



Memorandum

Date: October 24, 2022
To: Mayor Vinis and City Council
From: Sara McKinney, 541-682-8497
Subject: Testimony Submitted

Attached is testimony submitted at the Public Forum October 24, 2022. A copy of this material is also included with the meeting materials posted on the web at:

<https://eugene.ompnetwork.org/embed/sessions/256131/city-council-meeting-october-24-2022>

The following is a transcription of this video:

<https://www.youtube.com/channel/UCGDxIKp6WLmt4gbCUT6cpig>

The presenter's website:

<https://campanellipc.com>

Information about the law firm's Federal Telecommunications Act of 1996 (TCA) litigation, cell tower and wireless facility opposition, TCA-based zoning ordinance drafting and application review and more:

<https://campanellipc.com/practice-areas/federal-telecommunications-act-of-1996-tca-litigation/>

The Telecommunications Act of 1996 (TCA) - What Local Governments Need to Know in Plain English

by Andrew Campanelli, J.D.

Once again, contrary to what you may have heard or been told, when Congress enacted the Telecommunications Act of 1996 (TCA), its very first significant provision explicitly reserved the powers to control the placement of wireless facilities to local governments, including cell towers, small cells and DOS systems. Subparagraph A of the provision which reserves that general authority to local governments is followed by five essentially procedural requirements contained in Paragraph B. This is very easy to understand. It's not rocket science, I assure you, and I'm going to explain them to you today.

Let's talk about the first restriction. The first procedural requirement, rule number one, says that local governments cannot unreasonably discriminate between providers of equivalent services. What does that mean? Well, in general terms, it means a town can't say, okay we're going to let ATT come in and provide wireless service and build cell towers, but we're not going to let Verizon come in. That would be unreasonable discrimination, but again, the code only prohibits unreasonable discrimination. That does not mean that if you let ATT go build a tower in a commercial zone, that you automatically have to let Verizon build one. You must actually discriminate under the code. You must analyze each case based upon its own merits, just like any other type of zoning application. So you can grant one tower application for one carrier and deny another one because the circumstances of its application are different. It may inflict a significantly greater adverse aesthetic impact, have a more dramatic adverse impact on property values, even the increased density of wireless facilities can justify a denial of a tower. Again, they have to be addressed on a case-by-case basis. So there are five rules and that was rule number one.

Rule number two is the "shot clock." You've heard about it but most local zoning attorneys really don't understand it. I'm going to give you the general rule. There are many variations based upon the type of facility and where you are, but here's the general rule. If an applicant files an application for a new cell tower, you have to make a decision on their application within a reasonable time, which is typically 150 days from when the application is filed. The 150 days starts to run when the application is filed, irrespective of whether or not the application is

complete or incomplete. If the local government wants to claim the application is incomplete, you must notify the applicant in writing within 30 days telling them why it's incomplete. That will toll the shot clock. If the applicant then refiles something else and now claims it's complete, you then only have 10 days if you want to reject it as incomplete again. There are many traps in the shot clock. First, I want to make this crystal clear. Adopting a moratorium does not stop the shot clock from running. So how can you stop the shot clock from running? Well, if you reject an application as incomplete within the time periods I mentioned, that will stop the clock. You can also, however, toll the clock by an agreement between the local government board and the applicant. Be very careful here. Make sure that if you do agree to extend the shot clock, you extend it with sufficient time to enable you to close whatever public hearing you have and allow you a sufficient period of time after the close of the public hearing to render your decision. So, that's the shot clock. That's rule number two.

Again, these things are actually pretty simple. Now rule number three - written decision / substantial evidence. What does this mean? It means your written decision on any application for a wireless facility, number one, must be issued in a separate writing, and number two, it must be based upon substantial evidence. This is not as difficult a standard as it may sound. The written decision is pretty simple. The written decision must be issued within the period of the shot clock as far as substantial evidence. I'm going to point out that in the context of any zoning application, it is you, the local zoning board, who gets to decide what evidence you will require an applicant to produce and what weight is to be given to any evidence that's been submitted. So what is the standard? When can you say you have substantial evidence? Here's the test. Your decision must be based upon such evidence that might support a reasonable mind arriving at the decision you made. That's the standard, and it's very deferential. If you make fact-finding determinations, federal judges are loath to overturn them. They don't want to be zoning boards of appeals. The biggest problem here is that local zoning codes do not provide guidance, so that local boards don't know what decisions they have to make. For example, let's say somebody wants to build a cell tower and it's 20 feet from Mary Smith's house and you're going to deny the application because it's going to destroy the value of a property. But the applicant has alleged they have a significant gap in personal wireless services and that their proposed cell tower is the least intrusive means of remedying that service. The board makes a decision and denies it based upon the reduction of value of the person's house, but they make no factual determinations as to whether or not the applicant proved they have a significant gap in service or least intrusive means. Well, you just lost the case. Within 30 days from your decision, they're going to file a federal lawsuit. They're going to win for no fault for the planning board, because the planning board wasn't provided procedural guidance. Your code did not tell them what fact finding determinations they have to make, and if your code doesn't do that you're basically throwing your planning board and your zoning board to the wolves. You have to amend your code to have those guidelines in there, so they know how to comply with rule number three.

Rule number four is environmental concerns or health effects. This is the one that most people want to talk about, so what does this rule say? The rule says that local governments cannot regulate wireless facilities based upon environmental concerns, which many courts have interpreted to mean health concerns. To the extent that a facility is FCC compliant, what does that mean? Generally it means that when built, the facility is not going to expose members of the general public to radiation levels which exceed what are known as the general population

exposure limits. Here are the biggest problems. Number one, how do you know before it's built if the facility is going to exceed the FCC's limits? Well, most applicants will submit an FCC compliance report. One of the problems is many of these reports are false, but when your local code doesn't give guidance to your planning board or zoning board as to how to recognize a false compliance report, that report might as well be written in Sanskrit because your planning board members have no way to figure out if it's false. Making matters worse is that, in reality, when these facilities go up, for the most part the FCC will have no idea where it is and have no idea what level of radiation it's exposing members of your citizenry to. The reason is the FCC essentially never tests the radiation coming off these facilities. In reality, what that means is that local governments are the first and only line of defense against their citizens being exposed to illegally excessive levels of RF radiation. Recognizing this fact, sophisticated governments across the country have started adopting testing requirements, and it's a battle going on every day. So those are the environmental concerns issues, or more accurately, the health issue. That's rule number four.

Rule number five. Here's the one that's really taking hold in battles across the country. Rule number five says you can't prohibit or effectively prohibit the providing of personal wireless services. What does this mean? Well, not prohibiting is easy. You can't ban all cell towers in all wireless facilities. The big battle is when an applicant claims, we want to put in a cell tower and you have to grant it to us even if it violates your local zoning code, because if you turn us down and don't let us build it, you will be effectively prohibiting a specific carrier from providing personal wireless services. Now, when the Act was adopted in 1996, it only took two years for lawsuits to be filed and for these cases to get to the United States Circuit Courts of Appeals across the country. And the Circuit Courts of Appeals came up with standards which are pretty much uniform across the country, and here's what they've said. If an applicant wants to claim that a denial of their application would be an effective prohibition in violation of federal law, the applicant has to prove two things. One, they have to prove that they suffer from a significant gap in personal wireless services, and two, they have to prove that the proposed installation at the specific site they want it at, at the specific height they want it, is the least intrusive means of remedying that gap. If your board is fully informed and knows how to analyze these cases, it is extremely difficult for applicants to meet that burden. The problem is, local boards have no idea how to decide these cases, what evidence to ask for, how to recognize false evidence that's been submitted to you. So again, it all goes back to your zoning code. If you don't have an updated code which takes into account TCA compliance, they're going to be able to run roughshod over you.

The only reason local governments get sued under the TCA is because their local board did not understand. They weren't aware of the procedural requirements of the TCA, so obviously they couldn't know how to comply with them. So again, you need to adopt amendments to your code to provide procedural guidance to your local zoning board.