TOWN OF FAIRFAX
STAFF REPORT
July 7, 2021

TO: Mayor and Town Council

FROM: Garrett Toy, Town Manager

SUBJECT: Ratify letter sent by the Mayor in opposition to Assembly Bill 537 which would allow wireless companies to construct wireless facilities without local permits

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RECOMMENDATION

Ratify the letter opposing AB 537 sent by Mayor Ackerman.

DISCUSSION

Our Town Attorney's office, Best, Best, & Krieger, provided a model for the attached letter of opposition to AB 537, and encouraged us to send it to the Senate Governance and Finance Committee by 9:00 a.m. July 5, 2021, to get it into the committee record for the July 8th meeting.

Attorney Gail Karish, who drafted the Town's 5G ordinance, described the potential impact of AB 537 as follows:

> If adopted, it would allow wireless companies to construct wireless facilities without local permits if, in the view of the applicant, the city/county failed to act on the wireless siting application within the timelines or "shot clocks" set by the Federal Communications Commission for action on wireless permits. **These shot clocks are as short as 60 days**. All the applicant has to do before constructing the facility is to meet minimal requirements in the bill including to notify the local government that the shot clock was missed so the application is therefore "deemed approved", and by operation of law "all necessary permits shall be deemed issued and the applicant may begin construction."

As the Committee Hearing was scheduled prior to the next available Council meeting, Mayor Ackerman sent the attached letter on June 25th. In the past the Town has opposed similar legislation which attempts to override local control over wireless facilities. The Mayor is seeking ratification of the letter.

ATTACHMENT

Mayor Ackerman's letter

TOWN OF FAIRFAX
142 BOLINAS ROAD, FAIRFAX, CALIFORNIA 94930
(415) 453 – 1584 /FAX (415) 453-1618

June 24, 2021

VIA POSITION LETTER PORTAL https://calegislation.lc.ca.gov/Advocates/

Senate Governance and Finance Committee
State Capitol, Room 407
Sacramento, CA 95814

OPPOSE AB 537: The Bill is Reckless, Misguided and Unnecessary

Dear Senators Mike McGuire (Chair)
Jim Nielsen (Vice Chair)
María Elena Durazo
Robert M. Hertzberg
Scott D. Wiener:

We submit this letter on behalf of the Town of Fairfax to express strong opposition to AB 537. The bill is reckless, misguided, and unnecessary. We urge you to reject the bill or modify it significantly to address local community concerns.

AB 537 Is Reckless Because It Would Convert a Deemed Granted Remedy for a Siting Permit Into A Construction Authorization Putting Community Safety At Risk

Not only would AB 537 expand Government Code Section 65964.1 to create a deemed granted remedy for all types of wireless applications, including ones with FCC "shot clocks" as short as 60 days, it would convert the remedy into a construction authorization allowing construction of unsafe facilities merely because a local government might have missed a federal "presumptively reasonable" deadline for action. This is reckless.

The FCC shot clocks were intended to apply to siting permits. The industry routinely applies for the wireless siting permit first. Only much later, when the applicant is actually ready to construct the facility (which can be months after the siting permit is granted), does the industry applicant seek the other construction permits such as building, fire safety, electrical, traffic control, encroachment, among others. **It is reckless to provide a remedy that "all necessary permits shall be deemed issued and the applicant may begin construction" when in most instances the information needed to review and issue construction-related permits has not even been submitted to the local authority for review with the wireless siting permit application. This bill has no protections against unsafe construction potentially creating unknown structural and fire hazards, among other hazards, endangering the public.**

Further, the bill has no protections for the public from construction of facilities that might exceed safe levels of RF emissions. While local governments cannot set the RF emissions standards, an important part of the local review process is to confirm that the applicant will meet federal RF emissions standards at the proposed site. This is not an idle concern. A 2014 report found that one in 10 of Verizon's sites violated FCC rules. The FCC has fined Verizon Wireless and other carriers for operating facilities that do not have adequate safety measures in place resulting in RF emissions violations.[1] Removing local review and confirmation that facilities are designed and sited in compliance with FCC RF emissions standards will only increase the risk of non-compliant facilities, endangering the public.

The proposed language for Section 65964.1(b) conditioning construction only on obtaining a narrow set of permits for traffic control and obstruction of public right-of-way is way too limiting. It gives the wireless industry free reign to construct dangerous and non-compliant facilities. The Senate EU&C Committee Bill Analysis also recognized that by authorizing construction without permits the bill created a safety concern.

At a minimum, the bill should be modified (1) to limit the deemed granted remedy to the permit actually applied for; (2) to require the applicant apply for all permits including all construction-related permits if the applicant wants to obtain a construction authorization and further to require that these applications as submitted must meet all regulatory requirements; (3) to require the applicant submit a report to the local government demonstrating its specific facility will comply with federal RF emissions standards; and (4) to require the applicant to indemnify the local government against any and all claims related to the facility.

AB 537 Is Reckless Because It Would Effectively Eliminate the Local Government's Ability To Seek Judicial Review Of The Improper Exercise Of The Deemed Grant Remedy

The timelines in the FCC shot clocks are very short – as little as 60 days. But they are "presumptively reasonable" timelines — meaning, in certain circumstances, a longer review period would be *permissible and justified*. However, the FCC shot clocks can only be stopped through a timely notice of incompleteness (which must be issued in as little as 10 days after receiving the application), or with the agreement of the applicant. With these already extremely tight deadlines, any unexpected event might cause a locality to miss a deadline but have a good defense that longer review was warranted in the circumstances. Natural disasters, power outages, COVID-19, a large quantity of applications, and the like are examples of reasons why understaffed local governments may not be capable of meeting the presumed deadlines. Under this bill, not only will local governments be vulnerable to being inundated with deemed granted notices for applications that have not been adequately vetted through no fault of the locality, but by allowing construction to begin before the local government has even had the opportunity to seek judicial review the bill will put the health and safety of the communities at risk.

As drafted the bill gives no consideration to the various legitimate public interest reasons why the issuance of local permits may be delayed or the financial burden that would be placed on local governments forced to initiate legal proceedings to defend against deemed granted

[1]For example, https://wirelessestimator.com/articles/2015/fcc-hits-two-carriers-with-85000-in-fines-for-rf-exposure-rooftop-violations-in-arizona/

claims that have no merit. By converting the deemed grant into a construction authorization, the bill renders the judicial review remedy in the existing law potentially moot.

At a minimum, the language of the bill must be clarified to state that no deemed grant takes effect before the 30 days in Gov. Code Section 65964.1(a)(3)(B) has lapsed and only then if the local government has not sought judicial review.

AB 537 Is Misguided Because It Does Nothing to Require The Wireless Industry To Expand Broadband Facilities Or Close The Digital Divide

The findings introducing the bill claim this preemption of local review and control will support broadband deployment. It won't. Similar to Senate Bill 556, the bill's introduction claims giving more rights to the wireless industry is necessary to speed broadband deployment. In reality this bill would hand the wireless industry free reign to deploy their facilities on public assets in local streets at the public's risk and expense with no commitment to improve broadband where it is urgently needed.

At a minimum, the bill should mandate that the wireless industry deploy facilities fairly across all areas without redlining and the deemed granted remedy should only be available in underserved and unserved areas for broadband as determined by the CPUC broadband mapping data.

AB 537 Is Unnecessary Because It Would Apply to "Eligible Facilities Requests" Which Already Have A Deemed Granted Remedy Under Federal Law

Federal law already has a deemed granted remedy for "eligible facilities requests." *See* 47 CFR Section 1.6100(c). This category of wireless applications was excluded from AB 57, Gov. Code Section 65964.1 for that reason. Adding it now adds an additional layer of state remedies that allow construction without all requisite permits which will cause confusion as to applicable procedures and defenses, and heighten the burden and risk on local governments to defend against improper deemed granted assertions.

At a minimum, "eligible facilities requests" should not be subject to this bill and the language in Section 65964.1(b) of current law should be restored.

For all of the above reasons, the AB 537 is reckless, misguided and unnecessary. We urge you to reject the bill or modify it significantly to address local community concerns.

Sincerely,

/s/

BRUCE ACKERMAN
Mayor, Town of Fairfax