

LEGAL REVIEW NOTE

Bill No.: HB 496

LC#: LC1914, To Legal Review Copy, as of
January 29, 2019

Short Title: Revise telecommunication siting laws

Attorney Reviewer: Todd Everts

Date: February 10, 2019

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

LC1914, as drafted, may raise potential federal constitutional issues related to the Supremacy Clause under the United States Constitution, Art. VI, cl. 2, which provides that the Constitution, federal laws passed pursuant to the Constitution and treaties made under the Constitution's authority, constitute the supreme law of the land. Under the Supremacy Clause, if a conflict between state law and federal law exists, federal law prevails. California v. ARC America Corp., 490 U.S. 93 (1989).

With the enactment of the Telecommunications Act of 1996, Congress intended to remove all the barriers to entry in terms of locating and siting cellular transmission tower facilities. Section 253 of the Act states:

"[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." § 253(a), 110 Stat. 70 (to be codified at 47 U.S.C. § 253(a)).

As stated in the legislative history of section 253, this section is:

"intended to remove all barriers to entry in the provision of telecommunication services. [This new section] preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services." H.R. Conf. Rep. No. 104458, at 126 (1996), reprinted in 1996 U.S.C.C.A.N. 138.

Section 704 (a)(7)(B)(iv) of the Telecommunications Act of 1996 specifically provides that:

No State or local government or instrumentally thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such admissions.

LC1914 as drafted, restricts the siting of small cell network equipment near schools and provides that a municipal and county government may develop standards for wireless service infrastructure siting. Related local government restrictions have been held to be preempted in the federal courts (*BellSouth Mobility v. Gwinnett County, Georgia*, 944 F.Supp. 923 (N.D. Ga. 1996)). As such, LC1914 may raise potential constitutional conformity issues with the Supremacy Clause of the United States Constitution.

Requester Comments: