

Telecommunications Workshop

City of Ojai, California

January 20, 2015

Outline

- **LEGAL AND REGULATORY BACKGROUND**

- Telecommunications Act of 1996
- Shot Clock
- Section 6409(a) of the Middle Class Tax Relief Act

- **PROPOSED DRAFT ORDINANCE**

- Overview and Summary of Provisions

Telecommunications Act of 1996

- **CONFLICTED PURPOSES**

- Intended to promote rapid service and infrastructure deployment and reduce regulatory barriers to competitive telecom services
- Intended to preserve local authority over traditionally local zoning matters

- **PREEMPTION COMPROMISE**

- Generally preserves local zoning authority.
- Except for specific substantive and procedural limits.



Telecommunications Act of 1996

- **SUBSTANTIVE LIMITS ON LOCAL AUTHORITY**

- Explicit or Effective Prohibitions
- Unreasonable Discrimination b/w Functionally Equivalent Services
- Radio Frequency Exposure Regulations

- **PROCEDURAL LIMITS ON LOCAL AUTHORITY**

- Written Decision Based on Substantial Evidence in Written Record
- Reasonable Time



Explicit or Effective Prohibitions

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . *shall not prohibit or have the effect of prohibiting the provision of personal wireless services.*”

47 USC § 332(c)(7)(B)(i)(II)



Effective Prohibition

- When does an ordinance “effectively prohibit” wireless?
- A *single permit denial* effectively prohibits wireless services when the applicant demonstrates that:
 - a *significant gap* exists in its own service coverage; and
 - the denied site represents the *least intrusive means* to mitigate that gap.

Effective Prohibition: Significant Gap in Service Coverage

- **NO “BRIGHTLINE” RULE** (*MetroPCS v. San Francisco*)
 - Each case depends on the particular facts and circumstances
 - Not intended to close small “dead spots” in coverage
- **SOME FACTORS** (*Sprint v. Palos Verdes Estates*)
 - whether gap affects commuter thoroughfare
 - how many potentially affected users
 - whether site will improve existing or add completely new service
 - whether gap affects commercial districts
 - whether gap threatens public safety



Effective Prohibition: Least Intrusive Means

- **LOCAL VALUES**

- The location and design that “intrudes” the least upon the local values that a denial would serve (*MetroPCS v. San Francisco*).
- Localities—not the applicants—decide what constitutes the least intrusive means (*American Tower Corp. v. San Diego*)

- **BURDEN SHIFTING FRAMEWORK**

- The applicant bears the burden to show it considered alternatives; the local government must rebut with “technically feasible” and “potentially available” alternatives (*T-Mobile v. Anacortes*)



Unreasonable Discrimination between Functionally Equivalent Services/Providers

“The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . *shall not unreasonably discriminate among providers of functionally equivalent services.*”

47 USC § 332(c)(7)(B)(i)(II)



Radio Frequency Exposure Regulations

“No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities *on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations* concerning such emissions.”

47 USC § 332(c)(7)(B)(iv)



Written Decision Based on Substantial Evidence

“Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities *shall be in writing and supported by substantial evidence contained in a written record.*”

47 USC § 332(c)(7)(B)(iii)



Written Decision Based on Substantial Evidence

However, those reasons *do not have to appear in the written denial letter* as long as they appear in some other written record, are *sufficiently clear*, and are provided or made accessible to the applicant *essentially contemporaneously* with the written denial notice.

T-Mobile South LLC v. City of Roswell (U.S. Supreme Court)



Reasonable Time

“A State or local government or instrumentality thereof *shall act* on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time after the request is duly filed* with such government or instrumentality, taking into account the nature and scope of such request.”

47 USC § 332(c)(7)(B)(ii)

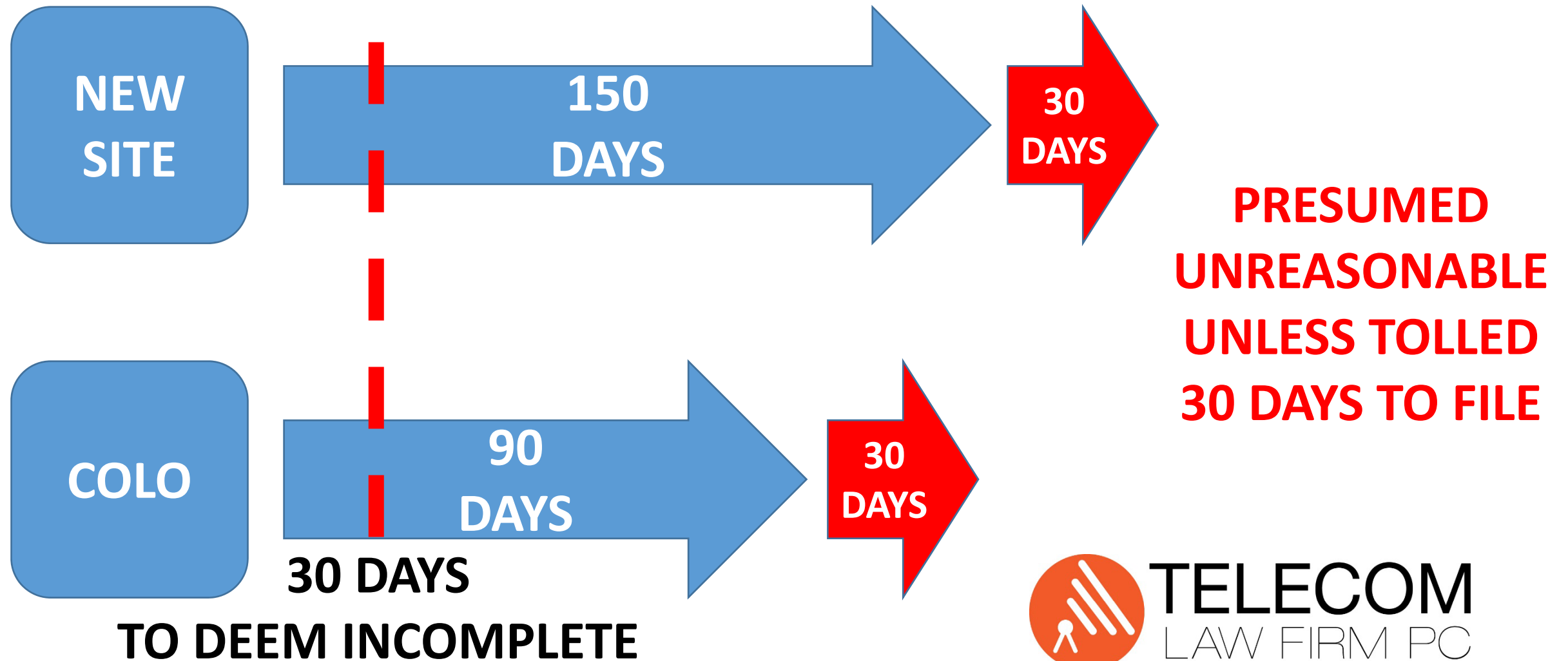


Shot Clock Declaratory Ruling (2009)

- **ESTABLISHED PRESUMPTIVELY REASONABLE TIMES FOR REVIEW**
 - 90 days for collocations
 - 150 days for all other permit applications (*e.g.*, new sites)
- **CREATED PROCEDURES TO TOLL THE SHOT CLOCK**
 - Incomplete Notices
 - Tolling Agreements
- **REMEDIES**
 - Within 30 days after the Shot Clock expires, applicants may sue for an injunction that forces the local government to act on a permit application.



Shot Clock Declaratory Ruling (2009)



Shot Clock “Clarifications” (2015)

- **SUBMITTAL**

- Shot Clock begins to run when the applicant submits the application.
- Not when local government deems the application complete.

- **INCOMPLETE NOTICES**

- **One-Bite Rule:** Localities cannot deem an application incomplete in a second notice for a reason not cited in the first notice.
- All incomplete notices must specifically identify the “publicly stated” source that requires the missing material.

- **MORATORIA**

- Shot Clock runs (and requires localities to act on permit applications) through a moratorium.



Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012

(a) Facility modifications.

(1) In general. Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) Eligible facilities request. For purposes of this subsection, the term “eligible facilities request” means any request for modification of an existing wireless tower or base station that involves—

- (A) collocation of new transmission equipment;
- (B) removal of transmission equipment; or
- (C) replacement of transmission equipment.

(3) Applicability of environmental laws. Nothing in paragraph (1) shall be construed to relieve the Commission from the requirements of the National Historic Preservation Act or the National Environmental Policy Act of 1969.



Section 6409(a)

State and local governments “may not deny, and shall approve” any “eligible facilities request” so long as it does not “substantially change the physical dimensions of the existing wireless tower or base station.”



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ELIGIBLE FACILITIES REQUEST

Collocations and modifications (removals and replacements) of wireless transmission equipment at an existing wireless tower or base station.



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ELIGIBLE FACILITIES REQUEST: *COLLOCATION*

“[T]he mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes.”

ELIGIBLE FACILITIES REQUEST: *MODIFICATION*

Not well defined, but at least includes “removal, or replacement of an antenna or any other transmission equipment associated with the supporting structure.”

ELIGIBLE FACILITIES REQUEST

Collocations and modifications of *wireless transmission equipment* at an existing wireless tower or base station.

ELIGIBLE FACILITIES REQUEST: *WIRELESS TRANSMISSION EQUIPMENT*

“[A]ny equipment that facilitates transmission for any Commission-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas and other relevant equipment associated with and necessary to their operation, including coaxial or fiber-optic cable, and regular and backup power supply.”



ELIGIBLE FACILITIES REQUEST

Collocations and modifications of wireless transmission equipment at an *existing wireless tower or base station*.



ELIGIBLE FACILITIES REQUEST: *EXISTING WIRELESS TOWER*

“[A]ny structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities”

ELIGIBLE FACILITIES REQUEST: *EXISTING WIRELESS TOWER*



ELIGIBLE FACILITIES REQUEST: *EXISTING BASE STATION*

- **DEFINED AS:** “[T]he equipment and non-tower supporting structure at a fixed location that enable Commission-licensed or authorized wireless communications between user equipment and a communications network.”
- **IN ENGLISH:** The transmission equipment itself and any non-wireless tower structure that supports transmission equipment under a valid permit for a wireless use.

ELIGIBLE FACILITIES REQUEST: *EXISTING BASE STATION*



both non-tower structures with legally permitted wireless transmission equipment

SECTION 6409(a)

State and local governments “may not deny, and shall approve” any “eligible facilities request” so long as it does not *“substantially change the physical dimensions of the existing wireless tower or base station.”*

SUBSTANTIAL CHANGE

- **OBJECTIVE:** based on empirical (more or less) changes to height, width, equipment cabinets, excavation, concealment, and permit compliance
- **DISJUNCTIVE:** must comply with all six elements
- **CUMULATIVE:** the Commission standards effectively create an invisible envelope around all wireless towers and base stations within which carriers can expand and change its transmission equipment

SUBSTANTIAL CHANGE OCCURS WHEN . . .

the proposed eligible facilities request increases
the height more than:

- 10% or one additional antenna array not more than 20 feet (whichever is greater) higher for towers on private property, or
- 10% or 10 feet (whichever is greater) for towers in the public rights-of-way and all base stations;

SUBSTANTIAL CHANGE OCCURS WHEN . . .

the proposed eligible facilities request increases
the width more than:

- 20 feet or the tower width at the level of the appurtenance (whichever is greater) for towers on private property, or
- six feet for towers in the public rights-of-way and all base stations;

SUBSTANTIAL CHANGE OCCURS WHEN . . .

the proposed eligible facilities request involves more than four (4) equipment cabinets

SUBSTANTIAL CHANGE OCCURS WHEN . . .

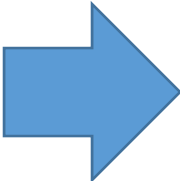
the proposed eligible facilities request *involves any excavation* outside either:

- the lease or license area on private property, or
- the “*proximity*” to the ground-mounted equipment in the ROW; or

SUBSTANTIAL CHANGE OCCURS WHEN . . .

the proposed eligible facilities request would *defeat the existing concealment elements* of the tower or base station;

SUBSTANTIAL CHANGE OCCURS WHEN . . .



SUBSTANTIAL CHANGE OCCURS WHEN . . .

the proposed collocation would *violate an [enforceable] prior condition of approval*

SECTION 6409(a)

State and local governments *“may not deny, and shall approve”* any “eligible facilities request” so long as it does not “substantially change the physical dimensions of the existing wireless tower or base station.”

MAY NOT DENY, and SHALL APPROVE *DEEMED GRANTED REMEDY*

- **PERMIT DEEMED GRANTED** after failure to act within **60 DAYS** after application is submitted
 - period tolls by mutual agreement and some incomplete notices
 - period does *not* toll for a moratorium
- applicant must provide written notice before it starts construction
- disputes still resolved by courts, not the Commission

MAY NOT DENY, and SHALL APPROVE: *CONDITIONAL APPROVALS*

- Conditional approval *not* tantamount to a denial
- Exempt from prior conditions that:
 - conflict with thresholds for a substantial change; or
 - are subjective
- Probably still valid conditions include:
 - Drainage;
 - Landscaping and maintenance;
 - Lighting, fencing, and access;
 - Indemnification, compliance with all generally applicable laws, etc.

Current Ordinance

- **NEEDS REVISIONS FOR COMPLIANCE**
 - No process to address Section 6409(a) and related rules
 - No guidance on how to follow Shot Clock deadlines
 - Current ordinance included prohibitions
- **IMPROVEMENTS TO ZONING PREFERENCES**
 - Substantially more detailed to help everyone involved understand local preferences and values
 - Permits deviation from standards only to the extent necessary to not effectively prohibit wireless services



Draft Ordinance

DEFINITIONS

- Updated to be consistent with legally operative terms
- Definitions derived from FCC rules

Draft Ordinance

APPLICABILITY

- Applies to all “wireless” services and equipment
- Applies to all new sites and changes to existing sites after effective ordinance date
- Contains standards exemptions

Draft Ordinance

APPLICATION PROCEDURES IN GENERAL

- Divides the world into two categories
 - Section 6409(a) does not apply → CUP
 - Section 6409(a) applies → Design Review
- Requires appointments for *initial* submittal
- Describes process for incomplete notices

Draft Ordinance

REGULATIONS FOR FACILITIES SUBJECT TO CUP

- Detailed permit application requirements
 - Director may waive or expand in writing
- Detailed design standards and guidelines
- Clear factors to evaluate whether to grant a CUP



Draft Ordinance

REGULATIONS FOR FACILITIES SUBJECT TO CUP

- **Location Preferences**

- Ordered preferences
- Close to residential uses most disfavored (see exception)

- **Design Preferences**

- Preference for stealth and camouflage
- Preference for use of natural surroundings to hide equipment



Draft Ordinance

REGULATIONS FOR FACILITIES SUBJECT TO DESIGN REVIEW

- **Procedural Guidance Tailored to FCC Rules**
- **Limited Application Requirements**
- **Findings for Approval Track FCC Rules**
- **Default Conditions of Approval**
- **Procedures for Denials without Prejudice**



Draft Ordinance

REGULATIONS FOR FACILITIES SUBJECT TO DESIGN REVIEW

- **Procedural Guidance Tailored to FCC Rules**
 - 60-Day Review Period
 - Explanation of Deemed-Granted Remedy



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REGULATIONS FOR FACILITIES SUBJECT TO DESIGN REVIEW

- **Limited Application Requirements**

- FCC Rules limit applications requirements for permits identified as potentially covered by Section 6409(a)
- Requires applicants to submit *all* applications for other needed permits (building, electrical, encroachment, etc.)



Draft Ordinance

REGULATIONS FOR FACILITIES SUBJECT TO DESIGN REVIEW

- **Findings for Approval Track FCC Rules**
 - Designed as a checklist for the Director
 - Rules differ based on facility type and location, so findings divided into categories for convenience
 - When Director can make all the findings needed for approval, Section 6409(a) applies and City must approve permit application



Draft Ordinance

REGULATIONS FOR FACILITIES SUBJECT TO DESIGN REVIEW

- **Default Conditions of Approval**
 - Self-executing conditions of approval that attach to “deemed-granted” permits and protect the City just as it would if the Director affirmatively approved the permit
 - Does not extend CUP permit term
 - Does not waive City’s right to challenge Section 6409(a) or a deemed-granted permit itself



Draft Ordinance

REGULATIONS FOR FACILITIES SUBJECT TO DESIGN REVIEW

- **Procedures for Denials without Prejudice**
 - Designed to deal with permit applications when City discovers that Section 6409(a) does *not* apply
 - Reduces uncertainty over whether a permit was deemed granted
 - Allows applicants to *immediately resubmit* the same project as a CUP or a modified project as a Design Review



Draft Ordinance

OPTIONAL INDEPENDENT CONSULTANT REVIEW

- Allows Director to retain outside help when needed on a case-by-case basis
- Costs billed to the City, but requires applicants to post a deposit to cover the costs
- Balance in deposit account returned to applicant after the City acts on the permit application



Draft Ordinance

MAINTENANCE

- Sites must be kept in neat, clean and safe condition
- Sites must comply with all laws at all times
- Operators must maintain all approvals in good standing

Draft Ordinance

REMOVAL OF ABANDONED FACILITIES

- Permittee must remove equipment and restore the site when
 - Site remains unused for 180 days; or
 - Permit is terminated/expired
- City may remove the equipment at permittee's cost after proper notice



Draft Ordinance

OWNERSHIP TRANSFERS

- Permittee must notify City when it transfers ownership to a new person/entity
- Necessary to provide notices to permittee/code enforcement

Draft Ordinance

PERMIT TERMS; CONDITIONS

- All permits for wireless sites automatically expire after 10 years, unless California law allows a shorter period
- Permittees need not remove facilities during a renewal application
- City approaches permit renewal as if it were reviewing a completely new site



Draft Ordinance

EXCEPTION FROM STANDARDS

- Allows applicants to deviate from the standards in ordinance to the extent necessary to mitigate a significant gap in its service coverage.
- Applicant must show by “clear and convincing evidence” that it needs a site to mitigate a significant gap, and that it proposes the least intrusive means.



QUESTIONS/COMMENTS

