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SMART PLANNING PROVISIONS FOR LOCAL GOVERNMENTS

“Power is made by power being taken.”

- John Mayer

Various state laws require the following disclaimer: This document is not intended, and should not be construed, as offering legal advice. Please consult a qualified attorney for advice on these matters.

The Telecommunications Act of 1996 is the primary governing document for the siting, construction and modification of wireless telecommunications facilities in the United States. In the Act, Congress specifically preserved the authority of local governments to exercise control over these activities in their communities.¹

47 U.S.C. 332(c) clearly states

“Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”

The Act specifies five exceptions. Local governments may not:

1. Unreasonably discriminate among providers of functionally equivalent services ;
2. Prohibit or have the effect of prohibiting the provision of personal wireless services;
3. Fail to act on any application to place, construct or modify a wireless facility within a reasonable period of time;
4. Deny an application to place, construct or modify a wireless facility without a written record supported by substantial evidence;
5. Regulate the placement, construction or modification of a wireless facility based on environmental effects of radiofrequency emissions.

Other than these exceptions, local governments may adopt whatever provisions are appropriate for their communities. With the sudden proliferation of wireless antennas related to the deployment of the next generation of wireless telecommunications referred to as “5G,” many local governments are taking the opportunity to revise and update their zoning codes to avail themselves of the powers preserved to them by Congress.

¹ The law is silent on regulatory authority over the “operation” of the wireless facilities.

By taking action to incorporate “smart planning” provisions into their municipal zoning codes, governments are able to exert control over the siting, construction and modification of cell towers, small cells and other wireless facilities.

These provisions are not automatically conferred on local governments by the TCA. Without immediately taking steps to preserve their legal authority over these matters, local governments are leaving themselves defenseless against the irresponsible deployment of small cells in their communities, and will be bound by whatever provisions are in their codes at the time the application is received. Wireless companies and site developers² will always choose antenna locations that are the least expensive most convenient *for them*, regardless of the needs or desires of the community.

The purpose of adopting “smart planning” provisions is to:

- (1) provide clarity and guidance to applicants;
- (2) minimize the total number of antennas required to obtain coverage of the community;
- (3) minimize the impact on residential communities.

Some sample “smart planning” provisions:

- Local governments can specify preferred locations (e.g., industrial or retail areas) for antenna placement and require that applicants submit documented proof that such locations will not provide coverage of the area before considering other locations.
- Local governments can require that applicants post conspicuous notices at proposed antenna locations prior to a public hearing on the application.
- Local governments can specify that the municipality has the right to hire its own RF engineer to conduct random, unannounced emission testing of any antenna location, paid for by the antenna owner.
- Local governments can require that aggregate emissions of all co-located equipment be within FCC human exposure guidelines.
- Local governments can require applicants and antenna operators to document possession of commercial liability insurance against health claims related to radiofrequency radiation exposure, naming the local government as additional insured.

These are just a few of the options available to local governments seeking to exert some control over the deployment of wireless facilities in their communities, but again, these provisions are not automatically granted to the local government: they must be expressly reserved in a “smart” zoning code.

² Most applications for small cell antennas are submitted by site developers who obtain the necessary permits to construct the antenna, and then lease space to one or more telecoms.