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Memorandum

To:	Honorable Mayor and City Council City of Burlingame, California
From:	Gail A. Karish
Meeting Date:	September 4, 2018
Re:	AT&T Wireless Appeals (Adjacent to 701 Winchester Drive and 1800 Hillside Drive)

This memo provides guidance on select topics concerning the scope of City Council authority which may be pertinent when considering the above-noted appeals.

1. Consideration of Aesthetics

The City can, within limited discretion, control the time, place, and manner of installation to ensure that facilities do not "incommode the public use" of the public rights-of-way. Under California law, telephone companies have state franchise rights to use public rights-of-way pursuant to Public Utility Code Section 7901 ("Section 7901"). Section 7901 has long been interpreted as a statutory grant of a franchise to telephone companies to use and place "telephone lines" in public rights-of-way, and to "erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines…".[1] Public Utility Code Section 233 defines "telephone line" broadly to include "all conduits, ducts, poles, wires, cables, instruments, and appliances, and all other real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate communication by telephone, whether such communication is had *with or without the use of transmission wires*." (*emphasis added*). The courts have held that the statutory definition of "telephone line" is sufficiently broad to include a wide range of technologies including facilities and equipment installed by carriers in connection with or to facilitate both wireless and landline telecommunications services.[2]

The right of telephone companies to use public rights-of-way to deploy facilities under the state franchise is, however, not unfettered. The City's ability to regulate the public right-of-way is an extension of its police powers under California Constitution, article 11, section 7;

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[1] *County of Los Angeles v. General Tel. Co.* (1967) 249 Cal.App.2d 903, 904.
[2] *City of Huntington Beach v. Public Utilities Com*. (2013) 214 Cal.App.4th 566, 587-8 ("*City of Huntington Beach*"); *GTE Mobilenet of Cal. Ltd. v. City of San Francisco* (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1103.

Section 7901 is a "limited grant of rights to telephone corporations, with a reservation of local police power that is broad enough to allow discretionary aesthetics-based regulation."[3]

Specifically, Section 7901 provides that such use must be "in such manner and at such points as not to incommode the public use of the road…". The phrase "incommode the public use" in Section 7901 means "to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest, embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use."[4] "Incommode" is "broad enough 'to be inclusive of concerns related to the appearance of a facility'", and therefore, Section 7901 does not prohibit local governments from conditioning the approval of a particular permanent siting permit on aesthetic concerns.[5] Thus, there is precedent for not only requiring discretionary review and conditioning approvals, but also even denying applications for facilities in particular locations in the public rights-of-way under Section 7901, for example due to aesthetic concerns regarding pole heights or underground districts.[6] Further, a local government has the right under Section 7901.1 "to exercise reasonable control as to the time, place, and manner in which roads…are accessed [by telephone companies]."[7] The "time, place and manner" of temporary access refers to "when, where, and how telecommunications service providers gain entry to the public rights-of-way."[8]

In addition to Sections 7901 and 7901.1, Pub. Util. Code Section 2902 also protects a local government's right "to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets…within the limits of the municipal corporation." This provision is a further basis for a local government to restrict the location of proposed facilities due to public safety reasons or other local concerns or even deny applications in appropriate circumstances.

The Burlingame Municipal Code, including in particular Chapter 25.77 and Sections 25.77.080(c) and 25.77.090, which address location preference order and design criteria, respectively, provide an expression of the City's aesthetic and locational concerns and preferences for what types of deployments would and would not "incommode the public use."

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[3] *T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 346 [review granted (Dec. 16, 2016) 385 P.3d 411] ("*T-Mobile West LLC*").
[4] *Id.* at 355, quoting *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 723. *See also*, *NextG Networks of Cal., Inc. v. City of Newport Beach* (C.D. Cal. Feb. 18, 2011) 2011 U.S. Dist. LEXIS 17013; *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744.
[5] *T-Mobile West LLC,* 3 Cal.App.5th at 344.
[6] *Id.*
[7] See *City of Huntington Beach,* 214 Cal.App.4th 566 at 569, fn. omitted.
[8] *T-Mobile West LLC,* 3 Cal.App.5th at 358, *quoting Sprint PCS Assets LLC v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, at 725.

2. Substantial Evidence

Federal law provides that any decision to deny a request to build personal wireless facilities "shall be in writing and supported by substantial evidence contained in a written record" submitted contemporaneously with the denial.[9] To determine whether a local government's decision is supported by substantial evidence within the meaning of the statute, a reviewing court "must be able to identify the reason or reasons why the locality denied the application."[10] The rationale behind such a denial need not be "elaborate or even sophisticated"—rather, a local authority must provide a rationale clear enough to "enable judicial review."[11]

In the Ninth Circuit, courts have construed the "substantial evidence" standard as requiring that the local government's decision be (1) authorized by local law and (2) supported by a reasonable amount of evidence.[12] There is no precise formula for determining when the "substantial evidence" requirement is met; rather, a reviewing court will affirm when a denial is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".[13]

Considerations of aesthetics in a denial are permissible when based on substantial evidence.[14] However, a denial based on aesthetics would not be permissible if such denial would result in an effective prohibition.[15]

A decision to deny a wireless facility application cannot be based on concerns about RF emissions if the applicant has demonstrated that its facilities will comply with FCC standards.[16] Thus, direct or indirect concerns over the health effects of RF emissions may not serve as

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[9] 47 U.S.C. § 332(c)(7)(B)(iii); *see* T-*Mobile S., LLC v. City of Roswell, Ga.* (2015) 135 S. Ct. 808, 815.
[10] *Id.* at 814.
[11] *Id.* at 815.
[12] *See Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir.2009) 583 F.3d 716, 721 ("*Palos Verdes Estates*"); *MetroPCS v. City and County of San Francisco* (9th Cir.2005) 400 F.3d 715, 725("*MetroPCS*").
[13] *Palos Verdes Estates*, 583 F.3d at 726; *see MetroPCS*, 400 F.3d at 725, *quoting Cellular Telephone Company v. Town of Oyster Bay* (2nd Cir. 1999) 166 F.3d 490 (local government must have "less than a preponderance, but more than a scintilla of evidence.").
[14] *Sprint PCS Assets LLC v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 722-723; *NextG Networks of Cal., Inc. v. City of Newport Beach* (C.D. Cal. Feb. 18, 2011) 2011 U.S. Dist. LEXIS 17013, *18 ("In this case, the City was entitled to determine that degrading the aesthetic of the Pacific Coast Highway area decreases the public's ability to enjoy this area. This decreased enjoyment, in turn, quite obviously risks damage to property values and has other 'materially detrimental' effects to nearby owners, residents and businesses.").
[15] See discussion below.
[16] 47 U.S.C. §332(c)(7)(B)(iv); Gov. Code §65850.6(f).

"substantial evidence" to deny an application if the proposed facilities comply with the FCC's regulations.[17]

Public concerns about property values sometimes are found to serve as a proxy for impermissible concerns about RF emissions.[18] Where the public concerns on property values are relatively generalized and limited, the courts tend to find there is no substantial evidence, or if they are contradicted by expert evidence, the expert evidence tends to be favored.[19]

Case law suggests expert evidence about impacts on property values *in other communities* is not adequate to respond to local concerns about local property values.[20] When faced with credible expert evidence on both sides, a reviewing court is likely to defer to the local jurisdiction's decision.[21]

3. Effective Prohibition Standard

Under 47 U.S.C. Section 332 ("Section 332"), a local government cannot regulate the "placement, construction, and modification of personal wireless service facilities" where such regulation has the effect of actually or effectively prohibiting service. In the Ninth Circuit, a regulation, or application denial, prohibits or has the effect of prohibiting the provision of

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[17] *AT&T Wireless Services of California LLC v. City of Carlsbad* (S.D. Cal. 2003) 308 F. Supp. 2d 1148, 1159; *MetroPCS, Inc. v. City and County of San Francisco* (9th Cir. 2005) 400 F.3d 715, 736.

[18] *AT&T Wireless Services of California LLC v. City of Carlsbad*, at 1161; *Cellular Telephone Co. v. Town of Oyster Bay* (2d Cir. 1999) 166 F.3d 490, 496-7 ("Cellular Telephone").

[19] *Cellular Telephone Co.,* 166 F.3d at 496 ("the volume and specificity of the comments were not adequate to satisfy the requirement of the substantial evidence standard…. A few generalized concerns about potential decrease in property values, especially in light of AT&T's contradictory expert testimony, does not seem 'adequate to support a conclusion' that the permits should be denied." (citations omitted)); see also, *T-Mobile Northeast LLC v. City Council of Newport News* (4th Cir. 2012) 674 F.3d 380 (Court upholds lower court holding, stating that "although citizens need not be 'armed with a slew of experts,' where 'the only cohesive thread' of opposition was found in 'four citizens' passing comments on property values,' such opposition was not substantial evidence.").

[20] *Michael Linet, Inc. v. Vill. of Wellington* (11th Cir. Fla. 2005) 408 F.3d 757, 762 (Court upheld local decision based on public concerns stating: "Linet's expert testimony contradicting the adverse property value impact concerns was provided by a telecommunications executive who placed a tower in a different part of the community and a realtor who based his knowledge on condominium sales in a different county. This does not change our conclusion. The residents were worried about the impact of this tower on the golf course within their community, not a different tower, different location, or different community.")

[21] *Primeco Personal Communs., L.P. v. Village of Fox Lake* (N.D. Ill. 1999) 35 F.Supp.2d 643, 649 ("[S]ubstantial record evidence supports the Village's decision to deny PrimeCo's application. Pointer's testimony supports both of the Village's major reasons for denying the permit: negative economic impact based on diminished future residential and resort development and decreased enjoyment by current owners of their property. Pointer, an expert in urban planning…relied on his 37 years of experience and various photographs, primarily of the balloon test, which demonstrate the visual impact of the proposed 150-foot tower at the Hellios site. Although PrimeCo's expert, George Baker, disagreed with Pointer's assessment of the proposed tower's impact, the standard of review does not permit us to resolve this conflict anew. The Village chose to believe Pointer's assessment, as it was entitled to do. A reasonable mind could accept Pointer's testimony as sufficient to support the Village's conclusion that the proposed monopole could stunt development and injure residents' enjoyment of their property. We see no reason to disturb the Village's choice.").

personal wireless services within the meaning of federal law if it: (1) bans the provision of personal wireless services outright or (2) has effectively prohibited the provision of such services.[22] Showing the mere potential for prohibition is not sufficient to overcome local discretionary review power.[23]

A denial can be found to improperly "prohibit" personal wireless services if it prevents a wireless services provider from closing a "significant gap" in its own service coverage using the least intrusive means.[24] There is no bright-line rule regarding when a gap is "significant," and the determination is based on a fact-specific analysis.[25] To support the contention that a site is necessary to close a significant gap, the provider must in the application process demonstrate that the significant gap exists, and that the manner in which it proposes to fill the significant gap in service is the "least intrusive" means.[26] To do so the provider must be able to show that it has made a good faith effort to identify and evaluate less intrusive alternatives, such as consideration of less sensitive sites, alternative system designs, alternative tower designs, placement of antennas on existing structures, etc.[27] The burden is on the applicant to submit a "comprehensive application" which shows "a meaningful comparison of alternatives."[28] The least intrusive means standard requires an analysis in relation to the factors in the locality's code, not generalized observations.[29]

Once the applicant has done that, the burden shifts to the locality. That is, a municipality is not compelled to accept the provider's representations as to the least intrusive means, however, in order to reject them, it must show that there are some potentially available and technologically feasible alternatives, and the provider must have an opportunity to dispute the availability and feasibility of the alternatives favored by the locality.[30]

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[22] *Sprint Telephony PCS, L.P. v. Cnty. of San Diego* (9th Cir. 2008) 543 F.3d 571, 579 ("*Sprint II*"); *Metro PCS*, 400 F.3d at 730-31.
[23] *Sprint II*, 543 F.3d at 579. Examples of regulations that "effectively prohibit the provision of service" include, e.g., an ordinance requiring that all facilities be underground when, to operate, wireless facilities must be above ground, or, an ordinance mandating that no wireless facilities be located within one mile of a road, where, because of the number and location of roads, the rule constituted an effective prohibition. *Id.* at 580.
[24] *Metro PCS*, 400 F.3d at 731.
[25] *Id.*; *City of Palos Verdes Estates*, 583 F.3d at 727.
[26] *Metro PCS*, 400 F.3d at 734.
[27] *T-Mobile USA Inc. v. City of Anacortes* (9th Cir. 2009) 572 F.3d 987, 996, fn. 10.
[28] *Am. Tower Corp. v. City of San Diego* (9th Cir. 2014) 763 F.3d 1035, 1056-7.
[29] *Id.* ("To prevail on this claim, therefore, ATC must show that its facilities were the "least intrusive means" in light of the aesthetic values that motivated the City's decision to deny the CUP applications.")
[30] *T-Mobile USA Inc. v. City of Anacortes* (9th Cir. 2009) 572 F.3d 987, 999.