Katherine Douglas Public Comment

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LATE DIST

From: Mark Graham <Mark@keepcellantennasaway.org>
Sent: Monday, February 3, 2025 3:20 PM
To: sbcob; Laura Capps; Roy Lee; Joan Hartmann; Supervisor Nelson; Steve Lavagnino; Eleanor Gartner; Cory Bantilan
Subject: Re: Public comments on agenda item 3, (2) revise existing development standards and permit procedures for Commercial Telecommunication Facilities;

February 3, 2025

Dear Supervisors and staff of Santa Barbara County,

Please also consider this.

Wireless facilities increase the risk of fires. If the supervisors vote for this ordinance, you will be ignoring very dangerous fire risks. Four Southern California fires have been started by telecom equipment and overloaded poles, costing billions of dollars. We need fire safety protocols and other protections that are missing in this ordinance. The FCC states that safety belongs to the municipalities to regulate.

Items that are ignored in the proposed Wireless Ordinance include:

1. The fires in Los Angeles City and County have shown California and the world that we are dealing with a climate crisis, with impossible conditions under which to fight fire. In this context the County should err way on the side of caution and avoiding any equipment known to start fires.

2. Santa Barbara County must do everything in their power to prevent fires from starting.

3. Cell towers and cell antennas and their associated equipment can and do start fires.

4. Cell tower fires are electrical fires and they cannot be fought through conventional means (water suppression) until the grid has been cut. Otherwise, anyone putting water on a cell tower fire will be electrocuted.

5. Amidst Santa Ana conditions, cell tower fires can grow exponentially in a matter of seconds.

6. We are imploring SB County to implement Malibu's Fire Safety Protocol for electrical engineering rigor, and the federally required APCO ANSI for structural engineering rigor to help prevent fires in the first place.

7. We want a setback from all properties of at least 300 feet in urban settings and up to 1500 feet in rural settings. It takes longer to cut the grid in rural settings which gives the fire more time to spread and makes it harder for residents to escape from.

We urge the Supervisors, based on the fire risk alone, to vote NO on the Wireless Ordinance and to work with experts: Attorney Julian Gresser, Attorney Andrew Campanelli and Fire Expert Susan Foster and President of the Environmental Health Trust Dr. Kent Chamberlin and add reasonable and necessary restrictions to the Telecom Ordinance.

Thank you and best wishes,

Mark Graham
Co-Founder and Organizer
Keep Cell Antennas Away
A local residents' advocacy group
www.KeepCellAntennasAway.org

On Monday, February 3rd, 2025 at 2:54 PM, Mark Graham <Mark@keepcellantennasaway.org> wrote:

> February 3, 2025
>
> Dear Supervisors and staff of Santa Barbara County,
>
> Please acknowledge your receipt of this email and the attachments. This is for your meeting tomorrow morning.
>
> I would appreciate the Board of Supervisors' questions and substantive response to the recommendations and information in this email. More than that I would appreciate and I ask for you to vote NO on or postpone a vote on the item I am writing about.
>
> On Tuesday, February 4, 2025, the Santa Barbara County Board of Supervisors will vote on amendments to the County's Wireless Ordinance that will allow the telecommunication companies to blanket our neighborhoods with small cell antennas, removing essential restrictions. This dangerous Ordinance removes notification, hearings, opposition, setbacks and environmental protection. Applications and permits will be rubber stamped!
>
> For the reasons stated in this email please vote NO or POSTPONE the vote on the proposed Wireless Ordinance and work with Attorney Julian Gresser, attorney Andrew Campanelli, and your informed local residents, your constituents, and others including myself who have been through this entire policy revision process that you are currently in and learned valuable lessons.
>
> You can pass this agenda item after omitting the section on (2) revise existing development standards and permit procedures for Commercial Telecommunication Facilities, which stands alone and is not directly related to the subject of the rest of this agenda item, and which could be brought back to the BOS as a new agenda item at a later date.
>
> **Overall** if the County passes the proposed item you will fail to exercise your zoning authority generally preserved to you in the Telecommunications Act of 1996 and you will fail to protect the County and your residents and constituents, leaving them and you open to significant avoidable harm. Once permits are issued it will be nearly impossible to unwind this mistaken policy. The right thing to do is fully know and exercise the County's rights and protect the County and your residents through an appropriate ordinance, which you do not have in front of you but could be written by you in cooperation with your local residents with input from attorneys Andrew Campanelli and Julia Gresser. Both are very experienced in helping local governments exercise their zoning authority fully and appropriately and protecting themselves and their residents.
>
> There are several key points that I want to make.

#1 Get a complete and accurate understanding of the County's regulatory authority over cell antennas per the Telecommunications Act of 1996.
#2 Please read, discuss and implement all of the recommendations in attorney Julian Gressers letter to the Board of Supervisors of Santa Barbara County.
#3 Please hear a presentation by and discuss this policy issue with the expert Dr. Kent Chamberlain.
#4 Know that even if the telecommunications companies ("telecom") sues the County, they cannot get the Court to order you to pay their attorney fees.
#5 The County can regulate cell antenna placement on the basis of aesthetics. Please do this.
#6 Please consider adopting a cell antenna policy such as the City of Elk Grove, California adopted in August, 2019.

Details of each point follow.

#1 Get a complete and accurate understanding of the County's regulatory authority over cell antennas per the Telecommunications Act of 1996.

The BOS and staff should have a complete and accurate understanding of the full extent of its regulatory and zoning authority over cell antennas and their placement per the Telecommunications Act of 1996 and case law. It appears that you do not have it. It appears you have been pressured and misled by the telecommunications companies, who have a vested interest in deceiving and misleading you, into believing that you have very few options.

The best way for you to gain this complete and accurate understanding is by, broadly speaking, listening to your well informed residents and to attorney Andrew Campanelli and attorney Julian Gresser.

In 2021 attorney Andrew Campanelli prepared for the City of Santa Barbara a document titled, "Federal law based analysis of The City of Santa Barbara, California Municipal Code Proposed Amendment to Add Chapter 9.170", dated August 16, 2021.

I am sending you in this message a copy of Mr. Campanelli's report. Please vote no or postpone a vote on this agenda item and make time to review this, discuss it amongst yourselves and with your counsel, and implement his recommendations.

Regarding the significant gap in coverage and the least intrusive means requirements, which have been part of case law in the U.S. Court of Appeals for the Ninth Circuit for many years, the FCC purported to eliminate those requirements in its small cell order and substitute in their place a new and much lower bar, not authorized by Congress and not found in the TCA, of a "material inhibition", which FCC defined very broadly so as to include virtually any improvement in service.

FCC does not have the authority to change the TCA or to creatively "reinterpret" it to mean something it does not mean or something it does not say! Is the County and the BOS clear on this? If you believe that FCC has the authority to change the TCA through an interpretive order into meaning something it does not mean then you have been misled by telecom and possibly by your own counsel.

Please consult with attorney Andrew Campanelli and attorney Julian Gresser on this point. Even attorney Jonathan Hobbs.

Mr. Campanelli can point to specifics on this. Please see his section on the Relevant History of the TCA and its application.

Even if you have fallen for FCC's creative reinterpretation of the effective prohibition section of the TCA you can still, per recent case law, regulate the placement of cell antennas on the basis of aesthetics as I will demonstrate in this letter as the City of Elk Grove has done and I am sure as several other cities and counties have done. See paragraphs 5 and 6 in this email.

Please read and discuss among yourselves and with your counsel section A of the Campanelli report, titled "The Preservation of Powers to Local Governments and Their Exercise of Same", on pages 4 - 7 of his report to the City of Santa Barbara.

Even though the recommendations in section V. of his report, "Recommended Changes to the Code of the City of Santa Barbara and Proposed Chapter 9.170" are specific to the City, they are directly applicable to Santa Barbara County too. You will see this in the outline on pages 3-4 and in the body of the report on pages 19 - 32.

V. Recommended Changes to the Code of the City of Santa Barbara and Proposed Chapter 9.170

A. Legislative Intent Provisions

B. Fact-Finding Requirements and Evidentiary Guidance

1. Local Zoning Determinations

2. TCA Determinations
3. Evidentiary Standards

a. Significant Gap Claims
b. Capacity Deficienty Claims

c. FCC Compliance Reports

d. Propagation Maps

e. Visual Impact Analyses

f. Verification Requirements

C. Notice Provisions and Hearing Requirements

You will no longer believe that your options are so limited after you have read this report and discussed it.

#2 Please read, discuss and implement all of the recommendations in attorney Julian Gressers letter to the Board of Supervisors of Santa Barbara County.

https://www.bbilan.org/blog/2025-01-24-bbilan-letter-to-santa-barbara-county-board-of-supervisors

I am sending you the short version of Mr. Gresser's letter in this email. You can access the longer version from a link found inside the short version and at that web address.

#3 Please hear a presentation by and discuss this policy issue with the expert Dr. Kent Chamberlain. Please read his letter before the hearing and before voting on the Wireless Ordinance. Dr. Chamberlain served on the New Hampshire Commission, is a Biomedical and Radiofrequency Engineer, was Chair of the Department of Electrical & Computer Engineering at the University of New Hampshire, performed research for over twenty-five sponsors, including the Department of Justice and the National Science Foundation. Most of his research has involved the modeling and measurement of electromagnetic fields which included the siting of communications and navigation antennas. Your other constituents have sent you a copy of his letter.

#4 Know that even if the telecommunications companies ("telecom") sues the County, they cannot get the Court to order you to pay their attorney fees. Telecom often threatens cities and counties with lawsuits, misrepresenting the Telecommunications Act of 1996 (TCA) and exaggerating their own powers and minimizing the cities' and counties' powers per the TCA. Do not be afraid. Do not buy their misrepresentations. You can ask attorney Andrew Campanelli, attorney Julian Gresser, and attorney Jonathon Hobbs (City of Elk Grove City Attorney) about this.

#5 The County can regulate cell antenna placement on the basis of aesthetics. Please do this. This is directly related to the front yard rule for cell antenna placement, my next point below. The City of Elk Grove has demonstrated how a local government can regulate cell antenna placement on the basis of aesthetics. I recommend that you postpone your vote on this proposal in agenda item 3 until such time as you and your staff have written, edited, and discussed, amongst yourselves and with counsel, a front yard rule for cell antenna placement for Santa Barbara County.

Slide 17 in your presentation says in part:

Federal Communication Commission's (FCC) "Small Cell Order" 18-133

- Requires streamlined permit process for "small wireless facilities" (shot clock)
- **Allows local use of aesthetic standards if reasonable and objective**

What are "aesthetic regulations"?

Federal law does not define aesthetics.

The FCC small cell order does not define aesthetics. It is up to the County to define and state what "aesthetic standards" mean to you. This is where local government, which has its zoning authority preserved generally in the TCA, can exercise that zoning authority.

18-133 is the number of the small cell order. Paragraph 87, on page 45 of the FCC small cell order, says this about aesthetic regulations.

"Analogously, aesthetic requirements that are reasonable in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments are also permissible. In assessing whether this standard has been met, aesthetic requirements

that are more burdensome than those the state or locality applies to similar infrastructure deployments are not permissible, because such discriminatory application evidences that the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment. For example, a minimum spacing requirement that has the effect of materially inhibiting wireless service would be considered an effective prohibition of service."

But again, FCC lacks the authority to "interpret" and "redefine" the TCA to say or mean something it does not say or mean.

The telecoms have accepted and acknowledged, through their failure to challenge it in court, that the City of Elk Grove front yard rule for cell antenna placement (see the next time) is acceptable per the TCA. The front yard rule for cell antenna placement in the City of Elk Grove has been in place, it has been the City's law, since September of 2019. During that time the City has received hundreds of cell antenna permit applications from telecom and has issued hundreds of permits - but none for a cell antenna immediately adjacent to or immediately across the street from the front yard of a residential dwelling. Telecoms have had over 5 years to consider whether this front yard rule for cell antenna placement is consistent with the TCA and whether the City of Elk Grove properly exercised its zoning authority when it passed this law. Telecom could have sued the City in federal court at any time for an alleged violation of the TCA and in particular the effective prohibition provision. But they chose not to. Their actions tell you something very valuable. Telecom knows that the City DOES have the right to so regulate cell antenna placement and the City DID properly exercise its local zoning authority, generally preserved by the TCA, when it passed this law. Santa Barbara County can do this too! I recommend that you do this in lieu of your proposed agenda item that I am talking about.

The City of Elk Grove wrote a letter of opposition to SB 556 on April 7, 2021 inwhich Mayor Bobbie Singh-Allen stated that the City has the authority to regulate the placement of cell antennas on the basis of aesthetics. I am enclosing a copy of that letter. You can also find it online here.

https://www.keepcellantennasawayfromourelkgrovehomes.org/wp-content/uploads/2021/04/COEG-Opposition-Letter-Final-2021.04.05-SB-556.pdf

"As recently confirmed by the Federal Ninth Circuit Court of Appeals, under Federal FCC regulations, cities retain local authority to impose reasonable aesthetic regulations on telecommunication providers' facilities, provided the regulation is technically feasible. (See *City of Portland v. United States*, 969 F.3d 1020, 1039-1043 (9th Cir. 2020).)"

(City of Elk Grove letter to the author of SB 556) I am sending you a copy in this email.

The rest of the letter explains why local government is best suited to make policy on cell antenna permitting and placement. SB 556 was vetoed and did not become law, similarly to SB 649 from a previous legislative session.

#6 Please consider adopting a cell antenna policy such as the City of Elk Grove, California adopted in August, 2019. This policy has protected by my estimate 90% of the homes in Elk Grove from having a cell antenna placed near it; those homes with a front yard.

Due to a grassroots campaign that I started (along with 2 other EHS friends) and led from early 2018 through the date of the City Council vote on August 28, 2019, the City adopted an ordinance 19-2019 which contained a key provision, which I call the "front yard rule for cell

antenna placement". This rule says that the City will not permit a cell antenna immediately adjacent to or immediately across the street from the front yard of a residential dwelling.

The City Council adopted this in Ordinance 19-2019 on August 28, 2019.

https://www.keepcellantennasawayfromourelkgrovehomes.org/wp-content/uploads/2019/09/City-of-EG-Ordinance-19-2019.pdf

The front yard rule (unofficial name) in the Elk Grove Municipal Code says:

> b. No small cell wireless communication facility shall be located immediately adjacent to, nor immediately across the street from, a front yard of any residential dwelling.

EGMC 23.94.050 A.6.b.

Here it is in context.

23.94.050 Development standards.

> A. General Development Standards. Unless otherwise exempt pursuant to EGMC
>
> Section 23.94.040, Exemptions, or as otherwise provided in an agreement approved by the Elk Grove City Council pursuant to EGMC Section 23.94.035, Small Cell Wireless Communications Facilities, the following general development standards shall apply to all wireless communications facilities:
>
> > 6. In a residential zoning district, the following development standards shall apply, unless the applicant can demonstrate with substantial evidence satisfactory to the approving authority that such siting limitation will materially inhibit personal wireless service as to a particular small cell wireless communication facility.
> >
> > > a. No small cell wireless communication facility shall be placed within five hundred (500' 0") feet of another small cell wireless communications facility.
> > >
> > > b. No small cell wireless communication facility shall be located immediately adjacent to, nor immediately across the street from, a front yard of any residential dwelling.

https://www.codepublishing.com/CA/ElkGrove/#!/ElkGrove23/ElkGrove2394.html#23.94.050

Here is the signed version of City of Elk Grove Ordinance No. 19-2019, which approved a new cell antenna policy which includes zoning code amendments and a master license agreement between the City and AT&T / Cingular. You can download it from this page.

City of EG Ordinance 19-2019

The agenda for the August 28, 2019 Elk Grove City Council meeting is here:

http://elkgrovecity.org/UserFiles/Servers/Server_109585/File/cityclerk/citycouncil/2019/ag-08-28-19.pdf

You can also download it from this site

EGCC ag-08-28-19Download

The staff report, containing the proposed zoning code amendment and master licensing agreement with AT&T / Cingular, is here:

http://www.elkgrovecity.org/UserFiles/Servers/Server_109585/File/cityclerk/citycouncil/2019/attachments/08-28-19_9.3.pdf

You can also download it from this site

08-28-19_9.3

I welcome your comments on this.

Will you acknowledge your receipt of this message?

Thank you and best wishes,

Mark Graham

Co-Founder and Organizer
Keep Cell Antennas Away
A local residents' advocacy group
www.KeepCellAntennasAway.org

CAMPANELLI & ASSOCIATES, P.C.

FEDERAL LAW BASED ANALYSIS OF:

The City of Santa Barbara, California
Municipal Code Proposed Amendment
to add Chapter 9.170

August 16, 2021

CAMPANELLI & ASSOCIATES, P.C.
1757 Merrick Avenue, Suite 204
Merrick, NY 11566
(516) 746-1600

Table of Contents

Introduction

This Memorandum is intended to provide a federal-law-based analysis of the applicability of the federal Telecommunications Act of 1996 (hereinafter "the TCA"), and its subdivisions, to the proposed amendment to the Santa Barbara Municipal Code (hereinafter "the Code") to add Chapter 9.170 pertaining to the regulation of the siting, construction, and modification of personal wireless service facilities, i.e., Small Wireless Facilities ("Proposed Chapter 9.170").

More specifically, the purpose of this Memorandum and the analysis contained herein are to:

A. Provide a review of the local zoning powers over the placement of personal wireless facilities, which the United States Congress explicitly preserved to local governments under the "General Authority" provision of the TCA,[1]

B. Dispel any misinformation regarding the current extent to which the City of Santa Barbara may exercise such powers which Congress explicitly preserved to local governments under the TCA, notwithstanding any recent "interpretative" Order or Orders of the FCC;

C. Provide specific recommendations pertaining to the Code, which may be incorporated into the Code to enable the City of Santa Barbara to exercise its regulatory authority to control the placement of wireless facilities, to the maximum extent intended by Congress, without violating the constraints set forth within 47 U.S.C.A. §332 (c)(7)(B)(i)(I), (B)(i)(II), (B)(ii), (B)(iii) and (B)(iv) of the TCA;

D. Provide recommendations regarding provisions that the City should incorporate into its Code to: (i) guide its local regulatory boards to ensure that when rendering zoning decisions upon applications seeking approvals for personal wireless facilities, the City's local boards do not violate the constraints of the TCA, and (ii) minimize the risk that an applicant whose application has been denied will possess a valid claim under the TCA which might serve as a basis for a viable federal lawsuit; and

E. Provide recommendations regarding provisions which the City should incorporate into its Code to: (1) enable its local regulatory boards to recognize what constitutes "substantial evidence" within the meaning of the TCA, and (2) ensure that such boards will not be misled by false, misleading, or deceptive documentation submitted by an applicant seeking approval for a wireless facility.

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[1] See 47 U.S.C.A. §332 (c)(7)(A)

About the Author

Andrew J. Campanelli

General Experience

Since beginning his legal career as a litigator in 1992, Mr. Campanelli has handled well over 7,000 civil cases in both federal and state trial courts and litigated over 1,000 cases to their conclusion. He has investigated and/or handled federal cases in United States District Courts within as many as twenty-three states. He has been admitted to nine of the thirteen United States Circuit Courts of Appeals and was admitted to The United States Supreme Court in 1998.

Mr. Campanelli has handled wireless facility cases from New York to California. His services have included: (a) litigating federal actions based upon the Telecommunications Act of 1996 (TCA), (b) providing representation, counsel, and guidance concerning TCA compliance within the context of processing applications for the installation of cell towers (macro cell sites), microcell sites and DAS systems before all forms of local zoning authorities and boards, and (c) assisting local governments in drafting and enacting local ordinances which vest such local governments with the maximum authority to regulate the installation of wireless facilities within their jurisdictions, and which afford their citizenry the maximum protections against both the irresponsible placement of wireless facilities and overexposure to illegal levels of radiation emanating from same.

Most Recent Presentations

Local Government Regulation of Wireless Facilities III
2020 Association of Towns of the State of New York Annual Meeting and Training School
Marriott Marquis, Times Square, New York, February 18, 2020

Local Government Regulation of Wireless Facilities II
Southern Tier Central Regional Planning and Development Board
Corning Community College, Corning NY, April 5, 2018

Local Government Regulation of Wireless Facilities II
Training Seminar – Wayne County, Department of Planning, June 5, 2017

Local Government Regulation of Wireless Facilities
New York State Conference of Mayors, July 24, 2013

Andrew J. Campanelli

General Court Admissions

United States Supreme Court

United States Court of Appeals for the First Circuit
United States Court of Appeals for the Second Circuit
United States Court of Appeals for the Sixth Circuit
United States Court of Appeals for the Seventh Circuit
United States Court of Appeals for the Eighth Circuit
United States Court of Appeals for the Ninth Circuit
United States Court of Appeals for the Federal Circuit

United States District Court, Eastern District of Arkansas
United States District Court, Western District of Arkansas
United States District Court, Northern District of Illinois
United States District Court, Central District of Illinois
United States District Court, Southern District of Illinois
United States District Court, District of Nebraska
United States District Court, Northern District of New York
United States District Court, Southern District of New York
United States District Court, Eastern District of New York
United States District Court, Western District of New York
United States District Court, District of North Dakota
United States District Court, Eastern District of Wisconsin

State of New York
State of Connecticut *(Retired)*

Note: Current *Pro Hac Vice* Admissions *(current admissions in other federal and state courts)* are not listed.

I. Relevant History of the TCA and its Application

Any federal-law based analysis of a local zoning ordinance pertaining to personal wireless facilities must begin with: (a) a review of the TCA, specifically the powers which Congress explicitly preserved to local governments under the Act, and (b) the five (5) finite constraints that Congress placed upon those powers.

A. The Preservation of Powers to Local Governments and Their Exercise of Same

When Congress was considering the enactment of the Telecommunications Act, it considered vesting the FCC with the power to control the placement of wireless facilities, and draft legislation was considered concerning same.[2]

Instead of doing so, Congress decided to explicitly preserve to local governments the general authority to regulate the placement, construction, and modification of wireless facilities within their jurisdiction,[3] subject to five (5) finite constraints that were placed upon such powers.[4]

In the more than two decades that have transpired since the adoption of the Telecommunications Act in 1996, well-informed local governments have employed the powers preserved to them by Congress by adopting and enforcing *"smart planning"* provisions.

Through these provisions, local governments have controlled the placement of cell towers and other wireless facilities to protect their communities against the often substantial adverse impacts of wireless facilities' irresponsible placement.

Smart planning provisions are local zoning ordinances designed to achieve three (3) specific objectives simultaneously.

They are designed to: (1) enable *wireless carriers*[5] to saturate the local jurisdiction with personal wireless coverage, (2) minimize the number of wireless facilities necessary to provide such coverage, and (3) minimize, to the greatest extent possible, adverse impacts upon residential developments, individual homes, and communities in general.

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[2] See H.R. Rep. No. 104-204(I), §107 at 94 (1995)
[3] See 47 U.S.C.A. §332 (c)(7)(A) which is entitled "General Authority"
[4] See 47 U.S.C.A. §332 (c)(7)(B) which is entitled "Limitations"
[5] *Wireless carriers* are companies which provide personal wireless services, within the meaning of 47 U.S.C. §332(c)(7)(C)(i).

Working *against* the smart planning efforts of local governments are both *wireless carriers* and *site developers*, the latter of which are private for-profit companies that do not actually provide any personal wireless services but are engaged in the business of constructing wireless facilities, and thereafter leasing space or capacity upon such facilities to wireless carriers.

Site developers are driven by a desire to construct wireless facilities in the least expensive locations possible, irrespective of the potential adverse impacts their irresponsibly placed wireless facilities typically inflict on nearby properties, residential homes, and communities.

In furtherance of such desires, site developers often seek to mislead local governments to believe that they are possessed of little or no authority to regulate the placement of wireless facilities. Their representatives often seek to convince local zoning officials and their attorneys to interpret the finite statutory limitations upon the powers of local governments under the TCA in such a manner that the finite exceptions to a local government's power would, for all practical purposes, stamp out the "*General Authority*" which Congress preserved to them.

Of equal, if not greater import, the agents of applicants seeking to build wireless facilities are known to: (1) submit patently false or materially misleading information and documentation to local zoning boards in support of applications seeking approvals for desired wireless facilities,[6] (2) install wireless facilities without obtaining, or even seeking to obtain, any local zoning approvals before installing them, (3) complete stealth installations under cover of darkness, or at times when the owners of nearby properties would not be home or asleep,[7] and (4) lie to local property owners as to their intent and/or the placement and/or size of the facilities they intend to construct.[8]

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[6] The most common false documents proffered to local planning boards and zoning boards include things such as false or materially misleading propagation maps, patently false FCC compliance reports, false certifications of "need," and misleading and/or defective visual impact analyses, among others.

[7] In Huntington, New York, a wireless carrier filed a belated application to "legalize" a partially completed monopole that had been installed upon a poured concrete foundation in the Town, without the carrier having filed any applications seeking any zoning approvals from the Town, allegedly in violation of setback requirements and the necessity for a Special Permit. During a public hearing upon the belated application to legalize the installation, the Author questioned a neighbor who testified that the concrete foundation for the tower "*was poured at midnight on December 24th*" - the neighbor's assumption being that the choice of time was deliberately calculated to ensure that none of the neighbors would be around to object to the installation.

[8] In the Matter of DeMarco, the Author's clients, a New York family, arrived home to find workers installing something in the ground on their front lawn. When approached by the family, the workers allegedly explained to them that: (a) there was a public right-of-way across their front lawn, and (b) that the ground-wire they were installing was for a new streetlight that was going to be installed at the street in front of their home. Less than 48 hours later, the family came home to find a forty (40) foot cell tower on their front lawn. See http://abclocal.go.com/wabc/story?section=news/local/long_island&id=7937987 http://newyork.cbslocal.com/2011/02/03/cell-tower-on-front-lawn-surprises-long-island-couple/ http://northshoresun.timesreview.com/2011/02/5977/town-asking-wireless-company-to-take-down-tower-built-on-mount-sinai-familys-property/.

As for the FCC, the FCC exercises no meaningful regulatory oversight over the location or operation of personal wireless facilities or radiation levels to which such facilities expose members of the general public.

Contrary to popular assumptions otherwise, with regard to the vast majority of cell towers, small cells, and DAS systems, the FCC has no idea where they are[9] or to what level of radiation any individual wireless facility is exposing members of the general public.[10]

This is because: (a) the FCC does not require wireless facilities that are less than 200 feet in height to be registered with it, and (b) unless they receive a complaint that a facility is emitting radiation levels that exceed the permitted limits, the FCC never tests the emissions emanating from wireless facilities.

This lack of meaningful regulatory oversight is exacerbated by the fact that the FCC has never updated its review of RF radiation levels it deems safe, which has precipitated a pending lawsuit seeking to force the FCC to review its antiquated RF radiation safety standards.

As such, local governments are their citizens' first, *and only,* line of defense against exposure to illegally excessive levels of RF radiation from *non*-FCC-compliant facilities.

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[9] The FCC's website addresses its lack of registration requirement, as follows:

"The ASR (Antenna Structure Registration) program requires owners of antenna structures to register with the FCC any antenna structure that requires notice of proposed construction to the Federal Aviation Administration (FAA) due to a physical obstruction. *In general, this includes structures that are* ***taller than 200 feet*** *above ground level or that may interfere with the flight path of a nearby airport."*

Excerpt from FCC's website at FCC.gov, May 27, 2020 [emphasis added]

Since the vast majority of cell towers, small cells and DAS nodes are less than 200 feet in height, they are not required to be registered with the FCC.

[10] The FCC's website addresses its lack of radiation testing, as follows:

"DOES THE FCC ROUTINELY MONITOR RADIOFREQUENCY RADIATION FROM ANTENNAS?
The FCC does not have the resources or the personnel to routinely monitor the exposure levels due at all of the thousands of transmitters that are subject to FCC jurisdiction. However, while there are large variations in exposure levels in the environment of fixed transmitting antennas, it is exceedingly rare for exposure levels to approach FCC public exposure limits in accessible locations. In addition, the FCC does not routinely perform RF exposure investigations unless there is a reasonable expectation that the FCC exposure limits may be exceeded."

Excerpt from FCC's website at FCC.gov, May 27, 2020 [underline added]

Far too often, uninformed and uneducated local governments do not exercise the regulatory powers that were intentionally preserved to them by the United States Congress, simply because:

- They are unaware that they possess such powers, much less know how to exercise them.

- They fail to enact local zoning provisions that vest their respective boards with the power to render the proper factual determinations, which local governments have the power to make within the context of deciding zoning applications seeking approvals for the placement of wireless facilities.

- They do not know how to evaluate "evidence" submitted by applicants seeking approvals for the installation of wireless facilities.

To exercise the regulatory powers which Congress intentionally preserved for local governments under the TCA to the greatest extent possible, local governments must adopt local zoning regulations which: (a) create permit requirements for all wireless facilities, (b) vest their local boards with the power to make factual determinations pertaining to permit applications for wireless facilities, and (c) codify guidelines to guide their local boards as to what factual determinations they are required to make, what evidence they should require or consider in making such determinations, and how to render decisions in a manner that does not violate any of the five (5) finite constraints that the TCA imposes upon them.

B. The Finite Constraints upon Local Government Powers under the TCA

Subparagraph A of the TCA, which encompasses the general rule that local governments possess the "*General Authority*" to regulate the placement of wireless facilities within their jurisdiction, is followed by subparagraph B, which places five (5) finite constraints upon such authority.

More specifically, 47 U.S.C.A. §332(c)(7) subparagraph (B) of the TCA is entitled "*Limitations*." It prescribes the following five limitations upon the general zoning authority and powers preserved to State and local governments under the TCA:

1. Local governments cannot unreasonably discriminate among providers of functionally equivalent services. §332(c)(7)(B)(i)(I)[11]

[11] As interpreted by the courts, this provision allows some discrimination among providers of equivalent services. Any discrimination need only be *reasonable*. Most courts have recognized that discrimination based on traditional bases of zoning regulation, such as preserving the character of the neighborhood and avoiding aesthetic blight are reasonable and thus permissible, and a mere increase in the number of wireless antennas in a given area over time can justify differential treatment of providers. See, e.g., MetroPCS Inc. v. The City and County of San Francisco,

2. Local governments cannot prohibit or have the effect of prohibiting the provision of personal wireless services. §332(c)(7)(B)(i)(II)[12]

3. Local governments must act upon any application to place, construct or modify a wireless facility within "a reasonable period of time." §332(B)(7)(B)(ii)[13]

4. Any decision to deny an application to place, construct or modify a wireless facility shall be *in writing* and be *supported by substantial evidence* contained in *a written record.* §332(c)(7)(B)(iii)[14]

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400 F3d 715, 727 (9th Cir. 2005); AT&T Wireless PCS v. City Counsel of The City of Virginia Beach, 155 F3d. 423 (4th Cir. 1998).

[12] Each of the United States Circuit Courts of Appeals have elaborated their own tests to establish whether or not a local government violated the effect of prohibiting language contained in §332 (c)(7)(B). For an overview of your Circuit Court's test, see Section III "Relevant Caselaw Within the Ninth Circuit."
The Second, Third and Tenth Federal Circuits follow the ruling in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999), which requires a wireless provider or site developer to prove that it had established before a local zoning authority that its proposed installation was "the least intrusive means" of closing "a significant gap" in the applicant's personal wireless services, and the zoning authority still denied its application. Thus, applicants could only force a local government to permit them to install a non-zoning-code-compliant wireless facility if they could prove both that they suffered from "a significant gap" in their personal wireless services and that their proposed installation was "the least intrusive means" of remedying that gap. Note that this standard is slightly different than the First, Fourth, and Seventh Circuits. For the Ninth Circuit, See Sprint Telephony PCS LP v. Cty of San Diego, 543 F3d 571 (9th Cir. 2008).
The FCC and the wireless industry are now working together to invoke the recent 2018 Orders of the FCC to argue that this standard no longer applies, and that a violation under this section occurs if a provider simply deems its new proposed installation is needed to either enhance existing wireless services, or to provide new ones.

[13] On November 18, 1999, the FCC adopted an interpretative ruling (FCC 09-99) which imposed the following time frames within which local governments must act upon siting requests for wireless towers or antenna sites: (1) ninety (90) days for the review of collocation applications, and (2) one hundred-fifty (150) days for the review of siting applications for new facilities.

[14] This provision mandates that when a local government renders a decision upon an application seeking approval for the installation of a wireless facility, the local government must: (a) reduce its decision to a separate writing (i.e., a "written record"), and (b) base its decision upon "substantial evidence."
The written record requirement specifies that: (a) local governments issue their decisions in a writing, separate and apart from any transcript or record of the proceeding, and (b) the written decision must contain a sufficient explanation of the reasons for the denial to allow a reviewing Court to evaluate the evidence in the record supporting those reasons. See, e.g., MetroPCS v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005).
The decision must also be based upon "substantial evidence" that was placed into the record. Substantial evidence means "less than a preponderance but more than a scintilla of evidence" Orange County-Poughkeepsie Ltd P'ship v. Town of Fishkill, 84 F.Supp.3d. 274 (S.D.N.Y. 2015), or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Cellular Tel. Co v. Town of Oyster Bay, 166 F3d 490 (2nd Cir. 1999). Review under this standard is essentially deferential, such that Courts may neither engage in their own fact finding nor supplant a local zoning board's reasonable determinations. See, e.g., American Towers, Inc. v. Wilson County, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV-1196].

5. Local governments cannot regulate the placement, construction, or modification of a wireless facility on the basis of environmental effects of radiofrequency emissions[15] *to the extent that such facilities comply with the FCC's regulations concerning such emissions.* §332(c)(7)(B)(iv)[16]

The exercise of local government powers to control the placement of wireless facilities, without violating the constraints of 47 U.S.C.A. §332 (c)(7) subparagraph (B), is relatively simple once a local government enacts zoning provisions to guide their local boards to avoid violating any of the limitations imposed under same.

This Memorandum will address (among other things) recommended changes to the Code to vest the City's zoning authorities with the maximum power to control the placement of wireless facilities within the City of Santa Barbara, while not violating the constraints imposed under 47 U.S.C.A. §332 (c)(7) subparagraph (B).

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[15] The FCC has defined Radiofrequency (RF) Radiation, for its purposes, as electromagnetic energy, that can be further defined as waves of electric and magnetic energy moving together through space, where such electromagnetic waves have frequencies that range from 3 kilohertz (kHz) to 300 gigahertz (Ghz) FCC OET Bulletin 65, Supplement B, (Edition 97-10) at page 8.

[16] The FCC has set maximum limits for human exposure to RF radiation based upon recommended exposure criteria issued by the NCRP and ANSI/IEEE, each of which identified the same threshold level "*at which harmful biological effects may occur.*" See FCC OET Bulletin 56, August 1999. Based upon same, the FCC adopted Maximum Permissible Exposure (MPE) limits, which are expressed in terms of electric field strength, magnetic field strength and power density. *Id.* While federal law requires all wireless facilities to comply with such RF exposure limits (47 C.F.R. §1.1310), there is no agency that actually enforces such requirement. The FCC does not test wireless facilities for compliance with either set of exposure limits. The wireless industry maintains that 47 USCA §332(c)(7)(B)(iv), prohibits local governments from considering the potential adverse health impacts of the RF radiation which the proposed installation will emit, if the respective applicant establishes that such emissions will not exceed the "*general population/uncontrolled limits*" or the "*occupational/controlled exposure limits*" which have been codified within the Code of Federal Regulations.

47 CFR § 1.1310(e)(2) dictates that the *general population limits* apply as follows:

"*General population/uncontrolled exposure.* For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related."

47 CFR § 1.1310(e)(1) dictates that the less stringent, *occupational limits* apply as follows:

"*Occupational/controlled exposure.* For FCC purposes, applies to human exposure to RF fields when persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over their exposure. Occupational/controlled exposure limits also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits, as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area by some other appropriate means."

C. The Potential Adverse Impacts of Irresponsibly Placed Wireless Facilities

Aside from preventing unnecessary redundancy and proliferation of wireless facilities within the respective jurisdiction, local governments have enacted and enforced smart planning provisions to prevent, to the greatest extent practicable, any unnecessary adverse impacts from the irresponsible placement of wireless facilities.

The most common adverse impacts that irresponsibly placed facilities can, and do, inflict upon adjacent and nearby homes, properties, and communities, which can range in significance from minimal to severe, include the following:

1. Adverse Aesthetic Impacts

The irresponsible placement of wireless facilities, of all types, often inflicts significant adverse aesthetic impacts, the most severe of which are typically found when wireless facilities are sited in unnecessarily close proximity to residential homes. Federal courts have ruled that adverse aesthetic impacts are a valid legal ground upon which local zoning authorities can deny zoning applications seeking approvals to install wireless facilities.[17]

Within the context of the "5G rollout," the frequency and severity of adverse aesthetic impacts inflicted upon residential homes across the nation have increased exponentially.

Since the transmissions from 5G facilities travel much shorter distances than previously installed wireless facilities, site developers have been installing them closer to residential homes, thus exacerbating their adverse aesthetic impact much more than before.

On an almost daily basis, the Author receives calls from homeowners advising that a wireless facility installation has been installed in extremely close proximity to their respective homes, either over their objection or without them having received any notice that such facility was to be so closely installed to their home, at any time before such installation occurred.

In the worst cases, wireless facilities have been installed as close as eight (8) feet from a young couple's kitchen table or ten (10) feet from a young child's bedroom window.

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[17] See, e.g., Omnipoint Communications Inc. v. The City of White Plains, 430 F3d 529 (2d Cir. 2005), T-Mobile Northeast LLC v. The Town of Islip, 893 F.Supp.2d 338 (E.D.N.Y. 2012).

2. Reductions in Property Values

Across the entire United States, both real estate appraisers[18] and real estate brokers have rendered professional opinions that support what common sense dictates.

When cell towers or other wireless facilities are installed unnecessarily close to residential homes, such homes suffer material losses in value, typically ranging from 5% to 20%.[19] In the worst cases, they make homes situated within a newly installed tower's fall zone completely unsalable.

3. Lack of Sufficient Fall Zones[20]

Due to the well-documented dangers irresponsibly placed cell towers present, local governments across the entire United States have enacted and enforced zoning provisions to ensure that the installation of such towers includes a fall zone or safe zone of sufficient size to preserve the health and safety of their residents.

The four principal dangers that irresponsibly placed cell towers present are structural failures, fires, icefall, and debris fall.

Due to the speed at which such cell towers are being constructed in the United States, and a desire on the part of *site developers* to build them as cheaply as possible, quality control over the manufacture, construction, and maintenance of monopole cell towers is nearly non-existent.

Not surprisingly, cell tower structural failures and cell tower fires occur far more often than the public knows. Such failures and fires often result in a cell tower collapsing to the ground and presenting a risk of property damage, injury, or death.

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[18] See, e.g., a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a Cell Tower in close proximity to a home had reduced the value of the home by more than 10%, go to http://bridgewater.patch.com/articles/appraiser-t-mobile-cell-tower-will-affect-property-values.

[19] In a series of three professional studies conducted between 1984 and 2004, one set of experts determined that the installation of a Cell Tower in close proximity to a residential home reduced the value of the home by anywhere from 1% to 20%. These studies were as follows:
The Bond and Hue - *Proximate Impact Study* - The Bond and Hue study conducted in 2004 involved the analysis of 9,514 residential home sales in 10 suburbs. The study reflected that close proximity to a Cell Tower reduced the price by 15% on average.
The Bond and Wang - *Transaction Based Market Study* - The Bond and Wang study involved the analysis of 4,283 residential home sales in 4 suburbs between 1984 and 2002. The study reflected that close proximity to a Cell Tower reduced the price between 20.7% and 21%.
The Bond and Beamish - *Opinion Survey Study* - The Bond and Beamish study involved surveying whether people who lived within 100' of a Cell Tower would have to reduce the sales price of their home. 38% said they would reduce the price by more than 20%, 38% said they would reduce the price by only 1%-9%, and 24% said they would reduce their sale price by 10%-19%.

[20] Although Proposed Chapter 9.170 deals primarily with Small Wireless Facilities, it provides for the facilities to be installed on tall support structures such as utility poles. See Proposed Chapter 9.170.100(B)(1).

The most common cause of a monopole cell tower's failure is baseplate failure, which typically causes the entire tower to collapse.[21] Monopole collapses, in whole or part, are also caused by the failure of such components as flanges, joints, and bolts, among others.

Another danger exists in cell tower fires, which occur far more frequently than known by the public. Such fires often cause the respective tower to "warp" from the heat of the fire, or in other cases, cause the respective tower to collapse in a flaming heap,[22] thereby creating the risk of igniting anything near the fallen flaming tower.

The third danger, that being ice fall, is prevalent in areas prone to freezing weather, where masses of ice can form on cell antennas and support structures atop cell towers. As temperatures rise and ice begins to melt, chunks of ice are known to dislodge and come hurtling to the ground.

According to a physicist's report, when a chunk of ice falls from a typical 150-foot cell tower, the chunk of ice travels at a speed of approximately 67 miles per hour by the time it reaches the ground. This falling chunk of ice presents a genuine danger of inflicting severe physical injury or death to anyone standing within the tower's icefall zone or damaging any personal property or structures situated within such zone.

Finally, there is the danger of debris fall. Examples of debris fall are when a piece of the wireless structure falls off the structure, or a worker drops a tool or piece of equipment during the performance of routine maintenance upon the structure.

Given these dangers that cell towers and wireless facilities present, informed local governments typically enact and enforce setback or fall zone requirements for cell towers. The most common distances required for safe zones around cell towers are 110% of their height.

4. Exposure to Dangerous Levels of Radiation From Non-FCC Compliant Facilities

Being well aware of the fact that, by its own admission, the FCC does not "have the resources" to test the radiation emissions from wireless facilities, wireless companies are free to cause their facilities to emit any levels of radiation they choose.

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[21] To see dramatic images of a 165-foot tower having collapsed at a firehouse, crushing the Fire Chief's vehicle, go to www.firehouse.com/news/10530195/oswego-new-york-cellular-tower-crushes-chiefs-vehicle, or go to Google and search for "Oswego cell tower collapse."

[22] To see videos of modern towers bursting into flames and/or burning to the ground, go to http://www.youtube.com/watch?v=0cT5cXuyiYY&NR=1 or http://www.youtube.com/watch?v=y__NKVWrazg, or simply go to *Google*, and search for "cell tower burns."

The potential danger posed to citizens due to the utter void of actual FCC oversight over radiation emission levels is exacerbated by the fact that applicants seeking zoning approvals often file false FCC compliance reports. These reports falsely claim that a proposed facility will be FCC compliant, when in reality, the facility may expose members of the general public to radiation levels that exceed the FCC's limits by several hundred percent or more.

By taking all of these well-documented dangers into consideration, local governments across the entire United States have enacted zoning provisions designed to protect their citizens, homeowners, and communities against same.

The City of Santa Barbara should follow suit.

D. The Non-Risks of Litigation

All too often, representatives of wireless carriers and/or site developers seek to intimidate local zoning officials with either open or veiled threats of litigation.

These threats of litigation under the TCA are, for the most part, entirely hollow.

This is because, even if they file a federal action against the City and win, the TCA does not enable them to recover compensatory damages or attorneys' fees, even when they get creative and try to characterize their cases as claims under 42 U.S.C. §1983.[23]

This means that if they sue the City and win, the City does not pay them a penny in damages or attorneys' fees under the TCA. Typically the only expense incurred by the local government is its own attorneys' fees.

Since federal law mandates that TCA cases proceed on an "expedited" basis, such cases typically last only months rather than years. As a result of the brevity and relative simplicity of such cases, the attorneys' fees incurred by a local government are typically quite small, compared to virtually any other type of federal litigation—as long as the local government's counsel does not try to "maximize" its billing in the case.

[23] See City of Rancho Palos Verdes v. Abrams, 125 S.Ct 1453 (2005), Network Towers LLC v. Town of Hagerstown, 2002 WL 1364156 (S.D. Ind. 2002), Kay v. City of Rancho Palos Verdes, 504 F.3d 803 (9th Cir. 2007), Nextel Partners Inc. v. Kingston Township, 286 F.3d 687 (3rd Cir. 2002)

II. *Hoodwinked* State Wireless Laws

Aside from the FCC's lack of meaningful oversight and failure to enforce the *General Population Exposure Limits* through actual testing, the most significant current threat to local governments and their citizenry is the enactment of *hoodwinked* wireless laws by State legislatures. These *hoodwinked* State laws result from either:

> Representatives of the wireless industry *hoodwinking* state legislators by essentially "tricking them" into authoring and/or securing the passage of State laws that strip local governments of local zoning authority over the placement of cell towers and wireless facilities *to an exponentially greater degree than the state legislators actually intended,* or;
>
> State legislators *hoodwinking* their electorate by authoring or securing the enactment of state laws in which they purport to impose only limited constraints upon local zoning powers over "***small cell***" facilities. In reality, such legislation strips local governments of virtually all control over cell towers, small cells, and DAS systems, which invariably results in a plague of irresponsibly placed wireless facilities throughout the State.

Since the TCA was adopted in 1996, local governments across the entire United States have been creating and enforcing local zoning laws that protect their citizens and communities against the adverse impacts of the irresponsible placement of cell towers and other wireless facilities upon them.

As both logic and common sense dictate, local governments are best suited to regulate wireless facilities' placement within their respective jurisdictions and protect their citizenry through the same. They establish zoning districts and the permitted uses within same to ensure that differing uses and structures are compatible with their surroundings. They are also acutely aware of their jurisdictions' geography, topography, scenic resources, and the location and character of their communities, historic districts, and scenic districts.

Being uniquely possessed of such knowledge, they routinely protect their citizenry and communities by enacting and enforcing "Smart Planning Provisions" within their local zoning regulations.

"Smart Planning Provisions" enable local governments to achieve three (3) objectives simultaneously.

1. They permit wireless carriers to saturate their respective jurisdiction with wireless coverage.

2. They avoid unnecessary redundancy in wireless infrastructure.

3. To the greatest extent possible, they minimize any unnecessary adverse impacts on communities due to the irresponsible placement of wireless facilities.

But apparently, acting under the influence of the wireless industry, many State legislatures have enacted insidious state laws that strip local governments of the power to use their local zoning laws, with which they have otherwise protected their communities and citizens for more than two decades.

As a direct result of such horrendous and wholly ill-advised State laws, on an almost daily basis, citizens awaken to find that some wireless structure has been installed in such close proximity to their respective homes and even outside their bedroom windows. These structures inflict substantial adverse aesthetic impacts upon their homes, substantially reduce the value of their homes, and in worst cases, present a serious physical danger by having placed their home within the fall zone of the particular installation.

Once such facilities are built, they are thereafter virtually unregulated. The FCC has no idea where they are and never tests them to ascertain whether such facilities expose the respective homeowners to illegally excessive radiation levels.

Inasmuch as the wireless industry is engaged in ever-continuing efforts to induce State legislatures to enact such *hoodwinked* laws, it would behoove the City of Santa Barbara to remain vigilant in seeking out information about any such possible future legislation which might be used to limit the City's zoning powers, as has been done in many other states.

III. Relevant Federal Caselaw within the Ninth Circuit

This analysis of the City's Code includes consideration of several relevant decisions of federal courts situated within the State of California and the United States Court of Appeals for the Ninth Circuit.

For any local government in California to possess any understanding of their ability to control the placements of wireless facilities within their jurisdiction, it is critical that they first know four (4) things.

First, they must understand that the TCA does not, itself, provide any legal basis to deny an application for an approval of a wireless facility but that the basis upon which such an application can be denied rests entirely upon state and local laws.[24]

This means that if a local government wishes to control wireless facilities' placement, it must enact zoning code provisions that (a) require a permit or approval to construct such facilities and (b) provide a basis upon which applications for such permits can be denied.

Second, it is not the TCA, but local zoning laws that exclusively govern what evidence a local zoning board can ask an applicant to provide and consider when deciding such applications.

Third, it is not the TCA, but the local zoning laws that exclusively govern *the weight* to which a local zoning board may assign each item of evidence presented to it when deciding such applications.

Fourth, when applicants file federal lawsuits (under the TCA) to challenge a local government's denial of their zoning application pertaining to a wireless facility, federal courts situated within the State of California are bound to apply a deferential standard to fact-finding determinations that have been made by a local zoning board when it has rendered the decision being challenged.[25]

As federal courts in the Ninth Circuit have made crystal clear, "this Court may not overturn the Board's decision on 'substantial evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence."[26]

Unfortunately, far too many local governments in California are entirely unaware of these facets of their regulatory powers, and for that reason, alone, they are powerless to exercise them.

Thus, among the most common problems with many local zoning codes, including The City of Santa Barbara Code and Proposed Chapter 9.170, is that they fail to provide guidance as to what evidence the approval authority[27] should require an applicant to produce, what weight should be given each item of evidence, and of greatest import, what fact-finding determinations the approval authority is required to make—if their decisions are to withstand a challenge under the TCA.

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[24] See Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (2008)

[25] See T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (2009) – "...we must take applicable state and local regulations as we find them and evaluate the City decision's evidentiary support (or lack thereof) relative to those regulations."

[26] See MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (2005)

[27] See Proposed Chapter 9.170.030(D).

By way of example, if an applicant were to assert that the City of Santa Barbara "*must*" grant their application to construct a new cell tower within the City because they suffer from a gap in personal wireless services and that their proposed installation is the "least intrusive means" of remedying that gap, the Code is wholly inadequate as to what evidence the City's approval authority[28] may request from the applicant to enable them to determine whether or not the applicant has proven either of those claims.

Unlike local governments, wireless carriers and site developers ***are*** aware of the law described hereinabove. Accordingly, applicants are now asserting that unless the local zoning Code explicitly authorizes a local board to require an applicant to produce a specific type of evidence, the approval authority cannot require the applicant to produce it.[29]

As representatives of the wireless industry also know, unless a Zoning Board obtains specific evidence, which a Code currently does not require, the TCA would actually prohibit the approval authority from denying a respective applicant's application because the approval authority would lack "substantial evidence" to support any such denial.

As such, it is imperative that the City of Santa Barbara further amend its code provisions if the City's approval authority is going to possess the ability to regulate the placement of wireless facilities within the City to any meaningful degree.

IV. The Code of the City of Santa Barbara

Without exception, the best model for a local zoning provision that enables local zoning authorities to regulate the placement of wireless facilities is a singular "all-inclusive" zoning provision, which creates a permit requirement[30] for all wireless facility applications, irrespective of the location proposed by any respective applicant.[31]

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[28] See Proposed Chapter 9.170.030(D).

[29] See, e.g. Orange Court-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp3d 274 (2015)(The failure of the applicant to introduce evidence of poor coverage in the area could not serve as a basis to deny its application, because the local zoning code did not require *Verizon* to provide evidence of dropped calls or customer satisfaction); T-Mobile Central LLC. V. United Government of Wyandotte County, Kansas, 546 F3d.1299, 1310 (10th Cir 2008)("the Board erred in requiring T-Mobile to demonstrate that its proposal was the least intrusive means of filling a service gap because nothing in the local law permitted the Board to impose such a requirement); Verizon Wireless LLC v. Douglas County Bod of Cnty Comm'rs, 544 F.Supp2d 1218 (2008)(a denial is not supported by substantial evidence if it imposes a burden upon the applicant for which there is no requirement under local law).

[30] The most common types of permit requirements under a local zoning code for the installation of wireless communication facilities are Use Permits, Special Use Permits, Conditional Use Permits, as well as Site Plan Approvals, and in certain circumstances, Use and/or Area Variances.

[31] Many jurisdictions enact separate code requirements and provisions for installations within public rights of way verses installations upon private property, separate provisions for small cells and DAS (Distributed Antenna Systems) verses Cell Towers, and new installations verses replacements and/or modifications of existing facilities.

Singular format provisions are simple to understand, use, and even defend when a denial of an application results in the affected applicant choosing to challenge that denial by filing a federal lawsuit under the TCA.

A review of Proposed Chapter 9.170 reflects that it attempts to follow this best model format.

Consistent with intelligent drafting, the provisions within Proposed Chapter 9.170 encompass, among other things, a legislative intent section,[32] a limited hierarchy of preferred siting locations,[33] height restrictions[34] , and provisions for RF considerations.[35]

There are, however, a number of meaningful deficiencies in Proposed Chapter 9.170, the most serious of which are both a lack of fact-finding guidelines, and evidentiary guidelines, for the City's approval authority and/or other zoning officials to follow when they are deciding applications for a Small Cell Facility Permit[36] and/or other permits and approvals,[37] for the installation of wireless communication facilities.

The analysis below addresses the changes that would be required to be made to the City's Code if the City were desirous of: (a) vesting the City's approval authority and other zoning officials with the maximum power available to the City to control the placement of wireless facilities within the City, and (b) providing guidelines that would enable them to exercise their powers in a manner that did not violate the finite constraints set forth within the applicable provisions of the TCA—meaning that to the extent that such officials were to deny an application seeking approval for the installation of a wireless facility, the denial would likely not only withstand legal challenge but would make the actual filing of such a challenge unlikely.

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[32] See Proposed Chapter 9.170.020.
[33] See Proposed Chapter 9.170.100(1).
[34] See e.g., Proposed Chapter 9.170.110(A)(3).
[35] See e.g., Proposed Chapter 9.170.070(C); Proposed Chapter 9.170.070(H); Proposed Chapter 9.170.090(B)(8); Proposed Chapter 9.170.130(A)(24).
[36] Pursuant to Proposed Chapter 9.170.050(A).
[37] Pursuant to Proposed Chapter 9.170.050(B).

V. Recommended Changes to the Code of the City of Santa Barbara and Proposed Chapter 9.170

A. Legislative Intent Section

Whether denominated a Zoning Code, Zoning Ordinance, or Zoning Law, virtually all local zoning laws contain a *legislative intent* or *legislative purpose*[38] provision.

These provisions codify the specific intent behind the respective local government's enactment of a zoning law. They describe the types of potential adverse land impacts that the respective zoning law and its provisions intend to prevent.

Consistent with same, the very beginning of most local zoning provisions pertaining to the installation of cell towers and other wireless facilities typically set forth *legislative intent* provisions that explicitly delineate the precise types of potential impacts that the respective municipality *seeks to prevent*, which serve as the reason why the local government initially enacted and continues to maintain a permit requirement for site developers and wireless carriers who seek to install a wireless facility within the local jurisdiction.

Among the reasons why these provisions *are essential* are: (1) They provide guidance to the local zoning authorities as to what they must consider when deciding whether to grant or deny a wireless facility application which is before them; (2) They render the zoning authorities more capable of defending any decision wherein they decide to deny an application for a proposed wireless facility, and the applicant wants to challenge that denial by filing a federal lawsuit under the TCA, and; (3) They reduce the likelihood that such a lawsuit would be filed in the first place.

In furtherance of such objectives, the "Purpose and Intent" section in Proposed Chapter 9.170.020 should be amended to more fully describe the potential adverse impacts that the City seeks to prevent, or at least minimize, which serves as the reason why the City enacted a permit requirement for small wireless facilities.

More specifically, the "Purpose and Intent" section in Proposed Chapter 9.170.020 should be amended to include descriptive words that indicate the purpose and intent of Proposed Chapter 9.170 extends to:

- Serve as a "Smart Planning" provision intended to achieve the simultaneous objectives of enabling wireless carriers to provide personal wireless services within the City while minimizing the number of facilities used to provide such coverage, avoid unnecessary, redundant wireless infrastructure, and avoid to the

[38] See Proposed Chapter 9.170.020. This provision is entitled "Purpose and Intent" not *Legislative* Purpose or Intent.

greatest extent possible, any unnecessary adverse impacts upon residential homes and residential communities.

- Protect the interests of the public, property owners, communities, and the City, against significant adverse impacts caused by the irresponsible placement of wireless facilities, including, but not limited to, adverse aesthetic impacts, reductions in property values of properties situated adjacent to, across from, or in close proximity to, a site for a proposed wireless facility, the potential dangers associated within structural failures, fire, icefall and debris fall from wireless facilities, adverse impacts upon historic resources and/or scenic views, and/or the use of properties which would be incompatible with nearby properties and thus be out-of-character with same.

While several of these issues are addressed to a limited extent within Proposed Chapter 9.170, the "Purpose and Intent" provision will be among the things a court will review and consider if, and when an applicant, whose application for a new wireless communication facility seeks to argue before a federal court that the basis of a denial was not supported by the legislative intent provision of the respective local zoning code.

By adding this specific language into Proposed Chapter 9.170, the Code will essentially expand the variety of considerations that the approval authority can consider when deciding whether to grant or deny a special permit for a proposed wireless facility.

B. Fact-Finding Requirements and Evidentiary Guidance

Within the context of the current "5G rollout," representatives of site developers and wireless carriers have become more aggressive than ever, not only demanding approvals of their applications but even "telling" local zoning officials what evidence they *can* and *cannot* consider when deciding their applications.

Where a local zoning code is silent as to what types of evidence local zoning officials can require an applicant to produce, site developers and wireless carriers now argue that if a local zoning code does not explicitly require an applicant to produce a specific type of evidence, the Board cannot require the applicant to produce it, or deny their application because they refused to do so. Federal courts have begun ruling in favor of applicants based upon same.[39]

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[39] See, e.g., Orange County-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp. 3d 274 (S.D.N.Y. 2015)(The failure of the applicant to introduce evidence of poor coverage in the area could not serve as a basis to deny its application, because the local zoning code did not require *Verizon* to provide evidence of dropped calls or customer satisfaction); T-Mobile Central LLC. V. United Government of Wyandotte County, Kansas, 546 F3d.1299, 1310 (10th Cir 2008)("the Board erred in requiring T-Mobile to demonstrate that its proposal was the least intrusive means of filling a service gap because nothing in the local law permitted the Board to impose such a requirement); Verizon Wireless LLC v. Douglas County Bod of Cnty Comm'rs, 544 F.Supp2d 1218 (D. Kansas 2008)(a denial is not supported by substantial evidence if it imposes a burden upon the applicant for which there is no requirement under local law).

In addition, where a local zoning code is silent as to what fact-finding determinations local zoning authorities must make, a local zoning board will often render a denial based upon a valid determination while failing to make a specific determination concerning a TCA issue, such as whether or not the applicant has established that it suffered from a significant gap in its personal wireless service.

In such cases, although the board had a perfectly valid legal reason for denying the application, its failure to "*dot the i's and cross the t's*" rendered its decision fatally defective, and such decisions are routinely overturned in federal court in proceedings that typically last less than 120 days.

If the approval authority is to exercise the power to regulate the placement of wireless facilities within the City, Proposed Chapter 9.170 must be amended to, among other things, codify: (1) what specific fact-finding determinations the Board is required to make, (2) the types of evidence they can require an applicant to produce to enable the approval authority to render those determinations, and (3) how to recognize when an applicant submits evidence that is false or materially misleading.[40]

Proposed Chapter 9.170 is deficient in describing the minimum factual determinations that the City's approval authority is required to make under both the Code and the TCA within the context of deciding applications under Proposed Chapter 9.170.[41]

Proposed Chapter 9.170 also fails to effectively specify what types of *probative evidence* the hearing examiner may require an applicant to produce when the approval authority is deciding permit applications pertaining to new wireless facilities.

Proposed Chapter 9.170 should be amended to describe the *minimum* specific factual determinations the hearing examiner should make when entertaining an application for a special use permit for a personal wireless service facility.

These must include both: (1) local zoning determinations **and** (2) TCA determinations.

1. Local Zoning Determinations

The Code should provide that the hearing examiner shall make affirmative factual determinations in a written decision wherein the approval authority describes whether or not the respective application met the requirements of the Proposed Chapter 9.170 and whether granting

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[40] In more than 90% percent of the zoning cases handled by the Author, a site developer or other applicant submitted patently false or materially misleading evidence to the local zoning authority in support of their application.
[41] See e.g., Proposed Chapter 9.170.090(B).

the application would be consistent with the "Purpose and Intent" section set forth within Proposed Chapter 9.170.020.

By way of example, Proposed Chapter 9.170 should be amended to explicitly state that the approval authority shall determine, in a written decision:

a. Whether or not the proposed installation will, or will not, inflict a significant adverse aesthetic impact upon adjacent or nearby properties or surrounding neighborhood or community;

b. Whether the proposed siting of the facility, both in terms of site location and the specific area upon the site where the installation is proposed, would minimize the adverse visual impact of the facility;

c. Whether the proposed height proposed for the facility is the minimum height necessary to remedy any significant gap in personal wireless coverage for any identified wireless carrier;

d. Whether or not the proposed installation will, or will not, inflict a significant adverse impact to the property values of adjacent or nearby properties;

e. Whether or not the proposed installation will, or will not, inflict a significant adverse impact upon historic resources or scenic views;

f. Whether or not the proposed installation will, or will not, provide and maintain a sufficient fall zone and/or safe zone around the facility to protect the public from the potential dangers of structural failures, icefall, debris fall and/or fire;

g. Whether or not the proposed installation will, or will not, create an unnecessary redundancy in wireless infrastructure within the City; and

h. Whether or not the granting of the permit application at issue would be consistent with the "Purpose and Intent" section set forth within Proposed Chapter 9.170.020.

2. TCA Determinations

Although Proposed Chapter 9.170.attempts to conform with the TCA,[42] the Code should be amended to more specifically provide that when rendering fact-finding determinations concerning any ***TCA-based*** issues, the approval authority shall state each of its specific findings in a final written decision, and cite the evidence in the record, whether in the form of

[42] 47 U.S.C.A § 332(c)(7)(B)(ii) and (iii).

documentary evidence or oral testimony, based upon which the approval authority made each factual determination.

This will satisfy the TCA requirements that any decision denying an application for a wireless facility be (a) in writing,[43] and (b) based upon substantial evidence.[44]

As long as the approval authority makes a fact-finding determination and has more than a scintilla of evidence to support their determination,[45] Federal Courts grant substantial deference to such determinations and are loathe to set them aside.

To ensure that any determination made by the approval authority complies with the requirements of the TCA, the Code should state that the approval authority shall make fact-finding determinations as to whether or not the respective applicant has met its burden of proof, based upon the evidence presented to the Board, ***for any of the following claims made by the applicant***:

a. Whether the applicant has proven, based upon the evidence presented to the approval authority, that an *identified wireless carrier* suffers from a "significant gap" in its personal wireless service coverage[46];

b. Whether the applicant has proven, based upon the evidence presented to the approval authority, that the proposed installation will remedy that significant gap or gaps in an identified wireless carrier's personal wireless coverage;

c. Whether the proposed facility presents "a minimal intrusion on the community";

d. Whether the applicant has proven, based upon the evidence presented to the approval authority, that its proposed installation is the least intrusive means of remedying any such gap;

e. Whether the applicant has proven, based upon the evidence presented to the approval authority, that there are no potential alternative less intrusive locations than the site proposed, or;

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[43] As is required under 47 U.S.C.A. §332(c)(7)(B)(iii).

[44] Id.

[45] See e.g. MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005), T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 2009)

[46] The term "significant gap" is not found anywhere within Proposed Chapter 9.170.

f. Whether the applicant has proven, based upon the evidence presented to the approval authority, that the proposed height for a facility is the lowest height possible to remedy the gap.

Even if the hearing examiner determines that the respective application should be denied for some reason, which is entirely unrelated to any wireless coverage gap issues, the hearing examiner **must still** make these determinations because its failure to do so will likely subject their decision to successful attack under the TCA.

3. Evidentiary Standards

The Code should codify minimum evidentiary standards to assist the approval authority in rendering its determinations for TCA-related determinations that should include, but not necessarily be limited to, the following:

a. Significant Gap Claims[47]

If the applicant asserts a claim that a proposed wireless facility is *necessary* to remedy a "*significant gap*" in an identified wireless carrier's wireless coverage, the approval authority must make several factual determinations, including whether or not the applicant has provided sufficient *probative evidence* to meet its burden of proving not merely that the applicant suffers from a "*gap*" but whether it has proven that it suffers from a "***significant*** *gap*" in personal wireless coverage.

The Second Circuit has defined a coverage gap as follows:

> "A coverage gap exists when a remote user of those services is unable to either connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication. When a coverage gap exists customers cannot receiv[e] and send [ ] signals, and when customers pass through a coverage gap their calls are disconnected."
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> New York SMSA Limited Partnership v. Town of Oyster Bay Zoning Board of Appeals, 2010 WL 3937277, at page 5, citing Omnipoint Holdings, 2008 U.S. Dist. LEXIS 111741, at *3.

While the TCA does not define what constitutes a "significant gap" in services, federal courts have determined that "*Significant gap* determinations are extremely fact-specific inquiries that defy any bright-line legal rule."..."District courts have considered a wide range of context-specific factors in assessing the significance of alleged gaps"[48]such as:

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[47] Once again, the term "significant gap" does not appear in Proposed Chapter 9.170.

[48] Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 583 F.3d 716, 727 (9th Cir. 2009).

i. Whether a gap affects a significant commuter highway or railway;[49]

ii. Assessing the "nature and character of that area or the number of potential users in that area who may be affected by the alleged lack of service";[50]

iii. Whether facilities were needed to improve weak signals or to fill a complete void in coverage;[51]

iv. Whether a gap covers well-traveled roads on which customers lack roaming capabilities;[52]

v. The consideration of "drive tests";[53]

vi. Whether a gap affects a commercial district;[54]

vii. Whether a gap poses a public safety risk.[55]

In short, the existence or absence of a "significant gap" in service is a factual determination by the respective zoning authority, on a case-by-case basis, based upon whatever evidence is presented to it or the lack of evidence presented to it.

In addition, a carrier's claim that it needs the proposed tower for "future capacity" or to "improve coverage" cannot establish that it suffers from a significant gap in service, without any actual affirmative claim that its customers cannot connect to its network, or that when their customers pass through a specific gap, their calls are disconnected.

As such, Proposed Chapter 9.170 should be amended to authorize the approval authority to require the applicant to provide *probative evidence,* in the form of hard data recorded during an actual drive test,[56] to establish (a) the existence of a significant gap in a specific carrier's wireless coverage, (b) the location of the gap, and (c) the geographic boundaries of the gap.

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[49] Cellular Tel. Co. v. Zoning Bd. of Adjustment of the Borough of Ho–Ho–Kus, 197 F.3d 64, 70 n. 2 (3d Cir.1999).

[50] Powertel/Atlanta, Inc. v. City of Clarkston, No. 1:05–CV–3068, 2007 WL 2258720, at *6 (N.D.Ga. Aug.3, 2007).

[51] Voice Stream PCS I, LLC v. City of Hillsboro, 301 F.Supp.2d 1251, 1261 (D.Or.2004).

[52] Nextel Partners, Inc. v. Town of Amherst, 251 F.Supp.2d 1187, 1196 (W.D.N.Y.2003).

[53] Am. Cellular Network Co., LLC v. Upper Dublin Twp., 203 F.Supp.2d 383, 390–91 (E.D.Pa.2002).

[54] Sprint Spectrum, L.P. v. Town of Ogunquit, 175 F.Supp.2d 77, 90 (D.Me.2001).

[55] APT Minneapolis, Inc. v. Stillwater Twp., No. 00–2500, 2001 WL 1640069, at *2–3 (D.Minn. June 22, 2001).

[56] A drive test is a simple and inexpensive process through which applicants compile hard data that accurately depicts the existence or absence of a significant gap in a specific carrier's personal wireless services. To perform

If, and only if, the approval authority were to receive such data, would they then (a) be placed in a position to ascertain if the proposed installation would be consistent with the smart planning provisions of the Code, and contemporaneously (b) be placed in a position to defend any decision the approval authority renders, from a claim that a denial of the respective application violated the TCA by "effectively prohibiting" the applicant from providing personal wireless services within the City.

Under the "effective prohibition" constraint of the TCA, the approval authority would legally be required to grant an application for the construction of a new wireless facility if the applicant proved BOTH that: (a) it suffers from a significant gap in its personal wireless services, and (b) its proposed new facility, at the site it has chosen, and the height it desires, is the least intrusive means of remedying such gap.

But it is the approval authority, *not the applicant*, which possesses the authority to determine if the applicant has met its burden of proving both of those things to the approval authority.

In making such determinations, the approval authority can determine, by way of example, that an applicant *has not* proven that it meets both prongs of the test, based upon a host of factual determinations, which can include, among other things: (a) any holes in coverage are limited in size, or confined to a limited number of homes, or are situated in a rural sparsely populated area, (b) that any lack in coverage would be *de minimis*, (c) that there are potential, less intrusive, alternative locations for the placement of a wireless facility which would fill the gap, (d) that a facility of a lesser height, or multiple shorter facilities at less intrusive sites, would be sufficient to remedy any alleged gap or gaps.[57]

At the same time, bald and conclusory claims by an applicant that a potentially less intrusive alternative site cannot be used because it "would not meet" the applicant's "***coverage objectives***" should be uniformly rejected because such terminology is inherently meaningless.[58]

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such a test, one simply attaches a recording device to a cell phone, which records wireless signal strength every few milliseconds. The tester then drives through an area within which a carrier is believed to suffer from a significant gap in its personal wireless services. In a two-hour drive, the device can record a massive number of readings which collectively reveal: (a) if there is a meaningful gap in wireless service, (b) the location or locations of any such gaps, and (c) their geographic boundaries.

[57] See Orange County-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp.3d 274 (S.D.N.Y. 2015).

[58] Among the most important of "coverage objectives" desired by site developers is to place their facilities at the least expensive sites possible, irrespective of whatever adverse impacts they might inflict upon adjacent and nearby properties.

b. Capacity Deficiency Claims

In a similar vein, where an applicant asserts a claim that a proposed wireless facility is *necessary* to remedy a *capacity deficiency*, the approval authority should require the applicant to provide *probative evidence*, that being hard data in the form of actual dropped call records[59] from the carrier which purportedly suffers from the capacity deficiency being alleged.

c. FCC Compliance Reports

Applicants seeking to install new wireless facilities invariably assert that their proposed wireless facility will be FCC compliant, meaning that it will not expose the City's residents and the general public to radiation levels that exceed the levels deemed safe by the FCC.[60]

In furtherance of same, they will invariably submit "FCC Compliance Reports."

Very often, these FCC compliance reports contain patently false information, which is submitted in a deliberate effort to mislead a local zoning board to falsely believe that a proposed facility will be FCC-compliant when in reality, it will expose members of the general public to radiation levels that exceed the levels deemed safe by the FCC.

The two most common deceits employed to mislead local zoning authorities into believing that a non-FCC compliant facility will be FCC-compliant are: (1) proffers of FCC

[59] Similar to drive test results, dropped call records are inexpensive to provide, and provide accurate hard evidence of the existence or absence of a capacity deficiency in a carrier's personal wireless services. Wireless carriers possess dropped call data and can provide simple printouts reflecting the number, and percentage of dropped calls they sustained in any geographic area for any period of time. This data shows what percentage of calls in a specific area failed, meaning that their customers were unable to initiate, maintain and conclude calls without loss of service. The TCA does not require local governments to grant applications for wireless facilities because an applicant wants to have *perfect* coverage, or *seamless* coverage, meaning a 100% call success rate, or absolutely no gaps in coverage. The TCA typically only requires approvals of applications for wireless facilities where the respective applicant establishes that it suffers from "*a significant gap*" in personal wireless services, and their proposed application is the least intrusive means of remedying such gap.

[60] Section §332(c)(7)(B)(iv) of the TCA provides that local governments cannot regulate wireless facilities based upon concerns over environmental impacts (which applicants assert means "health concerns") to the extent that a facility is FCC compliant.

compliance under the wrong standard[61] and (2) false radiation calculations based upon a false "minimum distance factor." [62]

The Code should mandate that any FCC compliance report submitted by any applicant disclose two (2) specific items of information on the cover page of any such report.

First, the cover page of the report must specify which set of FCC standards the applicant is claiming applies to its proposed facility, those being either the *General Population Exposure Limits or* the *Occupational Exposure Limits.*

Second, the cover page of the report must specify the minimum distance factor, measured in feet, which the applicant used to calculate the radiation emission levels to which the proposed facility would expose members of the general public or others.

Finally, since the approval authority cannot surmise the potential harm to which a non-FCC compliant facility may expose the general public, the approval authority must require that any FCC Compliance report be verified under oath, and under penalties of perjury, by the person who prepared any such report. A sworn verification must be attached to the report. Proposed Chapter 9.170 does provide for this.[63]

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[61] In the Author's experience, applicants often mislead local zoning authorities by claiming that the radiation levels to which a proposed facility will expose members of the general public will be "within the FCC's limits," while failing to disclose to that authority that the "limits" they are referring to are the much higher "*Occupational Exposure Limits.*" In a case in Garden City, New York, an applicant's RF engineer testified that the radiation levels which a proposed facility would emit would be "*well below the FCC's limits.*" Upon cross examination by the Author, the RF engineer conceded that the limits he was referring to were the *occupational exposure limits*, and that if the facility was to be installed, it would expose residents who would occupy an apartment underneath the installation to radiation levels that would exceed the *general population exposure limits* by 400 to 600 percent.

[62] The most common way that applicants deceive local governments into believing that a non-FCC compliant facility will be FCC compliant, is by preparing a false FCC compliance report based upon a false "*minimum distance factor.*"
For an RF engineer to calculate the radiation levels to which a proposed new facility will expose members of the general public, they must start their calculation with the minimum distance factor, that being the closest distance to which a member of the general public will be able to get near the transmitting antenna(s).
In a case in the Village of Southampton, New York, where an applicant wanted to install cell antennas in the steeple of the oldest Presbyterian church in the United States, an applicant submitted an FCC compliance report, wherein it calculated the projected radiation level for the proposed antennas based upon a minimum distance factor of approximately fifty (50) feet, which was the distance from all the way up in the steeple, and all the way down to the sidewalk in front the church. The Author was constrained to point out that, as was known to virtually everyone in the Village, the church steeple houses an antique clock, which has been manually "hand-wound" every eight (8) days for more than one hundred years, since it was installed back in the year 1871. Tourists regularly view the clock during regular historic tours within the church. When doing so, their heads would pass as closely as 3-4 feet from the transmitting antennas, instead of the fifty (50) feet minimum distance factor, which was used to falsely calculate the levels of radiation to which they would be exposed.

[63] See Proposed Chapter 9.170.130(A)(24).

d. Propagation Maps

The Code should be amended to provide that to the extent that an applicant seeks to submit one or more propagation maps in support of its application, the applicant would be required to submit both: (a) the hard data that was employed to create such map or maps, as opposed to merely providing a description of computer modeling through which the map was created, and (b) a certification, under penalties of perjury, that the data is accurate.

Because of overwhelming inaccuracies found within wireless carriers' coverage maps, both the FCC and the California Public Utilities Commission have come out in support of requiring wireless service carriers to conduct drive tests. The FCC had issued a proposal in July 2020 which stated, "In order to help verify the accuracy of mobile providers' submitted coverage maps, we propose that carriers submit evidence of network performance based on a sample of on-the-ground tests (drive tests) that is statistically appropriate for the area tested." Additionally, the California Public Utilities Commission expressed in their comments to the FCC that "drive tests are required to capture fully accurate data for mobile wireless service areas."

e. Visual Impact Analyses

Proposed Chapter 9.170 contains provisions that reflect that the City recognizes that the irresponsible placement of a cell tower or other wireless facility has the potential to inflict significant adverse visual impacts to the surrounding community and/or individual residential homes.

In accord with such objectives, Proposed Chapter 9.170 encompasses *limited* requirements intended to enable the approval authority to assess the potential adverse aesthetic impacts that a proposed wireless facility may inflict upon nearby properties.

Proposed Chapter 9.170 of the Code should be amended to require applicants seeking a permit to install a new wireless facility to provide a comprehensive visual impact assessment of its proposed installation.

Proposed Chapter 9.170.080(D), "Public Notice," generally provides that all required notices shall include "a general project description with photo simulations" but does not specify what those photo simulations should entail.

Proposed Chapter 9.170 would be far more effective if it were amended to specifically require applicants to submit images taken from the perspective of the nearest homes or properties which happen to be situated in closest proximity to the proposed site and, by virtue of which, are likely to sustain the most dramatic adverse impacts from the proposed installation.

As logic would dictate, the whole purpose for which an applicant is required to submit a visual impact analysis to a local zoning authority is to provide the authority with an accurate depiction of the actual adverse aesthetic impact that a proposed cell tower or other wireless installation will inflict upon nearby properties or the surrounding community.

To falsely portray that a proposed installation will have a dramatically less severe adverse impact than that which it will actually inflict, applicants routinely submit visual impact reports which contain photographic images, wherein they deliberately omit any images taken from the perspective of the closest properties that would suffer the most severe adverse impact from the installation.[64]

In Omnipoint Communications Inc. v. The City of White Plains, 430 F3d 529 (2nd Cir. 2005), the United States Court of Appeals for the Second Circuit explicitly ruled that where a proponent of a wireless facility presents visual impact depictions wherein they omit any images from the actual perspectives of the homes which are in closest proximity to the proposed installation, such presentations are inherently defective, and should be disregarded by the respective government entity that received it.

In a case where an applicant submitted a "visual impact study" to a local zoning authority in support of an application to build a cell tower on a golf course, which abutted several residential homes, the United States Court of Appeals for the Second Circuit explicitly pronounced:

> "...the Board was free to discount Omnipoint's study because it was conducted in a defective manner. . . ***the observation points were limited to locations accessible to the public roads, and no observations were made from the residents' backyards much less from their second story windows.***"
>
> Omnipoint Communications Inc. v. The City of White Plains,
> 430 F3d 529 (2nd Cir. 2005).

Even though the Omnipoint decision was handed down by the federal court nearly sixteen (16) years ago, applicants ***still*** submit visual impact analyses wherein they deliberately omit any images taken from the homes and/or other properties in close proximity to their proposed towers in a deliberate effort to mislead the respective local zoning authority to believe that their proposed new tower will have a far less significant adverse impact than it actually will.

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[64] Where applicants seek to install a 100–175-foot cell tower directly adjacent to a residential home, and they submit a "visual impact analysis" to the local zoning board in support of their application, they virtually never include any photographic images taken from the perspective of the adjacent home.
In a case in Bedford, New York, local zoning officials affirmatively requested that a specific applicant provide the Board with photos taken from homes whose views would suffer the most dramatic aesthetic impacts. When reviewing the photos, which were then provided by the applicant, the local zoning board recognized that whoever took the photos from one particular home, had positioned the camera so that a tree was in the direct line of sight between the camera and the tower location, blocking the view of same. Other photos were taken out of focus, or darkened, which, as apparently intended, created the appearance that the adverse aesthetic impacts were far less severe than they actually were.

To ensure that the City's hearing examiner is provided with an accurate depiction of the potential adverse aesthetic and/or other impact that a proposed cell tower will inflict upon any nearby homes or other properties, Proposed Chapter 9.170 of the Code should be amended to provide that the approval authority can not only require a visual impact analysis and a balloon test, but to explicitly require applicants to include, within any visual impact analysis or balloon test, photos taken from the perspective of the properties situated in closest proximity to the proposed installation, unless the applicant can show proof that it attempted to secure such images, but that the owners of such properties refused to grant them access to obtain such images.

Where, as here, an application pertains to a small cell facility, or a DAS System,[65] rather than a cell tower, the Code can provide that no balloon test be required. However, it should still require a visual impact analysis, which contains images taken from the perspective of any residential homes adjacent or in close proximity to any such proposed installation.

This is because, within the context of the 5G rollout, many small cells and DAS nodes are being installed in extremely close proximity to residential homes. As a result, they have the potential to, and very often do, inflict significant adverse aesthetic impacts to nearby homes and cause reductions in property values thereof.

f. Verification Requirements

Unfortunately, in ninety (90%) percent of the local zoning applications reviewed by the Author, applicants, their representatives, and even their engineers have submitted patently false or materially misleading documents, evidence, and misrepresentations to the respective local zoning authority.

In view of such practices by persons in the wireless industry, Proposed Chapter 9.170 should include a requirement that all submissions proffered to the City by an applicant be verified and should include a statement that any person signing or submitting documents verifies, "under penalties of perjury," the truth of the representations made therein. This requirement should be especially mandatory for all "propagation maps" submitted by an applicant because propagation maps are routinely manipulated to falsely portray wireless coverage as far less than what actual wireless coverage exists, as discussed above.[66]

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[65] DAS is a term commonly used to denote a Distributed Antenna System, which is a system that includes multiple transmission units which are individually referred to as Nodes.

[66] As it stands currently, the only verification requirement under penalty of perjury is for compliance with RF standards. See Proposed Chapter 9.170.130(A)(24). While this is a good start, the Code should require all submissions from an applicant to be subject to similar verification.

C. Notice Provisions and Hearing Requirements

Well drafted wireless provisions invariably include notice provisions and public hearing requirements, which serve two critical functions.

First, notice provisions enable all property owners who may be affected by adverse impacts caused by the irresponsible placement of a wireless facility in close proximity to their homes or other property to become aware of a proposed installation before it occurs, and it affords them an opportunity to voice any objections which they may possess.

Second, it affords the local approval authority with the ability to receive evidence from such property owners that can serve as "substantial evidence" within the meaning of the TCA, based upon which the approval authority could deny an application (if they determine that a denial would be appropriate) without violating the TCA.

The public notice provisions in Proposed Chapter 9.170[67] are adequate, subject to the discussion regarding visual impact analysis and photographs discussed above.

VI. Optional Additions to the City of Santa Barbara Code

A. ADA and FHAA Accommodations

Both the ADA and FHAA require local governments, their agencies, and public utilities[68] to make reasonable accommodations for persons who are disabled.

Electromagnetic Hypersensitivity Syndrome (EHS) has been recognized as a disability under the ADA, for which disabled persons are entitled to request reasonable accommodations under the ADA[69] and the FHAA.

Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and public entities' services. It applies to all state and local governments, their departments, and agencies.

A provision should be added to the City Code to establish a procedure to enable disabled persons suffering from EHS to submit requests for reasonable accommodations and file grievances for lack of accommodations, to be reviewed by the City's ADA Coordinator.

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[67] See Proposed Chapter 9.170.030(Z); Proposed Chapter 9.170.080.

[68] Site developers and wireless carriers uniformly assert that they are public utilities, and they are uniformly recognized as such by State Boards and commissions which are charged with the duty of regulating public utilities.

[69] See, e.g., G v. The Fay School Inc., 282 F.Supp.3d 381 (D. Mass. 2017).

B. Random Radiation Testing of Wireless Facilities

As described hereinabove, the FCC exercises no meaningful oversight over the levels of Radiofrequency (RF) radiation[70] to which wireless facilities expose members of the general public.

Recognizing same, local governments have begun enacting testing requirements, which provide for random testing of radiation levels emanating from wireless facilities within their jurisdiction to protect their citizens against exposure to illegal levels of radiation emanating from non-FCC-compliant facilities.

A facility is non-FCC-compliant when it exposes members of the general public to radiation levels that exceed the *General Population Exposure Limits*.[71]

The City may choose to amend its RF testing provision to authorize the random testing of facilities, at any time, as a precaution reasonably intended to ensure that the operators of such facilities are operating within the FCC's limits, not only at the time of their initial installation but at all times thereafter, which could then implicate the provision for permit revocation following notice and a hearing.[72]

C. Siting Hierarchy for the Placement of Wireless Facilities

Proposed Chapter 9.170.100(A)(1) consists of a loosely formed siting hierarchy preference "to assist applicants, staff and the approval authority understand (sic) and respond to the community's aesthetic preferences and values..."[73] Proposed Chapter 9.170.100(A)(2) lists "discouraged locations" where "applicants shall not propose to install small wireless facilities or

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[70] The FCC has defined Radiofrequency (RF) Radiation, for its purposes, as electromagnetic energy, that can be further defined as waves of electric and magnetic energy moving together through space, where such electromagnetic waves have frequencies that range from 3 kilohertz (kHz) to 300 gigahertz (Ghz) FCC OET Bulletin 65, Supplement B, (Edition 97-10) at page 8. The FCC has set maximum limits for human exposure to RF radiation based upon recommended exposure criteria issued by the NCRP and ANSI/IEEE, each of which identified the same threshold level "*at which harmful biological effects may occur*." See FCC OET Bulletin 56, August 1999. Based upon same, the FCC adopted Maximum Permissible Exposure (MPE) limits, which are expressed in terms of electric field strength, magnetic field strength and power density *Id.* While federal law requires all wireless facilities to comply with such RF exposure limits (47 C.F.R. §1.1310), there is no agency that actually enforces such requirement. As a general rule, the FCC does not test wireless facilities for compliance with either set of exposure limits.

[71] 47 CFR § 1.1301(e)(2) dictates that the *general population* limits apply as follows:
"*General population/uncontrolled exposure*. For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related."

[72] See Proposed Chapter 9.170.130(A)(16).
[73] See Proposed Chapter 9.170.100(A).

strand-mounted wireless facilities in a discouraged location unless no alternative site in a preferred location would be technically feasible."

However, these provisions mainly focus on other considerations while failing to meaningfully require the applicant to demonstrate the existing facilities' inability to provide, or the lack of potential to provide, adequate coverage and/or capacity to the City of Santa Barbara. These provisions fall short of ensuring the applicants do not take advantage of the approval authority's "good faith" in using the "least intrusive means necessary."

Historically, site developers have been known to submit patently false and materially misleading information and documentation to approval authority's in order to ensure their permit's approval.

In order to remedy the potential of your approval authority from being misled, amending the Code to include a single, more effective, and practical siting hierarchy provision, which many local governments include within their respective zoning ordinances, ensures that to the greatest extent possible, wireless facilities are sited at locations that are most compatible with surrounding properties and/or uses.

Typically, these provisions include a ranking of potential locations for the placement of wireless facilities, from the most desirable to the least desirable, designating them from Tier 1 to Tier 5 type locations. After incorporating such a ranking system into their Code, local governments then include a provision that requires each applicant who seeks to install a wireless facility at a less desirable location to establish that no higher-ranking sites are available to satisfy whatever coverage needs the respective applicant is seeking to remedy.

VII. The FCC's "Interpretative Order" of September 26, 2018

Any analysis of the City of Santa Barbara's power to control the placement of wireless facilities within the City must include a review of the FCC's recent "interpretative order," pertaining to the "*effective prohibition*" language within section 47 U.S.C §332(c)(7)(B)(i)(II) of the TCA.[74]

Under 47 U.S.C. §332(c)(7)(B)(i)(II) of the TCA, local governments cannot *prohibit* or *have the effect of prohibiting* the provision of personal wireless services.

For more than two decades, local governments have enacted and applied local zoning laws to control the placement of wireless facilities, without violating the "effective prohibition" language of that provision.

[74] This interpretive order is referenced in the "Background and Introduction" section. See Proposed Chapter 9.170.010.

To the extent that an applicant filed a federal lawsuit claiming that a denial of their specific application *effectively prohibited* them from providing personal wireless services in violation of the TCA, federal courts from across the entire United States have interpreted that language within the TCA and specifically defined what constitutes an "effective prohibition" under the TCA.

Within the context of the current 5G rollout, site developers and wireless carriers now seek to install an unprecedented number of new wireless facilities, many of which will be placed closer to homes than any previous wireless facilities, and at elevations that could place them virtually "outside bedroom windows" of residential homes nationwide.

Being well aware that local governments would employ their local zoning laws to restrict site developers' access to residential areas for the installation of 5G wireless facilities in extremely close proximity to homes, it is believed that the wireless industry has made efforts to induce the FCC to limit further the powers of local governments in restricting the placement of such facilities.

They ultimately succeeded to a limited extent, when on September 26, 2018, the FCC issued an order wherein it *essentially attempted* to strip local governments of much of their ability to enforce their smart planning provisions and/or to regulate the installation of wireless facilities within their respective jurisdictions and to wipe out 24-years-worth of local zoning regulations.

If it were to be read literally, the "interpretative order" essentially empowers site developers and wireless carriers to install new facilities, anytime, anywhere, and at any height, virtually free of any "interference" from local governments.

Among other things, the order purports to strip local governments of the authority to require applicants seeking to install a wireless facility to prove both that they suffer from a significant gap in their personal wireless services and that the proposed installation is the least intrusive means of remedying such gap and/or that there are no less intrusive alternative locations available at which they can install a facility to remedy their gap.

To do so, the FCC affirmatively stated that:

"...an effective prohibition occurs where a state or local requirement materially inhibits a provider's ability to engage in any of a variety of activities related to the provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities . . . Thus, an effective prohibition includes materially inhibiting additional services or improving existing services."

FCC Order 18-133 Adopted September 26, 2018.

This new "interpretation" by the FCC conflicts with more than twenty years of federal courts' rulings from across the country. United States District Courts are presumably bound by their respective Circuit Court's interpretations,[75] as opposed to this *new interpretation* from the FCC.

Significantly, this is not the first time that the FCC has tried to "**re-*interpret*** the TCA" in a manner to say something that it does not. In Arcadia Towers v. Colerain Township Board of Zoning Appeals, 2011 WL 2490047 (S.D. Ohio 2011), a plaintiff brought a federal action under the TCA based upon a new interpretation of the TCA, wherein the FCC interpreted the TCA to cover broadband services, even though the TCA does not say that it covers such services.

In dismissing that case, the Court ruled:

> "It certainly makes sense as a policy objective for broadband services to have protections under the law equivalent to that provided by the TCA. However, as laudable as such goal may be, the Court finds this is a case where the law has not kept up with changes in technology. Under such a circumstance ***it is not up to the FCC to construe the TCA to say something it does not say,*** nor up to the Court to find broadband communication encompassed by the law. It is up to Congress to act."
>
> Arcadia Towers v. Colerain Township Board of Zoning Appeals, 2011 WL 2490047.

Consistent with same, when an applicant tried to pursue a TCA claim in a federal court citing the recent FCC order, and *without* affirmatively asserting that it suffers from a "significant gap" in coverage, its case was dismissed by the federal court. See Extenet Systems Inc. v. The City of Cambridge Massachusetts, 481 F.Supp.3d 41 (D. Mass. 2020); see also Helcher v. Dearborn County, 500 F.Supp.2d 1100 (S.D. Ind. 2007), *aff.* 595 F3d 710 (7th Cir. 2010).

As the United States District Courts will likely recognize, as the District Court in Massachusetts did, they remain bound by the Circuit Courts' interpretation of "effect of prohibiting," and the FCC was without power to revoke powers which the United States Congress explicitly preserved to state and local governments under 47 U.S.C.A. 332(c)(7)(A), under the guise of "interpreting" the "effect of prohibiting" language within Section §332(c)(7)(B)(i)(II).[76]

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[75] Where a local government has denied a zoning application for the installation of a new wireless facility, and the applicant sues the local government in federal court claiming that the denial has the effect of prohibiting the provision of personal wireless services in violation of Section 332(c)(7)(B)(i)(ii) of the TCA, the applicant has the burden of proving both (a) the existence of a significant gap in service coverage, and (b) that its proposed installation is the least intrusive means of remedying that gap and/or there are no less intrusive alternative sites available. See, e.g., Crown Castle NG West LLC v. Town of Hillsborough, 2018 WL 3777492 (N.D. Cal. 2018); T-Mobile USA Inc. v. City of Anacortes, 572 F3d.987 (9th Cir. 2009). Where an applicant cannot meet that burden, any claimed violation of the effective prohibition provision of the TCA must fail. See, e.g., T-Mobile Northeast LLC v. Fairfax County Board of Supervisors, 672 F3d 259 (4th Cir. 2012).

[76] See, e.g., Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 91 (2002).[An agency may never exercise authority inconsistent with Congressional Intent, regardless of the issue the agency is seeking to address.], See also Am. Library Ass'n v. F.C.C., 406 F.3d 689, 708 (D.C. Cir. 2005) and La. Pub Serv. Comm'n. v. FCC, 476 U.S. 355, 90 (1986)[Courts have consistently held that agencies may only act within the authority given to them by Congress.

Moreover, as was already held, in adopting its 2018 Order, the FCC acted in an arbitrary and capricious manner (and violated the National Environmental Policy Act).[77]

Furthermore, the 2018 Order takes its interpretation of "effective prohibition" and applies it, specifically and separately, to fee requirements and aesthetic requirements, formulating distinct guidelines for each.

When determining whether fee requirements comply with the TCA, the FCC has established these (3) guidelines to limit municipalities' from garnering any revenue from wireless service providers outside of the municipalities' out-of-pocket costs:

1. Whether the fees are a reasonable approximation of the state or local government's costs.

2. Whether objectively reasonable costs are the only costs factored into the fees.

3. Whether fees are no higher than the fees charged to similarly situated competitors.

The FCC, like other federal agencies, "literally has no power to act... unless and until Congress confers power upon it."], and See Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d. 490, 495 (2nd Cir. 1999)[under the powers preserved to local governments under the Telecommunications Act, aesthetics is an appropriate ground upon which a local government has the power to deny a zoning application for the installation of a wireless facility, so long as there is substantial evidence of negative aesthetic impact].

[77] Congress enacted the National Environmental Policy Act (hereinafter "NEPA") to "encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n, 933 F. 3d 728, 734 (D.C. Cir. 2019). The objective of the National Environmental Policy Act (hereinafter "NEPA") is to assure a safe and healthful environment. See 42 U.S.C. §§ 4321, 4331. NEPA review "does not dictate particular decisional outcomes, but merely prohibits uninformed-rather than unwise-agency action." Id. Under 42 U.S.C. §4332, NEPA requires federal agencies to prepared detailed statements on potential environmental impacts of a proposed action that is considered a "major federal action." See also 47 CFR §1.1305 A "major federal action" is considered to be any action that significantly affects the quality of the human environment. See 42 U.S.C. §4332. See also 47 CFR §1.1305, which is specific to the FCC and requires that any commission action which is deemed to have a significant effect on the quality of the human environment requires an Environmental Impact Statement. At the very least, an agency must prepare a preliminary Environmental Assessment to determine if there is any potential for a negative environmental effect and therefore an Environmental Impact Statement would be required. See 40 C.F.R. §1508.9. As explicitly set forth in 40 C.F.R. §1500.1(b), an agency must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. According to the FCC's own website "responsibility for NEPA compliance rests with the FCC." The FCC's most recent order eliminated NEPA review for small cells. The FCC decision to eliminate NEPA review for certain small cells was "based on the Commission's conclusion that such review was not statutorily requested and would impede the advance of 5G networks, and that its costs outweighed any benefits." United Keetoowah Band of Cherokee Indians in Oklahoma, 933 F.3d at 737. However, the FCC failed to assess any harms that could come from the densification of the use of small cells for 5G. Id at 741. Further the Court in Keetoowah, noted that the FCC "does not reconcile its assertion that planned small cell densification does not warrant review because it will leave little to no environmental footprint" Id at 742. Ultimately, the Court determined that the FCC's order deregulating small cells was arbitrary and capricious. Id.

The FCC further explains, where state and local governments sought to apply a "per-facility" fee in the past, this model is no longer tolerable. Prior generations of wireless facilities were typically implemented through macro towers that had the capability to provide service coverage to larger areas. However, the FCC argues that it is anticipated that small wireless facilities will require "roughly double the number of macro cells built over the last 30 years" than what currently exists. When reviewed in the aggregate, the FCC states, "a per-facility fee may affect a prohibition on 5G service or the densification needed to continue 4G service even if that same per-facility fee did not effectively prohibit previous generations of wireless service."

The FCC's Order goes on to set a series of unreasonable fee limits for local governments, which they interpret as complying within the meaning of the TCA.

- For non-recurring fees, $500 may be charged, which includes single up-front applications that include up to five Small Wireless Facilities, with an additional $100 for each Small Wireless Facility beyond five; or,

- $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and,

- $270 per Small Wireless Facility per year for all recurring fees, including any possible right-of-way access fee or fee for attachment to municipally-owned structures in the right-of-way.

However, the FCC's Order further explains that *these limits are not rigid* in their application so long as localities can show that the costs and fees above the recommended limits fall within the three-prong test.[78]

With respect to non-fee requirements such as aesthetic requirements, the 2018 Order attempted to formulate a three-prong test again to determine whether a local government's requirements violate the FCC's interpretation of what constitutes an effective prohibition. The Order concludes that "aesthetics requirements are not preempted if they are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance."[79] The FCC intended for this standard to apply to minimum spacing requirements as well.

Fortunately, the Ninth Circuit held in *City of Portland v. United States of America,* the FCC's 2018 Order requiring that aesthetic requirements imposed on small cell wireless facilities be no more burdensome than those imposed on providers of functionally equivalent services exceeded the scope of its authority under the Telecommunications Act. The Act permits some differences in the treatment of different providers, so long as the treatment is reasonable. The FCC failed to take into account the differences among functionally equivalent but physically different services. Additionally, the requirement that a local government's aesthetic requirements imposed on small cell wireless facilities be "objective" was found to be unduly vague. The court

[78] FCC 18-133(80)
[79] FCC 18-133(86).

stated, "The prohibition on local regulatory authority in the regulation is in that respect broader than that contemplated by Congress."[80]

Unfortunately, in reviewing the FCC's limitations on fees which state and local governments could charge providers to deploy small cell wireless facilities, the Ninth Circuit found the 2018 Order was reasonable and in accord with the congressional directive in the TCA.

Moreover, in the Second Circuit[81], when the court reviewed an ordinance provision regarding a 5% gross revenue fee on wireless service providers in the City of White Plains, the court failed to analyze whether the fee structure itself was within the confines of the TCA.

Instead, the court found fault with how the fee provision was applied. The court found that White Plains' fees were not applied consistently or uniformly across the Board to all wireless service providers, failing to ensure a "competitively neutral" market. Where they applied the fees to one provider, they failed to provide any fees to another. However, the court did go on to state, municipalities' fees did not have to be equal and that different costs and uses of the right-of-way may be taken into account.

As such, it would behoove local governments to enact local zoning ordinances to empower them to control the placement of the new wave of 5G installations, in the absence of which their constituents will undoubtedly begin awakening to find such facilities installed in extremely close proximity to their homes.

Conclusion and Disclaimer

It is the opinion of the Author that if, and to the extent that, the City of Santa Barbara were to amend its applicable Code provisions, it would significantly increase the City's authority to regulate the placement of wireless facilities within the City, to protect the City and its residents against unnecessary adverse impacts resulting from the irresponsible placement of wireless facilities.

The struggle between the wireless industry and local governments attempting to control the placement of wireless facilities to protect their communities and citizens is ongoing and has intensified due to the 5G rollout. The ever-changing legal landscape of federal, state, and local laws and case decisions renders it impossible to guarantee that any local ordinance, rule, or regulation will not, at some point, be challenged in any federal or state court, based upon existing or future statutes or caselaw, or what the outcome of any such challenge may result.

[80] City of Portland v. United States, 969 F.3d 1020, 1041 (9th Cir. 2020).
[81] TCG New York, Inc. v. City of White Plains, 305 F.3d 67 (2d Cir. 2002).

Julian Gresser letter to SB County Jan 24 2025

2025-01-24 BBILAN Letter to Santa Barbara County Board of Supervisors
To: Santa Barbara County Board of Supervisors ("BOS")

From: Julian Gresser, Broadband International Legal Action Network

Re: Proposed Amendments to Wireless Ordinance (including reference to SB 9)

January 20, 2025

Dear Members of the Board,

January 20, 2025

Dear Members of the Board,

I am constituent and co-founder of the Broadband International Legal Action Network (BBILAN), a public interest legal advocacy and education organization. As a BBILAN attorney, I am currently appearing in the Federal Court for the Eastern District challenging the Tahoe Regional Planning Agency's failure to protect the Lake Tahoe community from the hazards of wireless small and macro cell towers. (One commissioned study suggests that 120,000 people could die due to poor planning especially around evacuation during a peak summer season when 200,000 tourists visit Tahoe each day.) We have also scored a partial victory against the Los Angeles County Board of Supervisors for failing to comply with CEQA and other laws in adopting a wireless ordinance that will endanger the public and historic sites. (See: March 27, 2024 Ruling by the Los Angeles Superior Court in Fiber First Los Angeles, et al. v. Los Angeles County et al. — A Significant Advance for the Public)

We would like to bring to your attention our concerns regarding the wildfire risks associated with passing the proposed Amendments to the existing Wireless Ordinance. We ask that you vote 'No' or at least abstain at the February 4 hearing to approve the Wireless Ordinance Amendments. BBILAN has organized a National Coalition on Fire Safety relating to cell towers and power lines such as the Goleta Load Pocket. Here is a link to our May 20, 2024 National Webinar that can provide a valuable reference. In this letter I will address three classes of legal questions and other legal and policy concerns. My letter is intended to be helpful to the BOS.

Legal Constraints. There are three legal tropes, based on outright dis- and mis-information, promoted by the wireless telecom industry that are being used to self-disable Planning Commissions, City Councils, and Boards of Supervisors across the country.

- **"Our hands are tied"** (in addressing cell tower wildfire risks). This is a legally false claim. See Attachment "A"—Opinion of FCC Litigation Counsel. Local control over fundamental questions of safety, for example, relating to wildfire protection, is safeguarded by the 9th and 10th Amendments to the Constitution.

- **"The FCC Shot Clock Rules require us to rush through permits. We simply have no time."** Again, this is legally incorrect. Applicants must comply with reasonable fire precautions incorporated into an Application Checklist. If an applicant fails to complete the Checklist elements, the shot clock is paused. If an applicant can meet its burden of proving an "unreasonable interference of service" (not simply claiming it), the applicant can use the shot clock to justify expedited review.

- **"We will get sued by the telecoms if we try to protect the public from cell tower and utility related wildfires."** That is possible. It has happened. Then again as indicated above, the public is increasingly empowered and able to litigate. The wiser path for the Board of Supervisors is simply to follow the law and do what it reasonably can, individually and as a regulatory body, to protect the public, before a massive fire catastrophe befalls Santa Barbara, as it now has in Los Angeles.

Legal Deficiencies in the Proposed County Wireless Ordinance Amendments

- **Violation of the Single Subject Rule.** There is an intentional linkage being made on every page between the ordinance amendments, and the state's passage of SB 9, which was declared unconstitutional in 2024 by the Los Angeles Superior Court in the case of City of Richmond v. Bonta. This unfortunate coupling creates the false impression that the proposed amendments will help alleviate the serious problem of affordable housing in Santa Barbara, when in fact the County Planning Commission itself has informed Safe Tech Santa Barbara ("STSB") that the one has nothing to do with the other. Clearly then the proposed amendments need to be revised, reference to SB 9 deleted, and a

statement made to rectify the false impression that the Amendments are intended to alleviate Santa Barbara's affordable housing crisis.

Legal Commentary

Santa Barbara County adheres to the single-subject rule as mandated by the California Constitution. This rule requires that legislation and ballot initiatives address only one main issue, aiming to prevent complexity and the inclusion of unrelated provisions. Specifically, Article IV, Section 9 of the California Constitution states: "A statute shall embrace but one subject, which shall be expressed in its title." We believe conflating SB 9 with the wireless ordinance amendments violates this rule.

This constitutional provision applies uniformly across all counties in California, including Santa Barbara County. Therefore, any legislation or ballot initiative within Santa Barbara County must comply with the single-subject rule as outlined in the state constitution.

The single-subject rule is designed to ensure transparency and simplicity in legislation, preventing the practice of "logrolling," where unrelated issues are combined to gather broader support. By adhering to this rule, California aims to maintain clarity and focus in its legislative process.

- **Violation of CEQA.** The BOS cannot disregard the requirements of CEQA by fiat. Had CEQA's rigorous and coordinated planning requirements and protocols, including preparation of an Environmental Impact Report, been followed, the risks of the present Los Angeles wildfires, still uncontrolled, might have been addressed early on, and effective and coordinated leadership exercised. The BOS has the burden to justify its asserted exemption in the face of documents which STSB and BBILAN are placing in the public record pointing to the high risks (defined as Probability x Damages) of cell tower and utility caused wildfires. In any event, if called upon to do so, BBILAN will show, if litigation is necessary, that the County's Wireless Ordinance falls within several CEQA exceptions to the asserted exemption, namely relating to cumulative effects, historic sites, and especially sensitive environmental areas.

- **No Finding of Consistency.** There must legally be a finding of consistency with the Santa Barbara Climate Action Plan, the Santa Barbara Wildfire Protection Plan, and other regional environmental and wildfire protection plans. There has been none.

•**Due Process.** The public hearing and notice provisions are legally inadequate and arguably violative of the federal and state constitutions.

•**Failure to Require Setbacks.** The proposed amendments make no special provision for setbacks, even when permitting densified small cell and macro cell towers near schools, playgrounds, day care centers, and other vulnerable communities. This dangerous omission flies in the face of an increasing recognition of fire risks by some California cities like San Diego that in August 2019 adopted a wireless ordinance requiring a 300 foot setback for schools, churches, and police stations.

•**Civil and Human Rights of Minority and Disabled Communities.** The proposed amendments disregard the especially high risks densified small cell and macro cell towers create for Santa Barbara's minority and disabled populations, in terms of communication and transportation, especially during the chaos which can emerge during evacuations.

•**Collapse of the Sovereign Immunity Defense.** If a massive cell tower or utility-caused wildfire occurs as a result of the adoption of the proposed ordinance amendments, the Board of Supervisors will not be able to claim that they were unaware of this clearly foreseeable risk and took reasonable precautions under its statutory duty of care. A major legal question is whether the Board of Supervisors can be held liable **as an agency** for such gross negligence? The law strongly favors immunity, **except when the obligation is non-discretionary — in other words, ministerial.**

The specific question will arise if the County Planning Commission fails to comply with the national, state, or local fire codes which may mandate that a professional electrical engineer sign off on a small cell permit application. BBILAN has already submitted testimony that at least one telecom provider is submitting tower applications containing violations of the National Electric Code, and the County's Planning Commission is routinely approving permits to this provider without the benefit of an electrical engineer's certification, or the preparation of a standard Short Circuit Coordination Study. This failure substantially increases the risks that a electrically-caused fire will happen. Attachment "B" provides a list of cases holding local governments liable, notwithstanding asserted immunity when ignoring a non-discretionary mandatory duty.

In any event, it is highly likely that the BOS will become enmeshed in multiple lawsuits if a massive wildfire occurs in Santa Barbara that is caused by a cell tower or some accident related to an electric utility pole such as those lining the Goleta Load Pocket. In this case the telecom companies and the electric utility will be defendants, and they will attempt to shield themselves from liability by claiming the BOS and Planning Department approved their permits and conducted all fire safety precautions as we are urging. These defendants and the plaintiffs will interplead the BOS, which will be caught in the crossfire. This contingency is today possible in the barrage of lawsuits currently being handled by the leading personal injury law firm specializing in wildfires, Panish, Shea, Ravipudi which we would seek to retain on behalf of victims in Santa Barbara. Both the wildfire disaster and the resulting legal conflicts are largely preventable.

Seizing the Opportunity for Wise and Resilient Leadership

- The BOS has an opportunity to build on the lead of other communities that are taking wise precautions by adopting ordinances that protect, rather than endanger, the public from the risks of small cell and macro cell towers. Appendix "C" provides a list of these protective ordinances.

- The first step is to vote "No" or abstain on February 4, and remand the amendments to the Planning Commission with instructions to comply with the laws and develop reasonable precautionary permit procedures, noted above.

- A second step is to adopt the Malibu Protocol by County BOS Resolution and embed its protocols in a specific checklist for permit applicants. (BBILAN is pleased to make this available to the Planning Commission and serve as a resource for the Commission in preparing these application requirements.)

- A third step is to instruct the County Planning Commission to meet with leading electrical engineers, environmental planning, and legal experts and draft a **balanced ordinance** that recognizes the concerns of both the telecom providers, the fiber optic providers, and experts on alternative power/energy saving systems that will provide resilient backup power, and support effective internet access and communication. In short, an integrated 21st century solution.

Santa Barbara County BOS have all the resources right in this community that are required to reach a wise, resilient, and innovative solution to the information-communication challenges before us as a community. We appreciate your thoughtful consideration.

Sincerely,
Julian Gresser
Co-Founder BBILAN

See HERE for the full letter, including Attachments.

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April 7, 2021

The Honorable Ben Hueso
Chair, Senate Energy, Utilities, and Communications Committee
State Capitol Building, Room 4035
Sacramento, CA 95814

RE: SB 556 (Dodd) Street Light Poles, Traffic Signal Poles, Utility Poles, and Support Structures: Attachments.
Notice of OPPOSITION (As Amended 03/16/21)

Dear Senator Hueso:

The City of Elk Grove ("Elk Grove") respectfully opposes SB 556 (Dodd), related to wireless broadband infrastructure deployment.

As recently confirmed by the Federal Ninth Circuit Court of Appeals, under Federal FCC regulations, cities retain local authority to impose reasonable aesthetic regulations on telecommunication providers' facilities, provided the regulation is technically feasible. *(See City of Portland v. United States, 969 F.3d 1020, 1039-1043 (9th Cir. 2020).)* SB 556 is an unnecessary regulation that threatens local control and conflicts with FCC law and regulations by seeming to require that cities make space available to telecommunications providers without recognizing the unique characteristics of a community that call for a local regulatory point of view.

The principle is poignantly illustrated by the City of Elk Grove's recent experience. In 2018 and 2019, Elk Grove held multiple public meetings and workshops concerning the issue of telecommunications facility regulation and siting, seeking input from stakeholders, including residents, community advocates, and industry representatives. Expert and technical analysis was solicited and provided to the City Council in conjunction with those meetings and workshops. The proceedings culminated in a City ordinance that struck a delicate balance between the concerns of the residents and the telecommunications industry, while ensuring compliance with applicable state and federal law. (See City of Elk Grove Ordinance 19-2019, adopted Sept. 11, 2019). The proceedings also resulted in agreements in late 2019 between the City of Elk Grove and New Cingular PCS (an AT&T affiliate), and the City of Elk Grove and Verizon Wireless. Those agreements, negotiated and executed in good faith and as part of an open and public process, regulate the telecommunications facility deployment plan and facility siting by these companies. Cities must retain the ability to implement ordinances and agreements, such as those implemented in the City of Elk Grove, in order to protect public facilities and address the specific and unique needs of a local community.

SB 556 also goes too far in seeking to restrain the monetary rate a local government agency can charge telecommunications providers for use of an agency's property. The $270 amount referenced in SB 556, which seems to find its origins in the FCC's Small Cell Order 18-133, is only a benchmark amount that is presumptively considered reasonable by the FCC Order. It is not a mandatory limit. Under the FCC Order and federal law, cities retain authority to justify different rate amounts. (*See City of Portland, supra*, 969 F.3d at 1037-1039). Cities and telecommunications providers also retain the freedom of contract to negotiate and agree upon different amounts. There is no need for additional state regulations infringing on these principles.

SB 556 improperly threatens to erode local regulatory authority. But, in doing so, it is unlikely to advance the stated goal of the legislation to remove barriers to telecommunications deployment and improve internet access. Elk Grove is an example of a diverse community that has been able to strike a balance between the competing needs of the residents and the telecommunications industry to reach a mutually beneficial solution. These determinations are ideally made at the local level to address the specific qualities and attributes of the local community.

For the reasons set forth above, the City of Elk Grove respectfully opposes SB 556. Thank you for your consideration of this matter.

Sincerely,

Bobbie Singh-Allen
MAYOR
City of Elk Grove

cc: The Honorable Bill Dodd, Senator
The Honorable Richard Pan, Senator
The Honorable Jim Cooper, Assemblymember
Charles Anderson, League of California Cities, Sacramento Valley Regional Public Affairs Manager (via email, canderson@cacities.org)
League of California Cities (via email, cityletters@cacities.org)