

LEGISLATIVE IMPLEMENTATION GUIDELINES

HB 2365
**WIRELESS FACILITIES;
RIGHTS-OF-WAY GUIDE**
August, 2017



The HB 2365 Guide, published as a service to the members of the League of Arizona Cities and Towns, does not identify every provision of this new law. It is neither designed nor intended to provide legal advice or counsel. It should be used only as a reference tool and not as a comprehensive guidance document. In certain limited instances, the Guide does highlight action items that should be considered by cities and towns. In no case, however, should the Guide substitute for the independent judgment of your city or town manager or attorney.

Contents

- A. Introduction 4
- B. Effective Dates 5
- C. Key definitions..... 5
- D. Application processes 6
 - 1. Applications that are NOT subject to zoning review: 6
 - 2. Applications subject to zoning review:..... 8
- E. Rates and fees..... 9
- F. Terms and conditions10
- G. Existing agreements11
- H. Frequently asked questions12

A. Introduction

On March 31, 2017 HB 2365 wireless facilities; rights-of-way was signed into law, which allows wireless providers to install and operate small cells and related equipment in city, town and county rights-of-way (ROW) and public easements, excluding deployment in areas outside of the right-of-way, on private easements or on electric distribution poles. Small cells are low-powered wireless base stations that typically provide coverage for targeted indoor or localized outdoor areas ranging in size from homes and offices to stadiums, shopping malls, hospitals and metropolitan outdoor spaces. The installations of this equipment in city and town rights-of-way help wireless carriers add capacity to their networks to provide better access to cell phone coverage and high-speed wireless data services in areas that are not being served by traditional cell sites.

The legislation also allows the wireless provider to construct, install, modify, mount, maintain, operate and replace utility poles that are associated with the collocation of small cells and to construct, install, modify, mount, maintain, operate and replace monopoles¹ that are associated with the collocation of wireless facilities (not just small cells) in the ROW.

While the legislation set the fees for small cells, it is silent on the fees for monopoles. Cities and towns are required to accept and process applications for the installation of new monopoles in the ROW² and to establish and make available rates, fees and terms for such monopoles.³ Siting of monopoles is subject to zoning codes and other regulatory processes governing use of the ROW.⁴ The installation, modification and replacement of monopoles are subject to municipal review regardless of the height of the monopole.⁵

Cities and towns that have already been working with wireless carriers on small cell equipment siting will need to thoroughly review this new law to determine its impact on existing agreements, existing zoning codes and regulatory processes for siting new small cells, monopoles, and utility poles in the ROW.

¹ ARS 9-592(H)(3)

² ARS 9-594(C)(1)

³ ARS 9-592(E)(1)

⁴ ARS 9-594(A)

⁵ ARS 9-592(H)(3)

B. Effective Dates

The effective date of HB 2365 is August 9, 2017. Cities and towns are required to establish and make available rates, fees and terms that are consistent with HB 2365 by February 9, 2018 or three months after receiving the first request by a wireless provider, whichever is later.⁶

C. Key definitions⁷

Applicable Codes: Uniform building, fire, electrical, plumbing or mechanical codes that are adopted by a recognized national code organization or local amendments to those codes that are enacted to address threats of destruction of property or injury to persons.

Authority: Cities and towns

Authority utility pole: a utility pole, excluding a utility pole for electric distribution, that is owned or operated by an authority and that is in a ROW.

Monopole: a wireless support structure that is not more than 40 inches in diameter at the ground level and that has all of the wireless facilities mounted on or inside of the pole.

Small wireless facility (SWF): a wireless facility that meets the following size qualifications of not more than:

1. 6 cubic feet of antennas, enclosed or fits within an imaginary enclosure;
2. 28 cubic feet of wireless equipment; and
3. 50 cubic feet of wireless equipment **only** if it was ground-mounted prior to August 9, 2017.

Equipment not included in size calculation:

1. Electric meters
2. Concealment elements
3. Demarcation boxes
4. Grounding equipment
5. Power transfer switches
6. Cutoff switches
7. Vertical cable runs

⁶ A.R.S. §§ 9-592(E), 9-595(D)

⁷ A.R.S. § 9-591

Utility pole: a pole or similar structure used in whole or part for communications services, electric distribution, lighting or traffic signals.

Wireless facility: Equipment, including small wireless facilities, that enables wireless communications between user equipment and a communications network, including:

1. Equipment associated with wireless communications; and
2. Radio transceivers, antennas, coaxial or fiber-optic cables, regular and backup power supplies and comparable equipment.

Wireless support structure: a freestanding structure, such as a:

1. Monopole;
2. Guyed or self-supporting tower;
3. Sign or billboard; or
4. Any other existing or proposed structure designed to support, or capable of supporting SWFs.

The definition does not include a utility pole.

D. Application processes

1. Applications that are NOT subject to zoning review:

Utility poles

A new, replacement or modified utility pole for SWF collocations installed in the ROW is **NOT** subject to zoning review or approval if it does not exceed the greater of either **(i) 10 feet** above the tallest existing utility pole (excluding utility poles supporting only wireless facilities), that is located within 500 feet of the proposed site for the new, replacement or modified pole if that existing pole was in place prior to August 9, 2017, but the new pole cannot be more than 50 feet above ground level; or **(ii) 40 feet** above ground level. The existing utility pole that is used as the basis for the new, replacement or modified utility pole must be in the same ROW and jurisdictional boundary of the city or town.

If there is no existing verticality, the new, replacement or modified utility pole may not exceed 40 feet above ground level.⁸

Applications are required to be approved unless the utility pole does not comply with⁹:

⁸ A.R.S. § 9-592(I)(1), (2)

⁹ A.R.S. § 9-592(K)

1. Applicable Codes;
2. Code provisions or regulations that concern public safety;
3. Objective design standards;
4. Reasonable stealth and concealment requirements;
5. Undergrounding requirements;
6. Undergrounding requirements that may require a waiver before a new pole or monopole can be installed in the ROW without prior approval. The undergrounding requirements cannot prohibit the replacement of utility poles or monopoles.
7. Contractual requirements between a city or town and a private property owner concerning design standards for utility poles in the ROW; or
8. Reasonable spacing requirements concerning the location of new utility poles in the ROW.

SWFs

Collocations of new small wireless facilities are **NOT** subject to zoning review and approval if they do not exceed 10 feet above the utility pole or wireless support structure (defined as including a monopole if there was an existing one in the ROW) and do not exceed 50 feet above ground level.¹⁰

Applications for a permit to collocate SWFs to utility poles in the ROW, in any zone, are required to be approved unless the application does not meet;

1. Applicable Codes;
2. Code provisions or regulations that concern public safety;
3. Objective design standards for decorative utility poles;
4. Reasonable stealth and concealment requirements; or
5. Reasonable spacing requirements concerning the location of ground-mounted equipment.¹¹

Note: If a city or town determines that the utility pole or wireless support structure must be replaced prior to collocation, the application to collocate may be conditionally approved pending replacement of the utility pole or wireless support structure. Requests for replacement utility poles are to be processed pursuant to A.R.S. § 9-592.

¹⁰ A.R.S. § 9-592(J)

¹¹ A.R.S. § 9-593(F)(4)

Consolidated applications for the collocation of up to 25 SWFs may be submitted by an applicant only if all SWFs included are substantially the same type and involve substantially the same type of structure.¹² SWF collocations may be removed from the application and considered separately if incomplete information was provided, the SWF does not qualify for consolidated treatment or the SWF is subject to a denial.¹³

If a city or town denies an application for not meeting one or more of the requirements listed above, documentation must be submitted to the applicant on or before the date of denial that includes the specific code provisions, regulations or requirements on which the denial was based.

The applicant may resubmit the application to cure the deficiencies that the denial was based on within 30 days after denial. The city or town must approve or deny the resubmitted application within 30 days of receipt with no additional fee charged to the applicant. The review of the resubmitted application is limited to the deficiencies that were cited for the basis or denial.¹⁴

Listed below are the application timelines for small wireless facilities and utility poles and collocations to authority utility poles that are **NOT** subject to zoning review. If a city or town takes no action on the application within the specified time frame, the application is deemed approved.¹⁵

20 days to determine and notify applicant if application is complete
75 days to take action on application
30 days to take action on revised applications

2. Applications subject to zoning review:

The modification of existing or the installation of new monopoles, the installation or collocation of wireless facilities, and the installation of utility poles and SWFs that exceed the heights that are exempt from zoning review are subject to all of the zoning codes, regulations and regulatory processes governing the rights-of-way.¹⁶

¹² A.R.S. § 9-593(D)

¹³ A.R.S. § 9-593(F)(6)

¹⁴ A.R.S. § 9-593(F)(5)

¹⁵ A.R.S. §§ 9-593(F)(2), 9-593(F)(3), 9-595(D)(1) Note: Statute requires applications for collocating to authority utility poles to be processed in the same manner as applications to collocate to utility poles

¹⁶ A.R.S. § 9-594(B)

Cities and towns are permitted to require reasonable appearance and concealment requirements and setback or fall zone requirements for these structures¹⁷ and prohibit, regulate and charge for the collocation of a wireless facility on municipally-owned wireless support structures.¹⁸

The following are the time frames established for processing applications:

30 days to determine and notify applicant if application is complete
150 days to take action on application

Collocation of wireless facilities¹⁹:

30 days to determine and notify applicant if application is complete
90 days to take action on application

Note: The application time period for approval may be tolled to accommodate requests for information or extended by mutual agreement of the applicant and the city or town²⁰.

A city or town may deny an application only if there is a reasonable basis for the denial and the denial is not discriminatory against the applicant with respect to the placement of the facilities of other wireless providers. If an application is denied, the city or town must notify the applicant in writing and provide substantial supporting evidence for the reason for denial.²¹

Rates and fees

Cities and towns are permitted to charge wireless providers a rate or fee for the use of and activities conducted in the ROW. Rates and fees are limited to the direct and actual cost of managing the ROW and may only be charged if other ROW users, such as telecom providers and utilities, are charged ROW use fees and there is legal authority for the fee.²²

The rate or fee charged may not do any of the following:

¹⁷ A.R.S. § 9-594(E)

¹⁸ A.R.S. § 9-595(E)

¹⁹ A.R.S. § 9-594(C)(3)

²⁰ A.R.S. § 9-594(C)(3) Note: Statute allows the time period to be tolled to accommodate timely requests for information or may be extended by mutual agreement of the city or town and the applicant.

²¹ A.R.S. § 9-594(C)(4)

²² A.R.S. § 9-592(C)

1. Result in a double recovery where existing rates, fees or taxes already recover ROW management costs;
2. Be in the form of a franchise or other revenue-based fees;
3. Be unreasonable or discriminatory;
4. Exceed the specified rate caps (see chart below).²³

In addition, rates and fees are capped as follows:

ROW use fee ²⁴	\$50/year x number of SWFs
ROW use fee for monopoles and associated wireless facilities ²⁵	Limited to not more than the direct and actual cost of managing the ROW
Authority utility pole attachment ²⁶	\$50/year

Application for collocating SWFs²⁷:

SWF collocation	\$100 per SWF up to five
	\$50 per additional SWF

Batched applications up to 25 SWFs²⁸:

First five SWFs @ \$100	\$500
Additional 20 sites @ \$50	\$1,000
Total for batch of 25	\$1,500

Utility pole and monopole applications:

New, replacement or modified utility poles NOT subject to zoning review ²⁹	\$750
New, replacement or modified monopoles and utility poles and collocation of wireless facilities subject to zoning review ³⁰	\$1,000

E. Terms and conditions

In addition to the establishment of rates and fees described above, cities and towns are required to establish and make available to wireless providers terms and conditions for the following activities conducted in the ROW:

²³ A.R.S. § 9-592(D)

²⁴ A.R.S. § 9-592(C)(4)

²⁵ A.R.S. § 9-594(D)(5)

²⁶ A.R.S. § 9-595(C)

²⁷ A.R.S. §§ 9-593(I), 9-593(J)

²⁸ A.R.S. § 9-592(D)

²⁹ A.R.S. § 9-592(L)

³⁰ A.R.S. § 9-594(E)(3)

1. Construction, installation, mounting, maintenance, operation or replacement of utility poles and monopoles;
2. Collocation of SWFs;
3. Collocation of wireless facilities on or within a monopole
4. Collocation of SWFs on authority utility poles.³¹

The standard terms and conditions **MAY NOT**:

1. Be unreasonable or discriminatory
2. Require the placement of SWFs on any specific utility pole or category of poles
3. Require multiple antenna systems on a single utility pole
4. Require minimum separation distances for SWFs.

The standard terms and conditions may, however, include requirements that are applicable to other ROW users and require that the operation of SWFs do not interfere with public safety communications.³² The terms must reasonably accommodate power supply and electric metering for the SWF.

The wireless provider may accept the standard terms and conditions or they may negotiate with the city or town for different or additional terms.

The legislation is silent as to whether the time deadlines for granting or denying the application are then tolled while the negotiations are taking place.

Existing agreements

Existing agreements with wireless providers that are in effect on August 9, 2017 will remain in effect subject to applicable termination provisions. Wireless providers may accept the new rates, fees and terms that are consistent with HB 2365 for SWF's and utility poles that are the subject of an application submitted after the rates, fees and terms become effective. .³³

³¹ A.R.S. §§ 9-592(E), 9-595(D)

³² A.R.S. §§ 9-592(F), 9-595(D)

³³ A.R.S. § 9-592(G)

Frequently asked questions

Q. Relocation of wireless equipment?

A. A.R.S. § 9-596(D) requires wireless equipment to be relocated at no cost to the city or town in order to accommodate a public project but does not specify any particular type of project.

Q. Are cities and towns permitted to apply spacing requirements for siting of new utility poles and equipment?

A. A.R.S. § 9-592(K)(4) allows cities and towns to apply “reasonable” spacing requirements to applications for new utility poles in the ROW in addition to “reasonable” spacing for ground-mounted equipment.

Q. Are cities and towns able to reserve space on poles as well as conduit and fiber?

A. A.R.S. § 9-593(G)(1) prohibits cities and towns from requiring applicants to reserve conduit, fiber or pole space on a wireless provider’s pole for the city or town. There is no similar prohibition for municipally-owned poles.

Q. What period of time does the new law provide for wireless providers to operate their equipment in the ROW?

A. Application approval allows the applicant to operate and maintain new, modified or replacement poles³⁴ and SWFs³⁵ for 10 years, subject to applicable relocation requirements and terms and conditions.

Q. Is there a time frame within which the wireless provider must complete construction or installation of the small cell for operational use?

A. Yes. For utility poles³⁶ the construction, installation, mounting, maintenance, modification, operation or replacement for which a permit is granted shall be completed within 180 days after the permit issuance date, unless the city or town and the wireless provider agree to extend the period or a delay is caused by lack of commercial power at the site and for small cells, they must be operational within that time period.³⁷

³⁴ A.R.S. § 9-592(M)(2)

³⁵ A.R.S. § 9-593(H)(3)

³⁶ ARS 9-592(M)

³⁷ ARS 9-593(E) and ARS 9-593(H) (collocations)

Q. What ability does a city or town have to address the radio frequency (RF) emissions from small cells?

A. The city or town may require the applicant to certify that the SWF to be collocated comply with the FCC's regulations concerning RF emissions. Beyond that, there is no basis to deny access to the ROW if compliance is demonstrated.

Q. What does the legislation say with respect to ground equipment?

A. A city or town may adopt reasonable requirements regarding the appearance and concealment of facilities, including those relating to materials used for arranging, screening or landscaping.³⁸ Facilities must be constructed, maintained and located so that they don't obstruct, endanger or hinder the usual travel or public safety on the ROW.³⁹

Q. Who will own the replacement utility pole?

A. The city or town.⁴⁰

³⁸ ARS 9-594(E)(1)

³⁹ ARS 9-598

⁴⁰ ARS 9-595(D)(1)