



SCAN NATOA

Telecommunications 101

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LOCAL REGULATION OF WIRELESS TELECOMMUNICATION FACILITIES

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Themes in Wireless Facility Regulation



Zoning Control v. Right-of-Way Management

De-regulation and New Technologies

State and Federal Preemption

Wireless Technology



Wireless Technology



Wireless Technology



Wireless Technology



Wireless Technology



Distributed Antenna System ("DAS")

- Lower power antenna network.
 - Smaller
 - More needed to cover same area.
- Linked to fiber optic network.
- Lower heights.
- Rarely on stand alone poles.



Wireless Technology



Small Cell Antenna

Lower power antenna network.

- Smaller
- Augments capacity for a given area.

Unlike DAS it does not require a series of antennas



Zoning v. ROW Management



- Zoning = Regulation of Private Property
 - Location
 - Height
 - Appearance
 - Conditions of approval
- ROW Management = Coordinating Use of Public Property
 - Time, Place, and Manner
- City as Owner/Landlord

Federal Telecom Law



Communications Act of 1934

- Established the Federal Communications Commission (FCC)
 - Organized federal regulation
 - Previous authority was spread amongst federal agencies including the Federal Radio Commission, Interstate Commerce Commission, etc.
 - Consists of 5 commissioners appointed by the President
- Regulates interstate and foreign communications by wire or radio

Federal Telecom Law

The Federal
Communications
Commission

The FCC



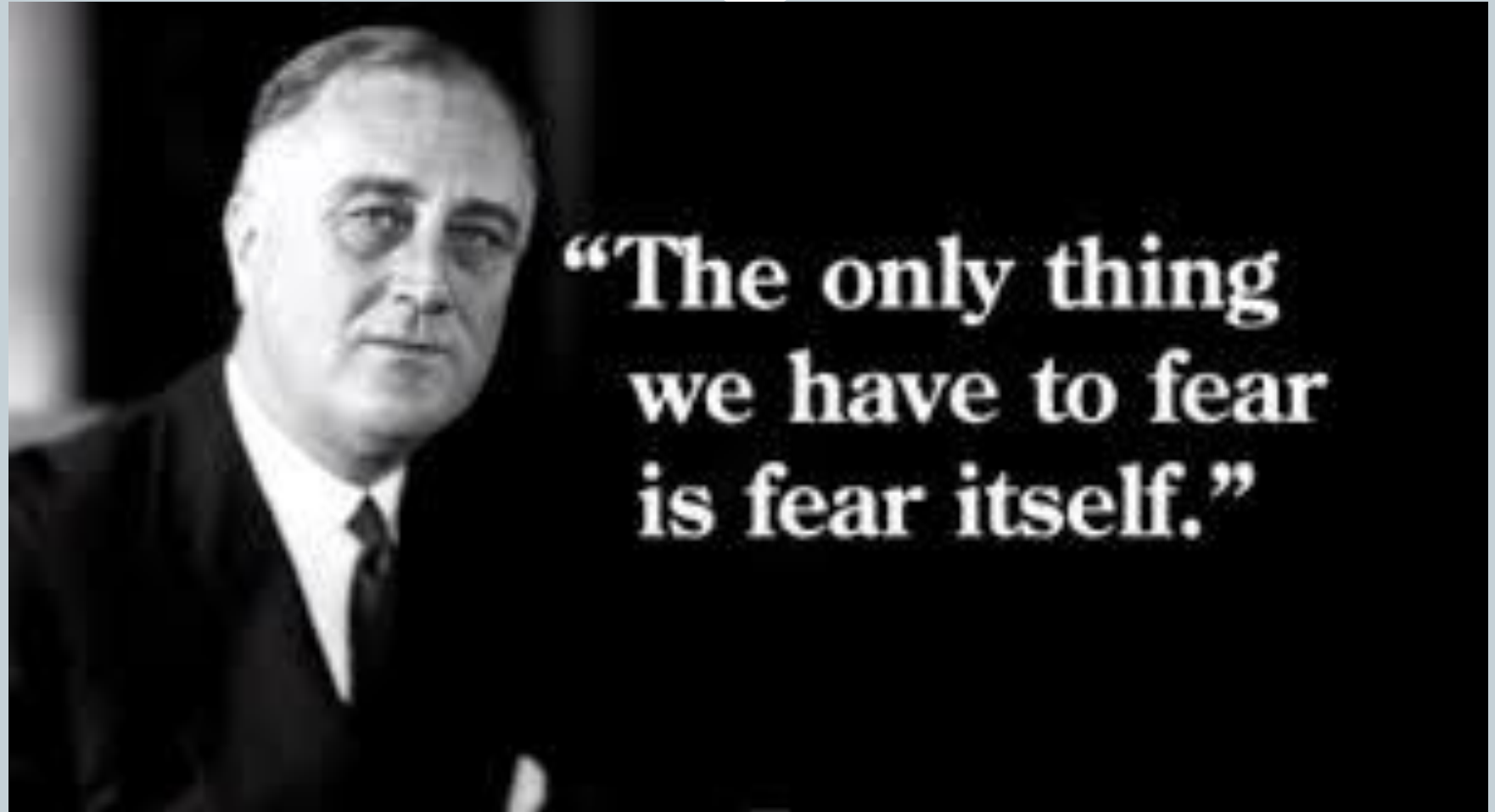
Federal Telecom Law



Communications Act of 1934

- FCC polices obscene content
- 1934 to today: The FCC's prominence and significance has increased immensely as communications technology became integral to society
- FDR to Obama: Interstate communication increased, Obama calls for #BetterBroadband

Federal Telecom Law



Federal Preemption of Local Zoning Control



The Federal Telecommunications Act of 1996

Purpose “to provide for a pro-competitive, **de-regulatory** national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition....”

(H.R. REP. NO. 104-458 (1996)).

Federal Preemption of Local Zoning Control



Section 253(a) of the Telecommunications Act

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” (47 U.S.C. § 253(a).)

Federal Preemption of Local Zoning Control



Section 253(a) of the Telecommunications Act

“[A] plaintiff suing a municipality under section 253(a) must show **actual or effective prohibition**, rather than the mere possibility of prohibition...”

Sprint Telephony PCS, LP v. County of San Diego, 543 F.3d 571 (9th Cir. 2008).

Federal Preemption of Local Zoning Control



Section 332(c)(7)(A) of the Telecommunications Act

“[N]othing in this [Act] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” (47 U.S.C. § 332(c)(7)(A).)

Federal Preemption of Local Zoning Control



Decisions on permit applications may not “unreasonably discriminate among providers of functionally equivalent services.” 47 U.S.C. § 332(c)(7)(B)(i)(I).

- Zoning rules and permit approvals cannot discriminate between **similar technologies** or similarly situated **service providers**.
- “[D]iscrimination based on traditional bases of zoning regulation such as preserving the character of the neighborhood and avoiding aesthetic blight are reasonable and thus permissible.” *MetroPCS v. City and County of San Francisco*, 400 F.3d 715, 727 (9th Cir. 2005).

Federal Preemption of Local Zoning Control



Zoning regulations must not “prohibit or have the effect of prohibiting the provisions of personal wireless services.”

47 U.S.C. § 332(c)(7)(B)(i).

- Cannot ban wireless services.
- Cannot have the actual effect of banning wireless services.
- Cannot prevent a service provider from closing a **significant gap** in its service coverage.

Federal Preemption of Local Zoning Control



Mind the Gap!

- Gap is a hole in the provider's geographic service area
- Service Provider bears the burden of proving:
 - Existence of the gap
 - The project closes the gap in the manner least intrusive of the values that would be served by denial.

Federal Preemption of Local Zoning Control



Denials of applications cannot be based on “the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC’s] regulations concerning such emissions.” 47 U.S.C. § 332(c)(7)(B)(iv).

- Example: A city could not prohibit a cell tower near a school based on a concern that the electromagnetic radiation would harm the students, if the tower complied with FCC standards.
- Cities can deny an application to construct or modify wireless facilities if the facilities do *not* comply with FCC’s regulations.

Federal Preemption of Local Zoning Control



Denial of a wireless facility permit must be supported by substantial evidence in the written record of the hearing. *See* 47 U.S.C. § 332(c)(7)(B)(iii); *MetroPCS*, 400 F.3d at 723-24.

- Substantial evidence = “less than a preponderance, but more than a scintilla of evidence. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”
- Standard mirrors the deferential standard already applied by California courts in reviewing local administrative decisions.

Federal Preemption of Local Zoning Control



Federal Preemption of Local Zoning Control



Federal Preemption of Local Zoning Control



T-Mobile South, LLC v. City of Roswell, 574 U.S. _____ (2015)

- Application for a new 108-foot tower on 2.8 acres of vacant, residentially zoned property.
- Council held “2-hour-long public hearing” before voting for denial.
 - Too tall
 - Aesthetically incompatible
 - Negative effect on real estate value
 - Other carriers had sufficient coverage; no need to “level the playing field” for T-Mobile
- City sent letter of denial; said see City Clerk for meeting minutes.
- Minutes not approved until 26 days later.

Federal Preemption of Local Zoning Control



T-Mobile South, LLC v. City of Roswell, 574 U.S. _____ (2015)

- T-Mobile sued: decision not supported by substantial evidence.
- District Court: City failed to issues a written explanation of the reasons for denial.
- 11th Circuit: reversed, City's reason for denial found in the minutes; reasons don't have to be in the same document as written denial.
- SCOTUS: separate document is sufficient; simple explanation sufficient; but the City still loses because...

Federal Preemption of Local Zoning Control



T-Mobile South, LLC v. City of Roswell, 574 U.S. _____ (2015)

“...the locality must provide or make available its written reasons at **essentially the same time** as it communicates its denial.”

Federal Preemption of Local Zoning Control



T-Mobile South, LLC v. City of Roswell, 574 U.S. _____ (2015)

“A locality may satisfy its statutory obligation if it states its reasons with sufficient clarity in some other written record issued **essentially contemporaneously** with the denial.”

Federal Preemption of Local Zoning Control



T-Mobile South, LLC v. City of Roswell, 574 U.S. _____ (2015)



Federal Preemption of Local Zoning Control



Shot Clocks are not just for Kobe Bryant

- A city must act “within a reasonable period of time” when reviewing an application for a wireless telecommunications facility.
- FCC decision now imposes time limits on the processing of applications for wireless telecommunication facilities. (FCC 09-99.)
 - **90 days for Collocation applications .**
 - **150 days for others.**
- Does not start until the application is complete, provided the applicant is notified within 30 days that the application is incomplete.

Federal Preemption of Local Zoning Control



Middle Class Tax Relief and Job Creation Act of 2012

Section 6409

“...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.”

- Applies to:
 - Collocation of new transmission equipment;
 - Removal of transmission equipment; or
 - Replacement of transmission equipment.

Federal Preemption of Local Zoning Control



Middle Class Tax Relief and Job Creation Act of 2012

Section 6409

“...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.”

- But what does it mean?
 - “Wireless tower”
 - “Base station”
 - “Substantially change”
 - “Collocation”

Federal Preemption of Local Zoning Control



What can Cities do?

- Detailed application requirements reasonably related to review of the project.
- Discretionary permits (except for certain collocated facilities).
- Public hearings.
- Aesthetic regulations, such as camouflage, setbacks.
- Facility maintenance standards.

California Law and ROW Management



California Public Utilities Code § 7901

“[T]elephone corporations may construct ... telephone lines along and upon any public road or highway, ... and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway....”

- State Franchise for telephone companies.
 - No complete prohibition
 - No local tolls
- Applies to wireless service providers.
 - Certificate of Public Convenience and Necessity (“CPCN”)

California Law and ROW Management



California Public Utilities Code § 7901.1

“(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the **time, place, and manner** in which roads, highways, and waterways are accessed.

“(b)The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.

”

...

California Law and ROW Management



§ 7901.1: Time, Place, and Manner

- No unreasonable interference with public's use of ROW.
- Discretionary permitting allowed.
- Insurance, bonding, and indemnity requirements.
- Compliance with building codes.
- Aesthetic regulations allowed. *Sprint PCS Assets v. City of Palos Verdes Estates*, 583 F.3d 716, 725 (9th Cir. 2009),

When the City is the Landlord



- Providers seek to save money by locating on city-owned property.
 - Property outside the ROW.
 - City facilities (e.g., light poles) in the ROW.
- Federal preemption does not apply.
- PUC § 7901 does not apply. (Rent!)

California Public Utilities Commission



- State Franchisor for telecom and video franchises
- The CPUC regulates privately owned electric, natural gas, telecommunications, water, railroad, rail transit, and passenger transportation companies.
- General Order 170
 - PUC Rulemaking Proceeding
 - Initial decision: PUC would preempt local CEQA review of telecom facilities.
 - Reconsideration is underway. Stay tuned.

Case Law



City of Huntington Beach v. CPUC

214 Cal.App.4th 566 (2013)

- Court of Appeals, 4th District, upholds CPUC decision that DAS operator (i.e. NextG) is a “telephone corporation” which is entitled under 7901 to utilize the public rights of way for its deployment
- CPUC abused its discretion by preempting the City’s undergrounding ordinance through its approval of the project

Case Law



Omnipoint Communications, Inc. v., City of Huntington Beach

738 F. 3d 192 (9th Cir. 2013)

- Held: The 1996 Telecom Act does not preempt an ordinance of the City requiring voter approval before a wireless facility could be located in a City park.

Case Law



NewPath Networks v. City of Davis

No: 2:10-cv-00236-GEB-KJM

(E.D. Ca. March 19, 2010)

- Court denies NewPath's request for preliminary injunction to reinstate 36 encroachment permits
- Case law reviewed
- Injunction denied by the Court

Case Law



Crown Castle v. City of Calabasas

Case No: BS 140933

Judgment filed Jan. 24, 2014 (L.A. Sup. Ct.)

- Crown Castle challenged City wireless ordinance
- Court upheld almost all of the ordinance – except provisions related to RF emissions
- Court holds the “Ordinance intrudes on the preempted area of RF emissions because it purports to authorize the City to monitor and enforce the FCC’s RF regulations”

Case Law



Pacific Bell v. City of Livermore

California Court of Appeal Case No: A136714

First Appellate District, Division Three

- Amicus Brief filed by the League, CSAC, and SCAN NATOA
- 7901 case on wireline services
- Oral arguments

Questions?



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