



City of Peoria

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OPINION NO. 2017-01

TO: John Sefton, Community Services Director
FROM: Steve Burg, City Attorney *S.J.B.*
DATE: March 1, 2017
SUBJECT: City's Legal Responsibilities for Wireless Equipment on City-Owned Property

QUESTION: Does the City have the legal ability to deny a provider request for wireless equipment placement on City-owned property?

What are the City's requirements and responsibilities as related to wireless facilities and equipment when proposed for City-owned property?

ANSWER: Yes and No. Yes, the City may while acting in its proprietary role deny a provider request for wireless equipment placement on City-owned property.

No, the City "may not deny, and shall approve" an "eligible facilities request" to place wireless equipment on City-owned property when the City is acting in its role as land use regulator and such request does not "substantially change" the physical dimensions of the existing wireless tower or base station.

HISTORY/BACKGROUND:

On January 23, 2017 you requested a legal opinion concerning the City's requirements and responsibilities as related to wireless facilities and equipment when proposed for City-owned property. In an effort to provide you with information immediately, I provided you with a brief memorandum on the subject matter. This opinion will expand upon that memorandum.

As previously noted, on October 17, 2014, the Federal Communications Commission ("FCC") unanimously adopted a Report and Order ("Order") with extensive new federal rules intended to streamline wireless infrastructure deployment. The new rules significantly impact State and local wireless ordinances, practices, and policies as to cell sites, broadcast towers, and other licensed and unlicensed communications services authorized by the FCC.

The sprawling Order imposed and expanded both substantive and procedural limits under Section 6409(a) of the Middle Class Tax Reform and Job Creation Act of 2012 (“Section 6409(a)”) and Section 704 of the Telecommunication Act of 1996 (“Telecom Act”) on traditionally local land-use authority over wireless sites on private and public property and in the public rights-of-way. The new rules became effective on April 8, 2015.

The critical question that should be addressed prior to responding to a request for wireless equipment placement on City-owned property is the nature of the request. Additionally, the type of City-owned property will need to be considered (e.g., a park versus the public right-of-way). An evaluation of the request should determine whether the City will be acting in its governmental regulator role or in its proprietary nature. It is imperative that the City distinguishes the difference between the City’s regulatory and proprietary roles.

Governmental/Regulatory Role

The City is acting in its governmental/regulatory role when its actions are mandated and authorized by the constitution, statute, or other law and such action is carried out for the benefit of the general public. Some of the actions that would be regulatory in nature consist of (i) approving and/or issuing permits for wireless sites; (ii) enforcing zoning regulations and the City Code related to construction of wireless sites in the public rights-of-way; and (iii) making policy related to these sites. If the City’s actions are tantamount to regulation or policy making then it is acting in its regulatory or governmental role. If the power conferred has relation to public purposes and is for the public good, it is generally classified as governmental in its nature. EUGENE MCQUILLIN, *A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS*, § 10:5 (3d ed. 2006). A function is a “governmental function” if it is the means by which the governing entity exercises the sovereign power for the benefit of all citizens. *Id.*

When the State [City] acts as regulator, it performs a role that is characteristically a governmental rather than a private role. *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 229, (1993). As a regulator of private conduct, the State [City] is more powerful than private parties; these distinctions are far less significant when the State [City] acts as a market participant with no interest in setting policy. *Id.*

Proprietary Role

A “proprietary function” is defined as “[a] municipality's conduct that is performed for the profit or benefit of the municipality, rather than for the benefit of the general public.” Black's Law Dictionary 1256 (8th ed. 2004). A municipality’s proprietary role is akin to a private individual when it participates in for profit activity or for the sole benefit of the municipality as a municipal corporation versus benefiting the general public. Private, municipal, proprietary functions and powers are those relating to the

accomplishment of private corporate purposes in which the public is only indirectly concerned, and as to which the municipal corporation is regarded as a legal individual. 2A McQUILLIN MUN. CORP. § 10:5 (3d ed. 2006). An example of such proprietary functions is when the City leases park property or property at a fire station for the placement of wireless equipment. The City is essentially a landlord and acting in its proprietary role when it leases its property.

OPINION:

The City, while acting in its proprietary role, does not have to allow a provider to construct a wireless site on City property. The FCC's 2014 Order supports this conclusion, as well as two recognized cases – *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2d Cir. 2002) and *Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192, 193 (9th Cir. 2013).

The FCC's Order verified the findings in the *Sprint Spectrum* case by determining that Section 6409(a), 47 U.S.C. § 332 (c) (7) and 47 U.S.C. § 253 did not apply to, nor preempt, the actions of the City acting in its proprietary role. As determined in *Sprint Spectrum*, the FCC pointed out that these regulations only address actions of a local government when acting in its governmental role.

...we conclude that Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities...Like private property owners, local governments enter into lease and license agreements to allow parties to place antennas and other wireless service facilities on local government property, and we find no basis for applying Section 6409(a) in those circumstances.

Federal Communications Commission Report and Order, § 5, ¶239 (Oct. 21, 2014).

We find that this conclusion is consistent with judicial decisions holding that Sections 253 and 332(c)(7) of the Communications Act do not preempt “non regulatory decisions of a state or locality acting in its proprietary capacity.”¹

Id.

¹ *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1240 (9th Cir.) (recognizing that Section 253(a) preempts only “regulatory schemes”); *Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002) (finding that Section § 332(c)(7) “does not preempt nonregulatory decisions of a local governmental entity or instrumentality acting in its proprietary capacity”).

The *Sprint Spectrum* case is the cornerstone for the decisions in the FCC Order and the *Omnipoint* case supports the position that the Telecom Act did not require the City, as a proprietor or market participant, to allow the construction of a wireless facility on its property.

...we see nothing in the Telecommunications Act to suggest that Congress meant to preempt a governmental entity's conduct that does not amount to regulation; and the structure and language of the TCA suggest precisely the contrary intent...

Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 420 (2d Cir. 2002).

...the Telecommunications Act does not preempt nonregulatory decisions of a local government entity or instrumentality acting in its proprietary capacity...

Id. at 421.

It is well established the City has “the same right in its proprietary capacity as [a private] property owner to refuse to lease” its property, and such an action/decision is not preempted. *Id.*

The *Omnipoint* case, which dealt with a municipality denying installation of wireless facilities, also verified the findings in the *Sprint Spectrum* case and was decided on the eve of the FCC's 2014 Order.

By its terms, the Telecommunications Act applies only to local zoning and land use decisions and does not address a municipality's property rights as a landowner.

Omnipoint Communications, Inc. v. City of Huntington Beach, 738 F.3d 192, 201 (9th Cir. 2013).

...the City's exercise of its property rights.... was non-regulatory and non-adjudicative behavior akin to an action by a private land owner.

Id.

Therefore, when the City is acting in a proprietary nature it has no requirements and responsibilities to adhere to FCC regulations as related to wireless facilities and equipment when proposed for City-owned property.

Supplemental Information

In addition to the legal opinion you requested all relevant legislation, a list of relevant regulatory agencies, an options list for consideration when reviewing such request (i.e., administrative procedures, Council policy, Ordinance, etc.), and if possible a detail of potential ramifications if cellular facilities are approved or denied. The relevant legislation and applicable regulatory agencies are:

- (i) The sprawling Federal Communications Commission Report and Order released on October 21, 2014, which imposes and expands both substantive and procedural limits under Section 6409(a). Section 6409(a) mandates that State and local governments “may not deny, and shall approve” an “eligible facilities request” so long as that eligible facilities request does not “substantially change” the physical dimensions of the existing wireless tower or base station. Section 332(c)(7) Shot Clock rules apply to Distributed Antenna Systems and small cells. The Federal Communications Commission clarified its permit application processing Shot Clock rules, which limit the time for local governments to review applications to 150 days for new sites or 90 days for collocations and other requests.
- (ii) The Telecommunications Act of 1996 specifically Section 704, which traditionally addresses local land-use authority over wireless sites on private and public property and in the public rights-of-way.
- (iii) The National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”). The new rules create and expand new categorical exemptions for wireless sites from review under the NEPA and the NHPA. The NEPA, NHPA, and the Shot Clock rules are applicable to new sites and substantial changes to existing sites.

I believe at present there is only one City law or policy that applies to evaluating a request -- City Charter Article I, Sec. 3(I), which provides the City Council with authority to acquire, lease, sell, convey, or “otherwise dispose of” real property. No City Code provisions have been adopted on this subject. Council Policy 3-1 regarding real property acquisition and Council Policies 3-2 and 3-3 regarding the disposal of surplus land generally and abandoned roadways, as well as the use of City facilities in Administrative Procedure 3-1, all do not directly address this question.²

As noted above, the critical question that should be addressed prior to responding to a request for wireless equipment placement on City-owned property is the nature of the request and the location of City-owned property that the provider wishes to use for placement of wireless equipment. If the request is for general City property and for a proprietary purpose, the City may deny the request in its sole discretion and a provider will have no legal right to challenge that denial.

² We should discuss whether it might be helpful to develop a new Administrative Procedure on this topic.

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If the City chooses to enter into a licensing or lease agreement with a provider on City property, any adjudicative decisions regarding construction permits, zoning, collocation of equipment and public safety fall in the realm of regulatory behavior and the federal regulations. In short, the City will lose unfettered control over a project if the City agrees to allow placement on City property. An assigned attorney would be available to work closely with City staff to identify all issues presented by a specific request.

I hope this information is helpful. Please let me know if you have any questions or would like to discuss further.