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Regulation of Antennas In Rights of Way Based on Aesthetic Concerns Upheld

Court Allows City's Ordinance



Beauty is in the eye of the regulator...at least, according to the First District Court of Appeal. Earlier this month, the court upheld portions of a City and County of San Francisco ordinance regulating telecommunications antennas near the public right of way based on aesthetic concerns.

In *T-Mobile West LLC v. City and County of San Francisco*, the court explained that the City's authority to regulate the installation of telecommunications equipment near public roads allows the City to consider whether the equipment would "diminish the City's beauty."

While the court is interpreting California law, it may have broader implications. The court was interpreting the scope of City police powers under a statute that permits telephone companies, including providers of wireless telecommunications services, to place facilities in rights of way subject to local time, place and manner restrictions. Many other states have laws that are similar, and others have statutes that are more protective of local authority over telephone companies, or that do not apply to providers of wireless facilities. Moreover T-Mobile raised discrimination claims that may be similar to claims that are being raised by other companies in other states.

California's Public Utility Code allows telephone companies to construct and maintain telecommunication antennas along public roads in such a manner as not to "incommode" the public use of the road. A 1995 amendment to the Code states local government may "exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed," but to be reasonable, that control must, at a minimum, *be applied to all entities in an equivalent manner*.

In 2011, San Francisco adopted an ordinance requiring a site-specific permit before the installation of wireless equipment in the rights of way. The ordinance was intended, in part, "to prevent telecommunications providers from installing

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wireless antennas and associated equipment in the City's public right of way either in manners or in locations that will diminish the City's beauty." The ordinance subjected proposed wireless facilities – but not wireline facilities – to different degrees of scrutiny based on the size of the wireless facilities proposed.

The plaintiffs brought a challenge arguing that local authority to regulate use of the rights of way did not permit it to control placement based on aesthetics and, because the ordinance applied only to wireless facilities, it violated the equivalence provisions of the Code. The appellate court rejected both claims.

Citing a Ninth Circuit U.S. Court of Appeals decision from 2009, and focusing on the term "incommode," the court explained that regulation of the use of the road was not limited to preventing physical obstructions and may include "social, expressive and aesthetic functions." (*Sprint PCS Assets v. City of Palos Verdes Estates*.) The court concluded that state law reserves to local government the police power to regulate against inconvenience of public use, a power that is "broad enough to allow discretionary aesthetics-based regulation."

Turning to the discrimination claim, the court noted that the wireless facilities were "generally similar in size and appearance' to equipment installed by 'landline' telephone corporations, cable television operators, and PG&E." However, the court ruled that the duty to provide "equivalent access" merely meant that the City must apply similar rules in regulating the temporary disruption of the right of way associated with construction or maintenance, and did not require the City to regulate the impacts associated with wireless and wireline equipment identically.

The challenge was a state law facial challenge – meaning that plaintiffs did not challenge the denial of an application to install facilities at any particular location. If such challenges are raised, providers can be expected to claim that a denial violates the federal law provisions prohibiting or effectively prohibiting the provision of personal wireless services. It is quite possible the case will be taken to the California Supreme Court. However, for now, the case provides support for local regulation of wireless aesthetics in California, and in states with similar laws, or laws that preserve greater authority over wireless facilities.

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