



Wireless Study Session

City of Piedmont



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Introduction

- **Regulations Affecting Wireless in the Public Right-of-Way**
 - State Regulations
 - State Preemption
 - Cities cannot exclude wireless from ROW
 - But Cities can regulate safety, aesthetics, ADA compliance, and in historical districts
 - Cities have right to exercise reasonable control as to time, place, and manner
 - Including imposing reasonable form based standards
 - Companies Cannot Inconvene the Public (PUC 7901, 7901.1)
 - Shot Clock Processing Requirements
 - CEQA and Historic Resources and Preservation
 - Federal Regulations
 - Local Agencies Cannot Deny Application if to do so has the effect of prohibiting the provision of wireless services
 - Significant Gap/Least Intrusive Means Standard
 - Cities can only require providers to meet FCC RF standards
 - Piedmont Ordinance and Other examples of local regulations



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State Regulations Affecting Wireless in the ROW

- Wireless Carriers in CA are franchised by the State CPUC as telephone companies
- State Law preempts Local Wireless or Telephone Franchising for use of the ROW
- Key State Provisions:
 - Pub. Util. Code sections 7901 and 7901.1



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Impact of State Telephone Franchising

- Local Governments cannot require wireless/telephone companies to obtain a city franchise agreement for the use of the city's rights of way
- Does not matter whether city owns the ROW in fee or in easement, state regulation prevails
- Under 7901, Cities cannot prohibit or exclude telephone companies from the ROW



Pub. Utilities Code 7901 and 7901.1

- 7901: Telephone companies “may construct lines...along and upon any public road...and may erect poles, posts...and other necessary fixtures...in such a manner as not to incommode the public use.”
- 7901.1: Cities “have the right to exercise reasonable control as to the time, place, and manner in which the roads are accessed” and the control, be applied to all entities in an equivalent manner



Cities Can Regulate for Aesthetics, Safety, and Historic Preservation

- Privilege granted under 7901 is not unlimited -“Cannot ‘Incommode’ the Public Use”
- “Incommode” includes Aesthetic Concerns
 - “a company can “access” a city's rights-of-way in both aesthetically benign and aesthetically offensive ways. It is certainly within a city's authority to permit the former and not the latter”
 - “would not be compatible with the character and appearance of the existing development”; and that it would “negatively impact the views” of residents.[..]We noted that the city ordinance governing permit applications required the city to consider such factors as the height of the tower and its proximity to residential structures, the nature of uses of nearby properties, the surrounding topography, and the surrounding tree coverage and foliage.(*Sprint v. Palos Verdes Estates* (2009) 583 f.3d 716,720
- Reasonable Aesthetic Concerns are Appropriate and Legitimate concerns for a City



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T-Mobile West v. San Francisco Pending at the CA Supreme Court

- T-Mobile is asserting that aesthetics is preempted by 7901 and 7901.1
- T-Mobile is arguing:
 - (1) “incommode” means only to “obstruct”
 - (2) 7901.1 is limited to time, place and matter and does not include aesthetics; and
 - (3) 7901.1 requires that to be reasonable all controls must be applied equally to all utilities



Aesthetics and Other Zoning Standards

- City can regulate based on Aesthetics
- City can exercise reasonable control as to time, place and manner
- City can adopt reasonable form based standards
 - City can consider different form based standards with different levels of regulation so long as it is reasonable



Physical Safety Regulation

- Cities can regulate in the ROW for:
 - Street Safety (i.e. tripping hazards, height of equipment)
 - ADA compliance (cannot install in a manner that blocks sidewalk, ramps)
 - Traffic Line of Sight; Obstructions
 - Other Physical Hazards to the Public
 - Adverse impacts to City's physical infrastructure including the protection of City street trees



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CEQA and State Historic Resources

- CEQA generally does not apply to installations on existing structures
- CEQA will not apply to construction of small facilities
- CEQA is usually completed by the CPUC and may be completed prior to any wireless application being filed with the City
- State Historic Rules apply
- An historic district does not preclude Wireless Facilities
 - ✓ But could/would require additional aesthetic review/stealthing or moving to a different location
 - ✓ May also be grounds for challenging CEQA Exemption



Shot Clocks and Timing

- Short time frames
- Need to determine completeness of application within 30 days
- 90 days to act on colocations
- 150 days to act on new applications
- 6409 – eligible facilities - 60 days to act
- Failure to timely act may be an approval
- Form Based Standards would help meet shot clock deadlines



Federal Laws Affecting Wireless Services

- Local agencies cannot deny applications if to do so would have the effect of prohibiting the provision of wireless services
- If there is a Significant Gap in Service, it must be addressed by the least intrusive means



Federal Law: Section 332(c)(7)

- (A) Except as provided in the paragraph, nothing in this chapter shall limit the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities. (Emphasis added.)
- (B) Limitations (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government or instrumentality thereof—
 - (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
 - (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.



Prohibit the Provision of Service: Significant Gap

- “Significant Gap/Least Intrusive” is a standard used by the Courts to determine if there is any merit to a claim that denial of a permit would prohibit, or effectively prohibit, the provision of personal wireless services
- Significant Gap is fact-specific and defies any bright-line legal rule. (*Sprint v. PVE* at 727)



Significant Gap in Coverage

- A significant gap in coverage is not required to request or approve a new wireless facility
- “Gaps in coverage” are carrier by carrier
- Generally, a significant gap may occur (1) if a customer cannot reliably use the system (i.e. to make a call); or (2) if a group of customers cannot be provided with reliable service given their patterns of use (i.e. lack of capacity)



Significant Gaps in Coverage

Factors include:

Weak Signal Strength

Dropped Calls

Dropped Service

Roaming Capabilities

Gap poses a safety risk

Number of users that may be affected

Nature and character of the area



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Significant Gap – Capacity – It's Complicated

- Historically looked to dropped calls or inability to connect to the network
 - ❑ Inability to connect involves capacity
- Federal Law preempts local siting decisions that would prohibit the provision of service



Least Intrusive Means

- Applicant has initial burden of making a *Prima Facie* showing
 - Includes an analysis of alternative sites and designs and a showing that the proposal is the “least intrusive”
- City: if City rejects the proposal, the City must show the existence of potentially available and technologically feasible alternatives
- Applicant can dispute; challenge in court



Piedmont Ordinance Findings in Summary

- Facility necessary to close a significant gap in the operator's coverage or capacity
- Meets location standards
- Meets development standards and design guidelines
- Collocation, to the greatest extent feasible



Significant Gap Under City's Ordinance

- Is the facility proposed to provide coverage or capacity that meets the needs of the residents for wireless service?
- Does it meet city's design and other standards?
- If not, then the federal rules on prohibition of services come into play, including federal significant gap and least intrusive means



Can the City Deny a Regulatory Permit Based Solely on Type of Radio or Power of Radio?

- Not if the proposal complies with Federal Law on RF
- City cannot unreasonably discriminate among providers of functionally equivalent services
- And assuming that the proposal meets City design standards
- Look at form/size of facility



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Current CA/Fed Law – Brief Summary

- Cannot exclude wireless from the ROW
 - Can regulate based on Aesthetics
 - If there is a significant Gap, must determine least intrusive means to address
- Cannot Unreasonably Discriminate among providers of functionally equivalent services
- Cannot regulate based on RF or health Concerns
 - Must meet federal standards
- Can have reasonable form based standards



Cities of Interest

- Pasadena
- Rancho Palos Verdes
- Davis
- Hillsborough



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