PRIORITY FOCUS

Analysis, Commentary and Updates on Legislative and Policy Issues that Affect California Cities

April 21, 2006
Issue #16-2006

TELECOM CONTINUES TO MOVE IN WASHINGTON AND SACRAMENTO

Telecommunications reform legislation will be heard next week in the U.S. Congress and the California Legislature next week.

In Congress, opening statements in the full House Energy and Commerce committee are slated to occur on Tuesday, April 25, with committee mark up of the Communications Promotion and Enhancement Act of 2006 (COPE) set for April 26. This legislation creates a national franchise, purportedly to expedite the provision of video and Internet services to local communities.
For more, see Page 2.

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SENATE AND ASSEMBLY COMMITTEES SET TO HEAR EMINENT DOMAIN BILLS

Several important bills dealing with eminent domain are up for hearing next week.

The Senate Judiciary Committee is set to hear three bills dealing with eminent domain on Tuesday, April 25: SB 1210 (Torlakson), SB 1650 (Kehoe) and SCA 20 (McClintock). The Assembly Housing Committee is set to hear another eminent domain bill, AB 1990 (Walters). Another bill, SB 1206 (Kehoe), is currently in the Senate Appropriations Committee, but as of this writing, no date has been set for a hearing. *For more, see Page 4.*

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AB 1899 (WOLK) – 'SHOW ME THE FLOOD PROTECTION' BILL NARROWED

Measure Passes Assembly Local Government Committee

With spring rains continuing, California's reservoirs at or near capacity and the state's flood control system stretched, it was fitting that Assemblymember Lois Wolk's AB 1899 was heard in the Assembly Local Government Committee this week. *For more, see Page 7.*

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The League of California Cities continues to work with California Congressional delegation members on the committee (Reps. Waxman, Eshoo, Radanovich, Capps, Bono and Solis) and the national lobbying groups representing an array of governmental interests. Efforts focus on refining amendments that were not successful during the during the Subcommittee mark up earlier this month. (Please see "House Telecommunications and the Internet Subcommittee Markup of National Video Franchising Bill" for a list of those amendments at www.cacities.org/telecom).

The League has sent a joint letter to members of the House Energy and Commerce Committee outlying our concerns for amendments. A copy of the letter will be available on the League's website at www.cacities.org/telecom early next week.

The bill is expected to pass out of the full committee on April 26, which means that it will likely go to the House floor in early May.

League Opposes AB 2987 (Nunez/Levine) in its Current Form

On Monday April 24, AB 2987 (Nunez/Levine): Cable and Video Services, will be heard in the Assembly Utilities and Commerce Committee. The League is opposed to the bill in its current form. League-adopted policy on telecommunications stands considerably at odds with the provisions of AB 2987.

The following issues are of specific concern:

State Franchise Authority. One of the cries of the telephone industry in the telecom debate has been the so-called "speed to market" issue. As they describe the problem, the traditional local franchise process is an impediment to the telephone companies (new market entrants) deploying these new communications services in a timely manner that makes sense in the context of their business plan. However, few persuasive arguments have been made by telephone companies to support these claims.

In spite of the telephone industry's claim that speed to market is critical, the model offered in AB 2987 makes little sense. The bill establishes a statewide franchise system that will be administered by the state Department of Corporations. It expands the department's responsibilities considerably and sets up a new bureaucracy to dispense franchise applications by companies interested in providing telecommunications services in local communities.

The department, as with all state departments or agencies, has had no experience in what has been to date a local franchising process. The department is designated in the bill as the authority in charge of activities that are occurring at the local level, primarily on local streets and roads.

League Recommends Alternative

If the Legislature enacts a new, expedited statewide franchise process, our recommendation is to enact a state franchise law **that is executed at the local level.** Under this proposal, all or most of the elements of the current local franchises would be placed in state law. This eliminates or reduces the amount of time spent negotiating the franchise with local and therefore provides the speed to market that the telephone industry is seeking.

The local government's authority would be a "ministerial" act and could be subject to a deadline for approval, once the new entrant video provider submits its application. The state law would put clear parameters around the franchise agreement and would remove most items from local negotiations. A statewide model executed at the local level achieves the "speed to market" demand of video providers, eliminates the need for a new state bureaucracy and maintains a local government role in what is still essentially a local issue.

There may be some situations where a city and a new entrant or and incumbent provider may want to negotiate an issue where it is in the mutual interest of both to do so. We recommend that any law also allow local franchise negotiations, **if/when both parties agree to negotiations.**

Franchises/Franchise Fees. The League recommends that a definition of "gross revenues" upon which franchise fees are calculated be written as broadly as possible. Since the start of the Levine working groups, all interested parties have agreed that cities should remain whole financially under any new franchise system.

Federal law has enforcement provisions that allow franchising agencies to not renew a franchise if a cable operator is out of compliance with the terms of the franchise. The League requests that AB 2987 be amended to permit this same authority locally.

Local franchise law also typically includes provisions to deal with problems of late payments by a provider, including interest and late payment charges. Provisions should be included in AB 2897 to cover these operational issues.

Further, language in AB 2987 implies that the franchise fee is imposed on and paid by the subscriber rather than the company holding the franchise. Under current cable franchises the cable operator pays the franchise fee, this bill should be corrected to ensure that the new entrant is also responsible for paying the franchise fee.

Preemption of Local Tax Authority. The language of 53085.4(c) is too broad and preempts local tax and fee authority. In its current version the bill preempts local taxes and fees such as encroachment and fees, and business license taxes. This should be corrected.

Right of Way Management. There are two key issues that involve management of the public right of way. The first is the stated intent of at least one "new entrant" to place large boxes (5 feet to 6 feet tall with a 3-foot to 4-foot square base) in the public right of way. There needs to be some authority to deal with the aesthetics of this large "lawn furniture."

Second, current right of way management under local franchises contains a set of procedural rules to follow when issues arise during the deployment of communications infrastructure. Procedural rules include who is responsible when a water main is accidentally broken, who is responsible for clean up and removal of graffiti and other safety or repair issues. Local franchises include procedures with several models to use to cover these incidents and therefore appropriate language should be amended into the bill.

Consumer Protection/Customer Service. There is considerable interest among cities to continue as the enforcement agency for consumer protection and customer service standards. From the perspective of the consumer it would make more sense to place this authority at the local level than with a state agency or department or certainly the Federal Communications Commission (FCC). Under current law, cities have the option to assume the authority to enforce consumer protection and customer service standards.

AB 2987 should be amended to permit those cities with the desire and experience to assume this enforcement authority. Federal law now permits local agencies to enforce the FCC adopted customer service standards and also allows the flexibility to enact local customer service standards in addition to the FCC standards. AB 2987 should be amended to permit this local option and flexibility using FCC standards as a base for customer service and consumer protection.

Emergency Notification. Current federal law requires cable operators to cooperate with the federal Emergency Alert System. This requirement does not cover local emergencies. As a result, many local franchises now require the cable operator to provide an emergency notification system. This is the text "crawler" at the bottom of the screen on every channel to warn local residents. AB 2987 should be amended to require the use of this notification system by all video service providers.

Outstanding Issues for Franchise Law Reform

There are two outstanding issues that are critical to a successful state rewrite of the franchise laws for telecommunications services. Those issues are:

Public, Education and Government (PEG) Channels/Institutional Networks (INET). The provisions of AB 2987 pre-empt local authority when it comes to the issue of public, education and government channels as well as the institutional network (INET) services currently provided in some communities.

The INET is a network of telecommunications lines connecting schools, libraries, nonprofit organizations and/or other governmental facilities. These services are critical in many communities. The immediate problem under AB 2987 is that there is no provision to continue these services after certain dates. It is not specified how a local community without INET services currently can acquire these services in the future.

AB 2987 does provide some standards for PEG services, but these standards may not be flexible enough to meet growing needs in California. The League has asked the Speaker's staff for more time to vet this issue of PEG channels and INET services and come back with an improved proposal.

Build Out/Discrimination Issues. Speaker Nunez's staff has indicated that the build out/discrimination issue is still a "work in progress" in the legislation. This is another critical issue in local communities. Under the current law for video services, local governments have the authority to demand build out of cable systems to ensure that all parts of a community receive these services.

Local governments have been successful in ensuring that our local communities receive cable services in California. The bottom line is that new entrants should not be given complete free-reign to pick and choose the parts of a community that receive these new telecommunications services. There has to be some reasonable standard to permit the deployment of these services in an equitable manner. The League pledges our cooperation in working toward such a solution.

The League is actively engaged with the Speaker and Assemblymember Levine and plans to keep city officials closely informed as this legislation moves forward.

Eminent Domain Continued from Page 1…

The League is **opposed** to SB 1206, SB 1210, SCA 20 and AB 1990. These bills are problematic for cities that are working hard to build affordable housing, restore blighted areas and revitalize their communities.

The League does not have a position on SB 1650. This measure is focused on ensuring fairness to property owners in the eminent domain process exercised by redevelopment agencies. The League and the California Redevelopment Association (CRA) support the purpose of the bill, and are working with the author to achieve this goal.

Cities Urged to OPPOSE SB 1206, SB 1210, SCA 20 and AB 1990

Cities are urged to carefully study these bills and determine the impact they would have on your community. We urge you also to contact the members of the Senate Judiciary Committee to **OPPOSE** SB 1206, SB 1210 and SCA 20, and contact the members of the Assembly Housing Committee to **OPPOSE** AB 1990. Explain the real world consequences of their provisions in your city.

Senate Judiciary Committee Members: Senator Joe Dunn (Chair, D-Santa Ana), Senator Dick Ackerman (Vice Chair, R-Irvine), Senator Martha Escutia (D-Whittier), and Senator Sheila Kuehl (D-Santa Monica).

Assembly Housing Committee Members: Mullin (Chair, D–S. San Francisco), Garcia (Vice Chair, R-Cathedral City), Baca (D-Rialto), Hancock (D-Berkeley), La Suer (R-La Mesa), Salinas (D-Salinas), and Torrico (D-Newark).

Bills Introduced Following *Kelo* Decision

All of these measures were introduced in the wake of last summer's Supreme Court's decision in *Kelo v. City of New London.* While the decision did not change California law, it raised the profile over the use of eminent domain by local agencies, giving property rights advocates, who have wanted to abolish eminent domain for years, a platform to run on. It's also given legislators who have been critical of redevelopment agencies an opening to try to overhaul all of redevelopment law – even that which has nothing to do with eminent domain.

SB 1206 and SB 1210 represent the most far-reaching changes to Community Redevelopment Law in over a decade. While the League supports responsible reform, these measures would threaten local governments' ability to eradicate blight, clean-up environmentally polluted properties, build affordable housing, and create jobs and economic opportunity. Below are just some of the problems with these bills:

SB 1206 (Kehoe). While SB 1206 contains other provisions that are duplicative or unnecessary, below are the major concerns:

- **Greatly limits communities' ability to identify and clean-up blight:** SB 1206 would abolish many of the current factors used by redevelopment agencies to show the existence of blight, such as "defective design or physical construction," "impaired investments," "high turn-over rates, abandoned buildings and excessive vacant lots." Remaining blight factors would have to meet specific numerical or percentage tests severely limiting a community's ability to eradicate blight by:
    - Creating arbitrary distinctions.
    - Eliminating any flexibility in methodology for demonstrating the existence of blight.

- **Opens the door to frivolous lawsuits and legal challenges:** SB 1206 contains several provisions which are legally problematic for local governments including:
    - Creates a new cause of action against redevelopment agencies that could be used to prevent or delay the issuance of bonds.
    - Prohibits agencies from requiring developers to indemnify the agency and local government from the costs of defending lawsuits. This could expose the general fund of cities or counties with limited financial resources to exorbitant costs associated with defending lawsuits without merit from project opponents.

- **Makes it considerably more difficult to keep commitments made to communities at the time of plan adoption:** SB 1206 requires new blight findings after 10 years from the adoption of the redevelopment plan as a condition of issuing new bonds. The typical redevelopment plan has a 30-year life span and is developed and approved with community involvement. Many times residents want quality of life components such as parks or libraries included in the plan. However, these components are typically put in towards the end of the plan when the majority of blight has been eradicated. If agencies have to make new findings of blight every time they issue bonds after 10 years, it is unlikely they will be able to fulfill their commitment to these communities.

SB 1210 (Torlakson). It's important to note that, for the most part, the provisions of this bill amend sections of Eminent Domain Law which are applicable to all public agencies and utilities which use the power of eminent domain. While SB 1210 contains provisions that are duplicative or unnecessary, below are the major concerns:

- **Greatly increases costs associated with acquiring properties for public projects and penalizes public agencies for attempting to be prudent with taxpayer dollars:**

- If a jury determines fair market value is 10% greater than the public agency's last offer, the public agency would be required to pay attorney fees and expenses. This would encourage public agencies to make offers well in excess of fair market value in order to avoid the risk of this penalty, resulting in a windfall to a few property owners at taxpayer expense.
- Would limit ability to quickly acquire property by making it easier for a property owner to obtain a stay of an order of prejudgment possession. This could delay major public works and utilities projects and drive up costs significantly. This section may restrict local governments' ability to timely engage in emergency fixes to critical infrastructure.

The League remains continual conversations with Sen. Torlakson about the scope and language of SB 1210.

Committee members need to be contacted to **Oppose** these bills and hear from redevelopment agencies and local government about the real world consequences of their provisions. The Senate Judiciary Committee members are Senator Joe Dunn (Chair, D-Santa Ana), Senator Dick Ackerman (Vice Chair, R-Irvine), Senator Martha Escutia (D-Whittier), and Senator Sheila Kuehl (D-Santa Monica).

SCA 20 (McClintock). This proposed constitutional amendment would prohibit the use of eminent domain unless the property to be acquired will be owned and occupied by a governmental entity. Since redevelopment agencies usually acquire property for the purpose of getting it redeveloped and back on the tax rolls quickly through private ownership, it effectively eliminates the use of eminent domain for redevelopment. SCA 20 also changes the definition of "just compensation," significantly increasing the cost of building roads, highways, transit, schools, parks, libraries, and other public works projects. It redefines "just compensation" to include:

- Cost of acquiring comparable property, even if "comparable property" is significantly more expensive than the fair market value of the property being condemned.
- Lost income, relocation costs and loss of business goodwill would be embedded in the state constitution.
- Attorneys' fees in any case where a jury awards even one dollar more than the agency's offer.

SCA 20 eliminates many public-private partnerships. SCA 20 prohibits the use of eminent domain if the property acquired does not stay in public ownership, thus doing away with public-private partnerships such as:

- Affordable housing. Redevelopment agencies often acquire blighted properties and work with non-profit housing developers to take over construction, ownership, and management.
- Environmental clean-up projects. More than 500 Brownfield sites have been or are being cleaned up by redevelopment agencies.
- Community revitalization projects. Redevelopment agencies partner with the private sector to revitalize blighted areas, to spur economic investment and jobs, and to stimulate business expansion.

SCA 20 would distort the constitutional principle of separation of powers. SCA 20 would distort this principle by fundamentally changing the relationship between legislative and judicial branches of government. This proposed constitutional amendment:

- Makes judges, not elected officials, the most significant figures in determining public use and necessity
- Instructs the court to give no deference to legislative determinations of public use and necessity
- Requires condemning agencies to prove by a preponderance of the evidence at trial the necessity of the taking, which is already done at the legislative level.

AB 1990 (Walters). AB 1990 would preclude the use or implied use of eminent domain for any property that would not be fully owned and operated by the acquiring governmental entity. It would preclude any transfer of land to nonprofit housing entities, public private partnerships like toll roads, and a host of other activities that make communities viable. AB 1990 would preclude redevelopment agencies from acquiring polluted brownfield properties and turning them over to a private sector end use.

Flood Protection Continued from Page 1…

As amended on April 17, AB 1899, the so-called "Show Me the Flood Protection" bill, has been significantly narrowed and changed. The League is continuing to review the amendments and processes proposed in AB 1899 and has no position on it.

As amended, the bill generally does the following:

- Only applies to geographic areas in the state within the jurisdiction of the State Reclamation Board (i.e. the flood hazard zones in the watersheds of the Sacramento and San Joaquin Rivers, including both project and private levees);

- Only applies to greenfield development, and not infill development;

- Establishes a process whereby the Reclamation Board and local flood districts would provide local governments with flood assessment information early in the development proposal process and through the California Environmental Quality Act (CEQA). This would include an assessment of the flood protection capabilities for the infrastructure that "protects" the proposed project (i.e. levee integrity, level of existing flood protection);

- Requires that if potential flooding would be a depth of three feet or more, that the development must meet a 200-year protection standard within five years in order to be approved by the local government.

After strenuous objections by the League earlier in the week, the author agreed to amend two sections of the bill dealing with liability. Provisions on pages 9 and 12 of the April 17 version of the bill will be amended to delete the sentence authorizing the Reclamation Board or a local flood control agency to require a city or county to indemnify them prior to providing flood assessment information. Instead, language will be added that the city or county will not be liable for basing decisions based upon the information received the Reclamation Board or local flood control agency.

Affected Cities Urged to Review, Provide League with Comments

The League is still reviewing AB 1899 and encourages affected cities to do so as well. The bill proposes a process that is, in part, consistent with some of the flood principles adopted by the League to ensure that cities do not unintentionally approve development that puts residents at risk. While the League does not support a blanket statewide 200-year flood protection standard, we do not have a position on the standard as proposed in AB 1899 – a 200-year protection for areas that will flood three feet or more in the Reclamation Board's jurisdiction.

Cities are encouraged to review AB 1899 carefully and send their comments to the League. Specifically, we suggest separating out the 200-year standard issue when evaluating the bill. First, cities should consider whether or not the process proposed in the bill is workable and what changes they would recommend to improve it. Second, is the 200-year standard requirement appropriate or not for areas that could flood to a depth of three feet or more? The author correctly states that AB 1899 is a work in progress and the League will continue to be involved in the discussions.

The political dynamics of the AB 1899 are evolving. Currently, the League, the California State Association of Counties (CSAC), the Regional Council of Rural Counties (RCRC), and American

Planning Association, California Chapter (APA) have no position. The realtors have removed their opposition and are now neutral based upon the April 17 amendments.

The development/business community appears to be somewhat split, with the Building Industry Association (BIA) and California Chamber of Commerce opposed and some development interests opposed unless amended and wanting to continue discussions to find a workable solution. Environmental groups generally support the bill.

AB 1899 passed the Assembly Local Government Committee this week and will be heard next in the Assembly Natural Resources Committee.

Telecom in the News

Online Retailers May Build Wireless Internet

According to a recent story in The Inquirer, an online news site covering technology, online retailers Google, eBay and Amazon.com have considered building their own nationwide wireless Internet system if telecos such as AT&T try to charge them for sending customers to their websites.

If such a system were developed, it could take the Internet out of the hands of the U.S. telcos, which would be severely impacted by the loss of Voice over Internet Protocol (VoIP) and broadband accounts.

To read the article, visit www.theinquirer.net and search for "Google, eBay and Amazon May Build Their Own Internet."

Barton Shielding Telecom Reform Bill

House Energy and Commerce Chairman Joe Barton (R-Texas) is taking steps to avoid having his telecommunications reform legislation referred to the Judiciary Committee.

Barton and Fred Upton (R-Mich.), chairman, Telecommunications and the Internet Subcommittee, were cautious about accepting amendments to the legislation that would give jurisdiction to the Judiciary Committee. The Communications Opportunity, Promotion, and Enhancement Act of 2006 (COPE Act) will be heard in the Energy and Commerce Committee on April 26.

To read the article, visit www.njtecomupdate.com and search for "Barton Shielding Telecom Bill from House Judiciary Panel."

Editorial Speaks Out Against COPE Act

An editorial in the April 17 edition of the San Francisco Chronicle expressed concern that the Communications Opportunity, Promotion, and Enhancement Act of 2006 (COPE Act) would undercut Internet access for citizens nationwide if it passed, calling the reform act "misguided."

The editorial writer believes that among other things, the bill would hinder efforts by start-up providers to get into the Internet business.

To read the editorial, visit www.sfgate.com and search for "Don't Undercut Internet Access."

Find a Bill, Legislators, Leg Committee – or Ask Leg Staff

Visit (and bookmark!) the League's Legislative Resources page (www.cacities.org/legresources). You'll find a roster and contact information for the League's legislative staff; the online Bill Search program, background materials on lobbying your legislators, and more.

Legislative Bill Summaries

ADMINISTRATIVE SERVICES

SB 1818 (Alarcon). Attorney Fees. Big Box Lawsuits. As amended, SB 1818 would provide local governments the ability to recover their attorney fees in any civil action brought by a big box retailer, where the local government prevails and the court determines the lawsuit to be frivolous.

Over the years, local governments have been sued by large retailers, the so-called "big box" stores. Local governments must use scarce city funds to defend themselves in court, even in the instances where the local government prevails.

In many situations, the large retailer, with very deep pockets and able to pursue lengthy and costly litigation, uses the threat of a lawsuit to pressure or intimidate a local government to abandon a proposed ordinance or modify it to reflect the wishes of the retailer. While this is bad enough for any situation, it is especially difficult for small or cash-strapped cities who cannot afford to defend a lawsuit that is frivolous.

The most recent lawsuit involving a big-box retailer against a city concerns Wal-Mart versus the City of Turlock. Wal-Mart sued after Turlock adopted a local ordinance regarding big-box retailers on the basis that the ordinance was unfairly targeting the store and that the city did not properly comply with CEQA before adopting the ordinance.

The city prevailed last year in Superior Court and again earlier this month in the Fifth District court in a 3-0 decision. Unfortunately, Turlock has spent over $300,000 fighting the lawsuits over the last two years.

SB 1818 would provide a narrow exception to this unfortunate situation and permit local governments that prevail in a lawsuit brought by a big box retailer to recover its legal costs, if the lawsuit is deemed by the court to be frivolous and without merit. The bill would protect cities and their taxpayers from having to cover the costs of defending merit less lawsuits.

SB 1818 will be heard April 25 in the Senate Judiciary Committee. Cities should send letters of support on this important fairness bill. **Staff:** Yvonne Hunter; **Status**: Hearing: April 25; SenJud; **Position: Support.**

Want to Send a Letter in Support of a League Position? Here's Who to call:

SENATE JUDICIARY—(5)—Dunn (Chair), Ackerman (Vice–Chair), Escutia, Kuehl and 1 vacancy. Chief Counsel: Gene Wong. Deputy Chief Counsel: Gloria Megino Ochoa. Counsels: Alexandra Montgomery, Amanda Taylor and Benjamin Palmer. Assistants: Carol Thomas and Roseanne Moreno. Phone (916) 651–4113. Room 2187.