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Response to Staff and County Counsel Statements on December 6.

On December 6th, the Board considered proposed wireless amendments to County Code Titles 16 and 22 for final adoption. After the considerable public opposition gave pause and the Staff and County Counsel were unable to fully answer questions, the Board decided to receive a legal briefing on December 20 and take the matter up again for deliberation on January 10, 2023. Fiber First Los Angeles County ("FFLA") was also unpersuaded by the Staff and County Counsel's responses.

This letter first lays out what the law actually provides and demonstrates that the County does in fact retain considerable power and discretion. Then we set out below several instances where *complete* responses to the Supervisors' questions could have validated the public's concerns and resulted in rejection of the proposed amendments.

There is no need to rush adoption of wireless-friendly amendments that unnecessarily limit public input, preclude environmental and historical review and give away the County's ability to decide whether a proposed facility is necessary and in a proper location. This is especially so for so-called small cells, which will be far more pervasive and present different issues than do large macro-towers.

We urge the Board to reject the proposed ordinances on January 10, 2023, as currently written.

1. Federal statutes and FCC rules

The place to start is the federal statute, and it simply does not support much of what the Board is being told. 47 U.S.C. §332(c)(7) states, in pertinent part (emphasis added):

> *Sec. 332(c)(7) Preservation of local zoning authority*
>
> *(A) General authority*
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> *Except as provided in this paragraph, nothing in this chapter 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 federal statute *expressly preserves* the County's discretion over "the placement, construction, and modification of personal wireless service facilities." The FCC cannot take this

right away,[1] and it has never purported to do so. There are some substantive limits in Section 332(c)(7)(B),[2] but none remove the County's basic right and power to control where wireless facilities are located or how they are constructed or modified other than the FCC rules implementing the "shall issue" requirements for "minor modifications" to "exempt facilities" in the Spectrum Act.[3]

The County can require that the wireless company prove that it must have a facility in a specific location in order to avoid an "effective prohibition" of service or unreasonable discrimination. The County **has** to approve a permit **only if the wireless provider proves with clear and convincing evidence that denial would effectively prohibit the carrier's ability to provide personal wireless service.** The Staff's proposed ordinances are deficient because they do not require the provider to prove actual need or a lack of technically-feasible alternatives.

The FCC did require that local governments allow small cells on public right-of-way, including on infrastructure owned by the County that is within right-of-way and it did limit the amount the County can charge. *Small Cell Order* ¶¶92-102. The Ninth Circuit affirmed on that point. So it is true that the County must allow leased access to right-of-way and County-owned infrastructure and it must suffer regulated charge limits as a general matter. But the FCC's decision *did not* require wireless company access everywhere and without limitation. The County still has §332(c)(7)(A) "general authority" over **location preferences**. Federal law does not grant the applicant the right to build whatever site in whatever location it chooses.

State and local jurisdictions may require wireless applicants to adopt the "least intrusive means" to achieve their technical objectives.[4] In the Ninth Circuit, the "least intrusive means" refers to the technically feasible and potentially available alternative design and location that

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[1] *See* Telecommunications Act of 1996, H.R. Rep. No. 104-458, at 207-208 (1996) (Conf.Rep.) "The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement.")

[2] The substantive limits are in Section 332(c)(7)(B)(i) and (iv):

> (B) Limitations
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> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—
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> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
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> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> ...
>
> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

[3] *See* 47 C.F.R. §1.1600, implementing Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, title VI (Spectrum Act of 2012), §6409(a), 126 Stat. 156 (Feb. 22, 2012) (codified as 47 U.S.C. §1455(a)).

[4] *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056 (9th Cir. 2014).

most closely conforms to the local values a permit denial would otherwise serve.[5] Applicants cannot rule out potential alternatives simply because they believe their preferred site is subjectively "better" than the jurisdiction's preferred alternative.[6] The local jurisdiction has the power to decide which among several feasible and available alternatives constitutes the best option. Similarly, an applicant cannot rule out a proposed alternative based on a bare conclusion that it is not technically feasible or potentially available; it must provide a meaningful comparative analysis that allows the jurisdiction to reach its own conclusions.[7]

2. Overconcentration

On December 6, 2021, Supervisors Hahn, Mitchell and Horvath each expressed concern over "overconcentration." Although the main discussion was about macro towers, small cells present the same concern. The answer is the same for both: the County ***can*** monitor for and prevent overconcentration using its "location" authority.

The County can most certainly deny a permit for a proposed small cell on County-owned infrastructure in right-of-way in environmentally-sensitive or historically-sensitive areas, and even in residential neighborhoods, purely on aesthetic grounds or local values. The County can determine that the proposed facility would create a safety hazard if, for example, it might impede escape from a fire or itself present a fire risk. The Board has full authority to require a full demonstration of compliance with all generally-applicable health and safety laws like electrical, fire and building codes.[8] The statute and FCC rules do not preempt state-law required environmental requirements.[9]

The proposed revisions to Title 16 do not take advantage of the County's expressly-retained local authority over location. The Title 16 and 22 drafts ordinances completely eliminate public participation for all projects other than new macro towers and give away the County's retained right to decide if a specific location for a small cell in right-of-way is appropriate.

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[5] *Id.*; *see also Verizon USA, Inc. v. City of Anacortes,* 572 F.3d 987, 995 (9th Cir, 2009).

[6] *American Tower Corp*., 763 F.3d at 1057 (finding that the applicant "did not adduce evidence allowing for a meaningful comparison of alternative designs or sites, and the [jurisdiction] was not required to take [the applicant]'s word that these were the best options.'").

[7] *Id.*

[8] *See Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies, Regarding Public Rights of Way and Wireless Facilities Siting; 2012 Biennial Review of Telecommunications Regulations,* 29 FCC Rcd 12865, 122951, ¶202 (Oct. 17, 2014): ("Congress did not intend to exempt covered modifications from compliance with generally applicable laws related to public health and safety. We therefore conclude that States and localities may require a covered request to comply with generally applicable building, structural, electrical, and safety codes or with other laws codifying objective standards reasonably related to health and safety, and that they may condition approval on such compliance.")(emphasis added).

[9] *See In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd 3102, 3132 ¶77 & nn. 152-153 (March 30, 2018), *rev'd other grnds United Keetoowah Band of Cherokee Indians in Oklahom*a, 933 F.3d 728, 744 (D.C. Cir. 2019) ("Finally, nothing we do in this order precludes any review conducted by other authorities – such as state and local authorities – insofar as they have review processes encompassing small wireless facility deployments. The existence of state and local review procedures, adopted and implemented by regulators with more intimate knowledge of local geography and history, reduces the likelihood that small wireless facilities will be deployed in ways that will have adverse environmental and historic preservation effects." (footnotes omitted)

3. Eliminating Public Input

At the meeting on December 6th the public's concerns were largely directed toward the Title 16 and 22 provisions governing wireless facilities other than macro towers, specifically small cells on private property (Title 22) and on County-owned property (Title 16). Staff suggested that the FCC's shot clock rules functionally require that public participation be eliminated and the only way to satisfy the rules is to implement a rubber-stamp ministerial process that essentially allows the wireless companies to put small cells wherever they want. This is flatly wrong.

There is a simple way to meet the shot clock rules without sacrificing public participation and abandoning meaningful evaluation. The Code should require that the wireless applicant do most of the work before filing the application and starting the clock. The Staff and public can then simply check their work while the shot clock is running. This is how the FCC meets its NEPA and historic preservation duties, and this is the method employed by a growing number of local zoning authorities.

4. The County *does* have control over small cell deployment

Supervisor Barger noted that the Staff is saying "we don't have local control, they can do what they want to do, and we have very little discretion." Amy Bodek seemed to confirm that statement. Supervisor Barger then said she wanted a continuance because she wondered if the Board could make the ordinances "have more teeth" and "go above aesthetics." Ms. Bodek then claimed aesthetics is essentially the limit of the County's control. Failure to pass the ordinances, she said, would be to give up even that limited control. In terms of controlling placement, Ms. Bodek claimed what "the FCC will not let us control is or consider are certain impacts and locations." She then asserted that "the county cannot prohibit or ban wireless facilities."

As we have noted herein**,** the FCC has **not** tied the County's hands. The County ***can*** have ordinances with more "teeth" and control far more than aesthetics. The County can still decide whether any proposed site for a macro tower or a small cell is appropriate. It can generally prohibit projects in inappropriate locations so long as there is a waiver process that will allow the wireless company to prove it truly needs the contemplated facility in one of those specific locations. The County can still require that the applicant provide notice to affected residents before it files, and still allow for an informal hearing. It can do so while complying with all federal and state laws and in a way that meets all FCC shot clock requirements.

5. What is the rush?

Supervisor Barger asked whether code amendments are absolutely required and if the action was time sensitive. Ms. Bodek admitted that immediate action is not required. She suggested, however, that if there is no action the County will lose all control over wireless deployment. She said that Staff is currently operating under a 2010 policy memo, which was necessary since the current code lacks definitions and no specific provisions for personal wireless services.

Ms. Bodek went on to say that action is necessary to the extent the Supervisors do want to exercise any control over aesthetics and design standards, the things she claimed are the *only* matters where the County retains discretion. Ms. Bodek repeatedly directed attention to how the proposed ordinances addressed new macro towers in the proposed Title 22 amendments. She deflected all attention from other application types like small cells, particularly those on county infrastructure that are addressed in Title 16.

We agree that the current ordinance could be much improved, but the 2010 policy memo will suffice for a bit longer and there is no risk of litigation if the County dedicates more time and effort toward much better and stronger Code provisions. The 2010 memo is far from perfect, but in practice – when the Staff actually applied its process and substance – it has allowed the County to exercise discretionary permitting. We entirely disagree that the draft ordinances retain or operationalize all the authority the County has. To the contrary, the draft ordinances *give away* all the County's power for no reason.

Ms. Bodek did not mention that Staff is not currently following the policy memo for many wireless applications. The 2010 policy memo requires a Conditional Use Permit for **all** wireless facilities. But apparently, in 2019, Regional Planning unilaterally decided to begin processing small cell applications under a more streamlined "Zoning Conformance Review" that treats small cell permits as a ministerial rather than discretionary review process.

Thus, there is no environmental or historic review. Staff has used this "ministerial" process to approve at least one unwanted small cell right in the middle of the View Park Historic District, a famous and precious place where African Americans created a vibrant neighborhood during the late 1950s. The Staff wants to rush these ordinance changes through to effectively ratify the "ministerial review" concept which has already been unilaterally implemented at the Staff level.

Conclusion

FFLA attorneys, with many years of experience in telecom zoning matters, have developed red-lined changes to the Staff's proposed draft ordinance. These revisions fully preserve the County's power to control wireless facilities' location and density while still meeting all federal and state requirements, enhancing public safety and fire specifications, and allow processing within the FCC's shot clock deadlines. We believe the Board should reject the proposed ordinances on January 10, 2023, request Staff prepare an Environmental Impact Report and, while that is in process, instruct the Staff to revise the ordinances to address the public's concerns.

FFLA stands ready to fully collaborate by lending its legal, environmental, and engineering expertise to assist Planning Staff in reaching superior ordinances that will effectively balance and reconcile all interests.

Sincerely,

Douglas A. Wood
Campaign Co-Coordinator