CUNNINGHAM, VOGEL & ROST, P.C.

legal counselors to local government

Municipal Issue Report

Report No. 2018-03 October 2018

Statewide Prepaid Wireless Emergency Telephone Services Charge Will Go Into Effect January 2019, Unless Cities Opt Out – Section 190.460 RSMo., passed by the legislature this past year, imposes a statewide service charge of 3% on all prepaid wireless phones and retail purchases. The revenue raised from this prepaid wireless emergency telephone service charge will be deposited in the Department of Revenue's general fund and the Missouri 911 Service Trust Fund. The Missouri 911 Service Board will then set rates at which to remit the funds from this account back to the counties and affected cities. The statute specifies the rates to be remitted to counties and the City of St. Louis. However, the statute is not expressed as to what, if any, portion of the funds will be remitted back to other cities. Any funds that cities and counties do receive from the board must be used only for reimbursing expenditures actually incurred in the implementation and operation of the Missouri 911 systems and for the answering and dispatching of emergency calls.

The charge will automatically go into effect on January 1, 2019 statewide, unless a city or county opts out. The statute directs the Missouri 911 Service Board to notify all cities in the state that they may opt out of this charge. Accordingly, many cities may have recently received such a notice. If a city desires to opt out of this charge, the city must adopt an ordinance or resolution by at least a two-thirds vote prohibiting the charge. Ordinances or resolutions opting out must be adopted at least forty-five days prior to the effective date—no later than Friday, November 16, 2018.

Cities and counties that opt out will not be eligible to obtain any funds from the Missouri 911 Service Trust Fund remitted to the fund under this charge. This law currently provides that it will expire in January 2023.

Changes in Missouri Telecom and Rights-of-Way Laws May Require Action; Linear Foot Fees for Grandfathered Cities Still Enforceable – There have been various changes in the past few legislative sessions relating to cities' ability to manage and zone their rights-of-way, particularly relating to telecom and wireless uses, and recent Federal Communications Commission ("FCC") rules and actions. The most recently adopted **FCC Rule** (adopted September 26, 2018) adds another layer of complexity to an already complex set of laws and regulations governing wireless facilities, as has previous been discussed and provided.

The most recent Missouri law (H.B. 1991, the "Uniform Small Wireless Facility Deployment Act") has provisions that went into effect August 28, 2018 and other provisions going into effect January 1, 2019, and therefore review of your practices and ordinances is required to comply with the law and also to seek to preserve public safety and control, to the extent still available. See previous information regarding specific considerations, timelines, and legal constraints relating to the Uniform Small Wireless Facility Deployment Act.

However, it is important to note that while changes and limits on compensation requirements for small wireless facilities in the rights-of-way in the new law exist, **it does not affect or limit the applicability of grandfathered cities' linear foot fees for fiber optic or other linear facilities placed in grandfathered cities' rights-of-way**. To be classified as "grandfathered," a city must have passed an ordinance reflecting a policy of imposing a linear foot fee for use of the rights-of-way prior to May 1, 2001 and otherwise comply with § 67.1846 RSMo. Such ordinance could be a specific franchise, code provision, or contract approved by ordinance imposing a linear foot fee. If such fee existed, the city is "grandfathered" and may continue to charge that fee, or even an updated or revised linear foot fee rate as provided by ordinance.

Payment of compensation to "grandfathered" cities has been enforced in cases such as *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007) (Linear foot fee agreements enforced) and *Aurora, et al. v. Spectra Communications Group, LLC, et al.*, 12SL-CC02896 (St. Louis Cnty. Cir. Ct.) (Linear foot fees upheld against legal challenge), *appeal pending in the Missouri Supreme Court*. Linear foot rates in Missouri have been applied over the last decades in numerous cities at rates generally ranging from $1.90 to $2.79/ft/year, and significantly higher in other parts of the country. It should be noted that the rate of $1.92/ft/year was contained in a model ordinance prepared by two consortia consisting of nearly 80 local governments in 2000 and 2001 as part of a Mid-America Regional Council and the Municipal League of Metro St. Louis. Accordingly, cities that adopted the model rights-of-way code from these consortia prior to May 1, 2001, would likely by that act alone have become "grandfathered" cities.

Given the magnitude of reduced fees and taxes from telecommunication users in cities over the last decade, potential compensation owed to grandfathered cities relating to linear foot facilities should be carefully examined to ensure that companies are not evading or failing to pay required fees or that your city is aware of its rights relating to such fees, which may range from thousands of dollars to hundreds of thousands of dollars per year in some circumstances. If you have any questions about these matters, or if you need assistance in determining if your city is a grandfathered city, please contact your city Attorney or Dan Vogel or Joe Bond at dan@municipalfirm.com and joe@municipalfirm.com, respectively.

Newspaper Article Triggers Statute of Limitations for Sunshine Law Violations in Case Against County Commission – The Missouri Court of Appeals, in *Missouri Landowners Alliance et al., v. Grain Belt Express Clean Line LLC, et al.,* threw out claims against the Monroe County Commission for various violations of the Sunshine Law because they were untimely. Sunshine law, § 610.027.5 RSMo., provides that claims for sunshine violations must be brought in court within one year from the time the violation was capable of discovery. That section also states that claims cannot be brought more than two years after the violation. In July 2014, Missouri Landowners Alliance ("MO Landowners") brought suit against the County Commission for Sunshine Law violations. MO Landowners complained that a matter requiring approval from the Commission, a proposed grain transmission line that would cross county roads, was not included on the meeting agenda for a July 2012 meeting, and that the minutes for that meeting did not contain the vote by the Commission approving Grain Belt's proposed transmission line. The meeting minutes were published in a local newspaper one month after the alleged violations, in August 2012. The court held that a reasonable person would have been put on notice of the Commission's Sunshine Law violations at the time the minutes were published in the newspaper. Therefore, the statute of limitations began to run in August 2012, and MO Landowners' suit was brought too late.

Legal Challenge to City's Zoning Code Light Restrictions Thrown Out – The United States District Court for the Eastern District of Missouri recently dismissed a lawsuit brought by a private, Catholic boys' high school against a city, alleging that the city had violated the school's rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by prohibiting certain lights on the school's sporting fields. *See Marianist Province of the United States v. City of Kirkwood*, No. 4:17-CV-805 RLW, (E.D. Mo. Sept. 7, 2018). In 2012, the city revised its zoning code to limit the height and light cast-off restrictions for all pole-mounted lighting fixtures on outdoor sports fields. In 2014, the school decided to renovate its sports fields and wanted to install pole lights that were in violation of the amended zoning code. The school applied for a variance, and the city mistakenly told the school that a variance was not required, believing that there were pre-existing non-conforming lights on the field. The school proceeded to install the lights and an accompanying sound system. After several complaints from neighbors about the lights and noise, the city informed the school that it was not permitted to use the lights. When the school again requested a variance, the city denied it. The school sued the city, alleging that the city's prohibition on the school's lights was a substantial burden on the school's religious exercise. The court rejected this claim, holding that the school failed to establish that the use of lights on its athletic field was a "religious exercise," and that the school failed to establish any substantial burden because the school could still use its fields during daylight hours. The court recognized that the city has a compelling interest in protecting the health and safety of the community, including through enforcing its zoning code. The court also held that although the City Planner had stated that the school did not need a variance, the city would not be bound by that incorrect statement of the law because "estoppel" does not apply to acts of government, and a city is not bound by illegal or unauthorized acts of its officers.

Presentations by CVR Attorneys – The following recent and upcoming educational presentations and resources from CVR attorneys are available for your review:

- *Regulating Commercial Uses or Violating Free Speech? Your Ordinances Under First Amendment Scrutiny* (Municipal Officials Training Academy) - John Hessel of LewisRice and Paul Rost

UPCOMING:

- November 14 - *Legalities of Planning and Zoning* (Chancellor's Certificate Program - UMSL) - Dan Vogel
- November 29 - *Sovereign Immunity* (Municipal Officials Training Academy) - David Streubel and Maggie Eveker

Feedback – Your comments are greatly appreciated. If you have suggestions for improving these Municipal Issue Reports, please let us know at the contacts below.

Upcoming Dates & Deadlines for Missouri Municipalities*

Mid November - TIF Annual Reports due to DOR. Penalty for failing to file report is loss of ability to implement new TIFs for 5 years.

Early December - Publish newspaper notice of opening filing date for municipal office, the offices to be filled, the proper place for filing, and the closing filing date of the election.

*This list is not exhaustive. For the complete **Calendar of Procedural Deadlines for Missouri Municipalities,** click below:

Jan. 1–Dec. 31 Fiscal Year

July 1–June 30 Fiscal Year

Also see CVR's ***Annual Requirements for Missouri Municipal Special Purpose Entities***

Municipal Links

Missouri Municipal League

Municipal League of Metro St. Louis

Mid-America Regional Council (KC Area)

East-West Gateway Council of Governments

For more, visit CVR's Resources Page

If you need further assistance on any of these matters, please consult your City Attorney or Legal Department for particularized guidance or contact us at:

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