

## Lawsuit Challenging Wireless Preemption Law Summary

On May 7, 2019, the Florida League of Cities and the cities of Fort Walton Beach, Naples and Port Orange filed a lawsuit challenging in part a 2017 state law that deprives cities of their constitutional right to manage the use of taxpayer-owned property. (An amended, corrected Complaint was filed on May 13, 2019.) The lawsuit was brought in Leon County against Attorney General Ashley Moody and Secretary of State Laurel Lee in their official capacities. Under the law, wireless service providers are given broad access to public rights-of-way, including city sidewalks, and to city-owned utility poles, including light poles and traffic signal poles, to place wireless antennas and large equipment boxes.

In 2017, the Florida Legislature passed the “Advanced Wireless Infrastructure Deployment Act.” Among other things, this law: (i) caps the fees cities may charge wireless providers for use of city-owned utility poles (such as light poles, traffic signal poles and signage) in public rights-of-way at artificial and unreasonable below-market rates (\$150 per year per pole); (ii) establishes arbitrary and restrictive requirements for cities to process permit applications for the use of city-owned utility poles; and (iii) frustrates cities’ ability to manage effectively the use of their utility poles to protect the health, safety and welfare of their residents and visitors.

Both the Attorney General and Secretary of State filed motions to dismiss the lawsuit, alleging various deficiencies such as not being a proper party. Also, the Legislature passed CS/CS/CS/SB 1000 (SB 1000) relating to the placement of communications facilities during the 2019 Session, Governor DeSantis signed the bill, and it became effective July 1, 2019. Provisions of the new law require modifications to the Complaint. Based on these various factors, on August 12, 2019 the prior Complaint was dismissed, and a new Complaint was filed.

The new Complaint is against Secretary of State Laurel Lee in her official capacity and the Florida Department of Revenue (DOR). It was determined that the Attorney General (AG) was likely not a proper defendant and the AG was dropped, but based on SB 1000 the DOR is a proper defendant. Changes to the law made by SB 1000 also lead to an additional allegation relating to creation of an attorney fees and costs provision. On September 24, 2019, both the Secretary of State and DOR filed motions to dismiss the lawsuit, alleging they are not proper parties. On February 28, 2020, the trial judge ruled the Secretary of State and Florida Department of Revenue were not proper parties (defendants) and ordered the Complaint be dismissed with prejudice.

The lawsuit is not a challenge to the entire law passed in 2017 or as amended in 2019. Rather, the lawsuit focuses on two primary provisions of the law having a direct and significant impact on city-owned property. As noted, the law provides cities may charge a maximum of \$150 per year per pole for the attachment of small wireless antennas to city-owned utility poles, an amount significantly below fair market value for these types of pole attachments. The law further provides cities must act upon a permit application within 60 days, or the permit to place facilities on city-owned utility poles is deemed to be granted. The effect of these provisions is to provide wireless corporations with a significant financial windfall at taxpayer expense.

The lawsuit is comprised of seven different “counts” or allegations that the law violates various provisions of the Florida Constitution, and seeks declaratory and injunctive relief on behalf of cities. The Counts are as follows:

Count I alleges the law allows taking municipal property without complying with the eminent domain (takings) and due process requirements of the Florida Constitution. By authorizing private wireless providers to place and maintain small wireless facilities on city-owned utility poles, without an appropriate process to determine the public purpose for such a taking or the full compensation owed to cities (limiting fees to only \$150 per year per pole), the law deprives cities of their rights under the Florida Constitution.

Count II alleges the law’s provisions that purport to preempt cities’ exercise of their proprietary authority over property they own are invalid because they violate cities’ home rule rights under the Florida Constitution. The Florida Constitution grants municipalities broad “governmental, corporate and proprietary” powers. Cities own and control their utility poles in their proprietary capacity as owners of personal property. The Legislature should be prohibited from preempting municipalities’ exercise of their proprietary authority as owners of personal property without there being a specified public purpose.

Count III alleges the law’s classification of utility poles owned or controlled by cities differently than utility poles owned or controlled by the Florida Department of Transportation located in city public rights-of-way for the collocation of small wireless facilities is an arbitrary classification in violation of the Florida Constitution. The Florida Constitution provides that in the enactment of general laws, political subdivisions or other governmental entities are to be classified only on a basis reasonably related to the subject of the law. Utility poles owned and controlled by the FDOT are exempt from the provisions of the wireless law. The different classification and treatment of city-owned utility poles versus FDOT-owned utility poles located in city rights-of-way does not have a basis reasonably related to the purpose of the wireless law.

Count IV alleges the law’s provisions that allow private corporations to use utility poles purchased, installed and maintained by cities with public funds without requiring the payment of appropriate fees violates a Florida Constitutional provision prohibiting a government entity from lending or using its taxing power or credit to aid a corporation or other private entity. By requiring cities to commit substantial taxpayer and public funds to accommodate wireless providers’ collocation of facilities on city-owned utility poles, and prohibiting cities from charging appropriate fees to wireless providers for that privilege, the law effectively requires cities to use taxpayer and public funds and property to subsidize private corporations.

Count V alleges the law’s mandate to allow the collocation of small wireless facilities on city-owned utility poles constitutes an unfunded mandate in violation of the Florida Constitution. Under the law, cities are required to incur substantial expenses to process permit applications and to accommodate wireless providers’ collocation of small wireless facilities on city-owned utility poles, both of which constitute a significant unfunded mandate that was not properly adopted under the Florida Constitution.

Count VI alleges that cities under their police powers have the authority to require a security fund or performance bond by communications providers that place and maintain communication facilities in city rights-of-way. This allegation is based upon various provisions of the Florida Statutes, and not as a violation of a Florida Constitutional provision. Cities have the general right to impose reasonable rules and regulations relating to the placement and maintenance of utilities within their roads or rights-of-way, and the requirement that wireless companies provide a security fund or performance bond as security for their work in the rights-of-way is a reasonable requirement.

Count VII alleges the law's (SB 1000) creation of federal court jurisdiction for actions based on an alleged violation of section 337.401, Florida Statutes, exceeds the Legislature's authority. The Count also alleges the creation of an attorney fees and costs provision (penalty provision) against cities allows the judicial branch to subject cities to financial penalties for exercising discretionary legislative authority (adopting an ordinance) in violation of the separation of powers provision of the Florida Constitution.

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