**ATTACHMENT 4 - History of Wireless Small Cell Facilites**

## INTRODUCTION AND BACKGROUND

Local authority over communications facilities in the public rights-of-way exists at an often-complex intersection between state law, federal law, changes in technologies and public policies. Laws and regulations impact not only whether municipalities may regulate, but how, when and even for what purpose.

These introductory remarks provide a brief background on the legal and technological developments relevant to the City of San Mateo's ability to regulate commercial wireless facilities within the public rights-of-way.

### *California Law*

The legislature's control over the relationship between municipalities and communication providers is as longstanding as the state itself is old. In 1850, the California legislature enacted a law to give telegraph corporations a so-called statewide franchise to use the public rights-of-way in the state to provide their services, so long as the use did not "incommode" the streets for other public uses. The legislature codified this law in 1872 as Civil Code Section 536 and then recodified it in 1951 as Public Utilities Code Section 7901. The current version applies to "telephone corporations" and includes personal wireless service providers.[1]

Section 7901 prohibits local franchises for telephone corporations but does not completely displace all other police powers held by municipalities in California.[2] For example, municipalities retain traditional zoning authority to regulate placement and aesthetics to ensure that communications infrastructure does not incommode the public rights-of-way.[3] In addition, Public Utilities Code Section 7901.1, a sister statute to Section 7901, bolsters local authority to regulate the time, place manner in which communications providers perform construction, maintenance and other operations within the public rights-of-way.[4]

Overall, California state law strikes a balance between the state-wide interest in a broadly available communications network and the local interest in well-planned development. Local governments cannot flatly refuse to approve deployments, but providers cannot build whatever they want wherever they want. These state laws must be reconciled with federal laws that affect local authority over communication facilities in the public rights-of-way.

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[1] CAL. PUB. UTILS. CODE § 7901; *Huntington Beach v. CPUC*, 154 Cal. Rptr. 3d 241, 257 (Ct. App. 2013); *GTE Mobilnet of Cal. Ltd. v. San Francisco*, 440 F. Supp. 2d 1097, 1103 (N.D. Cal. 2006).
[2] *See T-Mobile West LLC v. City & County of San Francisco*, 438 P.3d 239, 249 (Cal. 2019)
[3] *See id.* at 244–45.
[4] CAL. PUB. UTILS. CODE § 7901.1; *see also San Francisco*, 438 P.3d at 250.

### *Federal Law*

In 1996, Congress adopted the Telecommunications Act[5] to balance the national interest in advanced communications services and infrastructure with legitimate local government authority to enforce zoning and other regulations to manage infrastructure deployments on private property and in the public rights-of-way. Under Section 704, which applies to personal wireless service facilities, local governments retain all their traditional zoning authority subject to specifically enumerated limitations.[6] Section 253 preempts local regulations that prohibit or effectively prohibit telecommunication services (*i.e.*, common carrier services) except competitively neutral and nondiscriminatory regulations to manage the public rights-of-way and require fair and reasonable compensation.[7]

### *Small Wireless Facilities and Changes in Federal Law*

Communication technologies have significantly changed since 1996. Whereas cell sites were traditionally deployed on tall towers and rooftops over low frequency bands that travel long distances, cell sites are increasingly installed on streetlights and utility infrastructure on new frequency bands that travel shorter distances. According to the Federal Communications Commission ("**FCC**") and the wireless industry, these so-called "small wireless facilities" or "small cells" are essential to the next technological evolution. The industry currently estimates that each national carrier will need to deploy between 30 and 60 small cells, connected by approximately 8 miles of fiber optic cable, per square mile.

FCC regulations seek to promote these new technologies by preempting state and local authority the FCC views as an impediment to deployment. On September 27, 2018, the FCC adopted a Declaratory Ruling and Third Report and Order, FCC 18-133 (the "***Small Cell Order***"), in connection with two informal rulemaking proceedings entitled Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79, and Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84. In general, the *Small Cell Order*: (1) restricted the fees and other compensation state and local governments may receive from applicants; (2) required all aesthetic regulations to be reasonable, no more burdensome than those applied to other infrastructure deployments, objective and published in advance; (3) mandated that local officials negotiate access agreements, review permit applications and conduct any appeals within significantly shorter timeframes; and (4) created new evidentiary

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[5] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[6] 47 U.S.C. § 332(c)(7)(A); *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 300 (2015). These limitations include substantive restrictions on municipal authority to prohibit or effectively prohibit services, unreasonably discriminate among functionally equivalent service providers and regulate based on environmental effects from radiofrequency ("RF") emissions that meet federal exposure standards. 47 U.S.C. §§ 332(c)(7)(B)(i), (iv). Section 704 also imposes procedural requirements that require local officials to act on applications within a reasonable time and issue written decisions supported by substantial evidence. *Id.* §§ 332(c)(7)(B)(ii)–(iii).

[7] 47 U.S.C. §§ 253(a), (c).

presumptions that make it more difficult for local governments to defend themselves if an action or failure to act is challenged in court. This controversial order significantly curtailed state and local authority over wireless and wireline communication facilities reserved to them in the Telecommunications Act.

Municipalities, large and small, urban and rural, from all over the United States challenged the *Small Cell Order* in federal court. On August 12, 2020, the United States Court of Appeals for the Ninth Circuit invalidated many aesthetic restrictions in the *Small Cell Order* but largely upheld the other restrictions. *Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). The court specifically invalidated the requirements that aesthetic regulations be objective and no more burdensome than those applied to other infrastructure deployments. *See id.* at 1039–42. Although municipalities may exercise reasonable discretion over small wireless facilities, they must do so on an expedited basis to meet the short shot clock limits. Municipalities sought review by the United States Supreme Court on the Ninth Circuit's decision to uphold the FCC's fee restrictions, but the Supreme Court recently denied that petition. *See* Order Denying Petition for Certiorari, *Sprint Corp. v. FCC*, No. 20-1354 (June 28, 2021). Thus, the *Small Cell Order*, as modified by the Ninth Circuit's partial invalidation, is final with no further pending judicial review.

## SUMMARY OF EVENTS

A few significant moments in the development of laws that affect local authority over personal wireless service facilities are summarized as follows:

- On November 18, 2009, the Federal Communications Commission ("FCC") adopted a Declaratory Ruling in the proceeding titled *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review*, 24 FCC Rcd. 13994 (Nov. 18, 2009) (the "*2009 Declaratory Ruling*"), which imposed procedural restrictions on state and local permit application reviews such as presumptively reasonable times for action. After a petition for judicial review, the U.S. Supreme Court in *City of Arlington v. FCC*, 569 U.S. 290 (2013), upheld the FCC's authority to issue the rules in the *2009 Declaratory Ruling*.

- On February 22, 2012, Congress adopted Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. § 1455(a), which amended the Communications Act. This statute generally required that state and local governments "may not deny, and shall approve" certain additions and modifications to existing wireless facilities that do not substantially change existing facility's physical dimensions. Applications covered by this statute are deemed "eligible facilities requests".

- On October 21, 2014, the FCC adopted a Report and Order in the rulemaking proceeding titled *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, Report and Order, 30 FCC Rcd. 31 (Oct. 21, 2014) (the "*2014 Infrastructure Order*"), which implemented regulations for "eligible facilities requests" that defined statutory terms, prohibited certain application requirements, limited application review periods and deemed applications automatically granted when the state or local government fails to act within the applicable timeframe. The U.S. Court of Appeals for the Fourth Circuit in *Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015), denied petitions for review.

- On October 9, 2015, Governor Edmund Brown signed into law Assembly Bill 57 (Quirk), codified as California Government Code Section 65964.1, which created a "deemed-approved" remedy for when a local government fails to act on applications for certain wireless facilities within the presumptively reasonable times established in the *2009 Declaratory Ruling* and *2014 Infrastructure Order*.

- On August 3, 2018, the FCC adopted a Third Report and Order and Declaratory Ruling in the rulemaking proceeding titled *Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 7705 (Aug. 3, 2018) (the "*Moratorium Order*"), that formally prohibited express and *de facto* moratoria for all personal wireless services, telecommunications services and their related facilities under 47 U.S.C. Section 253(a) and directed the Wireless Telecommunications Bureau and Wireline Competition Bureau to hear and resolve all complaints on an expedited basis.

- On September 27, 2018, the FCC adopted a Declaratory Ruling and Third Report and Order, FCC 18-133 (the "*Small Cell Order*"), in connection with two informal rulemaking proceedings entitled *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, and *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84. The *Small Cell Order* set forth limitations on state and local government regulation of small cell wireless facilities that are placed on vertical infrastructure such as utility poles and street light standards located in the public rights-of-way. The *Small Cell* order: (1) limited the level of local permitting and discretion; (2) established "shot clock" rules (*e.g.*, time limits and deadlines) for processing action on local permits; and (3) limited the fees that can be charged for the facilities. The *Small Cell Order* further established that any aesthetic regulations and fees required for processing small wireless facilities be published in advance.

- On the April 4, 2019, the California Supreme Court in *T-Mobile West LLC v. City and County of San Francisco*, 438 P.3d 239 (Cal. 2019), held that California Public Utilities Code Sections 7901 and 7901.1 do not completely divest local governments of their police powers and only prohibit local franchises as a precondition for access to the public right-of-way by telephone corporations.

- On June 10, 2020, the FCC adopted additional regulations purporting to clarify its rules to interpret and implement Section 6409. *See Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012*, WT Docket No. 19-250, RM-11849, Declaratory Ruling and Notice of Proposed Rulemaking, 35 FCC Rcd. 5977 (Jun. 10, 2020) (the "*2020 Declaratory Ruling*"). These additional regulations specified what steps an applicant must take for the shot clock to commence, modified what constitutes a substantial change to a wireless facility and clarified the circumstances under which an environmental assessment is not required. State and local governments from around the United States challenged the *2020 Declaratory Ruling* in a petition for judicial review before the Ninth Circuit Court of Appeals. The Ninth Circuit invalidated the FCC's restrictions on subjective/discretionary aesthetic standards but upheld the FCC's other limitations on state and local authority over small wireless facilities. *See City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). As a result, subjective aesthetic standards for small wireless facilities are enforceable so long as they are technically feasible and nondiscriminatory.

- On August 12, 2020, the U.S. Court of Appeals for the Ninth Circuit in *Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), invalidated many aesthetic restrictions in the *Small Cell Order* but largely upheld the other limitations. The court specifically invalidated the requirements that aesthetic regulations be objective and no more burdensome than those applied to other infrastructure deployments. The U.S. Supreme Court denied a petition for review of the Ninth Circuit's decision to uphold the FCC's fee restrictions in the Order Denying Petition for Certiorari, *Sprint Corp. v. FCC*, No. 20-1354 (June 28, 2021). Thus, the *Small Cell Order*, as modified by the Ninth Circuit's partial invalidation, is final with no further pending judicial review.

- On November 3, 2020, the FCC adopted further regulations in Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012, WT Docket No. 19-250, RM-11849, Report and Order, 35 FCC Rcd. 13188 (Nov. 3, 2020) that defined wireless facility site boundaries and allowed certain additional excavation and deployment of transmission equipment beyond existing site

boundaries. Various local public agencies petitioned the FCC to reconsider this rule change but the FCC has not acted on the petition.

- On October 4, 2021, Governor Gavin Newsom signed into law Assembly Bill 537 (Quirk), which amended California Government Code Section 65964.1 to provide applicants a “deemed approved” remedy for a collocation or siting application for a wireless telecommunications facility if a city or county fails to approve or disapprove an application within a reasonable period of time in accordance with FCC rules, subject to certain requirements and limitations.

- On October 8, 2023, Governor Gavin Newsom signed into law Assembly Bill 965 (Carillo), codified as California Government Code Section 65964.3, which allows for the batching of applications for a wireless telecommunications facility and created a “deemed-approved” remedy for when a local government fails to act on batched applications for certain wireless facilities within the presumptively reasonable times in accordance with FCC rules, subject to certain requirements and limitations.