

Municipal Regulation of Telecommunications Equipment In Public Right Of Way Based On Aesthetic Considerations Not Preempted

The California Court of Appeal has upheld municipal regulation of telecommunications equipment in the public right-of-way against the argument that such regulations are preempted by state law. *T-Mobile West LLC v. City and County of San Francisco*, No. A144252 (1st Dist., Sept. 15, 2016). At issue was a San Francisco ordinance passed in 2011 that required permits for wireless telecommunications in the right of way based on aesthetic considerations. Several telecommunications providers sued to challenge the ordinance as being preempted by two sections of the California Public Utilities Code: Section 7901, which gives telephone corporations the right to install telephone lines in the public right of way "in such a manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters"; and Section 7901.1, which provides that local governments retain the right "to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed" and this control must "be applied to all entities in an equivalent manner." [caption id="attachment_4517" align="aligncenter" width="666"]

Man on a lift working on the power lines Man on a lift working on the power lines[/caption] The court of appeal rejected plaintiffs' arguments that the ordinance was impliedly preempted by sections 7901 and 7901.1. The court found nothing in section 7901 or section 7901.1 that divested cities of their broad police power under the state constitution to regulate local aesthetics. In doing so, the court adopted interpreted the phrase "incommode the public use" in section 7901 broadly to encompass aesthetic enjoyment. The court also distinguished between local regulations requiring site-specific permits based on aesthetic considerations (such as the San Francisco ordinance) and regulations requiring local franchises. Site-specific discretionary permits do not prohibit use of the right of way; instead, they are used to harmonize the interests and rights of telephone corporations with cities' and counties' other legitimate objectives. Local franchise requirements, on the other hand, have the immediate effect of barring telephone corporations' use of the public-right-way in the absence of a franchise agreement. Plaintiffs also maintained that the ordinance conflicted with section 7901.1 because the ordinance singled out wireless equipment for application of the permit requirements. Relying on the statute's legislative history, the court adopted a narrow interpretation of section 7901.1 as applying only to temporary access to the right of way for construction purposes. This opinion essentially tracks the holding in the Ninth Circuit's opinion in *Sprint PCS Assets v. City of Palos Verdes Estates*, 583 F.3d 716 (9th Cir. 2009), which also found that city regulation of wireless facilities for aesthetic purposes to not be preempted by Public Utilities Code section 7901 and 7901.1. This opinion does, however, contain a closer analysis of state court decisions and now provides California authority for this proposition.

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