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# Ruling upholds local wireless facility rules, but the debate isn't over

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In the age of 4G LTE and the rise of 5G wireless technology, many local governments in California find themselves tasked with deciding how to regulate telecommunication facilities within their streets, often times at the expense of community aesthetics. The desire to preserve local control frequently results in a debate with telecommunication carriers about the boundaries of local authority and the scope of Public Utilities Code sections 7901 and 7901.1.

Under Section 7901, telecommunication companies enjoy a franchise right to construct lines, poles and equipment in the public right-of-way if they do not "incommode" the public use of the right-of-way or interrupt the navigation of waters. Local governments, however, may exercise "reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed" pursuant to Section 7901.1 as long as such control is equally applied. Between these two statutes, should local governments have the ability to impose aesthetic requirements on wireless facilities deployment in the public right-of-way?

On April 4, the California Supreme Court answered this question in favor of local authority. In a unanimous decision issued in *T-Mobile West LLC v. City and County of San Francisco*, 2019 DJDAR 2886, the Supreme Court affirmed the decision of the 1st District Court of Appeal and held that a local ordinance conditioning wireless facilities permit to locate in the public right-of-way on aesthetic review was not preempted by Section 7901, and did not violate Section 7901.1.

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A cell tower disguised as a palm tree in Southern California.

**The T-Mobile case provides much needed clarification for municipalities seeking to exercise local control over telecommunications providers' use of the public right-of-way.**

## The Case

The *T-Mobile* case arises from a lawsuit brought by T-Mobile, Crown Castle, and ExteNet Systems against the city and county of San Francisco seeking to invalidate a provision in the San Francisco Public Works Code that regulates wireless facilities deployment. Like many cities, San Francisco requires all utilities, telephone companies, and wireless carriers to obtain temporary occupancy permits in order to install their facilities in the right-of-way if installation will take more than one day. In addition, a separate city ordinance also requires wireless facilities to obtain another permit that is contingent on aesthetic review and approval for installing facilities in specific areas within the city. For example, wireless facility installations proposed in historic districts or "excellent view" designated areas may only be approved if the city's planning department determined the proposed facility would not "significantly degrade" the district's aesthetic attributes or "significantly impair" an area's protected views.

Plaintiffs challenged the aesthetics ordinance. They argued that the city's ordinance is preempted by Section 7901 because it does not allow conditioning approval on aesthetic grounds. Specifically, plaintiffs argued that the Section 7901 term "incommode" should only mean obstructing the public's path of travel and, thus, aesthetic regulations are beyond local control. Likewise, the plaintiffs asserted that the city violated Section 7901.1 by only targeting wireless providers with aesthetic requirements.

## The Decision

The California Supreme Court first held that the city's ordinance is not preempted by Section 7901 because the Legislature did not intend to deprive local governments of the ability to impose aesthetic regulations. Citing prior judicial decisions and California Public Utilities Commission policies, the court reasoned that Section 7901 leaves room for local regulatory action in addition to preventing physical road obstructions. In particular, the term "incommode" does not only mean obstruction to paths of travel. It could also include, for example, noise generation, negative health consequences, or safety concerns that may come from telecommunication deployment and could disturb the use and quiet enjoyment of the public road. Further, cities and counties have inherent, constitutional police power to impose land use regulations including aesthetic requirements. Therefore, absent the Legislature's clear preemptive intent as is the case in *T-Mobile*, Section 7901 does not preempt San Francisco's ordinance.

Likewise, the court held that the ordinance does not violate Section 7901.1. The court observed that San Francisco requires all utility and telephone companies, wireless carriers or

# Court clarifies control over wireless providers

not, to obtain temporary permits to begin construction in the public right-of-way. These permits are not subject to aesthetic review. The city only requires aesthetic approval for the subsequent, continuing occupancy and operation of wireless facilities in the right-of-way. The court reasoned that Section 7901.1's "reasonable" and "equally-applied" mandates only applied to the city's requirements to temporarily access the public right-of-way at the start of construction, but not to subsequent regulations for other long-term impacts to the public right-of-way under Section 7901. As noted above, San Francisco requires a temporary permit for all construction work lasting more than one day in the public right-of-way, and the T-Mobile parties had stipulated that the city treats all companies equally when it comes to obtaining that permit. Thus, no Section 7901.1 violations occurred.

**The Implications**

The *T-Mobile* case provides much-needed clarification for municipalities seeking to exercise local control over telecommunications providers' use of the public right-of-way. In responding to the influx of requests from carriers proposing to expand existing service connectivity and preparing for the newest 5G technology roll-out, California municipalities must accommodate these carriers while preserving the use and appearance of streets and roads. Local governments cannot outright ban wireless facilities deployment under the Section 7901 franchise, but they may, as this case illustrates, impose aesthetics and other potential land use requirements.

However, the debate over local authority does not stop here. Unsurprisingly, there are federal preemptory mandates and regulations that some view as protecting the wireless telecommunications industry. For instance, the federal Telecommunications Act of 1996 prohibits local regulations from "effectively prohibiting" the provision of telecommunication services. Most recently in September 2018, the Federal Communications Commission also issued a controversial ruling (which is currently being challenged at the 9th U.S. Circuit Court of Appeals by cities and counties nationwide) to strictly limit local authority over wireless facilities, including requiring aesthetics regulations to be objective, reasonable, nondiscriminatory and published in advance. As wireless carriers can be expected to rely on these federal mandates to strengthen their interests in using the public right-of-way, it remains to be seen how the scope of local control might change as the wireless industry and local governments take the debate to the federal level.

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