Introduction

The purpose of this Memorandum is to provide a federal-law-based analysis of the applicability of the federal Telecommunications Act of 1996 (hereinafter "the TCA"), and its subdivisions, to the City of Portland, Oregon's Code, and its provisions pertaining to the regulation of the siting, construction, and modification of personal wireless service facilities.

More specifically, the purpose of this Memorandum and the analysis contained herein are to:

(A) Provide a review of the local zoning powers over the placement of personal wireless facilities, which the United States Congress explicitly preserved to local governments under the "General Authority" provision of the Telecommunications Act of 1996;[1]

(B) Dispel misinformation regarding the current extent to which the City of Portland may exercise such powers that Congress explicitly preserved to local governments under the TCA, notwithstanding any recent "interpretative" Order or Orders of the FCC;

(C) Provide specific recommendations pertaining to the Portland City Code, which may be incorporated into the Code to enable the City of Portland to exercise its regulatory authority to control the placement of wireless facilities, to the maximum extent intended by Congress, without violating the constraints set forth within 42 U.S.C.A. §332 (c)(7) (B)(i)(I), (B) (i)(II), (B)(ii), (B)(iii) and (B)(iv) of the TCA;

(D) Provide recommendations regarding provisions which the City should incorporate into its Code to: (i) guide its local regulatory boards to ensure that when rendering zoning decisions upon applications seeking approvals for personal wireless facilities, the City's local boards do not violate the constraints of the TCA, and (ii) minimize the risk that an applicant whose application has been denied will possess a valid claim under the TCA which might serve as a basis for a viable federal lawsuit; and

(E) Provide recommendations regarding provisions which the City should incorporate into its Code to: (i) enable its local regulatory boards to recognize what constitutes "substantial evidence" within the meaning of the TCA, and (ii) ensure that such boards will not be misled by false, misleading, or deceptive documentation submitted by an applicant seeking approval for a wireless facility.

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[1] See 42 U.S.C.A. §332 (c)(7)(A).

About the Author

Andrew J. Campanelli

General Experience

Since beginning his legal career as a litigator in 1992, Mr. Campanelli has handled well over 7,000 civil cases in both federal and state trial courts and litigated over 1,000 cases to their conclusion. He has investigated and/or handled federal cases in United States District Courts within as many as twenty-three states. He has been admitted to nine of the thirteen United States Circuit Courts of Appeals and was admitted to The United States Supreme Court in 1998.

Mr. Campanelli has handled wireless facility cases from New York to California. His services have included: (a) litigating federal actions based upon the Telecommunications Act of 1996 (TCA), (b) providing representation, counsel, and guidance concerning TCA compliance within the context of processing applications for the installation of cell towers (macro cell sites), microcell sites and DAS systems before all forms of local zoning authorities and boards, and (c) assisting local governments in drafting and enacting local ordinances which vest such local governments with the maximum authority to regulate the installation of wireless facilities within their jurisdictions, and which afford their citizenry the maximum protections against both the irresponsible placement of wireless facilities and overexposure to illegal levels of radiation emanating from same.

Most Recent Presentations

Local Government Regulation of Wireless Facilities III
2020 Association of Towns of the State of New York Annual Meeting and Training School
Marriott Marquis, Times Square, New York, February 18, 2020

Local Government Regulation of Wireless Facilities II
Southern Tier Central Regional Planning and Development Board
Corning Community College, Corning NY, April 5, 2018

Local Government Regulation of Wireless Facilities II
Training Seminar – Wayne County, Department of Planning, June 5, 2017

Local Government Regulation of Wireless Facilities
New York State Conference of Mayors, July 24, 2013

I. Relevant History of the TCA and its Application

Any federal-law based analysis of a local zoning ordinance pertaining to personal wireless facilities must begin with: (a) a review of the TCA, specifically the powers which Congress explicitly preserved to local governments under the Act, and (b) the five (5) finite constraints that Congress placed upon those powers.

A. The Preservation of Powers to Local Governments and Their Exercise of Same

When Congress was considering the enactment of the Telecommunications Act, it considered vesting the FCC with the power to control the placement of wireless facilities, and draft legislation was considered concerning same.[2]

Instead of doing so, Congress decided to explicitly preserve to local governments the general authority to regulate the placement, construction, and modification of wireless facilities within their jurisdiction,[3] subject to five (5) finite constraints that were placed upon such powers.[4]

In the more than two decades that have transpired since the adoption of the Telecommunications Act in 1996, well-informed local governments have employed the powers preserved to them by Congress by adopting and enforcing "smart planning provisions." Through these provisions, local governments have controlled the placement of cell towers and other wireless facilities to protect their communities against the sometimes severe adverse impacts that the irresponsible placement of wireless facilities typically inflict.

Smart planning provisions are local zoning ordinances designed to achieve three (3) specific objectives simultaneously.

They are designed to (a) enable *wireless carriers*[5] to saturate the local jurisdiction with personal wireless coverage while (b) minimizing the number of wireless facilities necessary to provide such coverage and (c) minimizing, to the greatest extent possible, adverse impacts upon residential developments, individual homes, and communities in general.

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[2] See H.R. Rep. No. 104-204(I), §107 at 94 (1995).

[3] See 42 U.S.C.A. §332 (c)(7)(A) which is entitled “General authority.”

[4] See 42 U.S.C.A. §332 (c)(7)(B) which is entitled “Limitations.”

[5] *Wireless carriers* are companies which provide personal wireless services, within the meaning of 42 U.S.C. §322(c)(7)(C)(i).

Working *against* the smart planning efforts of local governments are both *wireless carriers* and *site developers*, the latter of which are private for-profit companies that do not actually provide any personal wireless services but are engaged in the business of constructing wireless facilities, and thereafter leasing space or capacity upon such facilities to wireless carriers.

Site developers are driven by a desire to construct wireless facilities in the least expensive locations possible, irrespective of the potential adverse impacts their irresponsibly placed wireless facilities typically inflict on nearby properties, residential homes, and communities.

In furtherance of such desires, site developers often seek to mislead local governments to believe that they are possessed of little or no authority to regulate the placement of wireless facilities. Their representatives often seek to convince local zoning officials and their attorneys to interpret the finite statutory limitations upon the powers of local governments under the TCA in such a manner that the finite "exceptions" to a local government's power would, for all practical purposes, stamp out the "General authority" which Congress preserved to them.

Of equal, if not greater import, the agents of applicants seeking to build wireless facilities are known to (a) submit patently false or materially misleading information and documentation to local zoning boards in support of applications seeking approvals for desired wireless facilities,[6] (b) install wireless facilities without obtaining, or even seeking to obtain, any local zoning approvals before installing them, (c) complete stealth installations under cover of darkness, or at times when the owners of nearby properties would not be home or asleep,[7] and

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[6] The most common false documents proffered to local planning boards and zoning boards include things such as false or materially misleading propagation maps, patently false FCC compliance reports, false certifications of "need," and misleading and/or defective visual impact analyses, among others.

[7] In Huntington, New York, a wireless carrier filed a belated application to "legalize" a partially completed monopole that had been installed upon a poured concrete foundation in the Town, without the carrier having filed any applications seeking any zoning approvals from the Town, allegedly in violation of setback requirements and the necessity for a Special Permit. During a public hearing upon the belated application to legalize the installation, the Author questioned a neighbor who testified that the concrete foundation for the tower "*was poured at midnight on December 24th"* - the neighbor's assumption being that the choice of time was deliberately calculated to ensure that none of the neighbors would be around to object to the installation.

(d) lie to local property owners as to their intent and/or the placement and/or size of the facilities they intend to construct.[8]

As for the FCC, the FCC exercises no meaningful regulatory oversight over the location or operation of personal wireless facilities or the levels of radiation to which such facilities expose members of the general public.

Contrary to popular assumptions otherwise, concerning the vast majority of cell towers, small cells, and DAS systems, the FCC has no idea where they are[9] or to what level of radiation any individual wireless facility exposes members of the general public. [10]

This is because: (a) the FCC does not require wireless facilities that are less than 200 feet in height to be registered with it, and (b) unless they receive a complaint that a facility is emitting

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[8] In the Matter of DeMarco, the Author's clients, a New York family, arrived home to find workers installing something in the ground on their front lawn. When approached by the family, the workers allegedly explained to them that: (a) there was a public right-of-way across their front lawn, and (b) that the ground-wire they were installing was for a new streetlight that was going to be installed at the street in front of their home. Less than 48 hours later, the family came home to find a forty (40) foot cell tower on their front lawn. See http://abclocal.go.com/wabc/story?section=news/local/long_island&id=7937987 http://newyork.cbslocal.com/2011/02/03/celltoweronfrontlawnsurpriseslongislandcouple/ http://northshoresun.timesreview.com/2011/02/5977/townaskingwirelesscompanytotakedowntowerbuiltonmountsinaifamilysproperty/.

[9] The FCC's website addresses its lack of registration requirement, as follows:

"The ASR (Antenna Structure Registration) program requires owners of antenna structures to register with the FCC any antenna structure that requires notice of proposed construction to the Federal Aviation Administration (FAA) due to a physical obstruction. *In general, this includes structures that are **taller than 200 feet** above ground level or that may interfere with the flight path of a nearby airport."*

Excerpt from FCC's website at FCC.gov, May 27, 2020 [emphasis added]

Since the vast majority of cell towers, small cells and DAS nodes are less than 200 feet in height, they are not required to be registered with the FCC.

[10] The FCC's website addresses its lack of radiation testing, as follows:

"***DOES THE FCC ROUTINELY MONITOR RADIOFREQUENCY RADIATION FROM ANTENNAS?*** *The FCC does not have the resources or the personnel to routinely monitor the exposure levels due at all of the thousands of transmitters that are subject to FCC jurisdiction. However, while there are large variations in exposure levels in the environment of fixed transmitting antennas, it is exceedingly rare for exposure levels to approach FCC public exposure limits in accessible locations. In addition, the FCC does not routinely perform RF exposure investigations unless there is a reasonable expectation that the FCC exposure limits may be exceeded."*

Excerpt from FCC's website at FCC.gov, May 27, 2020 [underline added]

radiation levels that exceed the permitted limits, the FCC never tests the radiation emissions emanating from wireless facilities.

This lack of meaningful regulatory oversight is exacerbated by the fact that the FCC has never updated its review of the levels of radiation it deems safe, which has precipitated a pending lawsuit seeking to force the FCC to review its antiquated standards for radiation safety.

As such, local governments are their citizens first *and only* line of defense against exposure to illegally excessive levels of RF radiation from *non*-FCC-compliant facilities.

Far too often, uninformed and uneducated local governments do not exercise the regulatory powers which were intentionally preserved to them by the United States Congress, simply because:

(a) they are unaware that they possess such powers, much less know how to exercise them,

(b) they fail to enact local zoning provisions that vest their respective boards with the power to render the proper factual determinations, which local governments have the power to make within the context of deciding zoning applications seeking approvals for the placement of wireless facilities, or

(c) they do not know how to evaluate "evidence" submitted by applicants seeking approvals to install wireless facilities.

To exercise the regulatory powers which Congress intentionally preserved for local governments under the TCA to the greatest extent possible, local governments must adopt local zoning regulations which: (a) create permit requirements for all wireless facilities, (b) vest their local boards with the power to make factual determinations pertaining to permit applications for wireless facilities, and (c) codify guidelines to guide their local boards as to what factual determinations they are required to make, what evidence they should require or consider in making such determinations, and how to render decisions in a manner which does not violate any of the five (5) finite constraints which the TCA imposes upon them.

B. The Finite Constraints Upon Local Government Powers under the TCA

Subparagraph A of the TCA, which encompasses the general rule that local governments possess the "General Authority" to regulate the placement of wireless facilities within their jurisdiction, is followed by subparagraph B, which places five (5) finite constraints upon such authority.

More specifically, 47 U.S.C.A. §332 (c)(7) subparagraph (B) of the TCA is entitled "Limitations." It prescribes the following five limitations upon the general zoning authority and powers preserved to State and local governments under the TCA:

(i) Local governments cannot unreasonably discriminate among providers of functionally equivalent services §332(c)(7)(B)(i)(I),[11]

[11] As interpreted by the courts, this provision allows some discrimination among providers of equivalent services. Any discrimination need only be *reasonable*. Most courts have recognized that discrimination based on traditional bases of zoning regulation, such as preserving the character of the neighborhood and avoiding aesthetic blight are reasonable and thus permissible, and a mere increase in the number of wireless antennas in a given area over time can justify differential treatment of providers. See, e.g. MetroPCS Inc. v. The City and County of San Francisco, 400 F3d 715, 727 (2005); AT&T Wireless PCS v. City Counsel of The City of Virginia Beach, 155 F3d. 423 (4th Cir. 1998).

(ii) Local governments cannot prohibit or have the effect of prohibiting the provision of personal wireless services §332(c)(7)(B)(i)(II),[12]

(iii) Local governments must act upon any application to place, construct or modify a wireless facility within "a reasonable period of time" §332(B)(7)(B)(ii),[13]

(iv) Any decision to deny an application to place, construct or modify a wireless facility shall be *in writing* and be *supported by substantial evidence* contained in

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[12] Federal Circuit Courts have elaborated their own tests to establish whether or not a local government violated the effect of prohibiting language contained in §332 (c)(7)(B). For a review of your Circuit Court's test, see Section III "Relevant Caselaw Within the Seventh Circuit." The Second, Third and Tenth Federal Circuits follow, instead, the ruling in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999), which requires a wireless provider or site developer to prove that it had established before a local zoning authority that its proposed installation was "the least intrusive means" of closing "a significant gap" in the applicant's personal wireless services, and the zoning authority still denied its application. Thus, applicants could only force a local government to permit them to install a non-zoning-code-compliant wireless facility if they could prove both that they suffered from "a significant gap" in their personal wireless services and that their proposed installation was "the least intrusive means" of remedying that gap. Note that this standard is slightly different than the First, Fourth, and Seventh Circuits. For the Ninth Circuit, See Sprint Telephony PCS LP v. Cty of San Diego, 543 F3d 571 (2008). The FCC and the wireless industry are now working together to invoke the recent 2018 Orders of the FCC to argue that this standard no longer applies, and that a violation under this section occurs if a provider simply deems its new proposed installation is needed to either enhance existing wireless services, or to provide new ones.

[13] On November 18, 1999, the FCC adopted an interpretative ruling (FCC 09-99) which imposed the following time frames within which local governments must act upon siting requests for wireless towers or antenna sites: (1) ninety (90) days for the review of collocation applications, and (2) one hundred-fifty (150) days for the review of siting applications for new facilities.

a written record §332(c)(7)(B)(iii), [italics added][14] and

(v) Local governments cannot regulate the placement, construction or modification of a wireless facility on the basis of environmental effects of radio frequency

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[14] This provision mandates that when a local government renders a decision upon an application seeking approval for the installation of a wireless facility, the local government must: (a) reduce its decision to a separate writing (i.e., a "written record"), and (b) base its decision upon "substantial evidence." The written record requirement specifies that: (a) local governments issue their decisions in a writing, separate and apart from any transcript or record of the proceeding, and (b) the written decision must contain a sufficient explanation of the reasons for the denial to allow a reviewing Court to evaluate the evidence in the record supporting those reasons. See e.g. MetroPCS v. City and County of San Francisco, 400 F.3d 715(2005).

The decision must also be based upon "substantial evidence" that was placed into the record. Substantial evidence means "less than a preponderance but more than a scintilla of evidence" Orange County-Poughkeepsie Ltd P'ship v. Town of Fishkill, 84 F.Supp.3d. 274 (2015), or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Cellular Tel. Co v. Town of Oyster Bay, 166 F3d 490 (2nd Cir. 1999). Review under this standard is essentially deferential, such that Courts may neither engage in their own fact finding nor supplant a local zoning board's reasonable determinations. See, e.g. American Towers, Inc. v. Wilson County, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV-1196].

emissions,[15] *to the extent that such facilities comply with the FCC's regulations concerning such emissions* §332(c)(7)(B)(iv)[16] [italics added].

The exercise of local government powers to control the placement of wireless facilities, without violating the constraints of 47 U.S.C.A. §332 (c)(7) subparagraph (B), is relatively simple once a local government enacts zoning provisions to guide their local boards to avoid violating any of the limitations imposed under same.

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[15] The FCC has defined Radiofrequency (RF) Radiation, for its purposes, as electromagnetic energy, that can be further defined as waves of electric and magnetic energy moving together through space, where such electromagnetic waves have frequencies that range from 3 kilohertz (kHz) to 300 gigahertz (Ghz) FCC OET Bulletin 65, Supplement B, (Edition 97-10) at page 8.

[16] The FCC has set maximum limits for human exposure to RF radiation based upon recommended exposure criteria issued by the NCRP and ANSI/IEEE, each of which identified the same threshold level "*at which harmful biological effects may occur*." See FCC OET Bulletin 56, August 1999.

Based upon same, the FCC adopted Maximum Permissible Exposure (MPE) limits, which are expressed in terms of electric field strength, magnetic field strength and power density. *Id*. While federal law requires all wireless facilities to comply with such RF exposure limits (47 C.F.R. §1.1310), there is no agency that actually enforces such requirement. The FCC does not test wireless facilities for compliance with either set of exposure limits.

The wireless industry maintains that 47 USCA §332(c)(7)(B)(iv), prohibits local governments from considering the potential adverse health impacts of the RF radiation which the proposed installation will emit, if that the respective applicant establishes that such emissions will not exceed the "*general population/uncontrolled limits"* or the "*occupational/controlled exposure limits*" which have been codified within the Code of Federal Regulations.

47 CFR§ 2.1 dictates that the *general population* limits apply as follows:

"*General population/uncontrolled exposure*. For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related."

47 CFR §2.1 dictates that the less stringent, *occupational limits* apply as follows:

"Occupational/controlled exposure. For FCC purposes, applies to human exposure to RF fields when persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over their exposure. Occupational/controlled exposure limits also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits, as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area by some other appropriate means."

This Memorandum will address (among other things) recommended changes to the Portland City Code to vest the City's zoning authorities with the maximum power to control the placement of wireless facilities within the City while not violating the constraints imposed under 47 U.S.C.A. §332 (c)(7) subparagraph (B).

C. The Potential Adverse Impacts of Irresponsibly Placed Wireless Facilities

Aside from preventing an unnecessary redundancy and proliferation of wireless facilities within the respective jurisdiction, local governments have enacted and enforced smart planning provisions to prevent, to the greatest extent practicable, any unnecessary adverse impacts from the irresponsible placement of wireless facilities.

The most common adverse impacts that irresponsibly placed facilities can, and do, inflict upon adjacent and nearby homes, properties, and communities, which can range in significance from minimal to severe, include the following:

i. Adverse Aesthetic Impacts

The irresponsible placement of wireless facilities of all types often inflicts significant adverse aesthetic impacts, the most severe of which are typically found when wireless facilities are sited in unnecessarily close proximity to residential homes. Federal courts have ruled that adverse aesthetic impacts are a valid legal ground upon which local zoning authorities can deny zoning applications seeking approvals to install wireless facilities.[17]

Within the context of the "5G rollout," the frequency and severity of adverse aesthetic impacts being inflicted upon residential homes across the nation have increased exponentially.

[17] See, e.g. Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2d Cir. 2005), T-Mobile Northeast LLC v. The Town of Islip, 893 F.Supp.2d 338 (2012).

Since the transmissions from 5G facilities travel much shorter distances than previously installed wireless facilities, site developers have been installing them closer to residential homes, thus exacerbating their adverse aesthetic impact much more than before.

On an almost daily basis, the Author receives calls from homeowners advising that a wireless facility installation has been installed in extremely close proximity to their respective homes, either over their objection or without them having received any notice that such facility was to be so closely installed to their home, at any time before such installation.

In the worst cases, wireless facilities have been installed as close as eight (8) feet from a young couple's kitchen table or ten (10) feet from a young child's bedroom window.

ii. Reductions in Property Values

Across the entire United States, both real estate appraisers[18] and real estate brokers have rendered professional opinions that simply support what common sense dictates.

When cell towers or other wireless facilities are installed unnecessarily close to residential homes, such homes suffer material losses in value, typically ranging from 5% to

[18] See, e.g. a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a Cell Tower in close proximity to a home had reduced the value of the home by more than 10%, go to http://bridgewater.patch.com/articles/appraiser-t-mobile-cell-tower-will-affect-property-values.

20%.[19] In the worst cases, they make homes situated within a newly installed tower's fall zone completely unsalable.

iii Lack of Sufficient Fall Zones

Due to the well-documented dangers irresponsibly placed cell towers present, local governments across the entire United States have enacted and enforced zoning provisions to ensure that the installation of such towers includes a fall zone or safe zone of sufficient size to preserve the health and safety of their residents.

The four principal dangers that irresponsibly placed cell towers present are structural failures, fires, icefall, and debris fall.

Due to the speed at which such cell towers are being constructed in the United States and site developers' desire to build them as cheaply as possible, quality control over the manufacture, construction, and maintenance of monopole cell towers is nearly non-existent.

Not surprisingly, cell tower structural failures and cell tower fires occur far more often than the public knows. Such failures and fires often result in a cell tower collapsing to the ground and presenting a risk of property damage, injury, or death.

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[19] In a series of three professional studies conducted between 1984 and 2004, one set of experts determined that the installation of a Cell Tower in close proximity to a residential home reduced the value of the home by anywhere from 1% to 20%. These studies were as follows:

The Bond and Hue - *Proximate Impact Study* - The Bond and Hue study conducted in 2004 involved the analysis of 9,514 residential home sales in 10 suburbs. The study reflected that close proximity to a Cell Tower reduced price by 15% on average.

The Bond and Wang - *Transaction Based Market Study*

The Bond and Wang study involved the analysis of 4,283 residential home sales in 4 suburbs between 1984 and 2002. The study reflected that close proximity to a Cell Tower reduced the price between 20.7% and 21%.

The Bond and Beamish - *Opinion Survey Study*

The Bond and Beamish study involved surveying whether people who lived within 100' of a Cell Tower would have to reduce the sales price of their home. 38% said they would reduce the price by more than 20%, 38% said they would reduce the price by only 1%-9%, and 24% said they would reduce their sale price by 10%-19%.

The most common cause of a monopole cell tower's failure is baseplate failure, which typically causes the entire tower to collapse.[20] In whole or part, monopole collapses are also caused by the failure of such components as flanges, joints, and bolts, among others.

Another danger exists in the form of cell tower fires, which occur far more frequently than the public knows. Such fires often cause the respective tower to "warp" from the heat of the fire, or in other cases, cause the respective tower to collapse in a flaming heap,[21] thereby creating the risk of igniting anything near the fallen flaming tower.

The third danger, that being ice fall, is prevalent in areas prone to freezing weather, where masses of ice can form on cell antennas and support structures atop cell towers. As temperatures rise and ice begins to melt, chunks of ice are known to dislodge and come hurtling to the ground.

According to a physicist's report, when a chunk of ice falls from a typical 150-foot cell tower, by the time it reaches the ground, the chunk of ice is traveling at a speed of approximately 67 miles per hour. This falling chunk of ice presents a genuine danger of inflicting severe physical injury or death to anyone standing within the tower's icefall zone and damaging any personal property or structures situated within such zone.

Finally, there is the danger of debris fall. Examples of debris fall are when a piece of the wireless structure falls off the structure, or a worker drops a tool or piece of equipment during the performance of routine maintenance upon the structure,

Given these dangers that cell towers and wireless facilities present, informed local governments typically enact and enforce setback or fall zone requirements for cell towers. The most common distances required for safe zones around cell towers are 110% of their height.

iv Exposure to Dangerous Levels of Radiation
From Non-FCC Compliant Facilities

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[20] To see dramatic images of a 165-foot tower having collapsed at a firehouse, crushing the Fire Chief's vehicle, go to www.firehouse.com/news/10530195/oswego-new-york-cellular-tower-crushes-chiefs-vehicle, or go to Google and search for "Oswego cell tower collapse."

[21] To see videos of modern towers bursting into flames and/or burning to the ground, go to or or simply go to *Google*, and search for "cell tower burns."

Being well aware of the fact that, by its own admission, the FCC does not "have the resources" to test the radiation emissions from wireless facilities, wireless companies are free to cause their facilities to emit any levels of radiation they choose.

The potential danger posed to citizens due to the utter void of actual FCC oversight over radiation emission levels is exacerbated by the fact that applicants seeking zoning approvals often file false FCC compliance reports. These reports falsely claim that a proposed facility will be FCC compliant, when in reality, the facility may expose members of the general public to radiation levels that exceed the FCC's limits by several hundred percent or more.

By taking all of these well-documented dangers into consideration, local governments across the entire United States have enacted zoning provisions designed to protect their citizens, homeowners, and communities against same.

The City of Portland should follow suit.

D. The Non-Risks of Litigation

All too often, representatives of wireless carriers and/or site developers seek to intimidate local zoning officials with either open or veiled threats of litigation.

These threats of litigation under the TCA are, for the most part, entirely hollow.

This is because, even if they file a federal action against the City and win, the Telecommunications Act of 1996 does not enable them to recover compensatory damages or attorneys' fees, even when they get creative and try to characterize their cases as claims under 42 U.S.C. §1983.[22]

This means that if they sue the City and win, the City does not pay them a penny in damages or attorneys' fees under the TCA.

Typically the only expense incurred by the local government is its own attorneys' fees.

Since federal law mandates that TCA cases proceed on an "expedited" basis, such cases typically last only months rather than years.

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[22] See City of Rancho Palos Verdes v. Abrams, 125 S.Ct 1453 (2005), Network Towers LLC v. Town of Hagerstown, 2002 WL 1364156 (2002), Kay v. City of Rancho Palos Verdes, 504 F.3d 803 (9th Cir 2007), Nextel Partners Inc. v. Kingston Township, 286 F.3d 687 (3rd Cir 2002),

As a result of the brevity and relative simplicity of such cases, the attorneys' fees incurred by a local government are typically quite small, compared to virtually any other type of federal litigation—as long as the local government's counsel does not try to "maximize" its Billing in the case.

II. Relevant Federal Caselaw Within The Ninth Circuit

This analysis of the City's Code includes consideration of several relevant decisions of the United States Court of Appeals for the Ninth Circuit.

When applicants file federal lawsuits (under the TCA) to challenge a local government's denial of their zoning application pertaining to a wireless facility, federal courts situated within the Ninth Circuit typically apply a deferential standard to fact-finding determinations which had been made by the local government when it rendered the decision being challenged.

While federal courts will be deferential to a local zoning board's fact-finding determinations, many local zoning provisions, including Portland's Code, fail to provide guidance to ensure that its local zoning officials actually recognize what fact-finding determinations they are required to make—if their decisions are to withstand a challenge under the TCA.

Moreover, both the applicable provisions of Title 33 are grossly deficient in this regard because they do not contain evidentiary guidance provisions which would enable Portland's zoning officials to understand what evidence they are permitted to ask for or should consider in rendering determinations consistent with the intent of Section 33.274 et seq.

By way of example, if an applicant were to assert that the City "*must*" grant their application because: (a) they suffer from a significant gap in personal wireless services and (b) that their proposed installation is the "least intrusive means" of remedying that gap, the applicable provisions of Title 33 are entirely silent as to what evidence City zoning authorities may request from the applicant to enable them to determine whether or not the applicant has proven both of those claims.

Across the United States, applicants are now asserting that unless a local zoning Code authorizes a local board to require an applicant to produce a specific type of evidence, their local zoning Board cannot require the applicant to produce it.[23]

In many cases, however, unless the Board obtains such evidence, the TCA would actually prohibit the Board from denying a respective applicant's application because the Board would lack "substantial evidence" to support any such denial.

As such, it is imperative that the City amend its code provisions if its zoning authorities are going to possess the ability to regulate the placement of wireless facilities within the City to any meaningful degree.

[23] See, e.g. T-Mobile Central LLC. V. United Government of Wyandotte County, Kansas, 546 F3d.1299, 1310 (10th Cir 2008)("the Board erred in requiring T-Mobile to demonstrate that its proposal was the least intrusive means of filling a service gap because nothing in the local law permitted the Board to impose such a requirement); Orange Court-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp3d 274 (2015)(The failure of the applicant to introduce evidence of poor coverage in the area could not serve as a basis to deny its application, because the local zoning code did not require Verizon to provide evidence of dropped calls or customer satisfaction); Verizon Wireless LLC v. Douglas County Bod of Cnty Comm'rs, 544 F.Supp2d 1218 (2008)(a denial is not supported by substantial evidence if it imposes a burden upon the applicant for which there is no requirement under local law).

III. The Portland Zoning Code – Title 33 and Administrative Rules of the PBOT

Without exception, the most effective local zoning provisions regulating the siting and/or placement of cell towers and other wireless facilities are set forth within singular all-inclusive code zoning provisions, which empower a single identified board to entertain all applications seeking approval for the installation of wireless facilities.

Typically these singular all-inclusive provisions require applicants seeking to install a cell tower, small cell, distributed antenna (DAS) system, or another type of wireless facility within a City, County Town or Village, to file an application to obtain a specified permit for same.

The most common types of required permits consist of use permits, special use permits, and conditional use permits. The power to conduct hearings upon and determine applications for such permits is typically vested in a single Planning Board or Commission, subject only to a potential additional zoning requirement for an area and/or use variance, with such variance applications to be determined by a Zoning Board of Appeals.

These singular well-crafted provisions govern the installation of all wireless facilities within a respective jurisdiction, irrespective of whether the proposed location is situated upon private property, public property, or in a right of way.

Unfortunately, The City of Portland has not followed the singular code provision model. Instead, it has enacted and/or applies a hodgepodge of relatively disjunctive and dispersed zoning code provisions, Administrative Rules, and ill-advised interpretations of "legal limitations."

As drafted and applied, these provisions, rules, and interpretations virtually guarantee two things.

First, the City of Portland cannot exercise its potential authority to regulate the placement of wireless facilities within the City, to the maximum extent, which was intended by the United States Congress when it adopted the Telecommunications Act of 1996 (the "TCA").

Second, to the extent that any City zoning authority tries to deny any type of application seeking approval for the installation of a wireless facility, any sophisticated wireless carrier or site developer whose application has been denied will be able to file a simple, expedited federal lawsuit against the City under the TCA, with a high likelihood of success.

Aside from the fact that the hodgepodge of provisions and rules adopted by the City are collectively self-defeating, not a single one of such Code provisions, rules, interim rules or interpretations provide any guidance, whatsoever, for the City's decision-making authorities, as to the specific fact-finding determinations they are required to make if they are to avoid violating the TCA.

Moreover, while the City Zoning Code places the burden on applicants to prove that they meet the criteria for the granting of the respective approvals they are seeking,[24] it provides no guidance to the City's fact-finding boards or authorities as to what type of evidence they can consider, much less require an applicant to produce, when they are called upon to decide whether to grant or deny such applications.

The result is that any time a carrier or site developer's application to install a wireless facility is denied, they will be able to file a federal lawsuit against the City under the TCA, and the likelihood of their success will often be very high.

This also means that *within the context of the 5G rollout*, aggressive site development companies will likely have free reign to impose their will to install wireless facilities at virtually any locations they see fit, and at any height they choose, irrespective of the adverse impacts the irresponsible placement of such facilities may inflict upon residential homes and communities, among others.

To the extent one can untangle the City's regulatory scheme pertaining to wireless facilities, the City's Code and Rules divide authority to grant approvals for wireless facilities between differing City representatives, based upon the location chosen for a proposed wireless facility.

A. Public Rights of Way Installations

Under Interim Administrative Rule TRN-10.44, which was adopted by the Portland Bureau of Transportation (PBOT),[25] applications to install Small Wireless Facilities[26] within

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[24] Pursuant to City Code Section 33.800.060.

[25] Pursuant to City Code Section 3.12.010.

[26] See TRN 10-44 Section (II.)(D.).

Public Rights of Way, upon both public and private property, are required to be filed with the PBOT, which is vested with the authority to grant permits for the installation of same.[27]

Administrative Rule UTL 3.08, which was adopted by the City,[28] sets standards for applications to install Macro Wireless Facilities within Public Rights of Way but is silent as to what City authority is to determine whether an applicant has met such standards.

While one might expect that such determinations would be made either by the PBOT (which issues permits for wireless facilities on vertical infrastructure under Interim Administrative Rule 3.12.010), the Director of the City's Bureau of Development Services (BDS),[29] or the City's Land Use Hearings Officer,[30] it appears that they are being reviewed and possibly determined by the City's "Office for Community Technology."

In what are the most nonsensical notice requirements which the Author has seen in any zoning regulation anywhere within the entire United States, TRN-10.44 section IV(G.) requires applicants seeking approvals for the installation of wireless facilities to mail notices of their proposed installations to all property owners within 200 feet of their site for the proposed installation,[31] but thereafter provides for the City first to receive notice of any objections which such property owners might have to the proposed facility, two (2) weeks after its built.

Under TRN 10.44, the notice which an applicant sends to those property owners is required to direct those property owners to mail any comments, complaints, or objections they may have to *the applicant*[32] (instead of the PBOT or the City). The applicant is then required to provide the City with "a consolidated log of received comments and complaints" within two months after the facility has been installed.[33]

These provisions beg the question: What possible purpose would it serve to have the applicant *first* send the adjacent property-owners' complaints and objections to a proposal for a new wireless facility to the City, two months after it has already been built?

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[27] See TRN 10-44 Sections (IV.)(D), (V.)(D)(7)(a.) and (VI.)(B)(2.)(g).

[28] Pursuant to City Code 3.114.050(3).

[29] See Title 33, Section 33.720.020(A).

[30] See Title 33 Section 33.710.080(D.).

[31] *See* TRN 10-44(IV)(G)(1.)(c.).

[32] *See* TRN 10-44(IV)(G)(1.)(e.).

[33] *See* TRN 10-44(IV)(G)(1.)(f.).

Contrary to any appearance otherwise, TRN 10.44 contains no meaningful notice provision or any type but remains glaringly deficient in this regard.

Actual notice provisions invariably enable nearby property owners to send any objections they may have directly to the local authority which is vested with the authority to grant or deny the application for the proposed facility, and afford them an opportunity to be heard concerning such objections, so they can protect their properties against potentially substantial adverse impacts which the irresponsible placement of a wireless facility might inflict upon their homes or other properties.

B. Wireless Installations Which are Not Situated Within a Public Right of Way

Installations proposed upon sites which are not located within a Public Right of Way appear to be regulated under Title 33, Section 33.274.

Section 33.274.025 indicates, in part, that all new radio frequency transmission facilities require a conditional use approval, while Sections 33.274.025 and 33.274.030 simultaneously set forth a virtual laundry list of exemptions from such requirement.[34]

Section 33.274.040 imposes a setback requirement for wireless facilities but then sets the minimum setback requirement at a mere twenty (20%) percent of what most other jurisdictions require.[35]

To the extent that a proposed installation for a new wireless facility is not exempted from a conditional use approval requirement, applications for same are governed, in large part, by Section 33.815.

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[34] *See e.g.* 33.274.035 subparagraphs A and B

[35] *See e.g.* 33.274.040(C)(7) which sets a setback requirement of 20% of the height of a tower from a public street, while most other local governments require setbacks equal to 110% of the height of the tower.

Pursuant to Section 33.815.040(A)(1), an application for the installation of a new cell tower or wireless facility would be categorized as a "Type III procedure," for which a public hearing is required[36] and is to be scheduled by the Director of BDS.[37]

The approval criteria for such applications vary based upon the designated zoning of the proposed siting and encompass requirements: (a) that the visual adverse impacts of proposed facilities be minimized,[38] (b) that the applicant prove that the installation of a proposed tower is the only feasible way to provide the wireless service that the applicant seeks to provide,[39] (c) that the public benefit to be derived from the use of the new tower would outweigh any adverse impacts which cannot be mitigated,[40] and that the proposed installation will not "significantly lessen" the "desired character" of the area.[41]

Despite encompassing such criteria, Section 33.815, as well as Section 33.274, are utterly void of any provisions, whatsoever, which provide guidance as to (a) what factual determinations the zoning authorities are required to make in deciding applications to avoid violating the constraints of the TCA, and (b) what evidence such authorities can consider, and of equal import, can require applicants to provide, to enable them to make such required factual determinations.

By way of example, while Section 33.815(B)(1) provides that an applicant "must prove that a tower is the only feasible way to provide the (desired service)," the Code does not provide:

(a) what evidence the Board may consider in determining whether or not the proposed installation is the only feasible means of enabling a specifically identified provider to provide a specific type of wireless service,

(b) what probative evidence the Board may require an applicant to produce to enable the Board to determine whether such a test has been met, or

(c) that the Board must make a fact-finding determination that shall be placed in a written decision concerning same.

These specific types of omissions typically guarantee that, if a local zoning authority were to deny any application for installing a wireless facility, a sophisticated site developer or

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[36] *See* Section 33.730.030.

[37] *See* Section 33.730.030(D).

[38] *See* Section 33.815.225(A)(1), (B)(3)(a) and (B)(3)(e).

[39] *See* Section 33.815.225(B)(1) and (C)(1).

[40] *See* Section 33.815.225(B)(5), (C)(5) and (D)(3).

[41] *See* Section 33.815.225(B)(4), (C)(3) and (D)(1).

wireless carrier could challenge any denial in federal Court with a reasonably high likelihood of success.

In similar vein, the Code provides zero guidance to its fact-finding authorities on how to recognize when applicants seeking approvals to install wireless facilities submit patently false or materially misleading materials in support of their respective applications.

These glaring deficiencies in the City's code are greatly exacerbated by erroneous and/or misguided interpretations of the law, which have been embraced apparently by the City's Office for Community Technology.

These misguided interpretations reflect, with crystal-clear clarity, that the City actually has no idea of the extent to which it may exercise its authority to control the placement of wireless facilities within its jurisdiction.

C. The City's Misguided Legal Interpretations

For more than two decades, well-informed local governments have employed the "General Authority" which the United States Congress preserved for them under the TCA, to control the placement of wireless facilities within their jurisdiction and to prevent the unnecessary adverse impacts which the irresponsible placement of wireless facilities can inflict upon homes and communities.

Unfortunately, however, local governments are often misled to believe that they possess far less authority to control wireless facilities' placement than they actually possess.

A review of the City's Office for Community Technology's website reflects that, perhaps, the City of Portland falls squarely within this category.

That website contains a section entitled "LEGAL LIMITATIONS," which is intended apparently to describe existing "limitations" upon the City's ability to control the placement of wireless facilities within its jurisdiction.

The descriptions of purported limitations set forth within that section reflect that the City clearly lacks a basic understanding of the Telecommunications Act of 1996, and how it has been applied and interpreted by both local governments and Federal Courts across the entire United States during the 24 years which have passed since its enactment.

More specifically, the misstatements of law and fact set forth upon the City's website, and the erroneous positions inherent within same, include the following:

Misstatement of Law and Fact #1

"A wireless carrier has basic legal authority to place antennas to provide service to fill a coverage gap. The antenna placement decision itself is an engineering decision related to quality of signal/service."

These combined statements reflect both (a) a limited understanding of the effective prohibition provision of the Telecommunications Act of 1996, and (b) a contemporaneous lack of familiarity with the practices of the wireless industry in their pursuit of thousands of wireless facility applications nationwide.

False "Basic Legal Authority" Claim

Contrary to any suggestion otherwise, wireless carriers ***do not*** possess any "basic legal authority" to install antennas for "filling" a non-specific "coverage gap." There is no such "basic legal authority," which a local government might have to overcome if it wanted to deny an application for a wireless facility placement within the local government's jurisdiction.

What wireless carriers ***do possess*** is the right to carry on their commercial business of providing personal wireless services, and to file zoning applications seeking permission from local governments to construct personal wireless facilities to be employed to provide such services.

Such zoning applications are, for the most part, to be treated similar to any other zoning applications received and processed by local zoning authorities, subject to the caveat that the Telecommunications Act of 1996 places five (5) finite constraints upon how local zoning authorities exercise their zoning powers when entertaining such applications.

A wireless carrier can invoke section §332(c)(7)(B)(i)(II) of the Telecommunications Act to essentially force a local government to grant an application for a specific wireless cell tower**, if, and only if**, it can prove denial of its application for a specific facility will effectively prohibit it from providing personal wireless services.[42] This generally requires that it prove **both** (a) that it suffers from a **significant** gap in its personal wireless services, **and** (b) that its proposed installation and the site it desires, and at the height it proposes, is the least intrusive means of remedying that gap, and there are no potential alternative less intrusive locations available.[43]

Where an applicant fails to prove that it meets both parts of such test, it has no right or "basic legal authority" to place antennas anywhere to provide some type of service at such location.

Within the context of the 5G rollout, site developers have no "basic legal authority" to install 5G facilities. They can only force the City to grant a specific application for a specific facility, if they can prove that a denial of their zoning application for same will "actually" prohibit them from providing actual telecommunication service.[44]

False "Antenna Placement Decision" Claim

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[42] See Sprint Telephony PCS L.P. v County of San Diego, 543 F.3d 571 (9th Cir 2008).

[43] See e.g. T-Mobile USA Inc. v. City of Anacortes, 572 F3d. 987 (9th Cir 2009).

[44] See City of Portland v. United States, 2020 WL 4669906 (9th Cir 2020)("We held in *Sprint* that more than the mere possibility of prohibition was required to trigger preemption. *Id*. There must be an actual effect, and we recognized the continuing validity of the material inhibition test from *California Payphone.")*

Neither local zoning authorities nor most site developers rely solely upon "engineering decisions" in determining the placement of wireless facilities.

At present, the vast majority of applications for new wireless facilities are being filed by site developers, which do not actually provide any personal wireless services. They are engaged in the business of constructing, owning, and leasing space and/or capacity upon wireless infrastructure.

While their choice of location for proposed new wireless facilities obviously considers areas in need of current or future coverage or capacity issues, the most compelling factor that governs their choice of proposing sites consists of cost.

Simply stated, site developers choose locations based primarily upon cost. Without exception, they will seek to place new facilities at the least expensive location, even if the siting would cause their facility to be placed in the most intrusive location possible.

Misstatement of Law and Fact #2

Arguments regarding effects on property values are mixed at best, and nothing in the statutes or case law indicates the City can legally take these arguments into account when making wireless siting decisions.

On a daily basis, local governments entertaining applications for the installation of proposed new facilities consider evidence of the potential adverse impacts upon the values of real properties situated in close proximity to the proposed site. In those cases within which property owners submit substantial evidence that a proposed installation will adversely impact their property values, local boards can, and do, deny the respective application based in whole or in part, based upon same. These decisions are typically only thereafter challenged in Court when the respective zoning board did not receive substantial evidence based upon which it made its determination.[45]

[45] See e.g. California RSA No. 4 v. Madera County, 332 F.Supp.2d 1291 (2003), Cellular Telephone Company v. The Town of Oyster Bay, 166 F.3d. 490 (2nd Cir. 1999), AT&T Wireless Services of California LLC v. City of Carlsbad, 308 F.Supp.2d. 1148 (2003).

Partial Misstatement of Law #3

Federal law prohibits the City from making decisions modifying or denying any wireless sites based on allegations regarding human health impacts (47 USC §332(c)(7))

This statement omits the limitation of that prohibition, which explicitly states that such limitation extends *only to the extent that such facilities are FCC compliant*.

Local governments have the power not only to demand proof that facilities are and will be FCC compliant, both at their time of installation and at all times thereafter but also to ensure that their citizens are not exposed to illegally excessive levels of radiation emanating from non-FCC compliant facilities.

The analysis below addresses the changes which would be required to be made to the City Code if the City were desirous of: (a) vesting its officials with the maximum power available to them to control the placement of wireless facilities within the City, and (b) providing guidelines that would enable them to exercise such power in a manner which did not violate the finite constraints set forth within the applicable provisions of the TCA—meaning that to the extent that zoning officials were to deny an application seeking approval for the installation of a wireless facility, the denial would likely not only withstand legal challenge but would make the actual filing of such a challenge unlikely.

IV. Recommended Changes to The City Code

The City would be best served by enacting a single wireless ordinance within the City Code, which would require all entities seeking to install cell towers (or macrocells), small cells, or Distributed Antenna (DAS) Systems to file applications for a clearly identified type of permit(s) and/or approval(s), that would be entertained by a specific zoning authority, which would be charged with the duties of granting or denying such applications, after making specific fact-finding determinations based upon the evidence presented in support of each such application.

Such ordinance should: (a) vest a specific City Board, agency or official with the power to decide such applications, and to render factual determinations regarding same, and (b) place the burden of proof upon the applicant, to establish that: (i) their application meets whatever requirements are set forth within the applicable provision of the Code, (ii) granting their application would be consistent with the legislative intent provisions of the Code and/or (iii) that the existence of some constraint within 47 U.S.C. §332(c)(7)(B) of the TCA legally mandates that their application be approved.[46]

To vest the City's zoning officials with the maximum authority they may exercise within the purview of 47 U.S.C. §332(c)(7)(A), and to ensure that they exercise that authority without violating the constraints encompassed within 47 U.S.C. §332(c)(7)(B), it is recommended that the changes listed hereinbelow be made to the respective provisions of the City Code.

It must be noted that if, and to the extent that, any provision of the City Code as it currently exists or as it may be amended (based upon the recommendations herein) is found to conflict with Oregon state law (as it currently exists) or the TCA, the Code should include a severability provision to afford it protection against same.

[46] This is entirely consistent with both federal law within the 10th Circuit and the 9th Circuit decision in City of Portland v. United States, 2020 WL 4669906 (9th Cir 2020)

A. Legislative Intent Provisions

The very beginning of most local wireless ordinances typically set forth legislative intent provisions that explain the precise types of potential impacts that the respective municipality *seeks to prevent*, which serve as the reason why the local government initially enacted and continues to maintain a permit requirement for site developers and wireless carriers who seek to install a wireless facility within the local jurisdiction.

Among the reasons why these provisions *are essential* are they: (1) guide the local zoning authorities as to what they must consider when deciding whether to grant or deny a wireless facility application which is before them, (2) render the zoning authorities more capable of defending any decision wherein an application is denied, and the applicant wants to challenge that denial by filing a federal lawsuit under the TCA and (3) reduce the likelihood that such a lawsuit would be filed in the first place.

In furtherance of such objectives, it is recommended that the legislative "purpose" provision set forth within 33.815.010 should be amended by adding that the purposes for which the City enacted a conditional use permit requirement include, but are not limited to:

> a. to protect and preserve the property values or those properties situated adjacent to, across from, or in relatively close proximity to sites proposed for new wireless facilities,
>
> b. to protect against unnecessary and/or significant adverse aesthetic impacts upon those properties situated adjacent to, across from, or in relatively close proximity to sites proposed for new wireless facilities, and to the surrounding communities,[47]
>
> c. to afford protection against the potential dangers of structural failures, icefall, debris fall, fire, and any other potential dangers, by ensuring a sufficiently sized fall zone around such facilities,

[47] While "visual impact" is addressed elsewhere within Title 33, such as in Sections 33.815.225(A)(1) and (B)(3), among others, codifying the specific type of potential adverse impacts which the City intends to avoid within the legislative intent section of the Code crystalizes what the City's fact-finders must consider when deciding zoning applications for new wireless facilities, and, to an appreciable extent, insulates their decisions from subsequent challenge.

d. to protect and preserve the nature and characteristics of communities, neighborhoods, and districts, and to prevent incompatible uses of properties because of the nature of such uses, or the size of structures employed in furtherance of such use or uses,

e. to protect and preserve scenic areas, vistas, ridgelines, resources and/or other valuable scenic resources within the City,

f. to protect the nature, character, and historical integrity of historic landmarks, structures, districts and/or zones.

Whether the City chooses to simply amend Title 33, as it currently exists, or chooses to consolidate its regulations of wireless facilities, as is recommended hereinabove, the City must amend its code to (a) direct whatever agency or Board it empowers to decide such applications to render an affirmative, specific fact-finding determination as to each of these considerations, (b) direct such agency or Board to reduce each fact-finding determination to a written form and (c) for each such determination, make written reference to the evidence that was placed into the record, based upon which they made such fact-finding determination.

If, and only if, the agency or Board does each of these things, will they further insulate any decision they render from a challenge.

B. Notice Provisions and Hearing Requirements

Mandatory notice provisions and public hearing requirements should be part of any application for any new wireless facility.[48]

Well drafted wireless provisions invariably include notice provisions and public hearing requirements, which serve two critical functions.

First, notice provisions enable all property owners who may be adversely affected by adverse impacts caused by the irresponsible placement of a wireless facility in close proximity to their home or other property to become aware of a proposed installation before it occurs, and it affords them an opportunity to voice any objection which they may possess.

Second, it affords the local Board the ability to receive evidence from such property owners, which can serve as "substantial evidence" within the meaning of the TCA, which the Board could use to deny an application (if they determine that a denial would be appropriate) without violating of the TCA.

Whether the City chooses to enact a single Code provision to govern all applications seeking approvals for wireless facilities within the City, or it chooses to retain its piecemeal provisions, all of the City's Code provisions, regulations, and "interim rules" should be amended to require public hearings upon all applications and to require applicants to provide advance written notice of such hearings, to all property owners within a defined distance from the location at which the proposed facility is to be installed.

Such notice requirements can be varied based upon the size of the proposed facility. For example, an application to install a 150-foot cell tower might reasonably require an applicant to serve notice upon all property owners within 1,500 feet, by certified mail, return receipt requested. In contrast, a proposal to install a DAS node on a pre-existing utility pole might only

[48] As described herein above, the purported “notice” requirement set forth within TRN 10.44 is, quite candidly, utterly nonsensical.

require such notice to be provided to property owners whose properties are adjacent to or within 300 feet of the proposed site.

C. Fact-Finding Requirements and Evidentiary Guidance

Title 33 and the City's rules and interim rules are glaringly deficient in providing City officials with fact-finding guidance, which dramatically increases the likelihood that any denial of any application for a wireless facility will be fatally defective from the perspective of a potential challenge under the TCA.

More specifically, the Code does not: (a) describe the bare minimum factual determinations that the City's zoning authorities are required make within the context of deciding wireless facility applications, or (b) identify what types of evidence that the City's zoning authorities may require an applicant to produce when they are deciding such applications.

Within the context of the "5G rollout," representatives of site developers and wireless carriers have become more aggressive than ever, not only demanding approvals of their applications but even "telling" local zoning officials what evidence they *can* and *cannot* consider when deciding their applications.

Where a local zoning code is silent as to what types of evidence local zoning officials can consider, site developers and wireless carriers now argue that if a local zoning code does not explicitly provide that a local zoning board can consider a specific type of evidence, the Board cannot consider it. Federal courts are ruling in favor of applicants based upon same.[49]

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[49] See, e.g. T-Mobile Central LLC. V. United Government of Wyandotte County, Kansas, 546 F3d.1299, 1310 (10th Cir 2008)("the Board erred in requiring T-Mobile to demonstrate that its proposal was the least intrusive means of filling a service gap because nothing in the local law permitted the Board to impose such a requirement); Orange Court-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp3d 274 (2015)(The failure of the applicant to introduce evidence of poor coverage in the area could not serve as a basis to deny its application, because the local zoning code did not require Verizon to provide evidence of dropped calls or customer satisfaction); Verizon Wireless LLC v. Douglas County Bod of Cnty Comm'rs, 544 F.Supp2d 1218 (2008)(a denial is not supported by substantial evidence if it imposes a burden upon the applicant for which there is no requirement under local law).

Where a local zoning code is silent as to what fact-finding determinations local zoning authorities must make, a local zoning board will often render a denial based upon a valid determination while failing to make a specific determination concerning issues such as whether or not the applicant has established that it suffered from a significant gap in its personal wireless service.

In such cases, although the Board had a perfectly valid legal reason for denying the application, its failure to "*dot the i's and cross the t's*" rendered its decision fatally defective, and such decisions are routinely overturned in federal Court in proceedings that typically last less than 120 days.

If City zoning officials are to exercise any meaningful power to regulate the placement of wireless facilities within the City, the City Code must be amended to codify: (i) what fact-finding determinations each respective zoning authority is required to make, (ii) the types of evidence they should consider in rendering those determinations, and (iii) how to recognize when an applicant submits evidence that is false or materially misleading.[50]

The City Code should be amended to simply describe factual determinations which the City's permit authorities must make when entertaining an application for a wireless facility.

These must include both: (a) local zoning determinations and (b) TCA determinations.

(i) Local Zoning Determinations

The Code should provide that the respective City Board or authority must determine: (i) whether or not the respective application meets the requirements of the City Code, and (ii) whether granting the application would be consistent with the legislative intent section of the Code.

Consistent with the legislative intent provisions set forth within the Code, whenever a City Board is determining whether to grant or deny an application for the installation of a wireless facility, it should be required to determine, among other things, (a) if the proposed installation will inflict a significant adverse aesthetic impact upon one or more adjacent,

[50] In more than 90% percent of the zoning cases handled by the Author, a site developer or other applicant submitted patently false or materially misleading evidence to the local zoning authority in support of their application.

surrounding or nearby properties, or the community within which it would be placed,[51] (b) if the proposed installation will inflict a significant adverse impact upon the property values of one or more adjacent, surrounding or nearby properties, or the community within which it would be placed, (c) if the proposed installation will inflict a significant adverse impact upon a historic structure, property or district, (d) if the siting provides a sufficient surrounding fall zone or safe zone around the tower, to protect both the surrounding properties and the public from the potential dangers of structural failures, fire, icefall and debris fall.

(ii) TCA Determinations

To ensure that any determination made by any City Board complies with the requirements of the TCA, the Code should state that the relevant City Board shall make fact-finding determinations as to whether or not the respective applicant has met its burden of proof, based upon the evidence presented to the Board, *for any of the following claims made by the applicant*:

(a) whether the applicant has proven, based upon the evidence presented to the Board, that an *identified wireless carrier* suffers from a "significant gap" in its personal wireless service coverage;

(b) whether the applicant has proven, based upon the evidence presented to the Board, that its proposed installation is the least intrusive means of remedying any such gap;

(c) whether the applicant has proven, based upon the evidence presented to the Board, that there are no potential alternative less intrusive locations than the site proposed, or

(d) whether the applicant has proven, based upon the evidence presented to the Board, that the proposed height for a facility is the lowest height possible to remedy the gap.

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[51] See Helcher v. Dearborn County, 500 F.Supp2d 1100 (2007)(Dearborn County ZBA decision to deny permit for wireless facility based upon aesthetic grounds was upheld by federal court which opined "Their concerns were not based merely on a generalized aesthetic dislike of wireless towers; rather, they represent specific reasoned objections related to the particular aesthetic character of the neighborhood").

Even if the Board determines that the respective application should be denied for some reason, which is entirely unrelated to any wireless coverage gap issues, the Board **must still** make these determinations because their failure to do so will likely subject their decision to attack under the TCA.

The Code must also state that for each determination, the City Board must explicitly identify the specific evidence upon which it based each of its fact-finding determinations to insulate further their determinations from attack under the TCA.

(iii) Evidentiary Standards

The City Code should codify minimum evidentiary standards to assist the respective City Boards in rendering their determinations, which should include, but not be limited to, the following:

(a) Significant Gap Claims

If the applicant asserts a claim that a proposed wireless facility is *necessary* to remedy a *significant gap* in an identified wireless carrier's wireless coverage, then the determining Board or agency should require the applicant to provide *probative evidence,* in the form of hard data recorded during an actual drive test,[52] to establish (a) the existence of a real gap in the specific carrier's wireless coverage, (b) the location of the gap, and (c) the geographic boundaries of the gap.

[52] A drive test is a simple and inexpensive process through which applicants compile hard data that accurately depicts the existence or absence of a significant gap in a specific carrier's personal wireless services. To perform such a test, one simply attaches a recording device to a cell phone, which records wireless signal strength every few milliseconds. The tester then drives through an area within which a carrier is believed to suffer from a significant gap in its personal wireless services. In a two hour drive, the device can record a massive number of readings which collectively reveal: (a) if there is a meaningful gap in wireless service, (b) the location or locations of any such gaps, and (c) their geographic boundaries.

If, and only if, the Board or agency were to receive such data, would it then be placed in a position to ascertain if the proposed installation would be consistent with the smart planning provisions of the Code.

If, by way of example, a wireless carrier suffers from a significant gap in its wireless services, and a site developer proposes to construct a new cell tower upon a site that does not remedy the entire gap, then, after the proposed tower is built, either the site developer or the carrier will likely return, because the poor placement of the first tower did not remedy the actual gap in service which existed.

(b) Capacity Deficiency Claims

In a similar vein, where an applicant asserts a claim that a proposed wireless facility is *necessary* to remedy a *capacity deficiency*, the determining Board or agency should require the applicant to provide *probative evidence*, that being hard data in the form of actual dropped call records[53] from the carrier which purportedly suffers from the capacity deficiency being alleged.

(c) FCC Compliance Reports

If an applicant seeks to establish that its proposed wireless facility will be FCC compliant, meaning that it will not expose the City's residents and the general public to radiation levels that exceed the levels deemed safe by the FCC, the determining Board or agency should require any FCC compliance report to disclose two (2) specific items of information on the cover page of any such report.

[53] Similar to drive test results, dropped call records are inexpensive to provide, and provide accurate hard evidence of the existence or absence of a capacity deficiency in a carrier's personal wireless services. Wireless carriers possess dropped call data and can provide simple printouts reflecting the number, and percentage of dropped calls they sustained in any geographic area for any period of time. This data shows what percentage of calls in a specific area failed, meaning that their customers were unable to initiate, maintain and conclude calls without loss of service. The TCA does not require local governments to grant applications for wireless facilities because an applicant wants to have *perfect* coverage, or *seamless* coverage, meaning a 100% call success rate, or absolutely no gaps in coverage. The TCA typically only requires approvals of applications for wireless facilities where the respective applicant establishes that it suffers from "*a significant gap*" in personal wireless services, and their proposed application is the least intrusive means of remedying such gap.

First, the cover page of the report must specify which set of FCC standards the applicant is claiming applies to its proposed facility, those being either the *General Population Exposure Limits or* the *Occupational Exposure Limits.*[54]

Second, the cover page of the report must specify the minimum distance factor, measured in feet, which the applicant used to calculate the radiation emission levels to which the proposed facility would expose members of the general public or others.[55]

Also, since the Board cannot surmise the potential harm to which a non-FCC compliant facility may expose the general public, the Board must require that any FCC Compliance report be verified under oath, and under penalties of perjury, by the person who prepared any such report. A sworn verification must be attached to the report.

(d) Propagation Maps

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[54] In the Author's experience, applicants often mislead local zoning authorities by claiming that the radiation levels to which a proposed facility will expose members of the general public will be "within the FCC's limits," while failing to disclose to that authority that the "limits" they are referring to are the much higher "Occupational Exposure Limits." In a case in Garden City, New York, an applicant's RF engineer testified that the radiation levels which a proposed facility would emit would be "*well below the FCC's limits*." Upon cross examination by the Author, the RF engineer conceded that the limits he was referring to were the *occupational exposure limits*, and that if the facility was to be installed, it would expose residents who would occupy an apartment underneath the installation to radiation levels that would exceed the general population exposure limits by 400 to 600 percent.

[55] The most common way that applicants deceive local governments into believing that a non-FCC compliant facility will be FCC compliant, is by preparing a false FCC compliance report based upon a false "*minimum distance factor*."

For an RF engineer to calculate the radiation levels to which a proposed new facility will expose members of the general public, he must start his calculation with the minimum distance factor, that being the closest distance to which a member of the general public will be able to get near the transmitting antenna(s).

In a case in the Village of Southampton, New York, where an applicant wanted to install cell antennas in the steeple of the oldest Presbyterian church in the United States, an applicant's RF engineer submitted an FCC compliance report, wherein he calculated the projected radiation level for the proposed antennas based upon a minimum distance factor of approximately fifty (50) feet, which was the distance from all the way up in the steeple, and all the way down to the sidewalk in front the church.

The Author was constrained to point out that, as was known to virtually everyone in the Village, the church steeple houses an antique clock, which has been manually "hand-wound" every eight (8) days for more than one hundred years, since it was installed back in the year 1871. Tourists regularly view the clock during regular historic tours within the church. When doing so, their heads would pass as closely as 3-4 feet from the transmitting antennas, instead of the fifty (50) feet minimum distance factor, which was used to falsely calculate the levels of radiation to which they would be exposed.

The Code should be amended to provide that to the extent that an applicant seeks to submit one or more propagation maps in support of its application, the applicant would be required to submit both: (a) the hard data which was employed to create such map or maps, as opposed to merely providing a description of computer modeling through which the map was created, and (b) a certification, under penalties of perjury, that the data is accurate.

(e) Visual Impact Analyses

The vast majority of applicants who submit visual impact analyses invariably submit materially misleading images to local zoning authorities.

As logic would dictate, the whole purpose for which an applicant is required to submit a visual impact analysis to a local zoning board is to provide the Board with an accurate depiction of the actual adverse aesthetic impact that a proposed cell tower or other wireless installation will inflict upon nearby properties or the surrounding community.

To falsely portray that the proposed installation will have a dramatically less severe adverse impact than that which it will actually inflict, applicants routinely submit visual impact reports which contain photographic images, wherein they deliberately omit any images taken from the perspective of the closest properties which would suffer the most severe adverse impact from the installation.[56]

The Code should be amended to provide that the Board can require a visual impact analysis and a balloon test, and to additionally require applicants to include, within any visual impact analysis or balloon test, photos taken from the perspective of the properties situated in closest proximity to the proposed installation unless the applicant can show proof that it attempted to secure such images, but that the owners of such properties refused to grant them access to obtain such images.

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[56] Where applicants seek to install a 100-175 foot cell tower directly adjacent to a residential home, and they submit a "visual impact analysis" to the local zoning board in support of their application, they virtually never include any photographic images taken from the perspective of the adjacent home.

In a case in Bedford, New York, local zoning officials affirmatively requested that a specific applicant provide the Board with photos taken from homes whose views would suffer the most dramatic aesthetic impacts. When reviewing the photos, which were then provided by the applicant, the local zoning board recognized that whoever took the photos from one particular home, had positioned the camera so that a tree was in the direct line of sight between the camera and the tower location, blocking the view of same. Other photos were taken out of focus, or darkened, which, as apparently intended, created the appearance that the adverse aesthetic impacts were far less severe than they actually were.

V. Optional Additions to The City Code

A. Siting Hierarchy For the Placement of Wireless Facilities

Among the possible additional provisions which the City may find desirable to include would be a siting hierarchy, which many local governments include within their respective zoning ordinances to ensure that, to the greatest extent practicable, wireless facilities are sited at locations that are most compatible with surrounding properties and/or uses.

These provisions include a ranking of potential locations for the placement of wireless facilities, from the most desirable to least desirable, typically designating them from Tier 1 to Tier 5 type locations. After incorporating such a ranking system into their Code, local governments then include a provision that requires each applicant who seeks to install a wireless facility at a less desirable location to establish that no higher-ranking sites are available to satisfy whatever coverage needs the respective applicant is seeking to remedy.

B. ADA and FHAA Accommodations

Under its ADA Transition Plan, the City of Portland appointed an ADA Coordinator and created a Grievance Procedure for disabled persons within the meaning of the ADA.

Both the ADA and FHAA require local governments, their agencies, and public utilities[57] to make reasonable accommodations for disabled persons.

Electromagnetic Hypersensitivity Syndrome (EHS) has been recognized as a disability under the ADA for which disabled persons are entitled to request reasonable accommodations under the ADA[58] and the FHAA.

Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and public entities' services. It applies to all state and local governments, their departments, and agencies.

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[57] Site developers and wireless carriers uniformly assert that they are public utilities, and they are uniformly recognized as such by State Boards and commissions which are charged with the duty of regulating public utilities.

[58] See e.g. G v. The Fay School Inc., 282 F.Supp.3d 381 (2017)

A provision should be added to the Portland City Code to establish a procedure to enable disabled persons suffering from EHS to submit requests for reasonable accommodations and file grievances for lack of accommodations, to be reviewed by the City's ADA Coordinator.

C. Random Radiation Testing of Wireless Facilities

As described hereinabove, the FCC exercises no meaningful oversight over the levels of Radiofrequency (RF) radiation[59] to which wireless facilities expose members of the general public.

Recognizing same, local governments have begun enacting testing requirements, which provide for random testing of radiation levels emanating from wireless facilities within their jurisdiction to protect their citizens against exposure to illegal levels of radiation emanating from non-FCC-compliant facilities.

A facility is non-FCC-compliant when it exposes members of the general public to radiation levels that exceed the General Population Exposure Limits.[60]

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[59] The FCC has defined Radiofrequency (RF) Radiation, for its purposes, as electromagnetic energy, that can be further defined as waves of electric and magnetic energy moving together through space, where such electromagnetic waves have frequencies that range from 3 kilohertz (kHz) to 300 gigahertz (Ghz) FCC OET Bulletin 65, Supplement B, (Edition 97-10) at page 8.

The FCC has set maximum limits for human exposure to RF radiation based upon recommended exposure criteria issued by the NCRP and ANSI/IEEE, each of which identified the same threshold level "*at which harmful biological effects may occur*." See FCC OET Bulletin 56, August 1999. Based upon same, the FCC adopted Maximum Permissible Exposure (MPE) limits, which are expressed in terms of electric field strength, magnetic field strength and power density *Id*. While federal law requires all wireless facilities to comply with such RF exposure limits (47 C.F.R. §1.1310), there is no agency that actually enforces such requirement. As a general rule, the FCC does not test wireless facilities for compliance with either set of exposure limits.

[60] 47 CFR§ 2.1 dictates that the *general population* limits apply as follows:

"*General population/uncontrolled exposure*. For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related."

The City may choose to enact random testing requirements that provide for either: City funding testing (Type 1), owner/operator testing (Type 2), or private citizen testing, under a *qui tam* type provision (Type 3).

Type 1 Testing

Under the Type 1 type of provision, City governments enact a provision that provides that the respective local government will perform random testing of wireless facilities at the City's own expense, wherein it pays an RF engineer to test the radiation levels emanating from wireless facilities within the jurisdiction.

If the City engineer finds that a facility is exposing members of the general public to radiation levels that exceed the General Population Exposure Limits, then the City places the owner of the facility on notice and affords them a hearing at which the City requires them to show cause why the permit for their facility should not be revoked, and its installation removed.[61]

Type 2 Testing

Type 2 testing is the same as Type 1, except that the provision imposes the cost of the testing upon the owner of the facility being tested.

Type 3 Testing

Type 3 testing is a *qui tam* type provision that deputizes all members of the City. This type of provision provides that, at any time, any citizen can retain the services of an RF engineer and have any facility tested to ascertain if it is exposing members of the general public to radiation levels that exceed the General Population Exposure Limits.

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[61] While 47 U.S.C. §332(c)(7)(B)(iv) bars local governments from regulating wireless facilities based upon environmental effect, such ban only applies to the extent that such facilities are FCC-compliant, meaning that the radiation levels to which they are exposing members of the general public are within the General Population Exposure Limits.

If a facility is found exceeding such limits, the citizen can sue the facility owner to secure its removal. So long as the citizen establishes that the facility was exceeding the General Population Exposure limits, the facility owner must reimburse the citizen for their attorneys' fees.

VI. The FCC's "Interpretative Order" of September 16, 2018

Any analysis of the City's power to control the placement of wireless facilities within the City must include a review of the FCC's recent "interpretative order," pertaining to the "*effective prohibition*" language within section 47 U.S.C §332(c)(7)(B)(i)(II) of the TCA.

Under 47 U.S.C. §332(c)(7)(B)(i)(II) of the TCA, local governments cannot *prohibit* or *have the effect of prohibiting* the provision of personal wireless services

For more than two decades, local governments have enacted and applied local zoning laws to control the placement of wireless facilities, without violating the "effective prohibition" language of that provision.

To the extent that an applicant filed a federal lawsuit claiming that a denial of their specific application *effectively prohibited* them from providing personal wireless services in violation of the TCA, federal courts from across the entire United States have interpreted that language within the TCA and specifically defined what constitutes an "effective prohibition" under the TCA.

Within the context of the current 5G rollout, site developers and wireless carriers now seek to install an unprecedented number of new wireless facilities, many of which will be placed closer to homes than any previous wireless facilities, and at elevations that could place them virtually "outside bedroom windows" of residential homes nationwide.

Being well aware that local governments would employ their local zoning laws to restrict site developers' access to residential areas for the installation of 5G wireless facilities in extremely close proximity to homes, it is believed that the wireless industry has made efforts to induce the FCC to limit further the powers of local governments in restricting the placement of such facilities.

They ultimately succeeded when, on September 26, 2018, the FCC issued an order wherein it *arguably attempted* to: (a) strip local governments of the ability to enforce their smart planning provisions, and/or to regulate the installation of wireless facilities within their respective jurisdictions, and (b) to wipe out 24-years-worth of local zoning regulations.

If it were to be read literally, the "interpretative order" essentially empowers site developers and wireless carriers to install new facilities, anytime, anywhere, and at any height, virtually free of any "interference" from local governments.

Among other things, the order purports to strip local governments of the authority to require applicants, who are seeking to install a cell tower or wireless facility, to prove both (a) that they suffer from a significant gap in their personal wireless services, and (b) that the proposed installation is the least intrusive means of remedying such gap and/or that there are no less intrusive alternative locations available at which they can install a facility to remedy their gap.

To do so, the FCC affirmatively stated that:

> *"an effective prohibition occurs where a state or local requirement materially inhibits a provider's ability to engage in any of a variety of activities related to the provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities . . . Thus, an effective prohibition includes materially inhibiting additional services or improving existing services."*
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> FCC Order 18-133 Adopted September 26, 2018.

This new "interpretation" by the FCC arguably conflicts with more than twenty years of federal courts' rulings from across the country, and United States District Courts are presumably bound by their respective Circuit Court's interpretations,[62] as opposed to this *new interpretation* from the FCC.

Significantly, this is not the first time that the FCC has tried to "*interpret* the TCA" in a manner to say something that it does not. In Arcadia Towers v. Colerain Township Board of Zoning Appeals, 2011 WL 2490047, a plaintiff brought a federal action under the TCA based upon a new interpretation of the TCA, wherein the FCC interpreted the TCA to cover broadband services, even though the TCA does not say that it covers such services.

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[62] Where a local government has denied a zoning application for the installation of a new wireless facility, and the applicant sues the local government in federal court claiming that the denial has the effect of prohibiting the provision of personal wireless services in violation of Section 332(c)(7)(B)(i)(ii) of the TCA, the applicant has the burden of proving both (a) the existence of a significant gap in service coverage, and (b) that its proposed installation is the least intrusive means of remedying that gap and/or there are no less intrusive alternative sites available. See e.g. Crown Castle NG West LLC v. Town of Hillsborough, 2018 WL 3777492, T-Mobile USA Inc. v. City of Anacortes, 572 F3d.987 (9th Cir 2009). Where an applicant cannot meet that burden, any claimed violation of the effective prohibition provision of the TCA must fail. See, e.g. T-Mobile Northeast LLC v. Fairfax County Board of Supervisors, 672 F3d 259 (4th Cir. 2012).

In dismissing that case, the Court ruled:

> "It certainly makes sense as a policy objective for broadband services to have protections under the law equivalent to that provided by the TCA. However, as laudable as such goal may be, the Court finds this is a case where the law has not kept up with changes in technology. Under such a circumstance ***it is not up to the FCC to construe the TCA to say something it does not say,*** nor up to the Court to find broadband communication encompassed by the law. It is up to Congress to act."
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> Arcadia Towers v. Colerain Township Board of Zoning Appeals, 2011 WL 2490047

Consistent with same, when an applicant tried to pursue a TCA claim in a federal court citing the recent FCC order, and *without* affirmatively asserting that it suffers from a "significant gap" in coverage, its case was dismissed by the federal Court. See Extenet Systems Inc. v. The City of Cambridge Massachusetts, U.S.D.C. District of Massachusetts, Case 19-cv-11836 (Decision dated 8/26/2020)[Decision not yet reported] See also Helcher v. Dearborn County, 500 F.Supp.2d 1100 (2007), Affirmed 595 F3d 710 (7th Cir. 2010).

As United States District Courts will likely recognize, as the District Court in Massachusetts did, they remain bound by the Circuit Courts' interpretation of "effect of prohibiting," and the FCC was without power to revoke powers which the United State Congress explicitly preserved to state and local governments, under 47 U.S.C.A. 332(c)(7)(A), under the guise of "interpreting" the "effect of prohibiting" language within Section §332(c)(7)(B)(i)(II).[63]

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[63] See e.g. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 91 (2002).[An agency may never exercise authority inconsistent with Congressional Intent, regardless of the issue the agency is seeking to address.], See also Am. Library Ass'n v. F.C.C., 406 F.3d 689, 708 (D.C. Cir. 2005) and La. Pub Serv. Comm'n. v. FCC, 476 U.S. 355, 90 (1986)[Courts have consistently held that agencies may only act within the authority given to them by Congress. The FCC, like other federal agencies, "literally has no power to act… unless and until Congress confers power upon it."], and See Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d. 490, 495 (2nd Cir. 1999)[under the powers preserved to local governments under the Telecommunications Act, aesthetics is an appropriate ground upon which a local government has the power to deny a zoning application for the installation of a wireless facility, so long as there is substantial evidence of negative aesthetic impact].

Moreover, as was also already held, in adopting its 2018 Order, the FCC acted in a manner that was arbitrary and capricious, both with respect to an attempt to limit local government authority to regulate facilities based upon potential adverse aesthetic impacts[64] and with respect to the National Environmental Policy Act.[65]

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[64] See City of Portland v. United States, 2020 WL 4669906 (9th Cir 2020)("We hold that the FCC's requirement that all aesthetic regulations be objective is arbitrary and capricious").

[65] Congress enacted the National Environmental Policy Act (hereinafter "NEPA") to "encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n, 933 F. 3d 728, 734 (D.C. Cir. 2019). The objective of the National Environmental Policy Act (hereinafter "NEPA") is to assure a safe and healthful environment. See 42 U.S.C. §§ 4321, 4331. NEPA review "does not dictate particular decisional outcomes, but merely prohibits uninformed-rather than unwise-agency action." Id. Under 42 U.S.C. §4332, NEPA requires federal agencies to prepared detailed statements on potential environmental impacts of a proposed action that is considered a "major federal action." See also 47 CFR §1.1305 A "major federal action" is considered to be any action that significantly affects the quality of the human environment. See 42 U.S.C. §4332. See *also* 47 CFR §1.1305, which is specific to the FCC and requires that any commission action which is deemed to have a significant effect on the quality of the human environment requires an Environmental Impact Statement. At the very least, an agency must prepare a preliminary Environmental Assessment to determine if there is any potential for a negative environmental effect and therefore an Environmental Impact Statement would be required. See 40 C.F.R. §1508.9. As explicitly set forth in 40 C.F.R. §1500.1(b), an agency must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. According to the FCC's own website "responsibility for NEPA compliance rests with the FCC." The FCC's most recent order eliminated NEPA review for small cells. The FCC decision to eliminate NEPA review for certain small cells was "based on the Commission's conclusion that such review was not statutorily requested and would impede the advance of 5G networks, and that its costs outweighed any benefits." United Keetoowah Band of Cherokee Indians in Oklahoma, 933 F.3d at 737. However, the FCC failed to assess any harms that could come from the densification of the use of small cells for 5G. Id at 741. Further the Court in Keetoowah, noted that the FCC "does not reconcile its assertion that planned small cell densification does not warrant review because it will leave little to no environmental footprint" Id at 742. Ultimately, the Court determined that the FCC's order deregulating small cells was arbitrary and capricious. Id.

As such, it would behoove the City of Portland to amend its local zoning ordinances to empower its zoning officials to control the placement of the new wave of 5G installations, in the absence of which, the City's constituents will undoubtedly begin awakening to find such facilities installed in extremely close proximity to their homes.

Conclusion and Disclaimer

It is the opinion of the Author that if, and to the extent that the City were to amend its applicable Code provisions, it would significantly increase the City's authority to regulate the placement of wireless facilities within the City, to protect the City and its residents against unnecessary adverse impacts resulting from the irresponsible placement of wireless facilities.

This Memorandum, however, is not intended to provide legal advice in any specific matter. To the extent that any recipient reads the content of this Memorandum, it shall not create an attorney-client relationship with any such recipient.

The struggle between the wireless industry and local governments, who are attempting to control the placement of wireless facilities to protect their communities and citizens, is not only ongoing but has intensified as a result of the 5G rollout. The ever-changing legal landscape of federal, state, and local laws and case decisions renders it impossible to guarantee that any local ordinance, rule, or regulation will withstand a legal challenge in any federal or state court, based upon existing or future statutes or caselaw.

Neither the Author, nor his law firm, offers any representation or guarantees that the implementation of the Code changes recommended herein will effectuate any goals of the City, render City zoning or other determinations immune from legal challenge, or protect the City from any types of potential liabilities of any type.