

LEGAL ALERTS | APR 04, 2019

Ordinance Regulating Aesthetics of Wireless in Public Rights of Way OK'd by California Supreme Court

Decision in *T-Mobile West LLC v. City and County of San Francisco* a Victory for Local Government



Today marked a win for local government in the fight against preemption over local control of their streets. The California Supreme Court issued a decision in the *T-Mobile West LLC v. City and County of San Francisco* case. The Court affirmed the [First District Court of](#)

[Appeal decision](#), which had upheld portions of a City and County of San Francisco ordinance regulating telecommunications antennas in public rights of way based on aesthetic concerns. In doing so, the Court recognized there are “significant local interests” in regulating use and management of public streets and the “goal of technological advancement is not paramount to all others.” The wireless industry is increasingly seeking to deploy wireless facilities in public rights of way to add capacity to their 4G networks and to roll out 5G technologies. They have sought to preempt local control over these deployments through court actions, FCC rulings and state laws.

San Francisco adopted an ordinance in 2011 requiring a site-specific permit to install wireless equipment in the public rights of way. It was intended, in part, “to prevent telecommunications providers from installing 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 state law at issue in this case is California Public Utility Code section 7901. It allows telephone companies to construct and maintain telecommunications antennas along public roads in such a manner as to not “incommode” public use of the road. Additionally, PUC Section 7901.1 states that municipalities “exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.” But, to be

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reasonable, that control must, at a minimum, *be applied to all entities in an equivalent manner*. T-Mobile argued that the term “incommodate” refers to matters like blocking the street, and did not permit regulation on the basis of aesthetics at all. And it argued that, in any event, section 7901.1 invalidated local ordinances that applied aesthetic requirements to wireless and not to other street uses.

Section 7901 Does Not Preempt the Ordinance

The California Supreme Court concluded that “neither the plain language of section 7901 nor the manner in which it has been interpreted by courts and the [California Public Utilities Commission] supports plaintiffs’ argument that the Legislature intended to preempt local regulation based on aesthetic considerations.” The Court asserted that a local government has inherent police power to determine the appropriate uses of land within its jurisdiction, which includes establishing aesthetic conditions for land use. Thus, the question was whether section 7901 divests the City of that power. In its analysis, the Court presumed that the ordinance is not preempted absent a clear indication of preemptive intent.

The Court reasoned that, though section 7901 guarantees that telephone corporations do not need to secure a local franchise to operate in the State or construct telephone lines, section 7901 does not relieve telephone companies of the obligation to obtain permits and comply with local land use authority. Hence, it did not preclude localities from using permitting powers and land use authority to address the aesthetics of telephone lines. The Court further supported its decision by noting that the “[California Public Utilities Commission]’s default policy is one of deference to municipalities in matters concerning the design and location of wireless facilities.”

The Ordinance Does Not Violate Section 7901.1

The Court also concluded that the ordinance does not violate section 7901.1. Before trial, both parties agreed that the City treats all utility and telephone corporations equally when dealing with temporary access to the public rights of way during initial construction and installation. The Court analyzed the legislative history of section 7901.1 and ultimately found, as did the trial court and Court of Appeal, that this PUC section only deals with temporary access to the public rights of way. Therefore, the Court concluded that, since both parties agreed that the City does not discriminate when regulating temporary access to the public rights of way, the ordinance does not violate section 7901.1.

The Effects of this Ruling

This outcome supports local regulation of wireless facility installation aesthetics

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in California. However, 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 public 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 wireless facilities providers. Moreover, T-Mobile raised discrimination claims that may be similar to claims that are being raised by other companies in other states.

Federal Limitations and FCC Small Cell Order Still Matter

While a positive development at the state level, this court ruling does not change the effect of recent [FCC rules on aesthetics, shot clocks and moratoria, or FCC rules regarding non-discrimination in the public rights of way management](#). Best Best & Krieger LLP represented a lobbying coalition that successfully opposed a California small cell bill in 2017. BB&K represents a large coalition of local governments appealing the recent FCC orders at the U.S. Ninth Circuit Court of Appeals.

If you have any questions about how this decision or the recent FCC orders impact your community, contact the authors of this Legal Alert listed to the right in the firm's [Telecommunications Law](#) practice group, or your [BB&K attorney](#).

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