Summary of SB1188/HB1767 Wireless Facilities – Permitting and Siting
Local Government Article 15 – New Subtitle 15. Wireless Facilities

The Chairmen of the Senate Finance Committee and House Economic Matters Committees have introduced SB1188 and HB1767, to significantly reduce and prohibit local government review and permitting authority over deployment of wireless service facilities. SB1188 has been referred to the ***Senate Finance Committee*** *(see members at end of document).* ***A public hearing is scheduled for Tuesday March 20, 2018, at 1 pm, in the Finance Committee Room in the Miller Senate Office Building.*** *Witnesses must sign up at least 30 minutes in advance, and 25 copies of written testimony must be provided no later than noon on March 20. HB1767 has not yet been assigned to a specific House Committee. Both the Senate and House versions are identical. Citations to specific sections of SB1188 are provided below.*

SB1188 and HB1767:

- *Do not require better wireless service in rural, underserved or unserved areas.*
- *Prohibits most local zoning review or approval of wireless facilities for poles up to 50 feet tall, antennas up to 6 cubic feet in volume, and equipment up to 28 cubic feet in volume.*
- *Impose the most prohibitions on local zoning in single family residential areas, more than on roads or commercial areas, including prohibiting requiring information to demonstrate need for new poles.*
- *The Bills require local governments to allow wireless providers to attach equipment to local government poles and property at below market rates, and prohibits requiring public wifi, fiber, or conduit in return, even for use of property owned by the local government.*
- *Local taxpayers, businesses and residents would have to pay more for standard building and electrical permits than national communications companies that do not have to serve the entire community.*

SB1188/HB1767 – Section by Section Summary

SB1188/HB1767 creates a new Wireless Facilities Subtitle in the Local Government Article of the Maryland State Code. SB1188/HB1767 creates new numbered, but untitled sub-articles; titles are added to the summary to aid interpretation. Boxes and fonts enhancements are for emphasis.

Article – Local Government
Subtitle 15. Wireless Facilities

1–1501 – Definitions. Notably:

Antennas and Equipment

- (k) "Wireless facility" means antennas and equipment but not structures holding the antenna or equipment
- (i) "Small wireless facility" means a wireless facility with an antenna in an enclosure up to 6 cubic feet in volume with additional equipment that is up to 28 cubic feet, not including an enclosure (*i.e.*, covers for the antennas), wiring, and power meters.
- (h) "Micro wireless facility" means a small wireless facility that is 24 inches long, 15 inches wide and 12 inches high that has an exterior antenna not more than 11 inches long

Poles, Buildings and Structures

- (n) "Wireless support structure" seemingly means large structures designed or capable of supporting wireless facilities, but not poles, nor structures designed solely for collocation small wireless facilities. Wireless support structures are likely buildings and traditional tall cell towers.
- (d) "Decorative pole" means a pole owned by local government and likely means traffic and street signs, but might or might not mean streetlights and traffic lights.[1]
- (c) "Collocate" means installing, modifying, or replacing a wireless facility on or adjacent to a wireless support structure or pole.

People and Companies

- (l) "Wireless infrastructure providers" are the companies that build or install equipment for wireless service.
- (m) "Wireless providers" are the companies that provide wireless services.
- (e-g) The bill includes local governments and the poles and support structures they own, but not the same owned by the State or commercial companies. This likely means that public school properties are not affected by SB1188/HB1767, as public schools are legally State not local government entities.

[1] It is difficult to interpret this definition. "'Decorative pole' means a local government pole that is specifically designed for aesthetic purposes and on which no attachments are places or allowed to be placed…other than (1) a small wireless facility; (2) specially designed informational or directional signage; or (3) a temporary holiday or special event attachment." "'Local government pole' means a pole that is owned, managed, or operated by, or on behalf of a local government." Streetlight poles are designed to provide light for public safety purposes, and street signs are designed to identify roads – both may or may not have an aesthetic purpose. Small wireless facilities could be allowed or prohibited on either decorative poles or local governments poles.

Other

- (j) "Substantial modification" is defined as the FCC has interpreted it: 10 foot increase in height or 10% (whichever is greater) and 6 foot increase in width for towers in the right-of way; 20 foot increase or 10% (whichever is greater) in height, and 20 foot increase or the width of the structure (whichever is greater) in width for towers located outside of the right-of-way.

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1–1502 – Cable Providers

- The bill is not intended to change requirements for cable service providers to comply with federal cable requirements, nor to impose new requirements "on cable providers for the provision of cable service." Arguably, when cable providers deploy wifi antennas to provide wireless services, SB1188/HB1767's requirements would apply.

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1–1503 – Small Wireless Facilities and Poles in the Rights-of-Way

- Wireless providers can install small wireless facilities (6 cu. ft. antennas, 28 cu. ft. of equipment, plus equipment enclosures, meters and wiring) in the rights-of-way by right and are "**not subject to local zoning review or approval**." SB1188/HB1767 specifically states that adding more antennas, installing new poles, replacing poles, and modification or maintenance in rights-of-way are not subject to local approval. 1-1503(d)(3).

- Poles would include any new or modified pole **50 feet in height**, or **10 feet taller than the nearest existing pole** located in the right-of-way within 500 feet of the new or modified pole. 1-1503(e). Local government can authorize taller poles (but not limit to shorter ones. Existing poles are measures as of October 1, 2018.

- A local government must authorize replacement of decorative poles (i.e., streetlight and street sign poles) to support antenna and equipment attachments if the replacement reasonable conforms to the design of the pole being replaced. This would apply in areas with underground utilities.

- Local government can prohibit tall cell towers in areas underground utility requirements only if a waiver process is created to allow streetlights and street signs to be replaced with 50 foot poles and a waiver process for installation of new 50 foot poles with 6 cu. ft. antennas and 28 cu. ft. of equipment, plus enclosures, wiring, and power meters. 1-1503(g).

- Technically feasible, technologically neutral design or concealment requirements are permitted in a designated historic district, so long as they do not have the effect of prohibiting "any wireless provider's technology" and the concealment does not count toward the size limitation of antennas or equipment. 1-1503(h).

- Local government can require rights-of-way to be restored. SB1188/HB1767 is silent about requiring graffiti to be removed or damage to poles repaired.

- Local government may not enter into exclusive contracts and any fees collected are limited to what is allow under section 1-1508.

  Note: Many local governments have used competitive procurement processes to select a single vendor to provide pole maintenance and installation. SB1188/HB1767 states: "a local government may not enter into an exclusive agreement for … the installation of poles … maintenance, or replacement of poles associated with a small wireless facility." If a local government replaces a streetlight to install a structure that can support a small wireless facility, or performs maintenance on the replaced structure, it is unclear whether use of the single competitively selected vendor would be permitted under SB1188/HB1767.

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1–1504 – Small Wireless Facilities and Poles in the Rights-of-Way, and on Property Not in Single Family Residential Use Zones

Note: This section combines when local governments act as regulators to require permits to ensure compliance with applicable codes, and when local governments act as property owns to seek compensation for use of public property. Federal law specifically distinguished between the two in 2015, creating restrictions when a local government acts as a regulator, but not when it acts a property owner.

- Collocation of 6 cu. ft. antennas and 28 cu. ft. of equipment, plus enclosures, wiring, and power meters, is not subject to local zoning review or approval in rights-of-way or on property outside of single family residential use zones. 1-1504(c).

Permit Requirements 1–1504(e, f, j, l).

- A permit may be required but may not:
  - Require fiber, conduit, or pole space for the local government.
  - Require antennas and equipment to be placed on a specific pole or category of poles or to have multiple antennas on a single pole.
  - Requirement a certain minimum distance apart in order to limit the placement of antennas and equipment.
  - Be required for maintenance or replacement of small wireless facilities (6 ft. antennas and 28 cu. ft. of equipment)
  - Be required to collocate micro wireless facilities (24 in. x 15 in. x 12in. antennas and equipment with an 11 in. external antenna) strung on cables between existing poles.
- The permit must allow installation or collocation, and operations and maintenance, of antennas and equipment on a pole for 10 years with an option to renew at the applicant's discretion.
- A permit may require:
  - Construction and engineering drawing to enforce safety codes and Americans With Disabilities (ADA) act and pedestrian access laws.
  - Spacing of ground-mounted equipment and new poles is permitted as long as these "requirements do not prevent a wireless provider from serving any location."

Permit Applications Review Time Limits and Fees 1–1504(g & h).

- Local governments can require permit applications to attest that the small wireless facility will be operational for use within one year, unless the delay is caused by lack of power or "communications transport facilities" (which could mean there is no fiber or wireless connection to the pole), or an extension is granted by mutual agreement.
- Local governments must review applications and act on them within 60 days or they are deemed complete. Local government have 10 days to notify the applicant of what is missing in incomplete applications. If denied, applicants get 30 days to revise the application and resubmit, no additional fee may be charged for resubmission, and the local government must approve or deny the revised application in 30 days.
- **An applicant can file a single application for an unlimited number of facilities to be collocated within the local government jurisdiction.** Denial of one collocation in an application with many collocations cannot delay processing of the other collocations in the application.

Grounds to Deny Permits 1–1504(i)

- Permits may only be denied for safety code reasons (i.e., traffic, pedestrian, or transit safety, ADA non-compliance, or building and similar code reasons).

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1–1505 – Work Outside of the Right-of-Way on Property in Single Family Residential Use Zones

Note: This section combines zoning requirements with permitting requirements. Zoning typically reflects policy choices about what is a compatible community use, whereas permitting is the means to enforce zoning and safety code requirements.

- **Collocation or replacement of wireless facilities, wireless support structures, or poles that are not substantial modifications** (i.e., antennas 6 cu. ft., equipment 28 cu. ft., buildings and traditional cell tower, and "poles" (which is an undefined term) that are not increased in height by the greater of 20 ft. or 10% of the structure height, or increased in width by the greater of 20 ft. or the width of the structure), **is permitted by right and is not subject to zoning review or approval**. 1-1505(c).
- Seemingly, zoning review could be required for new structures that are not poles, wireless support structures designed for small wireless facilities (which could be interpreted as poles greater than 50 ft., buildings or traditional cell towers) **in single family use residential zones, but not in apartment, mixed-used, commercial or industrial zones**.
  - Permits may require reasonable screening and landscaping, and set back or fall zone requirements similar to those for "commercial structures of a similar height."
  - **Permits may not consider or require information about the application's business decision regarding the type, location, or need for pole, wireless support structure, or wireless facilities** (*i.e.*, poles, towers, antennas or equipment). 1-1505(d).

Permit Applications Review Time Limits and Fees 1–1505(f, h, i).

- Local governments must review applications and act on them within 150 days for new wireless support structures, and 90 days for installation, modification, or replacement of poles or wireless facilities or for substantial modifications, or they are deemed approved (*i.e.*, applications for new towers must be acted upon within 150 days, and applications for antennas and equipment that are bigger than 6 cu. ft. and 28 cu. ft. respectively, poles greater than 50 ft. tall, and antennas and equipment changes greater than 20 ft. height and width increases, have to be acted upon within 90 days, or they are preemptively permitted). These time limits are the same as under federal law, but under federal law the remedy is the applicant can sue in court for enforcement, not preempt permitting.
- Local government have 30 days to notify the application of what is missing in incomplete applications.
- Local governments can require permit applications to "begin construction within 2 years… and to diligently pursue the project to completion" unless the delay is caused by lack of power or "communications transport facilities" (which could mean there is no fiber or wireless connection to the pole) or an extension is granted by mutual agreement.
- Local government can require rights-of-way to be restored. SB1188/HB1767 is silent about requiring graffiti to be removed or damage to poles repaired.

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1–1506 – Collocation on Local Government Property Outside of the Rights-of-Way

- **Local government must authorize anyone who gets a permit under 1-1504 to collocate small wireless facilities on local government poles 50 feet or shorter (outside of the right of way).** These might be flag poles or outdoor field lights. Arguably, this requires local government to allow 6 cu. ft. antennas and 28 cu. ft. of equipment on any pole shorter than 50 feet located on government property outside of the right-of-way, if the application has received any permit to place antennas and equipment in the right-of-way, or on property outside of single family residential use zones. 1-1506(b).
- If a local government allows the use of 50 ft. or taller buildings or towers owned by the local government "for any commercial projects or uses," then 6 cu. ft. antennas and 28 cu. ft. of equipment must be authorized "to the same extent that the commercial projects or uses are authorized." Arguably, this might mean if one antenna is allowed, all antennas must be allowed. But it might be interpreted as if the local government owns a building and leases it to commercial providers (for example a coffee shop in a municipal building, or solar power panels), then antennas must be allowed on the building. It's unclear, if the local government allows antennas for public safety communications, must antennas be allowed for other commercial purposes. 1-1506(c).
- Non-discriminatory fees may be charged, taking into account differences in equipment and the structural limitations.

- Exclusive agreements with wireless provider are not permitted unless the wireless provider is allowing access to other wireless providers. Arguably, this would allow a local government to have an exclusive license with a wireless infrastructure provider that also is a wireless provider (e.g., Crown Castle owns infrastructure and is licensed to provide wireless service, but leases space on its infrastructure to other wireless providers.)

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1–1507 – Local Government Poles in the Rights-of-Way

Note: This section states that it applies to "activities of a wireless provider in a right-of-way" but most of the language address "local government poles." It may be intended to apply to municipal electric utility poles, but is written to apply to any pole owned or managed by a local government.

- Local government must authorize collocation of small wireless facilities on local governments poles in accordance with 1-1504. This means:
  - **6 cu. ft. antennas and 28 cu. ft. of equipment plus enclosures, wiring and power meters must be allowed on any pole owned by local government and are not subject to local zoning review or approval in rights-of-way or on property outside of single family residential use zones** and permits may not be required for maintenance.
  - **Permits may not require conduit, fiber or space for the local government *on the local government's own pole*.**
  - **The local government cannot restrict use of any specific pole or category of poles owned by local government, set minimum distances to limit placement or concentration of antennas and equipment on poles, or require multiple antennas on a single pole.**
  - Arguably, if the local government owns an electric utility and poles, it cannot prevent nor require a permit to attach 24 in. x 15 in. x 12 in. antennas and equipment with an 11 in. external antenna to be strung on cables between existing poles.
  - The local government must allow installation, collocation, operation, and not require any permits for maintenance, for a period of 10 years, which can be renewed at the applicant's discretion.
  - **Applicants can file to use all the pole they want in a single application, the local government must be act on the application within 60 days or it is deemed granted, and local government can only deny applications for safety and ADA reasons.**
- Within 60 days of receiving an application to use a local government pole, the local government must provide an estimate to complete "make-ready work," e.g., replacing the pole with a taller or stronger pole to allow new equipment to be safety installed, and 60 days after delivering the estimate to the applicant, the local government must complete the make-ready work.
  - This section may also violate the holding of *Chesapeake & Potomac Tel. Co. of Maryland v. Maryland/Delaware Cable Television Ass'n, Inc.*, 310 Md. 553, 530 A.2d 734 (1987) which found that the State of Maryland had not met the prerequisites of the reverse preemption terms of 47 U.S.C. 224 (c), to regulate pole attachments

- Under federal pole attachment rules (which apply in Maryland), the applicant must notify the pole owner that it wants the make-ready work done *and pay the make-ready cost estimate before the work is done*. **SB1188/HB1767 requires make ready work to be done without the applicant agreeing that the make work should be done or providing advance payment.** In addition, non-government poles owner, such as Verizon, AT&T, PEPCO, BG&E, and First Energy, can require make ready work payments before completing make ready work, but local government pole owners may not.
- Make-ready costs may not include any consultant fee or expenses. It is not clear whether this would prohibit a local government from using a management contract to lease local government poles or structures on government property, or use contracts to perform make ready work.

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1–1508 – Fee for Use of Rights-of-Way or Local Government Poles

- Permit fees under this subtitle must be similar to those charges for other commercial construction or development, and if "the costs recovered by the application fee are not also recovered by existing fees, rates, licenses, or taxes paid by the applicant."
  - Permit fees are already limited to cost under Maryland case law. *Eastern Diversified Properties, Inc. v. Montgomery County, Md,* 319 Md. 45, 570 A.2d 850 (1990). What is not clear is if a communications company pays any taxes for the privilege of doing business in the State or local jurisdiction, would SB1188/HB1767 be interpreted to prohibit collect of cost-based permit fees?
- Permit fees cannot include travel expenses incurred by a third-party or contingency-based fees. It is unclear whether rural local government would be prohibited from recovering the cost to pay consultants to travel from out of the jurisdiction to review wireless permit applications, or applications to attach antennas and equipment to local government poles or property.
- Permit fees are limited to cost, but are further capped regardless of whether the actual cost is more than the cap limit.
  - Collocations permit fees may not exceed $100 for the first five wireless facilities on an application, and $50 for each subsequent application, and there is no limit to the number of facilities that can be included in a single application. **Local governments may not recover actual costs and are required to subsidize wireless provider and infrastructure permits.** Moreover, urban jurisdiction must subsidize permits where providers want to build, and rural jurisdictions have not authority to require build out in underserved and unserved areas.
  - Right-of-way fees for pole installations or modifications, and the associated collocation of small wireless facilities for permitted uses (under Section 1-1503, *i.e.*, any pole less than 50 feet tall in the right-of-way) is limited to $250 per pole to permanently occupy the right-of-way.
  - The rate to occupy the right-of-way or to collocate on a local government pole is $20 per year per small wireless facility. **The rate to occupy the right-of-way in downtown Baltimore is the same as the right-of-way on the most rural road in Maryland.**

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1–1509 – Time Limit for District Court Adjudication

- District courts are required to adjudicate cases arising from disputes under this subtitle within 180 days. In a rate dispute, the rate is $20 per year, until the case is resolved.

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1–1510 – Indemnification, Insurance, and Surety Bond Restrictions on Local Governments

- Local government may not require "a wireless provider" to indemnify and hold harmless the local government, except for negligence.

- Insurance requirements for "wireless providers" must be reasonable and nondiscriminatory, but may not require "the insurance coverage of a wireless provider to name the local government, its officials, or employees as additional insureds."

- Surety bond requirements for "wireless providers collocating small wireless facilities" is permitted to provide for removal of abandoned or improperly maintained small wireless facilities, or to recover fees not paid for 12 months, but may not exceed $200 for each small wireless facility, up to a maximum of $10,000 total for all small wireless facilities in the jurisdiction.

- SB1188/HB1767 indemnity, insurance, and surety bond requirements seemingly do not apply to "wireless infrastructure providers" or to wireless facilities that are larger than "small wireless facilities."

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1–1511 – Other Restriction of Local Government Regulatory Authority

- If the local government does not enact a statute that complies with SB1188/HB1767, then a wireless provider can install and operate small wireless facilities in accordance with this subtitle.

- This subtitle prevails over local law in the event of conflict.

- "A local government does not have any authority over the design, engineering, construction, installation, or operation of a small wireless facility that is not located on property owned or controlled by the local government." Arguably, this includes any 6 cu. ft. antenna and associated 28 cu. ft. equipment on utility poles, private buildings, or private property in any zone.

- "Nothing in this subtitle authorizes the State or local government to: (1) require wireless facility deployment; or (2) regulate wireless services.

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