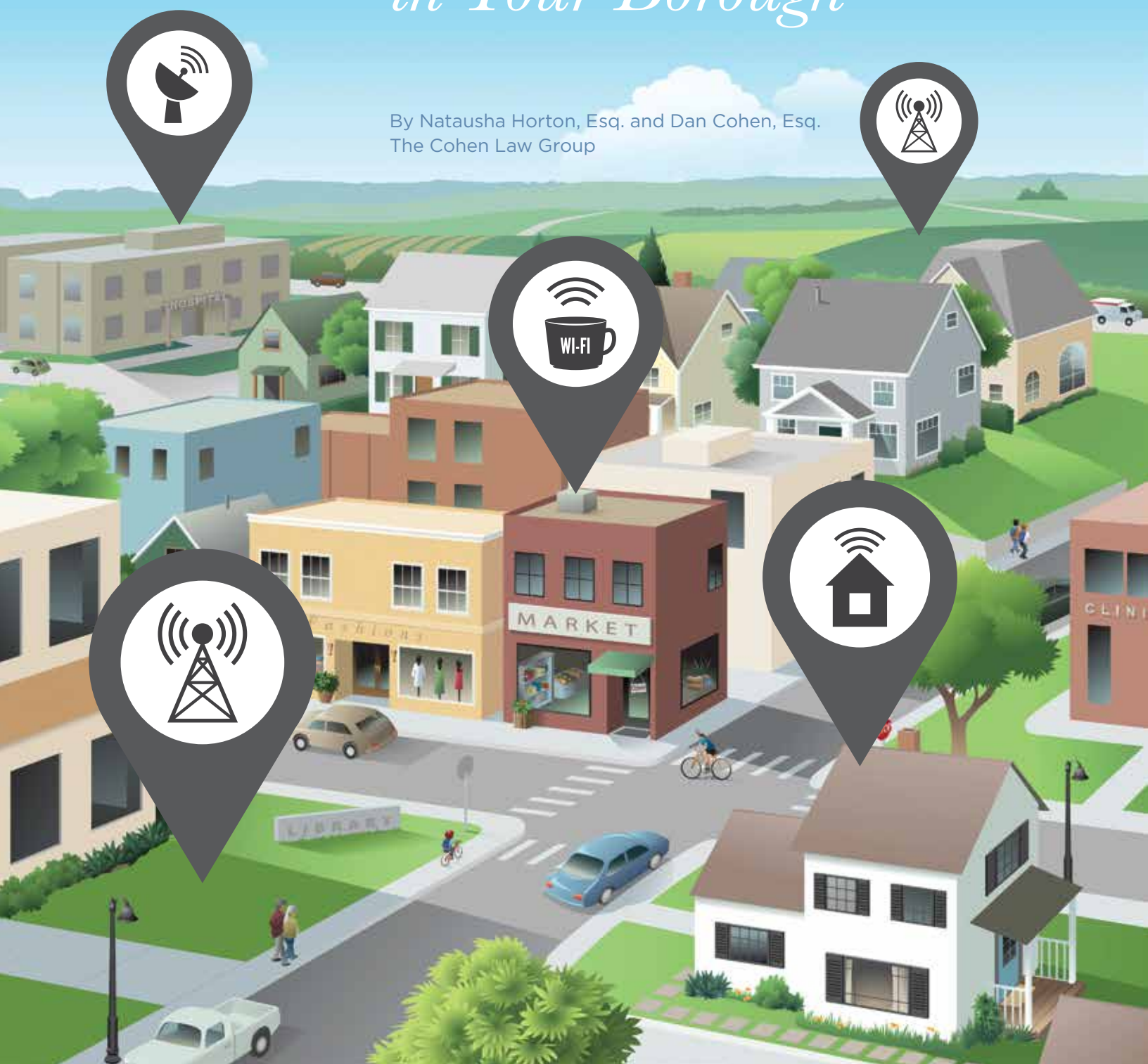


# *How to Manage* **WIRELESS FACILITIES** *in Your Borough*

By Natausha Horton, Esq. and Dan Cohen, Esq.  
The Cohen Law Group



By now the average Pennsylvanian has likely encountered wireless communications facilities in one form or another, whether by noticing one of the many lattice towers peppered along the PA Turnpike, spotting an antenna on a rooftop on Main Street, or wondering about the new mini-cell tower placed along a street in your borough.

Wireless facilities are popping up in virtually every municipality across the Commonwealth and are growing in number every year. Sometimes it seems as if your municipality has become a virtual “pin cushion” for wireless towers and antennas.

The reason for this explosion of wireless facilities is simple – the

demand for wireless broadband service has nearly doubled every year over the past several years. As communications technology companies, such as Apple and Google, create new applications for smartphones and tablets, consumers need more and more bandwidth to use them.

To accommodate this need, the four major wireless carriers – Sprint, Verizon, AT&T, and T-Mobile – have employed wireless contractors to erect as many wireless facilities as necessary to satisfy their bandwidth needs.

Demanding a quick approval process – sometimes referred to as “speed to market” – these wireless contractors have begun to locate wireless facilities – both mini-cell towers and antennas – in the public rights-of-way.

The result is that many municipalities have experienced a surge in applications for these facilities. However, unlike applications for traditional cell towers which have always been processed through zoning, wireless contractors obtain utility status from the Public Utility Commission (PUC) and then cast their requests as “right-of-way applications,” under streets and sidewalks ordinances.

These applications place your borough on the horns of a dilemma. On the one hand, wireless facilities have traditionally been addressed through the zoning code. On the other hand, these new facilities are placed in the rights-of-way by companies

that have utility status and request right-of-way, rather than zoning, approval.

How should your borough handle these applications in a manner that both protects your community and is consistent with the law? How does your borough exert sufficient control over the new structures being proposed for its streets? It is first necessary to understand the nature of this new wireless technology, the role of the PUC, and the tactics of the wireless industry before addressing your legal rights and how best to respond to wireless facility applications.

## Technological Advancements

As the need for wireless broadband has intensified over the past decade, companies have been charged with finding a quick, cost-effective way to keep up with consumer demand and create access to wireless data without having to construct large, expensive towers. Their solution has been the development and placement of mini-cell towers, also known as “macrocells,” with a typical coverage area of 0.5 to 2.5 miles, and “microcells,” typically, 100-800 meters. These technologies most often take the form of distributed antenna systems (DAS).

A DAS is a network of antennas that are spatially dispersed and strategically located to provide

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advanced wireless services such as cellular, 4G, LTE, Wi-Fi, and two-way radio communications to a targeted coverage area. A typical DAS includes a central pole, usually between 25 and 45 feet tall, with a control box topped by antennas, typically four to five feet high. It is connected to a central hub site by means of fiber optic cable and operates in conjunction with other mini towers and antennas. Its primary purpose is to boost bandwidth or capacity to an area where the existing cellular network does not offer enough capacity (i.e., a rural/suburban area where the signals cannot reach or an urban area where the network does not have sufficient capacity to meet demand).

In practice, DAS systems are usually installed in the public rights-of-way on new or existing poles. The signal radius on any individual DAS antenna is much smaller and more targeted than a signal coverage from a traditional tower; therefore, numerous antennas are needed to repair the capacity or coverage gap in the wireless network. This is the reason that multiple antennas are usually installed by the wireless contractor at the same time.

Not surprisingly, wireless companies have found that capacity gaps are most frequent in high density areas that are not in close proximity to a traditional cell tower. Because municipal zoning has historically restricted

traditional cell towers to industrial or commercial areas, gaps tend to appear most frequently in residential areas. They also arise in places where the demand for wireless data has increased dramatically over a relatively short period, such as a commercial strip or downtown area that has seen recent development.

As DAS networks are now the primary technology being used to infill capacity gaps, it is likely that your borough, if it hasn't received them already, will receive applications for such facilities within the next few years.

roads in the form of DAS. This shift in industry practice is critical, as the public rights-of-way are a borough's most valuable asset, which is why borough councils are entrusted with the fiduciary duty to maintain and preserve them for its citizens.

In order to gain access to the public rights-of-way, wireless contractors for all of the major wireless companies have obtained certificates of public convenience (CPCs) from the PUC. This privileged status grants them access to streets and roads to place their facilities. The problem that



The problem that arises with the use of their utility status is that mini-cell towers and other wireless structures add a physical burden to the rights-of-way and additional costs to the borough in managing the rights-of-way.

## *The Role of the PUC*

Traditionally, wireless facilities have been located on privately owned or municipal property. However, as the technological landscape have evolved, so has the geographical landscape for wireless facilities.

Mini-cell towers and antennas are now appearing along streets and

arises with the use of their utility status is that mini-cell towers and other wireless structures add a physical burden to the rights-of-way and additional costs to the borough in managing the rights-of-way. These costs include permitting, inspections, and traffic management. Additionally, mini-cell towers are often unsightly and can negatively affect



neighborhood property values, which is especially true in residential subdivisions in which all utilities are required to be placed underground.

Recently, some municipalities have questioned whether wireless contractors should be entitled to utility status at all.

Over the past several years, the PUC has received complaints that wireless contractors have used their utility status to access private property without having to negotiate a lease or obtain a standard easement from the property owner. In addition, utility status confers enormous powers, including the power of eminent domain, and there is an issue as to whether wireless contractors, let alone wireless carriers, should be granted such power.

Recognizing the significant rights and privileges that accompany certification, the PUC recently opened a public inquiry into whether wireless contractors should receive utility designation.

This past summer, Cohen Law Group submitted comments on behalf of the Pennsylvania State Association of Boroughs (PSAB), the Pennsylvania Municipal League (PML), the Pennsylvania State Association of Township Supervisors (PSATS), and the Pennsylvania State Association of Township Commissioners

(PSATC). These associations, and more than 100 Pennsylvania municipalities, urged the PUC to discontinue the granting of utility status to wireless contractors based on federal and state legal principles. The PUC has not yet issued a decision in the matter.

## Industry Tactics

Most wireless contractors are candid as to their intentions and are generally willing to comply with municipal zoning regulations. Others have decided to take a different approach.

One company, which is one of the largest wireless contractors in the country, and has been submitting “Right-of-Way Utilization” applications to municipalities across the Commonwealth, presents itself as a public utility with an unfettered right to access to the public rights-of-way.

The cover letter accompanying the typical application asserts the company’s utility status and identifies the recipient municipality’s streets and sidewalks ordinance as the governing authority for its facilities installation. Despite federal law, these applications reflect a disregard for the municipality’s zoning code, although the company is clearly aware of the fact that their facilities are subject to zoning regulations.

In addition, the typical cover letter refers to its proposed facilities

as “small cells.” Yet, upon review of the application itself, the “small cell” facility that it proposes is usually between 80 and 120 feet in height. No matter how you spin it, a 100-foot cell tower in the public rights-of-way is not small.

Boroughs must be careful when reviewing applications, as it is easy to inadvertently permit a very large tower along your street if close attention isn’t paid to the company’s application and proposed facility renderings.

Other companies use even more aggressive tactics when boroughs decide to amend their old cell tower ordinances. Recently, one company launched a campaign in PA to try to persuade municipalities not to take legal and reasonable steps to update their zoning codes. In some instances, company representatives showed up at borough council meetings in which a proposed ordinance is on the agenda, even though there is no facility being proposed. At such public meetings, representatives accuse council of “over-regulation,” even though the proposed regulations are balanced and well within the law.

This company has even crafted its own wireless facilities ordinance and has offered it to boroughs and other municipalities.

Not surprisingly, the ordinance being offered is one-sided and

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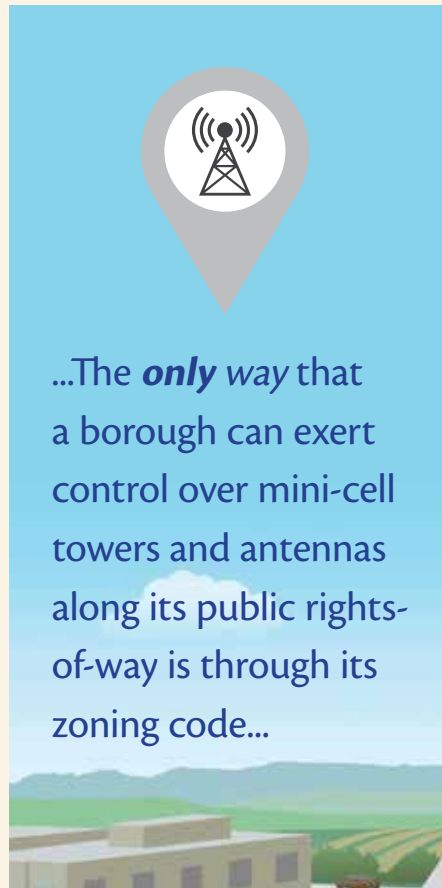
minimizes municipal rights. It is biased in that it makes it easy for wireless companies to place mini-cell towers in the public rights-of-way and does not protect sensitive areas. It does not take into account a borough's character, common sense municipal protections, areas where all utilities are underground, or whether the borough has any historic areas. Effectively, it creates a regulatory gateway for wireless companies to install towers and antennas without the involvement of borough council. Be wary of this ordinance as it does not protect your legal rights.

## Recommended Municipal Response

The wireless industry's shift to using mini-cell towers and antennas in the public rights-of-way is the new paradigm and it is likely permanent. It is, therefore, critical that boroughs create a legally sustainable framework by which they can process applications and still maintain control over their streets and roads without violating the law.

Pursuant to the Telecommunications Act of 1996, the construction, placement, and modification of all wireless facilities are subject to municipal zoning regulations. This position is also upheld by the Federal Communications Commission through its many wireless facility orders as well as the federal courts.

As such, the *only* way that a borough can exert control over mini-cell towers and antennas along its public rights-of-way is through its zoning code, regardless of



whether the applicant holds public utility status. Even if the wireless contractor submits a "right-of-way application" and insists that, due to its utility status, it should be governed by your streets and sidewalks ordinance, it is recommended that such applications be handled through zoning. This approach not only maximizes your borough's legal rights, but it is also consistent with federal and law.

It is essential, therefore, that boroughs update zoning codes

to specifically address wireless facilities in the public rights-of-way, as well as changes in the law at the state and federal levels. If there are no zoning regulations in place for wireless contractors to follow, or if your zoning regulations apply only to traditional cell towers and antennas, then the companies can (and most assuredly will) use their utility status to place facilities wherever they please. While amendments to your zoning code should assert the borough's control over its rights-of-way, it must also ensure that wireless facilities in the public rights-of-way are zoned fairly, are not subjected to exclusionary provisions, and are not treated in a discriminatory fashion.

Among other provisions, the zoning regulations should at least achieve the following:

- Address new wireless technologies, including DAS and related wireless advancements;
- Include design requirements and standards of care;
- Incorporate provisions protecting the character of borough neighborhoods;
- Organize the regulations into separate requirements for towers and antennae facilities;
- Include separate requirements for wireless facilities inside and outside the public rights-of-way;
- Give preference to and address collocated facilities (antennas on other support structures);

- Allow for the collection of fees to recover borough costs of managing wireless facilities in the rights-of-way;
- Incorporate recent judicial and regulatory changes in federal and state law; and
- Add restrictions on wireless facilities in historic districts.

By taking a proactive approach to wireless facility management via the zoning code, your borough can exert control over the placement, construction, and design of new wireless facilities – those proposed in the public rights-of-way and those proposed on private property. Of course, it is important for your residents and visitors to be able to access reliable wireless broadband service, but it is equally important for your borough to be able to preserve the character of its neighborhoods. Through a carefully crafted wireless ordinance, you can strike a proper balance between and convenience and community.

**About the Authors:** *The Cohen Law Group (CLG) specializes in representing public and private sector clients in cable, telecommunications, and broadband matters. Visit [www.cohenlawgroup.com](http://www.cohenlawgroup.com) or contact Dan Cohen, Esq., at [dcohen@cohenlawgroup.org](mailto:dcohen@cohenlawgroup.org) or Natausha M. Horton, Esq., at [nhorton@cohenlawgroup.org](mailto:nhorton@cohenlawgroup.org).*



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