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AESTHETICS AND CELL TOWERS— CITIES AND CARRIERS DUKING IT OUT IN THE COURTS

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Some urban problems never resolve; in colloquial terms, "the can gets kicked down the road." This article talks in some depth about a lingering, nagging problem that has been facing cities and their denizens since the advent of wireless telecommunication and cell phones, now ubiquitous. That problem is where to put the poles and the equipment so that the aesthetics of the landscape aren't interfered with, and the residents aren't frightened or worried about exposure to radio frequency radiation or other potentially harmful effects from having this equipment placed in their neighborhoods.

And a neighborhood problem it is, too. Increasingly, across the United States, the attempts to install these poles and equipment are polarizing neighborhoods and creating a grass-roots opposition which, while not professional, is extremely well organized and now has proliferated into both urban and rural communities alike. This article will talk about the scope of that expansion, the issues that underlie it and how the courts, the Federal courts in particular, are coming to grips with the collision between aesthetics and the right and need for wireless telecommunication facilities.

Clearly, the opposition has the carriers worried; this showed up in an amicus brief filed by a large wireless infrastructure provider in a very recent appeal to the U.S. Supreme Court:

> *Amici curiae* NextG Networks of California, Inc. and The DAS Forum support Sprint's Peti-

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> tion for Certiorari because the Ninth Circuit's en banc decision … presents an important case of national interest. The Ninth Circuit's narrow reading of Section 253(a) in this case is directly contrary to the intent of Congress, the policy goals of the Federal Communications Commission … and the interpretation of Section 253 by the FCC and several other Circuit Courts. *If uncorrected, the Ninth Circuit's en banc decision likely will embolden local governments to erect regulatory regimes so Byzantine as to have the effect of thwarting the deployment of advanced telecommunications technologies and competitive telecommunication services. While unacceptable in any context, the costs, burdens, delays, and uncertainty imposed by such municipal requirements will be particularly detrimental to the ability of new entrants, such as NextG and other DAS Forum members, to enter the market.*[1]

There is no question that a lot of money is at stake in this battle; the carriers and their public relations entity, the Distributed Antenna Systems (DAS) Forum, have made that clear in their own conferences and other public gatherings. On its website, the DAS Forum describes itself as:

> [A] broad-based nonprofit organization, dedicated to the development of the DAS component of the nation's wireless network[.] Founded in 2006, the DAS Forum is the only national network of leaders focused exclusively on shaping the future of DAS as a viable complement to traditional macro cell sites and a solution to the deployment of wireless services in challenging environments."[2]

The DAS Forum is comprised of large telecommunication entities and their suppliers, including Sprint Nextel, T-Mobile, Extenet Systems, and suppliers such as Corning Cable Systems and American Tower Corporation. What's especially interesting, though, is the volume of money that is at stake. On a web page advertising a June 15, 2010, conference, the DAS Forum said "Learn why DAS is a magnet for private equity and venture capital money, attracting more than $1/2 billion in the last year alone."[3] This is a staggering number, so high as to potentially warp traditional land use decisions, making them susceptible to political influence and a magnet for sophisticated, skilled land use consultants and political operatives.

Distributed Antenna Systems, as a technology, is the latest iteration of an old maxim called "Moore's Law," enumerated in 1965 by Intel co-founder Gordon E. Moore. As Wikipedia puts it:

> Moore's Law describes a long-term trend in the history of computing hardware. The number of transistors that can be placed inexpensively on an integrated circuit has doubled approximately every two years. The trend has continued for more than half a century and is not expected to stop until 2015 or later.[4]

The DAS system, described by the DAS Forum itself, is a lightweight and smaller exponent of the prior taller, larger cellphone towers that preceded it:

> A DAS network is, basically, a series of small antennas located on utility or streetlight poles in public rights-of-way or utility easements that are interconnected by fiber optic lines. Where a traditional "macro" wireless cell site such as a tower or monopole typically has a full complement of electronic network equipment located at the site with the antenna, the DAS network splits that traditional cell by placing the electronic network equipment at a central "hub" location and routing the signals to and from the remote antenna "nodes" via the fiber optic lines.
>
> These DAS networks facilitate a greater re-use of the wireless spectrum, since the antennas define small radio coverage cells isolated from each other, each carrying the same capacity and quality as a network delivered by traditional means. In addition, a DAS network in an urban area can provide coverage in many areas or "dead spots" that may be "shadowed" from coverage by the traditional antenna locations. Higher capacity and greater coverage in turn are the necessary building blocks for new, content-intensive wireless telecommunications services that are in demand by consumers. *DAS networks also take advantage of existing rights-of-way infrastructure, in the same way as traditional, purely wireline telephone systems*."[5]

The DAS Forum and the wireless telecommunications entities that are its members are beginning a wave of litigation to compel the granting of land use permits for installation of these antennae and ancillary equipment across the country. What makes this wave of litigation different from its forebears is that, under the DAS system, the telecommunication companies get to "piggyback" onto existing telephone poles, light poles and other previously-erected structures rather than having to construct, erect and maintain cell towers that can easily exceed 140 feet in height. On the surface, it would appear to be a win-win situation: The equipment has now shrunk and no new structures have to be built to accommodate it; the existing aesthetics won't be interfered with because existing installations will simply be modified to accommodate the new equipment.

On the surface, Distributed Antenna Systems technology would appear to be a win-win situation: The equipment has now shrunk and no new structures have to be built to accommodate it.

Is this in fact the case? If so, then why the proliferation of this litigation, and why are cities actively resisting allowing these installations to be constructed without the right to regulate their aesthetics, including the manner and method of installation as well as the location?

To put this problem into proper context, three Federal court cases dealing with the problems need to be reviewed. The 2008 Ninth Circuit case of *Sprint Telephony PCS v. County of San Diego*[6] is probably the best place to start, because it was the signal that the law was changing and that courts were going to more zealously uphold the rights and abilities of municipalities to control the "time, place and manner" of the location and installation of the wireless network infrastructure.

The County of San Diego enacted an ordinance to "establish comprehensive guidelines for the placement, design and processing of wireless telecommunications facilities in all zones within the County of San Diego."[7] The County set up four tiers of categories in the ordinance, depending primarily on the visibility and location of the proposed facility. Criteria for approval of facilities were on a sliding scale; an application for a low-visibility structure in an industrial zone generally was subject to lesser requirements than an application for a large tower in a residential zone.

More relevant to the lawsuit, though, were the general zoning requirements. The ordinance required hearings before a zoning board, and the board had to make certain findings to allow the installation of the

wireless facilities. Not surprisingly, almost all of the findings related to planning and aesthetic standards:

> Before a permit is granted, the zoning board must find:
>
> > That the location, size, design and operating characteristics of the proposed use will be compatible with adjacent uses, residents, buildings, or structures, with consideration given to:
>
> 1. Harmony in scale, bulk, coverage and density;
> 2. The availability of public facilities, services and utilities;
> 3. The harmful effect, if any, upon desirable neighborhood character;
> 4. The generation of traffic and the capacity and physical character of surrounding streets;
> 5. The suitability of the site for the type and intensity of use or development which is proposed; and to
> 6. Any other relevant impact of the proposed use.
>
> The decision-maker retains discretionary authority to deny use permit application or to grant the application conditionally.[8]

Sprint came out of the gate with the position that the ordinance itself violated the supervening Federal law, 47 U.S.C.A. § 253(a). Section 253(a) provides that no state or local statute or regulation may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. Sprint argued that San Diego's ordinance, on its face, prohibited or had the effect of prohibiting Sprint's ability to provide wireless telecommunication services.[9] The County rejoined that § 253(a) did not apply to the ordinance, because another Federal statute, 47 U.S.C.A. § 332(c)(7), exclusively governs wireless regulations and (perhaps more importantly) that the ordinance wasn't an effective prohibition on the provision of wireless services. The County's position relied clearly on the fact that a specific, detailed set of criteria were set forth in the ordinance, rather than an outright prohibition.

The Ninth Circuit looked at both statutes. As to § 253(a), the court acknowledged the language therein that no State or local regulation could prohibit or have the effect of prohibiting the ability of an entity to provide telecommunication services. Interestingly, though, the Ninth Circuit did some independent research and found that, although the House of Representatives had originally proposed legislation requiring the FCC to regulate directly the placement of wireless telecommunications facilities, the House and Senate conferees decided instead to preserve the authority of State and local governments over zoning and land use matters, except in the limited circumstances set forth in the conference agreement.[10]

The Ninth Circuit also declaratively announced that 47 U.S.C.A. § 332(c)(7)(A) preserves the authority of local governments over zoning decisions regarding the placement and construction of wireless service facilities, subject to limitations enumerated elsewhere in the statute. The court stated, "One such limitation is that local regulations shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[11]

So, in a sense, the court was "telegraphing" its punch; to it, the statutes were clear. Zoning authority was to remain in the hands of local municipalities unless it had the effect of completely prohibiting wireless service. The court went on to review some appellate decisions that seemed to be at variance with that declarative standard, in particular *City of Auburn v. Qwest Corporation*.[12] The court took the dramatic step of overruling its own prior holding in the *Auburn* case. It was pretty clear that the Eighth Circuit had recently stung the court by rejecting the *Auburn* standard in the case of *Level 3 Communications, L.L.C. v. City of St. Louis, Mo.*[13] As the Ninth Circuit put it in the opinion:

> Recently, the Eighth Circuit rejected the *Auburn* standard and held that, to demonstrate preemption, a plaintiff "must show actual or effective prohibition, rather than the mere possibility of prohibition." [Citation omitted.] We find persuasive the Eighth Circuit's and district court's critique of *Auburn*. Section 253(a) provides that "[n]o State or local statute or regulation … may prohibit or have the effect of prohibiting… provi[sion of]… telecommunication service." In context, it is clear that Congress' use of the word "may" works in tandem with the negative modifier "[n]o" to convey the meaning that "state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service." Our previous interpretation of the word "may" as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in

> holding that "a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition." [Citation omitted.][14]

Interestingly, the United States Supreme Court was then asked to review the *Level Three* case and the *Sprint Telephony* case by petitions for certiorari filed in both cases. The Supreme Court asked the Solicitor General to opine as to whether the Court should get involved in the dispute and, more pointedly, as the question was presented:

> Whether 47 U.S.C. 253(a), which provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" preempts only those state and local requirements that have an actual effect on the ability to provide service, as opposed to those that might have such an effect in the future[.][15]

Elena Kagan, now a Supreme Court Justice, was at that time the Solicitor General. She opined that the Ninth Circuit got it right in *Sprint Telephony*:

> Focusing on the word "may" in Section 253(a), some courts of appeals have suggested that "regulations that may have the effect of prohibiting the provision of telecommunications services are preempted" without regard to their "actual impact" on service providers[.] That suggestion is incorrect, and petitioners make little effort to defend it. As the Ninth Circuit explained below, "Congress' use of the word 'may' works in tandem with the negative modifier '[n]o' to convey the meaning that 'state and local regulations shall not prohibit or have the effect of prohibiting telecommunications service.'" *Thus, the word "may" is properly read in this context not to refer to the possible or conceivable effects of a regulation, but rather to deny permission to States and localities to enforce the types of legal requirements that Section 253(a) forbids. Nothing in the text of Section 253(a) "results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services."*[16]

The Ninth Circuit went on in *Sprint Telephony* to show why 47 U.S.C.A. § 332(c)(7) should control over § 253(a):

> Our present interpretation of § 253(a) is buttressed by our interpretation of the same relevant text in § 332(c)(7)(B)(i)(II)—"prohibit or have the effect of prohibiting." In [MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715 (9th Cir. 2005)], to construe § 332(c)(7)(B)(i)(II), we focused on the actual effects of the city's ordinance, not on what effects the ordinance might possibly allow[.] Indeed, we rejected the plaintiff's argument that, because the city's zoning ordinance granted discretion to the city to reject an application based on vague standards such as "necessity," the ordinance necessarily constituted an effective prohibition. … Consequently, our interpretation of the "effective prohibition" clause of § 332(c)(7)(B)(i)(II) differed markedly from *Auburn*'s interpretation of the same relevant text in § 253(a)[.]
>
> [...]
>
> Our holding today therefore harmonizes our interpretations of the identical relevant text in §§253(a) and 332(c)(7)(B)(i)(II). Under both, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunication services is insufficient.[17]

Here, the court brought the conflict out into the open; plaintiffs have to show that there is, in essence, an outright or actual prohibition by the municipal entity in denying service through the ordinance or its enforcement, not one that might possibly occur. In many ways, this is a pragmatic and "bright line" solution to what had become a tangled web of conflicting decisions, particularly because of the *Auburn* case. Courts were put in the untenable position, at the District Court level, of trying to determine whether municipal conduct rose to the level of *potentially* harming the ability of a telecommunications carrier to establish service in an area. This would be, in the best of cases, a dodgy and amorphous standard to try to apply, requiring courts to prognosticate on what might happen in the future.

Nor surprisingly, Sprint then tried to attack the zoning boards as simply another "tool" for a municipality to stop wireless services. The court saw the fallacy in the argument:

> Most of Sprint's arguments focus on the discretion reserved to the zoning board. For instance, Sprint complains that the zoning board must consider a number of "malleable and open-ended concepts" such as community character and aesthetics; it may deny or modify applications for "any other relevant impact of the proposed use"; and it may impose almost any condition that it deems appropriate. A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board could exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance—the provision of wireless services and other valid public goals such as safety and aesthetics[.]
>
> The same reasoning applies to Sprint's complaint that the ordinance imposes detailed application requirements and requires public hearings. Although a zoning board could conceivably use these procedural requirements to stall applications and thus effectively prohibit the provision of wireless services, the zoning board equally could use these tools to evaluate fully and promptly the merits of an application. Sprint has pointed to no requirement that, on its face, demonstrates that Sprint is effectively prohibited from providing wireless services. For example, the Ordinance does not impose an excessively long waiting period that would amount to an effective prohibition. Moreover, if a telecommunications provider believes that the zoning board is in fact using its procedural rules to delay unreasonably an application, or its discretionary authority to deny an application unjustifiably, the Act provides an expedited judicial review process in federal or state court. *See* 47 U.S.C. § 332(c)(7)(B)(ii) & (v).[18]

In ruling in this manner, the Ninth Circuit was following well-established, old and time-tested rules of procedure as well as substantive law in providing a way out for a wireless service provider who felt that it was being unfairly or unreasonably treated by a zoning board. For example, in the State of California an expedited review process under Code of Civil Procedure § 1094.5 permits a litigant to challenge an administrative review board that has made an administrative decision that it believes is invalid:

> 1094.5. Inquiry into validity of administrative order or decision.
>
> a. Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury[.]

47 U.S.C.A. § 332(c)(7)(B)(v) also provides for judicial review:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof ... may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.

In the Ninth Circuit, wireless providers have to go through the zoning process; they are not going to be able to avoid it by claiming that it "might possibly" prevent the establishment of wireless services.

We can now see that the Ninth Circuit has established a framework to protect both the community and the wireless providers. The wireless providers have to go through the zoning process; they are not going to be able to avoid it by claiming that it "might possibly" prevent the establishment of wireless services. Correspondingly, though, municipalities are going to have to fairly and justly enforce their own zoning codes. San Diego's clearly met such requirements:

> We are equally unpersuaded by Sprint's challenges to the substantive requirements of the Ordinance. Sprint has not identified a single requirement that effectively prohibits it from providing wireless services. On the face of the Ordinance, requiring a certain amount of camouflage, modest set-backs, and maintenance of the facility are reasonable and responsible conditions for the construction of wireless facilities, not an effective prohibition.[19]

Now, however, the bar has been raised. We now turn to the DAS system, with its correspondingly smaller footprint, but also the new and different problems that it raises by intruding into the public right-of-way and how municipalities and courts are coping with that.

Three decisions came down in 2009 that were of particular note. All were Federal cases and all dealt with public rights-of-way and how ordinances attempting to regulate aesthetics were affected by placing the poles and equipment in public rights-of-way. Two of the three cases were at the trial level at Federal District Courts in the Eastern and Central districts of California, respectively. Probably the more important one, and the better one to start with, is the October 2009 decision in *Sprint Telephony PCS, LLC v. City of Palos Verdes Estates*.[20]

To understand how, in some ways, this case was so peculiarly local is to understand how high a priority that residents of the City of Palos Verdes place on aesthetics in general. By way of example, Rancho Palos Verdes is one of the very few cities in the United States that has its own view protection and view restoration ordinance. The City describes it as follows:

> The citizens of Rancho Palos Verdes passed Proposition M in 1989 that set forth provisions for the preservation of views and the restoration of views impacted by foliage growth. The provisions of Proposition M have been incorporated into Section 17.02.040 of the City's Municipal Code and are administered by the View Restoration Division. In addition, the City adopted Guidelines that explain the procedure for preserving and restoring views. The process proceeds with the goal of reaching mutually acceptable solutions; however, if such resolutions are not reached, formal decisions are made by the City.[21]

The Ninth Circuit's opinion in the *Palos Verdes* opinion describes the community, too:

> The City is a planned community, about a quarter of which consists of public rights-of-way that were designed not only to serve the City's transportation needs, but also to contribute to its aesthetic appeal. In 2002 and 2003, Sprint applied for permits to construct wireless telecommunications facilities ("WCF") in the City's public rights-of-way. The City granted eight permit applications but denied two others, which are at issue in this appeal. One of the proposed WCFs would be constructed on Via Azalea, a narrow residential street, and the other would be constructed on Via Valmonte, one of the four main entrances to the City. [...]
>
> A City ordinance provides that WCF permit applications may be denied for "adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property." … Under the ordinance, the City's Public Works Director … denied Sprint's WCF permit applications, concluding that the proposed WCFs were not in keeping with the City's aesthetics. The City Planning Commission affirmed the Director's decision in a unanimous vote.
>
> Sprint appealed to the City Council … which received into evidence a written staff report that detailed the potential aesthetic impact of the proposed WCFs and summarized the results of a "drive test," which confirmed that cellular service from Sprint was already available in relevant locations in the City. […] The Council issued a resolution affirming the denial of Sprint's permit applications. It concluded that a WCF on Via Azalea would disrupt the residential ambience of the neighborhood and that a WCF on Via Valmonte would detract from the natural beauty that was valued at that main entrance to the City.[22]

The underlying issue in the lawsuit had to do with the right of the City to decide aesthetics issues when a telecommunications provider wanted to provide telecommunication services by using a public right-of-way to do it. Cities had previously lost on this point in earlier litigation, and decisions after that time were all over the map:

> While the question of whether California's municipalities have the power to consider aesthetics in deciding whether to grant WCF permit applications has been addressed by us and the California Courts of Appeals, it has not been resolved in a published opinion on which we may rely[.][23]

The *Palos Verdes* court treated 47 U.S.C.A. § 332(c)(7)(B) carefully and went over this argument again:

> One of the limitations that the TCA places upon local governments is that "[a]ny decision… to deny a request to place, construct or

> modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." [Citation omitted.] As we have explained, "The upshot is simple: this Court may not overturn the [City's] decision on 'substantial evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence." [MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 725 (9th Cir. 2005).][24]

Interestingly, the *Palos Verdes* court noted in a footnote just how much the law had changed in the last two years:

> The district court did not have the benefit of our decision in *Metro PCS* when it issued its order granting Sprint summary judgment on its claims under 47 U.S.C. §§ 253 and 332(c)(7)(B)(iii). Indeed, there has been considerable development in this area of the law since the district court resolved Sprint's motion. *See, e.g.*, [Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008); T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 2009).][25]

Sprint came into court claiming that because the proposed improvements were in a right-of-way, § 7901 of the California Public Utilities Code (PUC) prohibited any local control of a decision based on aesthetics. In doing so, it relied on the case of *Sprint PCS Assets, LLC v. City of La Cañada Flintridge*,[26] in which the Ninth Circuit held that § 7901 preempted an ordinance that allowed a city to deny permits to install telecommunications facilities based solely on aesthetics.

The *Palos Verdes* court, though, essentially ignored the *La Cañada Flintridge* holding and reconciled the City of Palos Verdes' ordinance with the State law that Sprint was asserting overrode local land use authority:

> The City's consideration of aesthetics in denying Sprint's WCF permit applications comports with PUC § 7901, which provides telecommunications companies with the right to construct WCFs "in such manner and at such points as not to incommode the public use of the road or highway." … To "incommode" the public use is to "subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)." 7 The Oxford English Dictionary 806 (2d ed. 1989); *see also* Webster's New Collegiate Dictionary 610 (9th ed. 1983). The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a WCF, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.[27]

To understand how dramatic a departure this harmonization of the state law and the local ordinance was from the *La Cañada Flintridge* holding, one has to know how polar the *La Cañada Flintridge* opinion was on this point:

> Section 7901 gives telephone companies broad authority to construct telephone lines and other fixtures "in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." By the plain text of the statute, the only substantive restriction on telephone companies is that they may not "incommode the public use" of roads. It is possible that extremely severe aesthetic objections could conceivably incommode the use of the roads. … An extraordinarily unattractive wireless antenna might, for example, cause such visual blight that motorists are uncomfortable using the roads. Counsel for the City posited, during oral argument, that an unattractive wireless structure could cause "discomfort."
>
> However, the most natural reading of § 7901 grants broad authority to telephone companies to install necessary wires and fixtures, so long as they do not interfere with public use of the roads. The text focuses on the *function* of the road—its "use," not its enjoyment. Based solely on § 7901, it is unlikely that local authorities could deny permits based on aesthetics without an independent justification routed in interference with the function of the road.[28]

The Ninth Circuit apparently later decided not to publish the opinion, and that threw the state of the law into greater chaos, but gave the *Palos Verdes* court the ability to settle the law without, in a sense, overruling itself.

On its face, the collision of the two opinions couldn't be more stark: the *La Cañada Flintridge* opinion is saying that, basically, if you can drive down the road and not hit the pole, and its mass, bulk and scale are not such a huge interference that you cannot use the roads, then Public Utilities Code § 7901 trumps any local land use decision based on aesthetics. *Palos Verdes* is saying the opposite: It has defined the word "incommode" in carefully laid out language, to make clear that the word "incommode" takes into account aesthetic issues.

It is all the more interesting to note how apparently sensitive the Circuit Judge writing the *Palos Verdes* opinion was on the issue of aesthetics. She went into detail about how aesthetics plays a part in rights-of-way:

> The absence of a conflict between the City's consideration of aesthetics and PUC § 7901 becomes even more apparent when one recognizes that the "public use" of the rights-of-way is not limited to travel. It is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive and aesthetic functions. See Ray Gindroz, *City Life and New Urbanism*, 29 Fordham Urban Law Journal 1419, 1428 (2002) ("A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use."); Kevin Lynch, The Image of the City 4, (1960) ("A vivid and integrated physical setting, capable of producing a sharp image, plays a social role as well. It can furnish the raw material for the symbols and collective memories of group communication."); Camillo Sitte, City Planning According to Artistic Principles 111-12 (Rudolph Wittkower ed., Random House 1965) (1889) ("One must keep in mind that city planning in particular must allow full and complete participation to art, because it is this type of artistic endeavor, above all, that affects formatively every day and every hour of the great mass of the population…"). As Congress and the California Legislature have recognized, the "public use" of the roads might also encompass recreational functions. *See, e.g.*, Cal. Pub. Util. Code § 320 (burying of power lines along scenic highways); 23 U.S.C. § 131(a) (regulation of billboards near highways necessary "to promote … recreational value of public travel … and to preserve natural beauty.")
>
> These urban planning principles are applied in the City, where the public rights-of-way are the visual fabric from which neighborhoods are made. For example, the City's staff report explains that Via Valmonte, which is adorned with an historic stone wall and borders a park, is "cherished for its rural character, and valued for its natural, unspoiled appearance, rich with native vegetation." Meanwhile, Via Azalea is described as "an attractive streetscape" that creates a residential ambience. That the "public use" of these rights-of-way encompasses more than just transit is perhaps most apparent from residents' letters to the Director, which explained that they "moved to Palos Verdes for its [a]esthetics" and that they "count on the City to protect [its] unique beauty with the abundance of trees, the absence of sidewalks, even the lack of street lighting."[29]

Sprint also brought up the companion section of the state Public Utilities Code, § 7901.1. That statute provides that "municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." As the *Palos Verdes* court put it:

> That provision was added to the PUC in 1995 to "bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise."[30]

Although Sprint argued that § 7901.1 barred the City from invoking aesthetic concerns in denying WCF construction permits, the *Palos Verdes* court disagreed:

> Aesthetic regulations are "time, place, and manner" regulations, and the California Legislature's use of the phrase "are accessed" in PUC § 7901.1 does not change that conclusion in this context. Sprint argues that the "time, place and manner" in which the rights-of-way "are accessed" can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way. We do not disagree. However, a company can "access" a city's rights-of-way in both aesthetically benign and aesthetically offensive ways. It is certainly within a city's authority to permit the former and not the latter.[31]

The *Palos Verdes* court treated two other issues in its opinion: the specificity of the ordinance itself and this idea of an "effective prohibition" of service. Reaching back to an earlier Ninth Circuit decision originating in the State of Washington, *T-Mobile USA, Inc. v. City of Anacortes*,[32] the court wanted to make sure that the ordinance contained enough specifics as to aesthetic considerations to allow it to be objectively and reasonably applied:

> Our interpretation of California law is consistent with the outcome in *City of Anacortes*, in which we rejected a § 332(c)(7)(B)(iii) challenge to a city's denial of a WCF permit application that was based on many of the same aesthetic considerations at issue here. *City of Anacortes*, 572 F.3d at 994-95. There, the city determined that the proposed WCF would have "a commercial appearance and would detract from the residential character and appearance of the surrounding neighborhood"; that it "would not be compatible with the character and appearance of the existing development"; and that it would "negatively impact the views" of residents. [Citation omitted.] We noted that the city ordinance governing permit applications required the city to consider such factors as the height of the tower and its proximity to residential structures, the nature of uses of nearby properties, the surrounding topography, and the surrounding tree coverage and foliage. ... What was implicit in our decision in *City of Anacortes* we make explicit now: California law does not prohibit local governments from taking into account aesthetic considerations in deciding whether to permit the development of WCFs within their jurisdictions.[33]

The second issue, the idea of "effective prohibition," grows out of this statute:

> The TCA provides that a locality's denial of a WCF permit application "shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. § 332(c)(7)(B)(i)(II). "[A] locality can run afoul of the TCA's 'effective prohibition' clause if it prevents a wireless provider from closing a 'significant gap' in service coverage." [Citation omitted.] The "effective prohibition" inquiry "involves a two-pronged analysis requiring (1) the showing of a 'significant gap' in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations." [Citation omitted.]
>
> [...]
>
> "'[S]ignificant gap' determinations are extremely fact-specific inquiries that defy any bright-line legal rule." [Citation omitted.] Yet Sprint and the district court take a bare-bones approach to this inquiry. The district court simply declared, as a matter of fact and fiat, that there was "a significant gap" in Sprint's coverage in the City. Sprint defends this factual finding on appeal, arguing that its presentation of radio frequency propagation maps was sufficient to establish a "significant gap" in coverage. We disagree.
>
> Sprint's documentation stated that the proposed WCFs would provide "good coverage" for .2 to .4 miles in various directions. However, it remains far from clear whether these estimates were relative to the coverage available from existing WCFs or to the coverage that would be available if there were no WCFs at all[.] In any event, that there was a "gap" in coverage is certainly not sufficient to establish that there was a "significant gap" in coverage. See [MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 733 n. 10 (9th Cir. 2005)] ("the relevant service gap must be truly 'significant' …'"); id. at 733 ("The TCA does not guarantee wireless service provides coverage free of small 'dead spots'…").[34]

New cases indicate that, contrary to prior law, municipalities do have significant authority to regulate aesthetics relating to the installation of wireless infrastructure.

So where does this leave us? We have a series of new cases that indicate that, contrary to prior law, municipalities do have significant authority and control to regulate their own aesthetics relating to the installation of wireless infrastructure. How are they being applied? Given the new technology of DAS systems, are the courts still supporting the application of aesthetics criteria, when now the infrastructure is smaller in scale and bulk and almost exclusively put in the public's right-of-way?

The answer, apparently, is an unqualified yes. Two decisions in particular coming down in 2009 and 2010, linked in tandem, both at the trial level in the Federal courts, and both arising in California, discuss this point. They are *NewPath Networks, LLC v. City of Davis*[35] and *NewPath Networks, LLC v. City of Irvine, California*.[36] These cases both involved DAS system installations, and both involved installations in rights-of-way. In the *Davis* case, the court went into some detail as to the origination of a DAS system and describing the infrastructure that would be used to implement it:

> A DAS is a network typically comprised of "small, low-power antennas," referred to as "nodes," connected to a "central hub" by "fiber optic cable." … Each node is located on or in light standards, traffic signals or other vertical structures[.] ... NewPath's DAS receives and transmits the wireless telephone and data communication signals of its Customer Carriers[.] … NewPath describes its DAS as a "dumb pipe," which its Customer Carriers can use to provide wireless communications to their subscribers; NewPath thus characterizes itself as a "carrier's carrier." …
>
> NewPath's proposed DAS calls for the installation of twenty-four wireless antenna facilities ("nodes") within the City. … NewPath would construct seventeen wooden or metal poles, approximately forty-two feet high, to host nodes, while the other nodes would be placed on existing telephone or electric poles[.] … Each node would be connected to the other nodes and a central hub by fiber optic cable.[37]

The *Irvine* case was similar, but in that case NewPath took a more aggressive tack. NewPath in the *Irvine* case challenged the ordinance on its face rather than how it was applied. NewPath obtained a notice to proceed from the California Public Utilities Commission and then claimed that, because the Commission had given consent, *the City's authority to regulate the installation on any grounds, not just aesthetics, was superseded*.

In essence, both the *Irvine* and the *Davis* court disagreed with this argument, finding that under both the *Anacortes* case and the *Palos Verdes* case, the cities did have that authority ("Under *Palos Verdes Estates*, it is proper to deny a WCF application on aesthetic grounds."[38]).

But the *Irvine* court went further; it did specific factual analysis, too:

> [U]nder *Anacortes* and *Palos Verdes Estates*, it is clear that Irvine had substantial evidence for its denial of the [conditional use permit.] Irvine had more than enough evidence to determine that the NewPath DAS project would have an adverse aesthetic effect on Turtle Rock. Irvine received visual simulations from NewPath of the proposed DAS nodes and attendant utility boxes and vaults….the Irvine city staff also prepared a report detailing the aesthetic impacts of the DAS project, including visual simulations of each of the 23 proposed DAS nodes… Irvine received substantial public comment at three public hearings during which many residents complained about the aesthetic impacts of the DAS project… It also received numerous letters and emails criticizing the aesthetics of the DAS project.
>
> *Irvine also had substantial evidence for its determination that the NewPath DAS project would adversely affect property values. It received input from numerous residents that the nodes would affect Turtle Rock's desirability and decrease property values, including a petition signed by 666 residents. Several residents stated that sales of homes had either been jeopardized or lost.*[39]

Courts are now applying the *Palos Verdes* and *Sprint Telephony* criteria: the carriers are being told that they are going to have to comply with aesthetic criteria. To catch up, a number of municipalities are rewriting their own ordinances.

In particular, the City of Norwalk, California enacted its Interim Ordinance No. 10-1627U on March 2, 2010, imposing a moratorium on approval of permits for the installation of wireless facilities.[40]

Interestingly, other small towns such as Catskill, New York, are applying both aesthetic criteria and what they believe are public safety criteria, perhaps in contravention of each other. In a June 19, 2009, newspaper article in *The Daily Mail* of Catskill, New York, emergency services volunteers complained that lack of service could seriously interfere with their ability to respond to emergency situations:

> "We need cell service in Durham because we're dealing with life-and-death situations," EMS Vice President Bob Haller said. "Right now,

> cell phone contact is hit-and-miss. That has an impact on the medics, REMO and paramedics. Without reliable cell service our ability to protect the health of Durham's residents is impaired."[41]

Others in the Durham town board meeting that was described in the article talked about health issues and electromagnetic radiation. The *Washington Post* did a very similar article on a very similar meeting. In its article of October 2, 2010, the *Post* detailed a meeting in a suburban Fairfax County, Virginia Council of PTAs' discussion about placing cell phone towers at schools:

> Schools tend to be in locations that cellphone companies find desirable (Longfellow is in the middle of a cellular "dead zone" in the Falls Church area) and often have existing structures[.] … Parents have started groups such as Gainesville-based Moms for Safe Wireless and Falls Church-based Protect Schools. At Longfellow, the proposition has agitated a group of passionate, educated parents who have collected a mountain of information—much of it inconclusive—on non-ionizing radiation. … Even though most public health agencies agree that the radio-frequency radiation exposure from the towers is significantly lower than exposure from cellphones, the infrastructure's long-term effect has caused concern. "They tell you it's absolutely safe, and safe within the FCC standard … but it's impossible to gauge the safety because Milestone doesn't provide sufficient data to determine the total RF radiation that will be generated by the specific antenna array at Longfellow," said Neil Ende, a parent of a Longfellow student. On Monday, a team of Milestone employees tried to explain the basics of wireless infrastructure to parents, some of whom resisted their efforts. Few middle school PTAs boast a more impressive pool of professional expertise. "I don't need you to explain this to me; I'm an electrical engineer," one parent said. "I'm a medical oncologist at Georgetown," another man said, by way of introduction. "I'm a telecommunications attorney," said another. "I just spoke with one of the world's foremost radiation experts in Salzburg, Austria," said Karl Polzer, co-founder of Protect Schools, who raised concerns about the effect of long-term radiation exposure.[42]

Lake Placid, New York, is having the same concerns;[43] as are Townsend, Tennessee;[44] Panama City, Florida;[45] San Jose, California;[46] and Merrick, New York.[47]

Some towns have gone as far as to enact distance limitations from residential areas, a principle that most commentators believe may inspire a legal challenge. That doesn't dissuade the residents:

> The Hempstead Town Board unanimously signed off on legislation Tuesday morning that bans any new cell towers or antennas within 1,500 feet of homes or schools. During a public hearing on the new ordinance, speakers on both sides of the debate—wireless companies arguing that the ordinance was too restrictive and residents saying it needed to address further issues—urged the board to delay a vote on the new regulations. Town Supervisor Kate Murray said, however, that the time to act was now.
>
> "The bottom line is we know that this is a very tough piece of legislation, a great piece of protection for our residents," Murray said, later adding that although the law could be amended down the road, "the feeling of the board was that we had to pass legislation today because it is entirely too important to let it continue on."
>
> The ordinance also states that no new cell towers or antennas can be placed within 1,500 feet of daycare centers or houses of worship.[48]

Grass-roots entities are also springing up to oppose the installations in public fora. The city of Burbank, California has been confronted by a citizens' group called Burbank ACTION (Against Cell Towers in Our Neighborhood), which has hosted a website and collected news articles, prepared petitions and is attending City meetings en masse regarding the content and function of wireless ordinances.[49]

Perhaps a viewpoint, though, that puts the conflict into perspective is one rendered by UCLA law professor Jerry Kang, who specializes in technology and communications policy. Quoted recently in an Orange Coast *Daily Pilot* news story, and asked about the DAS technology, he indicated: "You have technology that evolves really fast, and you've got existing law that's designed for the tall cell towers. … Entrepreneurs push the edges, and then the law comes in and says, wait, this is not what we expected."[50]

As demand increases due to the proliferation of smart phones and more complex, more data-hungry devices, so will the profit motive for installation and maintenance of Distributed Antenna Systems nodes.

The profit motive for the installation and maintenance of these DAS "nodes" and the infrastructure that supports them isn't going to go away and, as demand increases due to the proliferation of smart phones and more complex, more data-hungry devices, so will the profit motive. The City of Scottsdale, Arizona is currently considering a proposal by NewPath Networks to build a network of 287 DAS nodes, roughly spaced every quarter-mile through central and northern portions of Scottsdale. The sites are going to be connected by 120 to 150 miles of fiber optic cable. NewPath Networks has already received 220 approvals prior to this submission; the capital investment that is needed to put in fiber optic cable and do the necessary trenching, undergrounding, and acquisition of rights-of-way to bury the cable will be sufficiently costly that NewPath, or any potential infrastructure provider, will have to know the limits and scope of what it can and can't do in attempting to install and maintain these antennae.[51] In some cases, NewPath's competitors have ignored or flouted approval requirements, thinking that they can profit sufficiently to justify the risk of regulatory denial. This has happened, for example, in California:

> NextG ran afoul of the PUC in 2009 when it dug into the public right-of-way without a full certificate, and the Commission fined it $200,000. Since then, NextG has obtained the necessary PUC approvals to build in the rights-of-way. … NextG rushed to install the equipment by Mallett's Laguna Beach house because the permitting process was taking too long and a competitor has already installed nodes, a company representative said at a planning commission hearing. "Just the idea that they came in without permission," Mallett said. "It was just business for them. They didn't care about how it affected us."[52]

One of the neighbors affected by NextG's conduct sums up succinctly the wellspring of anger and frustration that has developed as a result of the proliferation of these networks and the citizen and municipal opposition being brought to bear as a result of it. Rose Mallett, one of the neighbors affected by NextG and its installation, also became angry at NextG's conduct:

> NextG also installed an antenna and equipment near Rose Mallett's Laguna Beach home. Her front porch overlooks a row of homes and, past the roofs and under utility wires, you can clearly see a stretch of the Pacific. That was until crews hung a black box from a low utility wire. As Mallett, 60, rocked in her hammock, she couldn't get it out of her line of sight. Enraged, she called the city. What she found out surprised her even more. The company installed it without a city permit.[53]

The same news article quoting Rose Mallett quoted an FCC report indicating that North American Mobile customers will use 40 times more data.

Cities and their citizens will now have to be very vigilant and very vocal to prevent aesthetic intrusions; the profit motive is so great and the number of players in the arena so large that very little will stand in the way of an explosion and proliferation of antennae, nodes, and fiber optic cable. How the landscape will look across the United States in the future will be directly affected by this tug of war; it will be easy to put up these towers but hard to take them down.

NOTES

1. Amici curiae brief of NextG Networks of California, Inc. and the DAS Forum (2009 WL 99138), filed in support of petition for certiorari filed in Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008), cert. denied, 129 S. Ct. 2860, 174 L. Ed. 2d 576 (2009) (emphasis added).
2. The DAS Forum—About Us: Who We Are; at www.thedasforum.org/about/who.php.
3. http://www.thedasforum.org/events/DASPelicanHill.html.
4. http://en.wikipedia.org/wiki/moore's_law.
5. Amici Curiae brief of NextG Networks and the DAS Forum, supra n. 1 (emphasis added).
6. Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008), cert. denied, 129 S. Ct. 2860, 174 L. Ed. 2d 576 (2009).
7. San Diego County Ordinance No. 9549, § 1, quoted in *Sprint Telephony*, supra n. 6, 543 F.3d at 574.
8. *Sprint Telephony*, supra n. 6, 543 F.3d at 575.
9. *Sprint Telephony*, supra n. 6, 543 F.3d at 575.
10. HR Rep No. 104-458, § 704, at 207-08 (1996), cited in *Sprint Telephony*, supra n. 6, 543 F.3d at 576.

11. *Sprint Telephony*, supra n. 6, 543 F.3d at 576 (internal quotation marks omitted).
12. City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) (overruled by, Sprint Telephony PCS, L.P. v. County of San Diego, 543 F.3d 571 (9th Cir. 2008)).
13. Level 3 Communications, L.L.C. v. City of St. Louis, Mo., 477 F.3d 528 (8th Cir. 2007).
14. *Sprint Telephony*, supra n. 6, 543 F.3d at 578.
15. Brief for the United States as Amicus Curiae, Level 3 Communications, LLC, Petitioner, v. City of St. Louis, Missouri and Sprint Telephony PCS, LP, Petitioner v. San Diego County, California et al, United States Supreme Court cases numbers 08-626 and 08-759, 2009 WL 1497821, p. 2.
16. Brief for the United States as Amicus Curiae, supra n. 15 at p. 6 (emphasis added).
17. *Sprint Telephony*, supra n. 6, 543 F.3d at 578-579 (emphasis in original).
18. *Sprint Telephony*, supra n. 6, 543 F. 3d at 579-580.
19. *Sprint Telephony*, supra n. 6, 543 F. 3d at 580.
20. Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates, 583 F.3d 716 (9th Cir. 2009).
21. City of Rancho Palos Verdes, View Restoration Summary at www.palosverdes.com/rpv/planning/vrestoration/index.cfm.
22. *Sprint PCS Assets*, supra n. 20, 583 F.3d at 719-20.
23. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 721 n. 2.
24. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 720.
25. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 721 n. 1.
26. Sprint PCS Assets, L.L.C. v. City of La Cañada Flintridge, 182 Fed. Appx. 688 (9th Cir. 2006).
27. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 723.
28. *La Cañada Flintridge*, supra n. 26, 182 Fed. Appx. at 690-91.
29. *Sprint PCS Assets*, supra n. 20, 583 F.3d at 723-724.
30. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 724.
31. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 724-25.
32. T-Mobile USA, Inc. v. City of Anacortes, 572 F.3d 987 (9th Cir. 2009).
33. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 725.
34. *Sprint PCS Assets*, supra n. 20, 583 F. 3d at 727.
35. NewPath Networks, LLC v. City of Davis, 2010 US DIST LEXIS 40043 (E.D. Cal. 2010).
36. NewPath Networks, LLC v. City of Irvine, California, 2009 US DIST LEXIS 126178 (C.D. Cal. 2009).
37. *City of Davis*, supra n. 35, 2010 US DIST LEXIS 40043 at 8-9.
38. *City of Irvine*, supra n. 36, 2009 US DIST LEXIS 126178 at 54.
39. *City of Irvine*, supra n. 36, 2009 US DIST LEXIS 126178 at 55-56 (emphasis added).
40. See, e.g., City Council Agenda Report –City of Norwalk from Ernie V. Garcia, City Manager to Honorable City Council at www.ci.norwalk.ca.us/pdf/agendas/13%20-%20urgency%20ord%20-%20wireless%20antennas%2003-02-10.pdf.
41. Cell tower foes argue for alternate sites; Hilary Hawke, *The Daily Mail*, June 19, 2009 at www.thedailymail.net/articles/2009/06/20/news/news3.prt.
42. www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100107286_pf.html.
43. See, http://pressrepublican.com/0100_news/x877133006/cupola-cell-tower-needs-local-permit.
44. www.thedailytimes.com/article/20091115/news/311159963.
45. www.newsherald.com/common/printer/view.php?db=newsherald&id=87498.
46. "Our concerns have always been that a fourth tower is too many, the height is too high, and there's no adequate screening to have the development blend in with the community," neighbor Chris Hyrne said."
47. www.nytimes.com/2010/08/29/realestate/29lizo.html?_r=1&pagewanted=print ("Tina Canaris, an associate broker and a co-owner of RE/MAX Hearthstone in Merrick, has a $999,000 listing for a high ranch on the water in South Merrick, one of a handful of homes on the block on the market. But her listing has what some consider a disadvantage: a cell antenna poking from the top of a telephone pole at the front of the 65-by-100-foot lot. …. She said cell antennas and towers near homes affected property values, adding, 'You can see a buyer's dismay over the sight of a cell tower near a home just by their expression, even if they don't say anything.'")
48. *Celled-Out: Hempstead Town Board Adopts Strict Regulations on New Wireless Equipment*, by Ryan Bonner; Merrick Patch; Merrick.patch.com/articles/celled-out-hempstead-town-board-adopts-strict-regulations-on-new-cell-towers.
49. See, e.g., http://sites.google.com/site/nocelltowerinourneighborhood.
50. Orange Coast *Daily Pilot*; "Cell towers get poor reception from community" by Mike Reicher; www.dailypilot.com/news/tn-dpt-0725-cell-20100724,0,3681468,print,story.
51. See, e.g., www.scottsdaleaz.gov/projects/interest/newpath_networks.asp.
52. "Cell towers get poor reception from community," Orange Coast *Daily Pilot*; Mike Reicher, July 23, 2010 at www.dailypilot.com/news/tn-dpt-0725-cell-20100724,0,2872935.story.
53. "Cell towers get poor reception from community," supra n. 52.

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

Am. Jur. 2d, Zoning and Planning §§391, 895

Salkin, American Law of Zoning §§25:1 et seq.

Zeigler, Rathkopf's The Law of Zoning and Planning §§79:18 to 79:24

Kmiec and Turner, Zoning and Planning Deskbook § 3:5

See also Foster, The Better Part of Valor Is Co-Location: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities under the Telecommunications Act of 1996, 42 Urb. Law. 595 (Summer 2010)

RECENT CASES

Ninth Circuit holds city's ban on tattoo parlors violated First Amendment.

The municipal code of the City of Hermosa Beach, California effectively banned tattoo parlors from the City by not including them in a list of allowed commercial uses. Johnny Anderson sued the City in federal court under 42 U.S.C.A. § 1983, alleging that the City's ban on tattoo parlors was facially unconstitutional under the First and Fourteenth Amendments. The district court granted summary judgment to the City, holding that the act of tattooing was not protected under the First Amendment and that, in view of the health risks inherent in operating tattoo parlors, the City had a rational basis for prohibiting them.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The court noted that tattooing is purely expressive activity, then it is entitled to full First Amendment protection, subject only to reasonable "time, place, or manner" restrictions. On the other hand, if tattooing is merely conduct that contains an expressive element, it can be restricted under the test set forth in *U. S. v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). In its analysis, the court examined tattoos themselves, the process of tattooing, and the business of tattooing.

There seems to be, said the court, little dispute that a tattoo itself is pure First Amendment "speech." The fact that a tattoo is engrafted onto a person's skin rather than drawn on paper has no significance for First Amendment purposes.

The court then considered whether the process of tattooing is purely expressive activity, and held that it is. The court noted that neither the U.S. Supreme Court nor the Ninth Circuit has ever drawn a distinction, for First Amendment purposes, between the process of creating a form of pure speech (such as writing or painting) and the product of such processes. As with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to First Amendment protection. The fact that the customer ultimately controls what tattoo is created makes no difference, said the court, because the tattooist applies his creative talents as well.

Finally, the court held that even the business of tattooing qualifies as purely expressive activity. The court cited various cases in which the sales of paintings, or the giving of speeches for compensation, were held to be protected speech.

The court then turned to whether the City's ban withstood scrutiny as a reasonable "time, place or manner" restriction on speech. The court noted that the City's ban did not involve the content of the regulated speech. However, said the court, the ban was substantially broader than necessary to further the City's concerns with the health and safety concerns implicated by tattooing. The contention by the City that it did not have the resources to adequately monitor tattoo parlors did not justify an outright ban, said the court, because the provision of such resources was within the City's control; a total ban cannot be imposed on protected First Amendment Activity simply because of the government's failure to provide the resources it thinks are necessary to regulate it.

The court went on to say that even if the City's regulation were narrowly tailored to serve its health and safety interest, it would fail because it did not leave open ample alternative channels for communication of the information imparted by a tattoo. Temporary tattoos, or the wearing of t-shirts carrying a message, are not like a tattoo, said the court. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010).

Eastern District of Pennsylvania holds that communications tower company had standing to challenge denial of use variance for construction of wireless telecommunications facility, even though it was not a telecommunications carrier or service provider.

Liberty Towers, LLC, a company in the business of constructing and operating wireless telecommunications facilities, submitted an application to the Zoning Hearing Board of Lower Makefield Township for a use variance to construct and operate a wireless telecommunications facility. Both Sprint and T-Mobile sought to install communication antennas on the proposed facility.

The Board held public hearings on Liberty Towers' application, at which Liberty Towers presented evidence that both Sprint and T-Mobile had significant gaps in wireless communication services in the township, and that construction of the proposed facility would allow both carriers to provide adequate service to the township as required by their FCC licenses. The Board, however, denied the use variance.

Liberty Towers appealed the denial to the state Court of Common Pleas, and at the same time sued in federal district court, alleging that the denial of the use variance had the effect of prohibiting the provision of personal wireless service in violation of the federal Telecommunications Act (TCA), specifically 42 U.S.C.A. § 332(c)(7)(B)(i)(II). The defendants moved for dismissal of the federal action, alleging, inter alia, that Liberty Towers lacked standing to sue under the TCA because it was not a telecommunication carrier or service provider, but merely constructed and operated telecommunications facilities.

The court rejected the defendants' standing claim and denied their motions to dismiss. The plain language of the TCA, said the court, made clear that Liberty Towers had standing to sue in its language providing that "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof" could sue in any court of competent jurisdiction. Liberty Towers had been adversely affected by the denial of its application and therefore had standing to sue. The court also rejected the defendants' contention that the existence of a parallel proceeding in state court made the case unripe for federal judicial review.

Finally, the court held that the fact that wireless service providers other than Sprint and T-Mobile were able to provide services in the area where Sprint and T-Mobile had gaps in their services did not bar Liberty Towers' lawsuit. Under a Declaratory Order issued by the FCC in 2009, noted the court, a carrier may seek to remedy gaps in its own services even though other carriers provide service to the areas in question. *Liberty Towers, LLC. v. Zoning Hearing Bd. of Tp. Lower Makefield, Bucks County, Pa.*, 2010 WL 3769102 (E.D. Pa. 2010).

The owner went to court, seeking to enjoin the city from demolishing the building. After a trial de novo, the court ordered demolition of the building.

On appeal, the Court of Civil Appeals of Oklahoma affirmed. Among the arguments made by the owner on appeal was that the state statute under which the demolition was ordered was violative of the state constitution's taking clauses. The court noted that the statute in question had previously been found constitutionally sound as a police power regulation. Property owners in cities must keep their properties up so as not to endanger public health and safety. The statute was a constitutionally permissible police power statute because it was rationally related to protection of the health, safety and welfare of the public and was clear and unambiguous in that purpose. Therefore, it did not constitute an unconstitutional taking.

The court also held that the owner had been afforded due process. The statute under which the building had been ordered demolished provided for at least ten days notice to the owner, and for a hearing. The owner had been afforded extra notifications and ten hearings before demolition was actually recommended, and the owner was afforded an appeal to the city council, where the city staff recommendation was upheld. The owner was also afforded a trial de novo in the district court, and the instant appeal. *Manufacturers Guild, Inc. v. City of Enid*, 2010 OK CIV APP 87, 239 P.3d 986 (Div. 1 2010).

