DAYS OF SUBMITTAL DO YOU NEED TO GIVE NOTICE TO THE APPLICANT?

Planning for Implementation – Review and Adjust Requirements and Processes as Needed

- ▶ Review your codes and permit regulations
- ▶ Review internal permit review processes – don't let an application get trapped in one department
- ▶ Are the right people reviewing and providing input?
- ▶ You require pre-application meetings – do you really need them for EFR applications?

Planning for Implementation – Shot Clocks

- ▶ Take every reasonable action to avoid missing the shot clock
- ▶ If you get close, seek agreement to continue
- ▶ If the applicant refuses (and you've made a good case for why extension is needed), DENY the application – this is your sword
 - ▶ If you deny because you need more time, do it in writing and provide details on why more time was needed to adequately review the substance of the application ... and that the applicant refused to agree to it

Planning for Implementation – Permitting for Eligible Facilities Requests

- ▶ Section 405 permitting prohibitions vs. public safety requirements – keep your eyes on the prize by considering these four things:
 - ▶ One: Review codes and permitting requirements for all activities covering work on EFRs
 - ▶ For example, are permits needed for lane closures? It should not matter whether it is an EFR or a collocation.
 - ▶ Are permits needed for trenching within the existing footprint of the wireless site?
 - ▶ Are permits needed for installing and connecting utilities to new cabinets within the site footprint?

Planning for Implementation – Permitting for Eligible Facilities Requests

- ▶ Section 405 permitting prohibitions vs. public safety requirements – consider these four things :
 - ▶ Two: Make sure that your codes and permitting regs clearly describe the public safety basis for any requirements you impose
 - ▶ Three: Unless the code is very clear, consider amending to require permits that address these public safety requirements for any kind of work related to a wireless facility
 - ▶ Four: If the requirements for permits are not in the code, does the code authorize the administrative adoption of such requirements?

A Lot of People Worked Hard for Local Government on this Bill

Kudos to:

- ▶ Colorado Communications and Utility Alliance



- ▶ CML – especially Bev Stables



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- ▶ Steamboat Springs City Council President Gail Garey



- ▶ Reps. Brianna Titone and Shannon Bird

- ▶ Sen. Faith Winter

THANK YOU!

Meet me in the city tonight ...



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