

CITY OF CALABASAS

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In The Matter of the City of Calabasas
Proposed Calabasas Municipal Code Section
17.12.050 entitled
“Antennas/Wireless Communication Facilities”

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**ANALYSIS AND SUGGESTED REVISIONS
TO PROPOSED CITY ORDINANCE 17.12.050**

Respectfully Submitted to the
City of Calabasas, California,

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Preamble

Before providing my suggested changes to the proposed new ordinance which is to constitute Calabasas Municipal Code Section .050 in Chapter 17.12 of Title 17, I have submitted an overview and analysis of the issues to be considered in enacting the proposed ordinance.

Such analysis and overview contain information which, in my experience, is not commonly known by most local government officials. As such, I have provided same to enable the City Council to make fully informed decisions when considering the provisions suggested for incorporation into the proposed new ordinance.

Section I of my analysis begins with an introduction to the most logical approach to enacting a local ordinance to regulate wireless facilities and the issues presented by such an approach.

Section II identifies the potential adverse impacts which often result from the installation and operation of wireless facilities in the absence of regulations to protect against such impacts.

Section III describes the constraints which the Telecommunications Act of 1996 (TCA) imposes upon the authority of the City to regulate wireless facilities, as those constraints have been interpreted by the United States Court of Appeals for the Ninth Circuit.

Section IV identifies a number of deceptive tactics commonly employed to deceive local authorities into permitting the installation or operation of wireless facilities which do not satisfy the requirements of local law, or which are likely to expose members of the public to RF radiation levels which exceed the maximum levels deemed safe by the FCC.

Section V addresses an important comment which has been raised by AT & T against the provisions of the proposed ordinance.

Section VI contains a risk of litigation disclosure.

Section VII thereafter sets forth my suggested revisions to the City's proposed ordinance.

I Introduction to The Zoning of Wireless Facilities

The development and use of wireless communications technologies have virtually exploded within the past decade. A vast majority of Americans have come to enjoy and rely upon the use of wireless devices including, but not limited to, cellular telephones.

The popularity of such devices, and the benefits being derived therefrom, is well established.

The use of wireless devices necessarily requires creation of an infrastructure capable of transmitting and receiving signals to and from such devices. Such an infrastructure commonly consists of components which include cell towers, antennas, transmitters, switching stations, transformers, back-up power supplies, etc.

The ever-increasing number of companies simultaneously pursuing the installation of such facilities has presented local authorities with very real challenges to protect their citizenry from a variety of adverse impacts from such installations.

Given the benefits derived from the use of wireless technologies, and the ever-developing law affecting the regulation of wireless infrastructure by local governments, a logical initial approach to regulating wireless facilities is to view them as public utility structures.¹

¹ This view was embraced by the United States Court of Appeals for the Second Circuit in Omnipoint Communications Inc. v. The City of White Plains, 430 F3d 529 (2005).

In Omnipoint, the United States Court of Appeals for the Second Circuit ruled that:

- (a) where a wireless company seeks a use variance to construct any new wireless facility in New York, New York State Law governing *public utility structures* applied, and
- (b) under New York State law governing *public utilities*, a local zoning board cannot grant a use variance to build a wireless facility, unless the respective applicant establishes that: (1) its proposed new construction is a *public necessity*, in that it is required to enable the applicant to render safe and adequate wireless service, and (2) there are compelling reasons, economic or otherwise, which make it more feasible to build a new facility other than to use alternative sources as may be provided by other facilities.

The Public Utility View

Traditionally, the regulation of public utilities by local government has been rather simplistic, for two basic reasons, namely (1) state oversight and (2) singular infrastructure.

First, the operations of traditional public utilities are generally regulated, and subject to oversight, by state public utility commissions.²

Unlike *traditional* public utilities, however, most wireless facilities are entirely *unregulated* by *any* authoritative body except to the extent that a local government has elected to enact an ordinance such as that being contemplated by the City of Calabasas.

Inasmuch as the Federal Communications Commission (FCC) does not require registration for any wireless facilities which stand less than 200 feet in height, the FCC does not know that they exist, or where they are, much less play any *material* role in regulating them.

The FCC does not test wireless facilities to ensure that the RF radiation levels to which they may be exposing the general public remain within the levels deemed safe by the FCC.

In fact, the FCC does not inspect them in any way, shape or form, whatsoever.

Moreover, the FCC does not monitor when antennas are modified or added to an existing facility, or if the power output of a wireless facility is increased after its initial installation.

As such, in the City of Calabasas, the City is the citizens' first *and only* line of defense against any potential adverse impacts which might be caused by the irresponsible placement or operation of a wireless facility within the confines of the City.

Singular vs Duplicative Infrastructure

Another key distinction between wireless facilities and traditional public utilities is that wireless facilities do not share two key characteristics of public utilities which have remained relatively constant through the years.

One such characteristic is that, as a general rule, public utilities have largely been provided through a singular main infrastructure.

² In California, for example, public utilities are regulated by the California Public Utilities Commission (the CPUC). In New York, they are regulated by the functionally equivalent New York Public Service Commission (the PSC).

Such singular infrastructures have generally included a single set of utility poles carrying power transmission lines and telephone lines, singular piping and/or conduit systems for the distribution of utilities such as natural gas or water, and in a similar vein, a singular piping system for the collection of sewage.

In stark contrast to traditional utilities, the wireless industry is comprised of innumerable wireless-related companies pursuing the installation of *duplicative* infrastructures.

Multiple companies pursue parallel saturations of wireless coverage of identical geographic areas, and each seeks to install their own duplicative sets of towers, antennas, transmitters and related equipment necessary to achieve that end.

Another characteristic of traditional public utility companies is that they generally do not seek to construct new facilities unless and until such new facilities are *actually necessary* to provide their utility services to the public, since it would make no financial sense to do otherwise.

By stark contrast, many of the companies which pursue applications to install new wireless facilities either: (a) do not actually provide *any* personal wireless services,³ or, (b) do not suffer from a gap in any wireless services they provide, at the locations where they seek to install many such facilities.

The fact is that the acquisition and installation of wireless facility sites is such a highly lucrative business, that it has spawned an entire industry of companies whose sole business consists of installing wireless facilities and leasing space on them to other companies.⁴

³ A prime example is the California-based company, *NextG Networks Inc.*, which has installed thousands of wireless facilities across the U.S. *See* NextGNetworks.net. *See also* *St CharlesTower.com*, the website of St. Charles Tower Inc, which, similar to *Next G*, has installed wireless facilities in multiple states.

⁴ Both the general public and most local government officials are generally unaware of the enormous revenues generated by the ownership of a wireless facility. Within the matter of *Beacon Wireless v. Town of Brookhaven*, (New York State Supreme Court, Suffolk County) my firm represents a plaintiff, which is suing the Town of Brookhaven to recover commissions allegedly due to it for wireless site acquisition services. More specifically, *Beacon Wireless* agreed to identify three locations on Town property which would be suitable for the installation of cell towers within the Town. In exchange for such services, the Town agreed to pay *Beacon* a *percentage* of the lease payments which wireless companies would pay the Town to lease space on those three towers. The total *commissions* claimed to be due and owing to *Beacon* for having located those three towers is \$4.6 million dollars.

As for the companies which *do* offer wireless services, many applications are being filed for a host of reasons wholly unrelated to any actual gap in their personal wireless service.

Wireless companies can, and arguably do, pursue applications to install towers and wireless facilities for such purposes as: (a) preparing for potential future capacity needs, (b) being the first among their competitors to secure a tower, and to force their competitors, thereafter, to lease space on their tower under applicable co-location requirements and/or (c) to secure wireless site installations “as assets” which increases the value of their respective company’s stock.

In at least half of the cases within which I have been retained to address an application to install a wireless facility, the applicant did not suffer from a significant gap in its personal wireless coverage at the location where they were seeking to install a new facility.

In fact, in a number of such cases, residents conducted actual call tests employing the respective applicant’s personal wireless service. Those residents found that they were invariably able to send and receive calls and texts, without difficulty, in the precise area where the applicant claimed it suffered from a “significant gap” in its personal wireless service.

As such, in any ordinance regulating the installation of wireless facilities within the City, such ordinance should restrict the construction of new facilities to those circumstances within which the construction of a new facility is actually necessary to provides wireless services, as opposed to being little more than an asset or future investment of a company seeking to profit from same.

This will ensure that, to the greatest extent feasible, wireless facility installations within the City will be treated just like any other public utilities, notwithstanding the fact that there will be a significantly greater level of redundancy in wireless facility infrastructures.

Such redundancy will be unavoidable, because under the constraints of the TCA, the City must permit redundant wireless structures, where they are actually necessary for a wireless provider to remedy a significant gap in its personal wireless service, even if a multitude of other providers have already saturated the area with facilities and wireless services.

Once again, the goal should not be to prevent the installation of wireless facilities when they are actually needed, especially given the clearly-established benefits they provide to residents of the City.

The goal should be to minimize the extent to which such facilities are constructed unnecessarily, or in a manner which adversely impacts the City, its communities and/or its residents, to any extent greater than is necessary.

II Potential Adverse Impacts of Wireless Facilities

While it is beyond argument that wireless facilities bestow a benefit upon the City's citizenry, it is equally beyond argument that, absent adequate regulation to prevent same, the irresponsible placement and/or operation of such facilities can have very real adverse impacts upon citizens, neighborhoods and the City as a whole.

(a) RF Radiation Exposure

Among the health and safety concerns created by the installation of a wireless facility, is the potential adverse health impacts which may be caused by the overexposure of citizens to RF radiation emanating from a wireless facility.⁵

Overexposure can occur where a facility exposes the public to levels of RF radiation which exceed the maximum safe exposure limits adopted by the FCC.⁶

I address this potential impact *first* for three reasons.

First, it is the RF radiation/health issue which often draws the most attention, and greatest hostility, at public hearings upon applications for the installation of wireless facilities.

Second, it is the single issue which, once raised before a local zoning board, most quickly draws threats of litigation by applicants.

⁵ The FCC has defined Radiofrequency (RF) Radiation, for its purposes, as electromagnetic energy, that can be further defined as waves of electric and magnetic energy moving together through space, where such electromagnetic waves have frequencies that range from 3 kilohertz (kHz) to 300 gigahertz (Ghz) FCC OET Bulletin 65, Supplement B, (Edition 97-10) at page 8.

⁶ The FCC has set maximum limits for human exposure to RF radiation based upon recommended exposure criteria issued by the NCRP and ANSI/IEEE, each of which identified "*the same threshold level at which harmful biological effects may occur.*" See FCC OET Bulletin 56, August 1999. Based upon same, the FCC adopted Maximum Permissible Exposure (MPE) limits, which are expressed in terms of electric field strength, magnetic field strength and power density *Id.* Under federal law, all wireless facilities must comply with such RF exposure limits *See* 47 C.F.R. §1.1310.

Third, because it is in this area that unscrupulous applicants most often employ misleading tactics in order to deceive local governments into believing that their proposed installation will be FCC compliant, when, in fact, it will not.

Each and every time this issue is raised, wireless companies protest that the Telecommunications Act of 1996 prohibits local governments from considering the potential adverse health impacts which their wireless facilities may have upon members of the general public due to exposure to RF radiation.

As the wireless companies are acutely aware, however, that statement is only *half* true.

What the TCA *actually* provides, is that local governments cannot consider such potential adverse health impacts, *to the extent that the applicant's proposed new facility will be FCC compliant.*⁷

As such, the City of Calabasas has the power to require an applicant to submit information to ensure that any proposed wireless installation will be FCC compliant, so that a wireless facility within the City does not expose the public to RF radiation levels which exceed the Maximum Permissible Exposure (MPE) levels deemed safe by the FCC.

Such RF radiation levels must remain within the FCC's MPE limits, not only at the time of a wireless facility's initial installation, but for the entire period during which a respective wireless facility is thereafter being operated within the City.⁸

Remarkably, while the FCC has issued rulings *to assist wireless companies* in the process of siting wireless facilities,⁹ it has *steadfastly refused to assist local governments* by issuing any ruling providing for, much less mandating, a procedure for local governments to follow when they seek to ensure that proposed wireless installations will be FCC compliant.

⁷ 47 U.S.C. §332(c)(7)(B)(iv).

⁸ The City should be aware of the practice of *powering-up* (as addressed in Section IV herein below) wherein the power output of an initially FCC compliant facility is increased *after* the facility has been approved by the City, and installation is completed.

⁹ *See, e.g.* FCC ruling 09-99, wherein the FCC created a "shot-clock" against local governments when processing applications for the siting of wireless facilities.

The FCC's failure to assist local governments, has continued for more than a decade,¹⁰ leaving local governments "in the dark" as to: (a) how to determine whether a proposed installation will be FCC compliant,¹¹ and (b) to what extent they are permitted to require proof of compliance from an applicant.

Despite same, it has been clearly established that local governments may require applicants to submit information to establish that their intended installation will be FCC compliant.

As recently held by the United States Court of Appeals for the Second Circuit:

"Because the FCC has not mandated any procedure by which localities must determine compliance with its requirements, there can be no serious dispute but that the Town may require applicants to submit information pertaining to RF emissions in order to determine whether the FCC standards are met i.e., it may require more than a statement of compliance."

New York SMSA Limited Partnership d/b/a Verizon Wireless et al,
603 F.Supp.2d 715, 730 (2009)

Across the Country, local governments have enacted ordinances which require applicants to submit proof that their facility will be FCC compliant.¹²

¹⁰ See FCC Report and Order FCC 00-408, November 13, 2000, "The sole question in this area posed by the RF Procedures Notice was the extent of a State or local government's authority . . . to require a demonstration of compliance with our RF exposure guidelines . . . we do not believe any binding rule governing demonstrations of compliance is necessary."

¹¹ See "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures and Practical Guidelines" FCC publication June 2, 2000 "This document is not intended to provide legal guidance regarding the scope of state or local government authority under Section 332(c)(7) or any other provision of law."

¹² See e.g. City of Berkeley, CA, Municipal Code 23C.17.090 ["No (wireless facility) shall at any time produce power densities that exceed the FCC's limits for electric and magnetic field strength and power density for transmitters. In order to ensure continuing compliance with all applicable emission standards, all (wireless facilities) shall submit reports (of FCC compliance) as required by this section"]; See also City of Burbank, CA, Municipal Code Ordinance 3817, effective 10/14/11.

(b) Aesthetics and/or Adverse Community Impacts

In the absence of any local ordinance, the unregulated installation of wireless facilities will generally inflict “a blight of ugly antennas” and irresponsibly placed cell towers upon a community or City.¹³ This phenomenon is occurring across the Country.

Installations can adversely affect the aesthetics and/or character of a neighborhood, community or City:

- (a) where an installation, because of its size, appearance or location is inconsistent with the character of the properties and/or community surrounding the installation, and as such, its installation has a direct adverse impact on the character of the neighborhood, community or area within which it has been installed, or
- (b) where the installation is aesthetically offensive, ranging from the mildly offensive to an “aesthetic blight” upon a community.

As should be expected, the magnitude of such potential impacts, are greatest in residential communities, such as those within the City of Calabasas, where homeowners go to great lengths, and expend vast sums of money, to make their surroundings aesthetically pleasing.

The fact is, Americans have become so focused upon the aesthetic appearance of their homes and communities, that decorative landscaping supply and installation is a multibillion dollar industry in the United States.

Under the circumstances, federal Courts have upheld the power of local governments to deny wireless installation applications where the proposed installation will cause an adverse impact upon the aesthetics or character of the local area, and have further ruled that such denials do not violate the TCA.¹⁴

¹³ By way of example, the Town of Hempstead, New York experienced a massive surge in wireless facility installations, during which period the Town failed to enact any ordinance to regulate the installation of such facilities. As a result, the Town is now plagued with perhaps as many as 1,000 installations, with many arguably being “the most ugly antenna installations” one might imagine. Free of any restraints, wireless companies simply installed that which was cheapest and quickest to install, with complete and utter indifference to “aesthetics.”

¹⁴ See Omnipoint Communications Inc. v. City of White Plains, 430 F3d 529 (2nd Circuit 2005).

(c) Physical Safety Concerns

Similar to *Smart Cars*, wireless facilities are designed and built to be economically sensible, rather than to be as safe as possible.

The economies of their design, together with the blinding pace at which cell antennas and/or cell towers are being installed, have rendered quality control over their manufacture, installation and maintenance virtually impracticable.

Not surprisingly, wireless facilities can and do fail, often in dramatic fashion.¹⁵

Across the country, there are documented cases of cell tower collapses, wireless facility fires, and other failures, due to a wide range of structural or maintenance failures.

It is not possible to ascertain, with any level of accuracy, how often such failures occur, because (not surprisingly) wireless companies do not publicize such failures.

With a simple visit to the popular website *YouTube*, however, one can readily view videos of a cell tower erupting into flames,¹⁶ or burning as it collapsed to the ground.¹⁷

¹⁵ Lack of quality control was glaringly apparent in a case in Oswego New York where a new cell tower collapsed at a firehouse, crushing a Police Chief's vehicle, where the bolts securing the tower to its base had apparently not been tightened. To see vivid photographs of same, go to: <http://www.firehouse.com/node/62632>.

¹⁶ Video footage of a cell tower which burst into flames in New Jersey in January of this year can be viewed at: http://www.youtube.com/watch?v=y__NKVWrazg, or by searching for "cell phone tower fire" on *Youtube*.

¹⁷ Video footage of a flaming cell tower collapsing to the ground in Massachusetts can be viewed at: <http://www.youtube.com/watch?v=0cT5cXuyiYY&NR=1>, or by searching for "cell tower burns to the ground" on *Youtube*. An article regarding a cell tower erupting into flames in Michigan can be found at: http://blog.mlive.com/annarbornews/2007/07/updated_cell_phone_tower_fire.html

Common structural elements of cell towers which are known to have caused or contributed to failure and/or collapse include baseplates,¹⁸ flanges, defective sections,¹⁹ joints and guy wires, among others.

Taking these structural failures into consideration, local zoning authorities have enacted “fall-zone” requirements, which mandate that wireless facilities are maintained at a sufficient distance from other structures and the general public, to ensure their safety in the event of a structural failure or fire at a wireless facility.

The rule of thumb which seems to be taking hold across the United States is that most local ordinances provide for setbacks of 150% to 200% of the height of a proposed tower.

These setbacks are deemed suitable to protect against the dangers structural failures of a collapse, falling pieces of a tower, fire, or even falling chunks of ice which might fall from a tower.

I am constrained to note that, at a recent meeting of the City counsel, a resident presented the counsel with a large color photographic image depicting a wireless facility within the City, which had been allowed to fall into a state of disrepair.

More specifically, the image showed that a large cover plate had “fallen off” of the facility’s enclosure, thereby exposing electrical wiring to both the elements and the general public.

Most troubling within such presentation, was a representation by the resident, that the owner of the facility had been notified of the defect, but they had not replaced the cover plate despite the passage of several months after it had been notified of the condition.

As is self-evident, this reflects that there exists a need in Calabasas to ensure that its proposed ordinance contains a mechanism to make certain that wireless facilities are properly maintained by their owners.

¹⁸ Images of a monopole which collapsed in California, apparently due to a base plate failure, can be viewed at:

<http://residentsact.blogspot.com/2007/11/just-how-safe-are-monopole-cell-towers.html>

¹⁹ To view a video of a failure where a section of a cell tower “sheared off” and speared itself into the ground in a residential backyard, go to:

<http://www.youtube.com/watch?v=DdOPITTstWQ&feature=related>

(d) Noise

Another potential adverse impact from a wireless installation is noise.

In a recent federal case I had filed in the in the United States District Court, E.D.N.Y.,²⁰ my clients described how a wireless facility located roughly 100 feet from their backyard was generating a humming noise, similar to the type of noise one would hear from a power plant or transformer station.

Such noise was continuously emanating into their backyard, and deprived them of any opportunity to enjoy a quiet, peaceful night out on their back deck.

²⁰ Thomas Hoy and Elke Hoy v. The Incorporated Village of Bayville, Sprint Spectrum Realty Company, L.P., Nextel of New York, Omnipoint Facilities Network 2, LLC, New York SMSA Limited Partnership, U.S.D.C. E.D.N.Y. 10 CV 0094 (JFB)(AKT).

III The Telecommunications Act of 1996

Across the United States, local governments have faced a *tsunami* of applications to install wireless facilities, which was ushered in by 47 U.S.C.A. §332, commonly known as the federal Telecommunications Act of 1996 (the “TCA”).

At the heart of the *tsunami*, is 47 USCA §332(c)(7)(b) which imposes five (5) restrictions upon the authority of local governments to regulate the installation of wireless facilities, and/or to deny applications seeking approvals for such installations.

The five (5) constraints which the TCA imposes upon local zoning authority consist of the following:

- (a) Local governments cannot unreasonably discriminate among providers of functionally equivalent services §332(c)(7)(B)(i)(I),²¹
- (b) Local governments cannot prohibit or have the effect of prohibiting the provision of personal wireless services §332(c)(7)(B)(i)(II),²²

²¹ As interpreted by the United States Court of Appeals for the Ninth Circuit, this provision allows some discrimination among providers of equivalent services. Any discrimination need only be *reasonable*. MetroPCS Inc. v. The City and County of San Francisco, 400 F3d 715, 727 (2005)[“Most courts have recognized that discrimination based on traditional bases of zoning regulation, such as preserving the character of the neighborhood and avoiding aesthetic blight are reasonable and thus permissible . . . In fact, the sole district court case in the Ninth Circuit on this issue holds that a mere increase in the number of wireless antennas in a given area over time can justify differential treatment of providers”].

²² “Effect of prohibiting” - As reflected within its text, §332(c)(7)(B)(i)(II) prohibits local governments from enforcing ordinances which actually either prohibits or “have the effect of prohibiting” the provision of wireless services.

In 2008, *Sprint* sued the County of San Diego to challenge the City’s ordinance regulating the installation of wireless facilities, claiming that a parallel law, 47 USC §253(a), prohibited any ordinance which “*may*” have the effect of prohibiting wireless services. In considering *Sprint’s* argument, the United States Court of Appeals for the Ninth Circuit reversed its own previous decisions, and ruled that a plaintiff suing a municipality under section §253(a) must show that the ordinance being challenged imposes *an actual or effective prohibition*, rather than *the mere possibility of prohibition*. Sprint Telephony PCS LP v. County of San Diego, 543 F3d 571 (2008).

- (c) Local governments must act upon any application to place, construct or modify a wireless facility within “a reasonable period of time” §332(B)(7)(B)(ii),²³
- (d) Any decision to deny an application to place, construct or modify a wireless facility shall be *in writing* and be *supported by substantial evidence* contained in *a written record* §332(c)(7)(B)(iii),²⁴ [italics added] and
- (e) Local governments cannot regulate the placement, construction or modification of a wireless facility on the basis of environmental effects of radiofrequency emissions, *to the extent that such facilities comply with the FCC’s regulations concerning such emissions* §332(c)(7)(B)(iv) [italics added].

Ironically, §332(c)(7) is entitled “Preservation of local zoning authority” and subparagraph (B) which contains the above-referenced restrictions is preceded by subparagraph (A) which provides:

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

Alternatively stated, subject to the five limitations listed above, the City of Calabasas remains vested with full authority to regulate the installation and operation of wireless facilities, just as it would regulate any other structures within the City.

²³ On November 18, 1999, the FCC adopted ruling FCC 09-99 which imposed the following time frames within which local governments must act upon siting requests for wireless towers or antenna sites: (1) 90 days for the review of collocation applications, and (2) 150 days for the review of siting applications other than collocations.

²⁴ Written Record - In MetroPCS v. City and County of San Francisco, 400 F.3d 715(2005) the United States Court of Appeals for the Ninth Circuit adopted the *Todd* standard for what satisfies the requirement of a written record. Under this standard, to satisfy §332(c)(7)(b)(iii) any local government which denies an application for the installation of a wireless facility must: (a) issue a written denial which is separate from the written record of the proceeding, and (b) the denial must contain a sufficient explanation of the reasons for the denial to allow a reviewing Court to evaluate the evidence in the record supporting those reasons.

“Substantial Evidence” - In MetroPCS, the Ninth Circuit Court of Appeals also embraced *Oyster Bay* standard for what constitutes “substantial evidence.” Under this standard, substantial evidence means less than a preponderance but more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Review under this standard is essentially deferential, such that Courts may neither engage in their own fact finding nor supplant a local zoning board’s reasonable determinations.

IV Deceptions Commonly Employed Against Local Zoning Authorities

Unfortunately, representatives of applicants seeking to install wireless facilities often successfully engage in a variety of deceptions to mislead local zoning authorities into granting applications which should be denied, or to enable them to install wireless facilities which are not FCC compliant.

Such deceptions commonly include deliberately providing false or misleading information to local zoning authorities, concealing information, or otherwise engaging in affirmative efforts to mislead both local zoning authorities, and residents who might seek to oppose the installation of a proposed new facility.

Far more often than not, such deceptions are successful, and the local authorities who have been successfully deceived rarely, if ever, learn of the deception.

In enacting any ordinance to regulate the installation of wireless facilities within its confines, the City should consider such deceptive practices and ensure that its proposed ordinance affords protection against City representatives deceived by applicants.

To familiarize City's representatives with some of the issues which applicants often address through deception, and the most common types of deception employed, I offer the following:

(A) False Representations of FCC Compliance

The Telecommunications Act of 1996 provides that "to the extent that such facilities comply with the FCC's regulations concerning such RF emissions," local governments are prohibited from considering the potential adverse health impacts of the RF radiation to which the intended wireless installation will expose the public.

Alternatively stated, if an applicant establishes that their proposed tower or antenna will not expose members of the general public to radiation levels which exceed the maximum levels deemed safe by the FCC, then the local government cannot consider any potential adverse health impacts from the tower or antenna's radiation when deciding a zoning application to install them.

To establish that their intended installation will be FCC compliant, applicants generally submit "FCC compliance" reports which are prepared by RF engineers, who certify that, as of the time of installation, the antennas will be FCC compliant.

With alarming regularity, however, the representatives of wireless companies who prepare or cause the preparation of such compliance reports mislead local governments to falsely believe that their proposed installation will be FCC compliant, when, in fact, it will not be FCC compliant.

The most common practices in this regard are: (i) proffers of FCC compliance based upon the wrong FCC standards, (ii) projecting RF exposure levels based upon false distance limitations (“The Distance Game”) and (iii) powering up.

(i) Proffers of Compliance Under
The Wrong FCC Standard

To enact any meaningful ordinance to ensure that a wireless facility will be FCC compliant, it is critical to understand that there are two very different sets of RF radiation limits adopted by the FCC, as codified under the Code of Federal Regulations.

These include: (a) the “*general population*” limits, which are the maximum RF radiation levels to which wireless facilities can expose the general public, and (b) the “*occupational*” limits, those being the RF radiation levels to which a facility can expose workers who maintain those facilities.

As adopted by the FCC, the *occupational* limits allow for RF radiation exposure levels as much as 500% to 600% higher than the maximum levels deemed safe for the *general public*.

Far more often than conceivable, applicants “trick” local zoning boards into granting them permission to install a wireless facility which exposes the public to RF radiation levels well in excess of the levels deemed safe by the FCC.

To do so, they simply represent to a local zoning board that the level of RF radiation exposure “will be within the limits set by the FCC,” while the local board is entirely unaware of the fact that the applicant is referring to the wrong limits.

Simply stated, in representing that their maximum exposure levels will be within FCC limits, they refer to the occupational limits, rather than the general population limits, so that when the facility is installed, they can be exposing members of the general public to radiation levels as much as 500% to 600% higher than the maximum levels deemed safe by the FCC.

As they are well aware, the Code of Federal Regulations (CFR) makes it crystal clear when each respective set of limits is to be applied.²⁵

The occupational limits can only be applied in situations where the facility prevents members of the general public from reaching an area in close proximity to the facility.

In an effort to misapply the occupational standard, representatives of wireless companies can, and do, falsely represent how close people will be able to get to their facility.²⁶

²⁵ 47 CFR §2.1 dictates that the less stringent, *occupational limits* apply as follows:

“Occupational/controlled exposure. For FCC purposes, applies to human exposure to RF fields when persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over their exposure. Occupational/controlled exposure limits also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits, as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area by some other appropriate means.”

By contrast, 47 CFR§ 2.1 dictates that the more stringent *general population* limits apply as follows:

“General population/uncontrolled exposure. For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related.”

²⁶ In a recent case before a Zoning Board of Appeals in the Town of Hempstead, New York, an applicant’s RF engineer testified that a proposed facility would be FCC compliant based upon a claim that the closest distance a member of the general public would get to the proposed antennas would be eighty (80) feet. Upon cross examination by me, the expert conceded that: (a) proposed antennas being mounted upon a flat roof directly above an apartment would be only a few feet from the inhabitants of the apartment, and (b) the RF radiation levels would exceed the general population RF radiation exposure limits by 600% to 700%.

(ii) The Distance Game

Within their FCC compliance reports, RF engineers perform mathematical calculations to determine the levels of RF radiation to which a proposed wireless facility will expose members of the general public or others.

At the heart of such calculations is the minimum distance factor.

As is commonly known, the closer one gets to a RF emitting antenna, the greater the level of RF radiation to which they are exposed. Significantly, as the distance between a person and a transmitting antenna closes, the level of RF radiation exposure increases *exponentially*, rather than *proportionally*.

As such, in determining such exposure level for preparation of an FCC compliance report, the engineer must start their analysis by first determining the closest distance anyone will be able to get to an antenna which is proposed for installation.

To prepare calculations which falsely reflect that a proposed antenna will expose the public to radiation levels considerably lower than what the actual levels will be, all an engineer has to do, is start their calculation with a false minimum distance factor.

This tactic is simple, effective, and commonly employed.²⁷

²⁷ In support of an application currently pending before the Village of Southampton, New York, an applicant's representative submitted a RF Compliance report, pertaining to an application to install an antenna array inside the steeple of the oldest Presbyterian church in the United States. In preparing such a report, the applicant's representative premised his calculations upon "the assumption" that the closest anyone will get to the antennas will be the distance between "the antennas way up in the steeple" and someone standing down on the sidewalk near the church. As is common knowledge in the Village, the steeple houses a clock which is required to be manually reset, and it has been reset every eight (8) days, continuously from 1871 through the present. As such, as was likely known to the applicant's representatives, the closest that anyone will get to the antennas is less than four feet.

(iii) Powering Up

Within their FCC compliance reports, wireless companies cause RF engineers to certify that, as of the time of its installation, a proposed wireless facility will be FCC compliant.

As is known to the wireless industry, however, the installation of wireless facilities and their antennas is not stagnant. For a host of reasons, including, but not limited to evolving technology, antennas are very often replaced.²⁸

As is also known to the wireless industry, once the tower or antennas are installed, there is absolutely nothing to stop the company which owns them from “powering up” the site by either: (a) increasing the power output of the antennas, or (b) replacing them with different, more powerful antennas.²⁹

Where this occurs, there is always the possibility that members of the public could be exposed to radiation levels which exceed the maximum levels deemed safe by the FCC.

In the absence of any local regulation providing for same, there is absolutely no way the City of Calabasas would know if the power output of the facility or its antennas has been increased.

Nor would members of the general public know if they were being exposed to excessive RF radiation levels, because RF radiation cannot be “felt.”

²⁸ Within the context of a federal lawsuit my firm commenced in the United States District Court, E.D.N.Y. against five (5) of the largest wireless companies in the U.S., it was disclosed that a number of antennas at the respective site were entirely removed and replaced with larger ones, which the wireless company described as “routine maintenance.”

²⁹ Wireless Companies can easily claim a need to “power-up” due to changing technologies. *See e.g. Sprint Spectrum L.P. v. Mills*, 283 F3d 404 (2nd Cir. 2002) [In *Sprint*, a New York School District entered a lease to allow Sprint to install an antenna atop a high school, but placed RF emission limits within the lease. After *Sprint* had agreed to the terms of the lease, including the RF emission limits, *Sprint* advised the School District that “changes in available equipment required it to modify its original installation plan,” and that one of the changes would be to increase the RF emissions from the installation. After the School District refused to allow the more powerful RF emissions, *Sprint* sued the School District, claiming that the Telecommunications Act of 1996 (TCA) preempted the School District from setting maximum RF levels in the lease. The United States Court of Appeals for the Second Circuit ruled against *Sprint*, holding that the TCA did not pre-empt enforcement of the RF emission limitations which the School District had set in the lease].

(B) False Representations of Need

As ruled by the United States Court of Appeals for the Second Circuit in *Omnipoint, supra*, under New York State law, local zoning boards cannot grant wireless companies use variances to install wireless facilities, unless they can establish, among other things, that the proposed new installation is necessary to remedy a significant gap in their wireless service.

In more than half of the matters within which I have been retained to address such an application, the respective applicant was claiming, and/or attempting to mislead a local government to falsely believe, that a non-existent gap existed.

The most common tactics currently being employed in this regard are the bait and switch, and massaging the numbers.

(i) The Bait & Switch

The bait & switch is simple. A carrier who does not suffer from a significant gap in service, will posit that it suffers from a gap in “*in-building* coverage,” meaning that it lacks sufficient signal strength *inside buildings*, to provide personal wireless services.

Rather than simply testing those signal strengths, however, the applicant performs a drive test, within which they record signal strengths encountered during a drive through the geographic area at issue.

Then, they “calculate” what the signal strengths “*would be*” inside buildings in the area, by multiplying the outside signal strengths by a completely arbitrary factor, claiming that such factor accounts for the reduction in signal strength which will occur as a result of the signal passing through the structural materials of buildings.

As logic would dictate, if they actually wanted to know the signal strength inside a building, they could simply enter the building and record it.

They choose, instead, to conduct an outside drive-test, because it enables them to arbitrarily choose a “multiplication factor” to proffer that the “calculated” *in-building* signal strengths are such that the applicant is suffering from a significant gap in its coverage.

(ii.) Massaging the Numbers

Massaging the numbers is even easier. In this tactic, they don't even bother to do a drive test. Instead, they buy "canned" signal strength data, and then they "introduce variables."

This means they take the canned data, and multiply it by some arbitrary percentage factors, to arrive at calculated signal strengths which reflect that they suffer from a significant gap in coverage.

In my personal experience, in more than 60% of the cases wherein an applicant claimed that it suffered from a significant gap in coverage, no such gap existed.

(C) Stealth Installations

An additional "tactic" with which any municipality should be concerned, is the practice of wireless companies undertaking "stealth installations."

Stealth installations include:

- (a) where a wireless company simply proceeds to install a wireless facility without providing a local government with any notice whatsoever, nor applying for any type of zoning approvals at all,³⁰ and/or

³⁰ In the Matter of the Application of T-MOBILE NORTHEAST LLC, T-Mobile filed an application to "legalize" a partially completed monopole which had been installed upon a poured concrete foundation in the Town of Huntington, New York. The installation had been undertaken without the filing of any applications seeking any zoning approvals from the Town, allegedly in violation of setback requirements and the necessity for a Special Permit. During a public hearing upon a belated application to legalize the installation, I questioned a neighbor who testified that the concrete foundation for the tower "*was poured at midnight in December*" - the neighbor's assumption being that the choice of time was deliberately calculated to ensure that none of the neighbors would be around to object to the installation.

- (b) where a wireless company installs a wireless facility, literally under cover of darkness, at night, on a holiday, or at any other time when they anticipate no one will see the installation, or be around to raise objection to it.³¹

Having personally encountered at least a dozen cases involving stealth installations, I cannot overstate the importance of enacting regulations to address post-installation redress for the City in cases of stealth installations of wireless facilities.

³¹ In the Matter of DeMarco, my clients, a New York family arrived home to find workers installing something in the ground on their front lawn. When approached by the family, the workers allegedly explained to them that: (a) there was a public right-of-way across their front lawn, and (b) that the ground-wire they were installing was for a new streetlight which was going to be installed at the street in front of their home. Less than 48 hours later, the family came home to find a 40 foot cell tower on their front lawn. The cell tower was owned by the California-based company NextG Networks. *See* http://abclocal.go.com/wabc/story?section=news/local/long_island&id=7937987
<http://newyork.cbslocal.com/2011/02/03/cell-tower-on-front-lawn-surprises-long-island-couple/>
<http://northshoresun.timesreview.com/2011/02/5977/town-asking-wireless-company-to-take-down-tower-built-on-mount-sinai-familys-property/>

V AT & T's Comments Regarding PUC §7901

I have reviewed the comments which have been submitted by AT & T, and the revisions they propose be made to the draft ordinance.

Below, I address AT & T's comment regarding "Applicable Law." AT & T's comments regarding specific sections of the proposed ordinance are addressed in Section VII herein below.

AT & T Comment - Applicable Law

Under the heading "Applicable Law," AT & T briefly addresses the constraints of the TCA, and then states:

"In our view, the City possesses only a limited right to curtail the rights of telephone corporations under Section 7901" of the California Public Utilities Code.

As an attorney retained to provide peer review services to the City, I am constrained to advise the City that:

- (a) it is beyond argument that the City possesses the power to regulate the installation of wireless facilities in public rights of way,
- (b) Section 7901 imposes constraints upon that power, and
- (c) wireless companies will claim, and have tried to claim, that §7901 leaves local governments with less regulatory power than that which they still possess.

In Sprint PCS Asserts LLC v. City of Palos Verdes Estates, a wireless company argued that §7901 prevents local governments from regulating the installation of wireless facilities based upon aesthetics.

In rejecting *Sprint's* argument, the United States Court of Appeals for the Ninth Circuit ruled that:

- (a) The California Constitution authorizes local governments to make and enforce, within their limits, all local, police, sanitary and other ordinances not in conflict with general laws,

- (b) The question before the Court was whether or not California Public Utility Code divested the City of its authority to deny applications to install wireless facilities based upon aesthetics, and
- (c) Neither Public Utilities Code §7901 nor §7901.1 conflicted with “the City’s default power” to deny a wireless facility application for aesthetic reasons.

Sprint PCS Asserts LLC v. City of Palos Verdes Estates, 583 F3d 716 (2009).

Significantly, before rendering its ruling, in *Sprint*, the United States Court of Appeals for the Ninth Circuit made a request to the California Supreme Court, asking the Supreme Court to decide whether PUC 7901 and 7901.1 permit local governments to restrict the placement of telephone equipment in public rights-of-way based upon aesthetic grounds.

The California Supreme Court denied the federal Court of Appeal’s request that the Supreme Court decide such issue, and concomitantly, the federal Court of Appeals rendered its own ruling in the absence of same.

A reading of the Court’s decision in *Sprint* suggests that, in the Federal Court’s view, local governments in California retain “default” power to regulate wireless facilities in public rights of way.

Not being admitted to practice in the State of California, however, I cannot provide direct guidance to the City in interpreting how broad the City’s power remains under California law.

ACCORDINGLY, I STRONGLY RECOMMEND THAT THE CITY OBTAIN A SECOND OPINION FROM AN ATTORNEY ADMITTED WITHIN THE STATE OF CALIFORNIA REGARDING THE EXTENT OF THE CITY’S AUTHORITY TO REGULATE THE INSTALLATION OF WIRELESS FACILITIES WITHIN A PUBLIC RIGHT OF WAY.

VI Risks of Litigation Disclosure

In 2005, after MetroPCS sued the City and County of San Francisco to challenge their ordinance regulating wireless facilities, the United States Court of Appeals for the Ninth Circuit opined:

“This case marks yet another episode in the ongoing struggle between federal regulatory power and local administrative prerogatives - the kind of political collision that our federal system seems to invite with inescapable regularity.”

MetroPCS v. The City and County of San Francisco, 400 F3d 715, 718 (2005)

Just as local governments can be expected to enact ordinances to protect the interests of their citizenry from the unregulated installation and operation of wireless facilities, wireless companies can be expected to file lawsuits to challenge denials of applications, or ordinances themselves,³² especially given the enormous revenue generated by the ownership and/or operation of such facilities.

The simple realities are that:

- (a) there are huge financial incentives to secure wireless installations regardless of the cost,
- (b) as a practical matter, the wireless industry has virtually unlimited resources to pursue litigation against local governments,
- (c) the wireless industry has an incentive to file lawsuits to “make examples” of some local governments, so that local governments with lesser resources will “fall in line” under fear of similar litigation,
- (d) the attorneys representing wireless companies may not hesitate to recommend litigation knowing that they will be well-paid if the wireless company hires them to pursue same.

³² As is undoubtedly known to both the City Counsel and City Attorney, local governments across California and the rest of the Country are being sued by wireless companies to challenge denials of individual zoning applications, or local ordinances which regulate the installation of wireless facilities. *See e.g. NextG Networks of California Inc. v. City of Newport Beach CA*, 2011 WL 717388 (C.D. Cal.), *Sprint Telephony PCS LP v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008), *MetroPCS v. The City and County of San Francisco*, 400 F3d 715 (9th Cir 2004).

One company, Omnipoint Communications Inc., has even gone so far as to sue an attorney for having drafted a zoning ordinance for a local government.³³

To the extent that wireless companies have succeeded in lawsuits claiming that a local government has violated the TCA, the relief generally awarded by the respective federal Court has been affirmative injunctive relief directing the respective government to issue the desired permit or approval necessary to enable the company to install its desired facility.

I am currently unaware of any case within which a wireless company has been awarded damages where it succeeded in establishing that a local government had violated the TCA

Enterprising attorneys representing wireless companies have tried to recover damages for TCA violations by asserting claims under 42 U.S.C. §1983, but both the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court have ruled that TCA violations do not give rise to §1983 claims.³⁴

The fact is that wireless facilities enable both citizens and visitors within Calabasas to receive personal wireless services, and thereby provide a valuable benefit.

As such, the most logical approach to regulate the installation of wireless facilities is to recognize that they are as necessary as power plants or public water distribution systems. The City, however, needs to regulate them in such a way as to permit the installation of no more structures than are actually necessary to provide the services at issue and to ensure that the placement, construction and maintenance of same limits any adverse impacts on the City and its citizens.

Consistent with such approach, my drafting efforts herein are not intended to prohibit or effectively prohibit the installation of wireless facilities.

They are to assist the City in drafting a regulation which will give the City the broadest authority possible, in seeking to further the legitimate planning goals described herein.

³³ Omnipoint Communications Inc. v. Richard Comi, 233 F.Supp.2d 388 (2002)[Ruled attorney could not be held liable under 42 U.S.C. §1983 for drafting a wireless ordinance for a local government].

³⁴ See e.g Sprint Telephony PCS LP v. County of San Diego, 543 F3d.571 (9th Circuit 2008).

Towards that end, I have submitted herewith a number of suggested amendments to the City's draft Ordinance.

Any local government must recognize, however, that there will always exist the possibility that a wireless company may commence a lawsuit against it, anytime the local government either denies a respective application, or enacts an ordinance to restrict or limit such installations, and may seek to recover attorneys damages and/or costs in any such action.

As such, in proffering this submission to the City of Calabasas, I do not provide any guarantee nor representation that a wireless carrier or company will not commence an action based upon any denial of an application for the installation of a wireless facility processed under the new ordinance, or that they will not file an action to challenge the ordinance itself.

VI Suggested Revisions to Proposed
Section .050, Chapter 17.12 of Title 17

*I recommend that proposed Section .050 begin with a definition section,
to precede what has been proposed as Section A.*

The definition section should include the following:

Definitions. For purposes of this Section, the following terms, phrases, words, abbreviations, their derivations and other similar terms shall have the meanings given herein. When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number.

“Accessory Equipment” means any equipment installed, mounted, operated or maintained in close proximity to a Wireless Communication Facility to provide power to the Facility or to receive, transmit or store signals or information received by or sent from a Facility.

“Antenna Structure” means an antenna, any structure designed specifically to support an antenna and/or any appurtenances mounted on such structure or antenna.

“Applicable Law” means all applicable federal, state and City law, ordinances, codes, rules, regulations and orders, as the same may be amended from time to time.

“Applicant” means any person or entity submitting an application to install a Wireless Communication Facility under this Section.

“City” means the City of Calabasas.

“FCC” means the Federal Communications Commission.

“Personal Wireless Service” means commercial mobile services provided under license issued by the FCC.

“Stealth Facility” means any Wireless Communication Facility which is disguised to appear as another natural or artificial object that exists in the surrounding environment or which is architecturally integrated into a building or structure.

“Wireless Communication Facility” or “Wireless Facility means an Antenna Structure and any Accessory Equipment located within the City limits and which is used in connection with the provision of Personal Wireless Services.

Section A

The following language is suggested to replace the language which was proposed for Section A

- A. **Purpose and Intent.** The purpose of this section is to regulate the installation, operation and maintenance of antennas and wireless communications facilities within the City. It is recognized that the unrestricted installation of redundant wireless infrastructures is contrary to the City’s efforts to stabilize economic and social aspects of neighborhood environments, and to promote and protect safety and aesthetic considerations, family environments and a basic residential character within the City.

In enacting this section, it is the intent of the City to:

- (a) Promote and protect the health, safety, comfort, convenience and general welfare of residents and businesses in accord with Section .020 Chapter 17.01 of this Title, and
- (b) Protect the benefits derived by the City, its residents and the general public from access to personal wireless services, by providing non-discriminatory access to wireless providers while minimizing, to greatest extent feasible, the redundancy of wireless infrastructures within the City.

In enacting this section, it is the intent of the City to effect a balancing of such goals, by permitting the installation and operation of wireless facilities where they are actually needed, while enacting limitations to reduce, to the greatest extent feasible, adverse economic, safety and/or aesthetic impacts on nearby properties and the overall community.

Notes on Section A

The proposed language which indicates that it is the City’s intent to encourage “more efficient technology” has been intentionally omitted. Federal Courts have held that the type of technology to be employed in providing wireless services is the exclusive province of the FCC. See e.g. New York SMSA Limited Partnership d/b/a Verizon Wireless v. Town of Clarkstown, 603 F.Supp.2d 715 (2009).

Section B

As drafted, Section B provides that it applies to existing facilities [B(3)], or facilities for which an application has already been filed [B(1) and B(2)], but it does not indicate that it applies to new applications which have not yet been filed.

As such, Section B should include a new subparagraph 1, as follows:

-
1. All future applications seeking approval for the installation of Wireless Communications Facilities within the City.
-

The existing subparagraphs 1, 2 and 3, should be respectively renumbered 2, 3 and 4 and I suggest that existing subparagraph B(3) be replaced with the following

4. All facilities for which applications have been previously approved, but are now or hereafter: (a) expanded, or (b) modified by the installation of additional antennas, larger antennas or more powerful antennas, shall comply with this section.
-

This permits owners of existing facilities to maintain them, even if they do not comply with the new setback requirements, but requires such owners to seek approval to expand such facilities.

The modification language of B(3) addresses both AT & T's concern regarding changing technology, as well as the City's need to know when additional, larger and/or more powerful antennas are being added to an existing installation.

The owners of facilities can change their equipment, as technology changes, with no application requirements. But the installation of additional, larger, or more powerful antennas triggers the requirements of the ordinance, thereby placing the City on notice of the new installation, and the ability to oversee that the owner certifies that the new, more powerful, installation will be FCC compliant.

Section C

Comment - The broadest authority which the City can wield in regulating the installation of wireless facilities, is the imposition of a requirement that an applicant establish that a proposed installation is: (a) necessary to close a significant gap in service, and (b) that the proposed installation is the least intrusive means by which to close that gap.

Based upon the *Omnipoint* case *supra*, which remains good law,³⁵ this exercise of state and/or local zoning power does not run afoul of the TCA.

As such, in employing its zoning powers, the City can impose the “significant gap” and “least intrusive” requirements to further the goals set forth within section A, including but not limited to, protecting the aesthetics and character of residential neighborhoods, ridgelines, or even open spaces, to the same extent that the City has endeavored to protect them in the past.

On the other hand, the City cannot prohibit the provision of wireless coverage where an installation is necessary to close a significant gap, and a proposed installation is the least intrusive means of closing that gap.

It is my understanding that at least one wireless provider has already saturated the City with wireless coverage, without having placed facilities in residential zoning districts, preserved open spaces, or on ridgelines.

As such, to the extent that the City seeks to continue any pre-existing prohibitions against the approval of any structures in open spaces, ridgelines etc., it would seem that the City can continue to do so, without violating the TCA.

³⁵ Although the *Omnipoint* decision was rendered by the United States Court of Appeals for the Second Circuit, the case has been cited by the United States Court of Appeals for the Ninth Circuit, which raised no objection to the Second Circuit’s ruling.

Section C(1)

Sections C(1)(i) and C(1)(iii) each refers to approvals to be obtained from a “commission.”

Each of these two separate subsections should explicitly identify the commission to which they refer, whether it’s the Communications and Technology Commission (commonly referred to as the CTC) (*See* Chapter 2.38 of Title 2) or the Planning Commission (*See* Chapter 2.28 of Title 2).

To the extent that the City intends to empower the CTC to grant either or both of the approvals described within C(1)(i) and C(1)(iii), the City should amend section .040 of Chapter 238 of Title 2 to empower the CTC to entertain requests for such approvals, and, where stated requirements are met, to grant such approvals.

To the extent that the intent of the City is to have the Planning Commission entertain such requests and, where appropriate, grant such approvals, the scope of Subsection G, Section .040 of Chapter 2.28, already empowers the Planning Commission to hear and grant applications for conditional use permits, and as such, makes a similar amendment to that Commission’s power unnecessary.

To the extent that subsequent provisions in the proposed ordinance also refer to a Commission, each must specify to which Commission it refers.

Section C(2)

Section C(2)(c)

As is self evident, the intent of C(2)(c) is designed to give the City oversight as to the overall development of a wireless infrastructure within the City. Knowing what new wireless facilities are to be pursued in the near future is a valuable planning tool for the City, especially with regard to seeking to minimize the unnecessary redundancy of such facilities.

As set forth within its language, this section essentially provides that (a) an applicant seeking to install a wireless facility must provide a “master plan” to place the City on notice of all additional applications it may seek to file within the next three years, and (b) bars the applicant from filing, (and the City from accepting), applications for any new facilities which are not described within the master plan.

I am constrained to agree with the objection raised by AT & T that the three-year projection period is too long. In the world of wireless facilities and equipment, the development of technologies is moving so quickly that it is not feasible for a wireless company to predict what type of equipment it will need to employ three years from now. I agree with AT & T that the disclosure period in C(2)(c) should be reduced from three years to two years.

As for barring the applications which are not identified within each applicant's master plan, I think the ordinance is reasonable on its face, but it would not be enforceable in the event that a provider can establish that it truly needs to install a new facility to close a "significant gap" in its personal wireless services, and that the proposed installation is the "least intrusive means" of closing such gap.

As such, I think the bar language should remain, but the following language should be added at the end of C(2)(c):

"unless the applicant establishes before the Commission that a new installation is necessary to close a significant gap in the applicant's personal wireless service, and the proposed new installation is the least intrusive means of closing that significant gap"

Section C(2)(e)

Section C(2)(e) is virtually meaningless to the extent that its intent is to protect the City and its residents from the installation or operation of a wireless facility which will expose the public to RF Radiation levels in excess of the maximum levels deemed safe by the FCC.

As described herein above, the FCC has refused to address the means by which local government may require an applicant to establish that its proposed installation will be "FCC compliant," meaning that it will not expose the general public to RF radiation levels which exceed the MPE's³⁶ set by the FCC.

In the absence of guidance from the FCC, local governments across the Country have been requesting, (and applicants seeking to install wireless communication facilities have been submitting), what are commonly known as "FCC Compliance Reports."

In these reports, applicants disclose the projected RF radiation levels to which the proposed facility will expose the general public and/or the persons who will work on a proposed facility.

To understand whether or not a wireless facility will be FCC compliant, it is critical to understand that there are two very different sets of RF radiation limits adopted by the FCC, as codified under the Code of Federal Regulations.

³⁶ Maximum Permissible Exposure limits - See FCC OET Bulletin 56, August 1999.

The first set of limits are the *less stringent* “Occupational” or controlled exposure limits.”³⁷

The second, and far more restrictive set of limits, are the “General Population” or uncontrolled exposure limits”³⁸

In the current void of guidance from the FCC, I suggest that the City require applicants to file standard FCC compliance reports which will disclose the projected RF emission levels to which the intended facility will expose the general public.

To address the concerns discussed in Section IV herein above, the report should not merely state that the proposed facility will be FCC compliant, but it should: (a) identify which set of RF limits the statement of compliance is based upon, (i.e. the occupational limits or the general population limits), (b) clearly set forth the minimum distance between antennas and members of the general public which the applicant used to determine such exposure limits, and (c) state whether the calculations being performed are based upon operation of the intended antennas at full strength and/or power of operation.

Among other things, this will enable the City to determine if it needs to petition the FCC for intervention.

³⁷ 47 CFR §2.1 dictates that the less stringent, *occupational limit* apply as follows:

“Occupational/controlled exposure. For FCC purposes, applies to human exposure to RF fields when persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over their exposure. Occupational/controlled exposure limits also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits, as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area by some other appropriate means.”

³⁸ 47 CFR§ 2.1 dictates that the more stringent *general population* limit applies as follows:

“General population/uncontrolled exposure. For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related.”

Accordingly, I suggest the following language to replace C(2)(e)

- e. An FCC Compliance Report, which shall provide the projected RF exposure levels of the intended installation, and which shall include an affirmation, under penalties of perjury, that the proposed installation will be FCC compliant, in that it will not cause members of the general public to be exposed to RF levels which exceed the MPE levels deemed safe by the FCC. Such a report shall disclose whether its RF exposure analysis is based upon the occupational/controlled exposure limits or the general population/uncontrolled exposure limits, as defined under 47 CFR §2.1.
- Such a report shall also disclose the proposed minimum distance based upon which the applicant's projected exposure levels were calculated, that being the assumed closest distance that a member of the general public will be able to get to the proposed antenna(s), and shall further disclose whether or not the exposure calculations are based upon the assumption that the proposed antennas and facility will be operating at full power.
- If the applicant seeks to apply the occupational/controlled exposure limits, the applicant's FCC compliance report shall describe how the facility will be restricted against access by the general public, and shall describe the warning signage to be installed, as required by the FCC for the occupational limits to be applied, and as described within FCC OET Bulletin 65, Supplement B (Edition 97-10)
-

There is always the possibility that a wireless provider may assert a legal claim that this type of local requirement is preempted by federal law, in that the regulation of RF emissions is the exclusive province of the FCC. Thus far, however, I have seen the largest wireless companies routinely provide FCC compliance reports to local zoning boards without any objection to providing same. Moreover, compliance with the suggested language is less burdensome than what is currently required by the other Cities in California, such as Berkeley, Burbank and Davis.

Since: (a) the FCC does not monitor or test whether an installation is exposing members of the general public to RF radiation levels which exceed the maximum levels deemed safe by the FCC, and (b) the FCC has failed to provide guidance to local governments as to how they can ensure that such installations are not exposing the general public to radiation levels in excess of those deemed safe by the FCC, there is simply no other way for the City to afford its inhabitants protection against the possibility of excessive RF radiation exposure, unless it requires the above referenced disclosures from applicants, and/or it actually tests facilities for the actual radiation levels emanating from same.

Section C(3)

Section C(3)(a)(iii)

As drafted, Section C(3)(a)(iii) imposes a 150% setback requirement for free standing cell towers. This is not only consistent with protecting the safety, comfort, convenience and general welfare of residents and businesses in accord with Section .020 Chapter 17.01, it is also consistent with local ordinances from around the Country.

While AT & T's comments include a suggestion that this section be deleted in its entirety, I suggest it remain intact, precisely as it is drafted.

Section C(3)(a)(iv)

Having personally visited Calabasas and viewed both City Hall and residences within the City, I can appreciate the efforts undertaken by the City and its residents to maintain an aesthetically pleasing environment.

While an effort to restrict the proximity of wireless facilities to homes, schools and parks to minimize aesthetic and visual impacts is consistent with the intent of Section .020 Chapter 17.01, Section C(3)(a)(iv), as drafted, may be problematic.

Within its comments, AT & T asserts that a 1500 foot setback would "preclude future service to most areas of the City." If this were true, then the ordinance would run afoul of the constraints of the TCA as described herein above.

As the City may or not be aware, the Town of Hempstead in New York enacted a somewhat similar 1500-foot-setback provision. That ordinance is now the subject of a federal lawsuit which was filed by *New Cingular Wireless, Sprint* and *T-Mobile*, seeking to have the local ordinance declared to be in violation of the TCA.³⁹ That lawsuit remains pending.

Bearing in mind that: (a) the purpose of the proposed setback is to minimize aesthetic and visual impacts, (b) the City cannot prohibit the provision of wireless services within its borders, and (c) there are existing facilities which may not be in compliance with the proposed setback requirement, I suggest that Section C(3)(a)(iv) be revised to provide as follows:

³⁹ New York SMSA Limited Partnership d/b/a Verizon Wireless, New Cingular Wireless PCS, LLC, Sprint Spectrum L.P. and T-Mobile Northeast LLC, v. Town of Hempstead, United States District Court, Eastern District of New York, Case No. CV 10-4997, filed on October 29, 2010.

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- iv All new wireless communications facilities shall be set back at least 1000 feet from schools, dwelling units and parks, as measured from the closest point of the wireless facility (including equipment) to the applicable property line, unless an applicant establishes before the Commission that a new installation which shall be situated less than 1000 feet from a dwelling unit, school or park is necessary to close a significant gap in the applicant's personal wireless service, and the proposed new installation is the least intrusive means of closing that significant gap.

To the extent that the owner of an existing wireless communication facility which is located less than 1000 from a dwelling unit, school or park seeks to increase the physical size of such facility, or of its antennas, such owner shall be required to establish before the Commission that such increase in the size of its facility is necessary to close a significant gap in the applicant's personal wireless service, and the proposed new installation is the least intrusive means of closing that significant gap.

Once again, the City must both choose, and specify within the ordinance, which "Commission" is to make the relevant determination.

I am suggesting that the City consider reducing the 1500 foot restriction to 1000 feet, if the City agrees that such distance is adequate to protect against adverse impacts upon aesthetics and character of the City's local neighborhoods.

Section C(3)(c)

As drafted, Section C(3)(c) purports to prohibit the installation of wireless facilities on a ridgeline, in a residential district, in areas set-aside for open space, or parks or playgrounds, while providing that a facility may be installed if it is necessary to close a significant gap in personal wireless service and the proposed installation is the least intrusive means of closing that gap.

This section needs to be revised if it is to accomplish whatever limits the City seeks to impose under this section.

First, the areas subject to the intended prohibition must be specified.

By way of example, if the provision intends to prohibit the installation of a wireless facility in “*areas set aside for open space*,” the provision must specify what is intended to fall within the definition of open space.

The ordinance must specify whether it is intended to include: (a) that which is zoned OS (Open Space) District under 17.16.010, (b) that which is zoned OS-DR Open Space-Development Restricted under 17.16.010, (c) some other areas which are intended to be included within the areas deemed open space under the ordinance, or (d) a combination of (a) through (c).

In a similar vein, the provision must identify the specific zoning districts which fall within the intended scope of the prohibition’s coverage for residential zones, parks or playgrounds.

In addition, Land Use Table 2-2 contained within 17.11.010 must be amended to include a new entry for “Wireless Communications Facilities” under its left-hand column of listed “Land Uses,” and corresponding entries for each respective zoning district must be entered in each of the respective columns to the right.

Once the City determines the extent of the areas to be included within such prohibition, then the City must decide: (a) to what extent it would choose to include, within the ordinance, *an exception* from the prohibition against the installation of wireless facilities, and (b) to what extent it would legally be required to do so.

By way of example, if the City were to determine that it chooses to prohibit the installation of wireless facilities in OS Districts, without exception, then it must consider whether such a prohibition would prevent a wireless provider from providing complete wireless coverage within the City.

If it would not prohibit a carrier from doing so, then it would be within the City’s power to impose an outright prohibition against the installation of wireless facilities within such districts.

If, on the other hand, it would likely prohibit a wireless provider from providing coverage, then the ordinance would need to include an exception for those circumstances where the installation of a wireless facility in the otherwise prohibited area, is truly necessary for a provider to close a significant gap in its coverage, and that the proposed installation in the open space in the least intrusive means of doing so.

Given the fact that, to date, wireless providers have been able to provide full coverage in the City without invading the City's open space, it is likely that such an exception would not be required.

The same rule would apply to any other defined zones/areas which the City chooses to include within section C(3)(c).

Sections C(3)(b) and C(3)(d)

Within Sections C(3)(b) and C(3)(d) the word "camouflage" should be replaced with "Stealth," consistent with the definition of Stealth Facility provided in the definition section.

This has become standard language within the industry.

Section C(4)

Section C(4)(f)

Section C(4)(f) restricts the noise level emanating from a wireless communications facility to fifty (50) decibels. Noise restrictions are perfectly permissible zoning constraints, and I am unaware of any soundproofing limitations which would render it impracticable for operators of such facilities to reduce the sound emanating from their facilities.

Since such facilities operate continuously, day and night, the City may impose whatever sound constraints it deems reasonably necessary to reduce their noise level to that which would not be found to be objectionable to those in close proximity to such facilities.

Section C(6) (Monitoring requirements)

As described herein above, the FCC refuses to perform any actual monitoring to ensure that wireless facilities are FCC compliant, and it's refusal has been exacerbated by its concomitant failure to provide local governments with either guidelines or mandates to enable them to ensure that wireless facilities within their jurisdiction are FCC compliant.⁴⁰

As such, local governments are the first and only line of defense available to protect the public against overexposure of RF radiation due to non-FCC-compliant facilities.⁴¹

Theoretically, if a local government becomes aware that a facility is not FCC compliant, it can file a complaint with the FCC. In reality, however, it is impossible for a local government to become aware that a facility is not FCC compliant, unless a facility is actually tested, because excessive RF radiation levels cannot be "felt." As such, even if a non-FCC-compliant facility was exposing the general public to radiation levels 500% higher than the maximum levels deemed safe by the FCC, both the general public and the City would be completely unaware of such overexposure.

Accordingly, in the absence of protective action by the FCC, local governments have been enacting provisions to ensure that wireless facilities within their jurisdiction are FCC compliant, both at the time of initial installation, and during the entire period of operation thereafter.

Each time they do, wireless companies threaten litigation, consistent with AT & T's comment to the City of Calabasas that, if Section C(6) is included in the ordinance as drafted, it "will be subject to legal challenge."

Faced with such failures on the part of the FCC, and threats from wireless companies, local governments are left in the undesirable position of either: (a) leaving their residents naked of any protection against overexposure to RF radiation generated by wireless facilities which are not FCC compliant, or (b) enacting provisions to ensure or require FCC compliance, under risk of litigation regarding same.

As reflected within the Municipal Codes of the Cities of Berkeley, Burbank and Davis, among others, local governments have chosen to pursue the path of affording their citizens reasonable protections against non-FCC-compliant wireless facilities, despite the threats and risk of litigation by wireless companies.

⁴⁰ "FCC compliant" meaning that such facilities are not exposing the public to RF radiation levels in excess of the maximum levels deemed safe by the FCC.

The City of Berkeley, California, requires applicants to certify that wireless facilities will be compliant at the time of installation, and further requires periodic testing for compliance, with the actual cost of such testing borne by the owner of each respective facility.⁴²

The City of Burbank, California requires certification of FCC compliance,⁴³ and explicitly prohibits wireless facilities from generating RF emissions and/or electromagnetic radiation in excess of FCC standards.⁴⁴

The City of Davis, California goes even further, and provides:

- (a) that the City can request monitoring information at any time, and if such information is not provided within 10 days, a facility's conditional use permit may be revoked, and
- (b) that if, at any time, a facility is found to be non-FCC-compliant, the facility must cease operation immediately.⁴⁵

Similar provisions have been, and are being, incorporated into local ordinances across the Country.

Under the circumstances, I fully expect that, at some point in time, a wireless company will commence a federal action to challenge a local government's ordinance, claiming the inclusion of such provisions constitutes "regulating" within a field over which the FCC has the exclusive authority to regulate, and that as such, such local ordinance is pre-empted by federal law.

Since the TCA only explicitly precludes local governments from considering environmental impacts of wireless facilities, *to the extent that they are FCC compliant*, there remains an open issue as to how far a local government can go in ensuring FCC compliance, before a federal Court would determine that such efforts intrude into a federally pre-empted area.

If the City of Calabasas chooses to follow the path taken by the other California Cities described above, then Section C(6) is, by comparison, a mild provision to provide a moderate level of assurance of FCC compliance. It is both less restrictive and less burdensome upon applicants, than comparable provisions enacted by other local jurisdictions, but as such, it simultaneously affords less protection than such others.

⁴² City of Berkeley Municipal Code and Zoning Ordinance Section 23C.17.090

⁴³ City of Burbank Municipal Code Section 10-1-1118(E)

⁴⁴ *Id.* at Section 10-1-1118(D)(3)(I)

⁴⁵ City of Davis Municipal Code Section 40.29.220.

The City must determine how strongly it wants to ensure FCC compliance, viewed against the certainty that the stronger the protection it affords, the more likely a wireless company will challenge it with a lawsuit.

Section C(7)(b) (Abandonment)

Once approval has been given to install a facility, and such an installation has been completed, its owner becomes vested with a “property right” with regard to same.

To guard the City against possible claims under 42 U.S.C. §1983,⁴⁶ I suggest that the owner of a facility which is believed to be abandoned be afforded a right to a hearing before one of the Commissions at which to challenge the City’s claim that their respective facility has been abandoned.

The procedure for such hearing should be set in accord with applicable State and local laws, and since I am not admitted to practice within the State of California, the language to provide for such procedure should be drafted by an attorney admitted to practice within the State.

Section C(10) (unsafe facilities)

Similar to my suggestion for Section C(7)(b), before removal is required under Section C(10) the owner should similarly be afforded a hearing at which to challenge the City’s claim that its facility has become unsafe or otherwise incompatible with public health, safety or welfare.

⁴⁶ Where a person is deprived of a “property right” without “due process of law,” in violation of the 14th Amendment, such person may pursue an action to recover damages under 42 U.S.C. §1983, and their attorneys fees incurred, under 42 U.S.C. §1988.

Section D

As stated herein above, I suggest that the City obtain a second opinion from an attorney admitted to practice within the State of California, as to the extent of the City's power to regulate the installation of wireless facilities within a public right of way.

Sections D(2) and D(6)

Given the suggestion that the City has less regulatory power over facilities within a PROW versus those which are not, I do not understand why the ordinance has been drafted to be more restrictive for facilities in a PROW than those which are not.

Without understanding the intent behind such provisions, it is impossible for me to suggest any revisions.

Section D(3)(c)

I suggest that D(3)(c) be amended, consistent with the changes I suggested for the parallel provision section C(2)(c), so that the period is reduced from three years to two years, and the limiting language below be added.

"unless the applicant establishes before the Commission that a new installation is necessary to close a significant gap in the applicant's personal wireless service, and the proposed new installation is the least intrusive means of closing that significant gap"

Section D(3)(e)

This section should be changed to mirror my suggested changes for C(2)(e), to require an FCC compliance report - See C(2)(e) herein above

Section D(4)(c)

Change the word "camouflage" to "Stealth."

Section D(4)(e)(i)(1), (2) and (3)

Change the word "camouflage" to "Stealth."

Section D(4)(j)

Consistent with section C(3)(a)(iv), I suggest that the distance be reduced from 1500 feet to 1000 feet.

Section I

Section I encompasses a *qui tam* (or whistleblower) provision which, among other things, empowers private citizens to pursue violations of the proposed ordinance through litigation.

Not surprisingly, AT & T “urges deletion” of this section, claiming, among other things, that its “not necessary” and “bad policy.”

Within the past six years, at least twenty nine (29) states and two (2) cities have enacted *qui tam* laws empowering private citizens to commence lawsuits to protect the rights and/or coffers of the respective State or City.⁴⁷

Empowering private citizens to protect government interests has proven to be a highly effective means of protecting government interests, at no cost to the respective government.

The most prominent *qui tam* statute is the federal False Claims Act, which empowers private citizens to file lawsuits to recover monies which have been defrauded from the federal government. More than two billion (\$2,000,000,000) dollars is recovered each year under the False Claims Act.

I cannot think of a better, or more cost effective, means of guarding against evils such as stealth installations or unapproved expansions of wireless facilities, than to empower all residents within the City to act as private attorneys general to remain vigilant against same.

As such, I suggest that Section I be enacted as drafted.

⁴⁷ *Qui tam* statutes have been enacted by the States of California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Wisconsin, the District of Columbia, and the Cities of New York and Chicago.

Additional Suggested Provisions

Specific Guidelines for Establishing Significant Gap

As drafted, the ordinance contains a number of provisions which, for certain applications, will impose a burden upon an applicant to establish that a desired facility is necessary to remedy a “significant gap” in its personal wireless coverage. As recognized by the United States Court of Appeals for the Ninth Circuit, the term “significant gap” is intended to mean a gap which is “truly significant” and not merely individual dead spots within a greater service area.

See MetroPSC Inc v. City and County of San Francisco, 400 F.3d 715, 734 (9th Circuit 2005), *Sprint PCS Assets, LLC v. City of Palos Verdes Estates*, 583 F3d. 716 (9th Circuit 2009).

The ordinance should therefore: (a) first specify which Commission shall be charged with making a determination as to whether or not an applicant established that it suffers from a significant gap, and then (b) provide guidelines as to how to determine same.

Towards that end, among others, I suggest that the ordinance include the following provisions, somewhere within its sections.

Where an applicant seeks to establish that it suffers from a significant gap in its personal wireless coverage, that the applicant’s proposed installation is necessary to close that gap, and that the proposed installation is the least intrusive means to close such gap, the applicant shall be required to provide direct evidence of *in-kind* call testing, and the results of same.

The term “*in-kind* call testing” means actual call testing to establish the precise type and location of gap the applicant purports to exist. By way of example, if the claimed gap is for *in-building* coverage, then simple *in-building* call testing must be performed to establish the existence or absence of such gap. If the applicant is incapable of securing building access to conduct such call testing, then the applicant shall provide a sworn affidavit attesting to its attempts to secure access into buildings to conduct such testing, and the circumstances which prevented the application from conducting such testing. Comparable *in-kind* call testing shall be performed for claimed gaps for *in-vehicle* coverage or *open area* coverage.

In rendering a determination as to the existence or absence of a significant gap, the Commission shall accept evidence of call testing from both the applicant and any individuals or entities who may seek to oppose the subject application, and shall not automatically give greater weight to the results submitted by either side, but shall consider the call testing evidence as submitted, taking into account: (i) the number of

calls conducted in the call test, (ii) whether the calls included in the test were undertaken on different days, at different times, and under differing conditions, and (iii) whether calls could be successfully initiated, received and maintained in the area where the applicant claims to suffer from a significant gap in its coverage.

Aside from the fact that call testing is the least expensive means of acquiring evidence of the existence or absence of a significant gap, I believe it to be perhaps the best indicator of same.

Other factors which the City may wish to have the Commission consider in making a determination as to whether or not there is a "significant" gap include: (a) the number of residents which may be affected by the alleged gap in service, (b) whether a proposed facility is merely needed to improve weak signals or to fill a complete void in coverage, or (c) whether the gap affects either a significant commuter highway, or other well-traveled roads on which travelers lack roaming capabilities.

FCC Compliance

To ensure that all facilities installed and maintained within the confines of the City are FCC compliant, I suggest that a provision including the following be added to the ordinance.

All applicants seeking any approval for the installation, expansion or increase in power of a Wireless Communications Facility within the City shall submit, along with any application, an FCC compliance report, consistent with those customarily being provided by applicants in the wireless industry to local zoning boards. Such a compliance report shall include, at a minimum, the following:

- (a) A certification that the proposed wireless facility will be FCC compliant,
 - (b) A calculation of the RF emission levels to which members of the general public shall be exposed by the proposed wireless facility, which shall plainly and clearly disclose the assumed minimum distance between members of the public and the facility, and which distance was used to complete such calculation of exposure levels,
 - (c) A certification that the calculation is based upon the proposed facility and its antennas operating at full power,
 - (d) A clear indication of whether or not the applicant's certification of FCC compliance is based upon the federal limits for general public/uncontrolled exposure or the federal limits for occupational/controlled exposure.
 - (e) If the applicant's certification of compliance is based upon federal limits for occupational/controlled exposure, the applicant shall further provide:
 - (i) a description of the means by which the public's access to the proposed facility will be restricted, and (ii) a description of the required warning signage which is to be installed, as described in FCC OET Bulletin 65, Supplement B, (Edition 97-10).
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Severability Provision

I suggest the ordinance include a severability provision, and provide the following language for same.

If any Section, subsection, clause, provision or phrase within this ordinance is, for any reason, held by Court of competent jurisdiction to be invalid or unconstitutional, such decision shall not affect the remaining portions of this ordinance.

I look forward to meeting with the City Counsel to discuss my suggested revisions, and answer any questions the Counsel may have.

Respectfully Submitted to the
City of Calabasas, California,

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