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City of Portland v. United States of America

Ninth Circuit Affirms Local Agency Authority Over Aesthetic Regulations

By: **Travis Van Ligten**

In 2018, the FCC issued a series of orders limiting cities' and counties' ability to regulate the installation of "Small Cell" wireless antennas ("Small Cell Order"), and restricting the application of local moratoria to wireless facility installations ("Moratoria Order").¹ The Orders prompted an avalanche of litigation from local agencies and wireless providers. The local agencies argued that through the Orders, the FCC went beyond what federal law allows, and that the FCC's actions were not otherwise supported by the evidence. Others – principally the wireless industry -- argued that the Orders did not go far enough.

The Ninth Circuit Court of Appeal issued a ruling on August 11, 2020 upholding the Orders, but with two significant exceptions related to aesthetic regulations. Specifically, the 9th Circuit overruled that the FCC's attempts to (1) mandate that aesthetic regulations of small cells be equivalent to regulations of other utilities, and (2) limit aesthetic regulations to "objective standards." A brief summary of the case and its importance is provided below.

Local Agencies May Impose Subjective Aesthetic Standards

The Small Cell Order was designed to limit locally-imposed regulatory hurdles to the deployment of "small cell" antennas, and thereby facilitate development of the nation's 5G network. To that end, the Small Cell Order (1) limits the fees that local agencies' can collect for allowing a wireless installation on agency-owned property within the right-of-way; (2) requires that all aesthetic regulations be (i) reasonable (ii) no more burdensome than requirements placed on other types of utility facilities, and (iii) objective and published in advance; and (3) accelerates permit processing deadlines by imposing presumptive time limits – called "shot clocks" – within which a local agency must approve or deny a permit application. The Ninth Circuit upheld the majority of the Order. The fee limitations and the shot clocks will remain in place. But the limitations on aesthetic regulations were overturned for two reasons. First, the Ninth Circuit found that the requirement that the restrictions must be "no more burdensome than other types of infrastructure deployments" was inconsistent with federal law. Rather, federal law specifically allows local agencies to discriminate between wireless providers and other types of infrastructure, provided that such discrimination is not unreasonable. Accordingly, the FCC's attempt to prohibit **any** discrimination ran afoul of the authority reserved for local agencies.

¹ The decision also addressed a challenge to the FCC's order, 33 FCC Rcd. 7705, 7705–91 (2018) ("One-Touch Make-Ready Order"). Because that order was limited to the relationship between the owners of utility poles and wireless providers, this summary does not address that portion of the Court's decision.

Second, the Court found that the requirement that the aesthetic standards be “objective” was “arbitrary and capricious.” In so holding, the Court recognized that subjective standards, such as protecting the character of a neighborhood, can be perfectly legitimate.

Both of these holdings are significant victories for cities and counties, in that those entities maintain their ability to impose “subjective” standards, and preserves a reasonable framework for determining what is (and what is not) discriminatory. Wireless applicants will still have many advantages in the regulatory process – e.g., federal law will still preempt any denial that results in an “effective prohibition” of the ability to provide telecommunications services – but the preservation of meaningful authority over aesthetic matters preserves some hope that, over time, wireless facilities will continue their trend of becoming less and less intrusive on local streetscapes and landscapes.

Not all Regulations that Cause Delays Are Illegal Under the Moratoria Order

In the Moratoria Order, the FCC found that municipal actions that halt 5G deployment, could take the form of either a “de facto” or “express,” moratorium, and further found that such moratoria would violate federal law.

The Ninth Circuit found that the FCC’s findings and interpretation of federal law is reasonable, but in doing so, the Court also affirmed that several traditional timing restrictions are not moratoria. In particular, the Court found that the Moratorium Order does **not** prohibit necessary and customary restrictions on construction seasons. Nor does it prohibit emergency moratoria for the protection of “public safety and welfare,” so long as the moratoria are competitively neutral and intended to remedy an ongoing public safety concern.

This decision impacts the multi-billion dollar wireless industry, the national interest in deployment of wireless service and emergency communications services, and the local interests in the preservation of the character and appearance of carefully regulated cityscapes. As a result, scores of local agencies, wireless industry interests, and public interest groups participated in this lawsuit. The financial and public policy issues and interests at stake are massive: Given those interests, it is very likely that one or more parties will seek further review by the Ninth Circuit and/or request that the United States Supreme Court review the Ninth Circuit’s decision. However, if the decision stands as is, local agencies should be pleased that the courts have again re-affirmed local agencies authority to impose reasonable aesthetic regulations.

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Travis Van Ligten specializes in a wide range of litigation and transactional matters relating to both public and private clients. Additionally, he provides advice to both private and public clients on a wide range of environmental and land use issues.

TVanLigten@rutan.com | (714) 641-3435