



# Legislative UPDATE

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## **Senate Business and Commerce Committee Interim Hearing: Small Cells, Lawsuits, the “Free Market,” and TML**

It’s time to clear up what appears to be some confusion about the relationship between cities, TML, and cell providers, which are all focused on small cell technology. Earlier this week, the Senate Business and Commerce Committee held an interim hearing on the following charge: “the Committee will receive an update on the implementation of S.B. 1004, relating to the deployment of network nodes in public right-of-way.”

The witnesses at the hearing consisted of the representatives of the major cell phone providers, city representatives from four large cities, and various others. One overarching principle is clear after the hearing: cities and businesses want better cellular/broadband service. We all want the best technology for educational and businesses opportunities. That’s why the tone of some parts of the hearing was disconcerting.

The committee members’ questions became pointed when they began asking about a lawsuit filed by the City of McAllen, which was joined by around 40 other cities. Senate Bill 1004 requires a city to allow access for cell nodes and related equipment in city rights-of-way, and it also entitles cell companies and others to place equipment on city light poles, traffic poles, street signs, and other facilities. The bill limits cities to a rental fee of \$250 per node, far less than the \$1,500 to \$2,500 companies must pay on the open market.

The lawsuit challenges that unconstitutional cap on a city’s right-of-way rental fee. The low fee is a taxpayer subsidy to the cellular industry because it allows nearly free use of taxpayer-owned rights-of-way and facilities. Put simply, the bill takes the money every city resident pays in taxes and hands it directly to cell phone providers.

Some committee members, and some witnesses, characterized the lawsuit as being only about cities wanting more money. And it's certainly not true, as many committee members alleged, that "TML is leading charge to organize these cities to get more money."

The lawsuit isn't about a "money grab." It is about a mandate in the Texas Constitution that prohibits the legislature from doing what it did with S.B. 1004: giving away taxpayer-owned property to private business without just compensation. The relevant part of the Constitution is very simple:

"[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State...to grant...[any] thing of value in aid of, or to any individual, association or corporation whatsoever..."

The legislature mandating the use of city property for less than fair market value clearly violates the above provision, and the victims are city taxpayers who are forced to subsidize private industry. Think about this analogy: would the legislature mandate that a city allow its parkland to be used by a fast food restaurants for little or no rent? Of course not, and city residents would be appalled by such a mandate, as they should be here. That's why cities are suing, not because the League told them to. Texas cities are smarter and more independent than some in the legislature give them credit for. In fact, the mayor of the City of McAllen penned a letter to one of the witnesses explaining why the city filed the lawsuit, and pointing out that – contrary to some industry claims – nothing in the bill will help deploy broadband to underserved areas. The [letter](#) is well worth reading.

City officials who are concerned about their taxpayers subsidizing the cellular industry may wish to join the coalition of cities that aims to stop the practice. Those who are interested should contact Kevin Pagan, city attorney for McAllen, at [kpagan@mcallen.net](mailto:kpagan@mcallen.net) or 956-681-1090.

## **Building Permits in the ETJ Part IV:** **No Home Rule Authority**

"The City lacks authority to require a landowner developing property in its [extraterritorial jurisdiction] to obtain City building permits, inspections and approvals, and pay related fees." This is a quote from the just-released Dallas Court of Appeals opinion in *Collin County v. City of McKinney v. Custer Storage Center*.

A Collin County district court previously held that a home rule city can enforce building codes and require building permits in its extraterritorial jurisdiction (ETJ). Specifically, the district judge entered an order declaring that an ETJ subdivision agreement ceding the county's subdivision authority to the city also grants building code and permitting authority to the city, but only for property that is subdivided.

The case arose when the developer of a self-storage facility in the city's ETJ refused to obtain building permits or pay fees to the city. As part of that dispute, the developer argued that it had already obtained the appropriate permits from the county.

The city contended that the statutorily-required ETJ subdivision agreement with the county controls the dispute. The agreement granted the city "exclusive authority to review and approve plats and 'related permits' for conformance with the city's subdivision ordinance and related development ordinances" in the ETJ. The trial court agreed with the city.

Overturning the trial court, the appeals court concluded that any city – including a home rule city – must have statutory authorization to enforce ordinances in its ETJ:

Based on the Texas Supreme Court's opinion in *Bizios* [which concluded that general law cities may not require building permits in their ETJs], opinions from our sister courts, and relevant provisions of the local government code, we conclude every municipality, including a home-rule municipality, requires legislative authorization to enforce building codes beyond its corporate limits. We have not found any legislative authorization giving the City the power it seeks to exercise, and the City does not cite any in its brief. Therefore, we conclude the City lacks authority to require a landowner developing property in its ETJ to obtain City building permits, inspections and approvals, and pay related fees.

There is no word yet on whether the city will appeal to the Texas Supreme Court. One good portion of the opinion confirms the authority of a city to require a landowner to file a plat in its ETJ, subject to contrary provisions in its ETJ subdivision agreement with the county.

## **Texas Water Development Board:** **Flood Protection Planning Grants**

The Texas Water Development Board (TWDB) has posted a request for applications (RFA) for \$1.8 million in grants for flood protection planning, flood early warning systems, and flood response strategies.

All political subdivisions in Texas with the authority to plan for and implement projects related to flood protection are eligible to apply. Applications will be accepted until 2:00 p.m. on July 11, 2018. The TWDB anticipates announcing the recipients in September 2018. The full RFA is available on the [TWDB's website](#).

For additional information, please contact Ivan Ortiz at 512-463-8184 or [Ivan.Ortiz@twdb.texas.gov](mailto:Ivan.Ortiz@twdb.texas.gov).

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