Jenny Leinen <leinen@monterey.org>

#2, Please forward to Planning Commission and Wireless Ord. Subcom

1 message

nbeety Fri, Apr 5, 2019 at 4:40 PM
To: leinen@monterey.org
Cc:

Please forward to the Planning Commission and the Wireless Ordinance Subcommittee. Thank you

Dear Planning Commission and Wireless Ordinance Subcommittee:

This link is to the testimony of Attorney Harry Lehmann on small cell towers to the Larkspur City Council Wednesday.
https://youtu.be/ClOqvQHhlwc?t=1h45m25s

Attorney Harry Lehmann on April 3, 2019 to Larkspur City Council (partial transcript):

"**Now, life and death situations have two sides. One of those sides is that this is one of the greatest opportunities that any of us will ever have to save human lives in large numbers.** Finally, as to liability, the greatest problem you have is not from the shepherds over there, it's not from the City Attorneys. . . **It's from the wolves and I am a wolf.** Now, I am no longer taking cases, but I am a plaintiff's lawyer . . . I know that field. I've done 1,600 cases with over a 99% successful resolution rate, I know what I am doing in this field. I have been doing science cases since 1983.

You are going to get sued under ADA if you participate in this. . . but that's not all that is at stake here. You are talking about situations of joint ventures, about dangerous conditions of public property because of the merger [of private Wireless carrier antennas on public property] under the Doctrine of Fixtures . . . you are going to have a situation of liability here from a dangerous condition of public property under section 835 of the CA Government Code, but **your severe liability risk is not diddling around with these guys from the Telecom Cos., the severe liability you are going to face is from the people who will be getting injured from this stuff.** I did my best here. Good luck and thank you for your attention."

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Linked in the transcript is Lehmann's letter on SB 649 which includes information on the state's liability if they approved SB 649 and it became law, due to declaring small cells a dangerous object by giving firefighters the exemption from these on fire stations due to health impacts. CACI 1100 is referenced in the letter.
https://www.justia.com/trials-litigation/docs/caci/1100/1100/

Sincerely,

Nina Beety

Monterey CALIFORNIA

Jenny Leinen <leinen@monterey.org>

Please forward to PC and Wireless Ord. Subcom.

1 message

nbeety
To: leinen@monterey.org
Cc:

Fri, Apr 5, 2019 at 4:25 PM

Please forward to the Planning Commission and Wireless Ordinance Subcommittee. Thank you.

April 5, 2019

Dear Planning Commission and Wireless Ordinance Subcommittee:

Yesterday the California Supreme Court affirmed the judgment of the Court of Appeals on T-Mobile v City and County of San Francisco and released its opinion – attached.

This is good news. It is a far-reaching decision on the wireless ordinances of municipalities. Much of the discussion revolved around Public Utilities Code 7901 and 7901.1 and the definition of "incommode" and the Constitutionally-granted policing powers and "powers of control" of municipalities.

Some excerpts with a few of the points from the Supreme Court opinion – underlining is mine (the full opinion is linked below and attached):

p. 4-5
Under the California Constitution, cities and counties "may make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) General laws are those that apply statewide and deal with matters of statewide concern. (Eastlick v. City of Los Angeles (1947) 29 Cal.2d 661, 665.) The "inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." (City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc. (2013) 56 Cal.4th 729, 738 (City of Riverside); see also Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1151 (Big Creek Lumber).) The local police power generally includes the authority to establish aesthetic conditions for land use. (Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 886; Disney v. City of Concord (2011) 194 Cal.App.4th 1410, 1416.)

p. 7
The parties agree that section 7901 grants telephone corporations a statewide franchise to engage in the telecommunications business.[7] (See *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, 750 (*Visalia*).) Thus, a local government cannot insist that a telephone corporation obtain a *local* franchise to operate within its jurisdiction. (See *Visalia,* ta p. 751; see also *Pac. Tel. & Tel. Co. v. City and County of S.F.*(1959) 51 Cal.2d 766, 771 (*Pacific Telephone*) The parties also agree that the franchise rights conferred are limited by the prohibition against incommoding the public use of roads, and that local governments have authority to prevent those impacts.

p. 8-9
...the City has inherent local police power to determine the appropriate uses of land within its jurisdiction. That power includes the authority to establish aesthetic conditions for land use....

We also disagree with plaintiffs' contention that section 7901's incommode clause limits their right to construct [telephone] lines only if the installed lines and equipment would obstruct the path of travel. Contrary to plaintiffs' argument, the incommode clause need not be read so narrowly. As the Court of Appeal noted, the word " 'incommode' " means " 'to give inconvenience or distress to: disturb.' " (T-Mobile West, supra, 3 Cal.App.5th at p. 351, citing Merriam-Webster Online Dict., available at <http://www.merriam-webster.com/dictionary/incommode> [as of April 3, 2019].)8 The Court of Appeal also quoted the definition of "incommode" from the 1828 version of Webster's Dictionary. Under that definition, "incommode" means " '[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition.' " (T-Mobile West, supra, 3 Cal.App.5th at p. 351, citing Webster's Dict. 1828—online ed., available at <http://www.websterdictionary1828.com/Dictionary/incommod e> [as of April 3, 2019].) For our purposes, it is sufficient to state that the meaning of incommode has not changed meaningfully since section 7901's enactment.9 Obstructing the path of travel is one way that telephone lines could disturb or give inconvenience to public road use. But travel is not the sole use of public roads; other uses may be incommoded beyond the obstruction of travel.

(T-Mobile West, at pp. 355-356.) For example, lines or equipment might generate noise, cause negative health consequences, or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment.

p. 12
The "right of telephone corporations to construct telephone lines in public rights-of-way is not absolute." (City of Huntington Beach v. Public Utilities Com. (2013) 214 Cal.App.4th 566, 590 (City of Huntington Beach).) Instead, it is a " 'limited right to use the highways . . . only to the extent necessary for the furnishing of services to the public'" (*Ibid.*, quoting *County of L.A. v. Southern Cal.Tel.Co.* (1948) 32 Cal.2d 378, 387:...

p. 16
The gist of plaintiffs' argument is that section 7901's purpose is to encourage technological advancement in the state's telecommunications networks and that, because enforcement of the Ordinance could hinder that purpose, the Ordinance is preempted. But no legislation pursues its objectives at all costs. (Pension Ben. Guar. Corp. v. LTV Corp. (1990) 496 U.S. 633, 646-647.) Moreover, the Legislature made clear that the goal of technological advancement is not paramount to all others by including the incommode clause in section 7901, thereby leaving room for local regulation of telephone line installation.

p. 17
The state Constitution vests principal regulatory authority over utilities with the PUC, but carves out an ongoing area of municipal control. (Cal. Const., art. XII, § 8.) A company seeking to build under section 7901 must approach the PUC and obtain a certificate of public necessity. (§ 1001; see City of Huntington Beach, supra, 214 Cal.App.4th at p. 585.) The certificate is not alone sufficient; a utility will still be subject to local control in carrying out the construction. Municipalities may surrender to the PUC regulation of a utility's relations with its customers (§ 2901), but they are forbidden from yielding to the PUC their police powers to protect the public from the adverse impacts of utilities operations (§ 2902).

p. 18
Footnote 13: Among the PUC's express priorities regarding wireless facility construction is that "the public health, safety, welfare, and zoning concerns of local government are addressed." (General Order 159A, *supra*, at p. 3)

p. 22
It is eminently reasonable that a local government may: (1) control the time, place, and manner of temporary access to public roads during construction of equipment facilities; and (2) regulate other, longer term impacts that might incommode public road use under Section 7901. Thus, we hold that section 7901.1 only applies to temporary access during construction and installation of telephone lines and equipment...
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I am not an attorney. As a member of the public, I claim my right and responsibility to discuss the people's law. This Supreme Court opinion seems to go far beyond mere aesthetic standards, opening the door to the exercise of municipalities' full police powers to regulate small cell towers. "Municipalities may surrender to the PUC regulation of a utility's relations with its customers (§ 2901), but they are forbidden from yielding to the PUC their police powers to protect the public from the adverse impacts of utilities operations (§ 2902)"
Also, "travel is not the sole use of public roads; other uses may be incommoded beyond the obstruction of travel. (T-Mobile West, at pp. 355-356.) For example, lines or equipment might generate noise, cause negative health consequences, or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment."

Below and attached are the Supreme Court April 4 opinion, the affirmed Court of Appeals decision of September 16, 2016, and the amicus brief for the League of California Cities, California State Association of Counties, the International Municipal Lawyers Association, and SCAN NATOA, Inc. written by Jeffrey T. Melching and Ajit Singh Thind of Rutan and Tucker, LLP, submitted May 11, 2017

Please read these documents.

Sincerely,

Nina Beety

https://www.courts.ca.gov/opinions/documents/S238001.PDF
California Supreme Court opinion, T-Mobile West LLC et al. v City and County of San Francisco et al, April 4, 2019

https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Request-Amicus-Support/Recent-Filings/Briefs-(1)/T-Mobile-v-City-and-County-of-San-Francisco_Supre
Amicus brief by League of California Cities, California State Association of Counties, International Municipal Lawyers Association and SCAN NATOA, Inc., T-Mobile West LLC et al. v City and County of San Francisco et al, May 11, 2017

https://caselaw.findlaw.com/ca-court-of-appeal/1751556.html

Appellate decision 9-16, T-Mobile West LLC et al. v City and County of San Francisco et al., September 15, 2016

California Public Utilities Code

7901. Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

7901.1. (a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.
(b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.
(c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities.
- - - - - - - - -

Section 2901-2906
2901. Any municipal corporation may retain or surrender to the [Public Utilities] commission the powers of control vested in it to supervise and regulate the relationship between any one or more classes of public utilities, and their present or prospective customers, consumers, or patrons, and, if it has retained such powers over any class of public utilities, may thereafter surrender such powers to the commission.

2902. This chapter shall not be construed to authorize any municipal corporation to surrender to the commission its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation.

2903. Unless the context otherwise requires, the definitions and general provisions set forth in this article govern the construction of this chapter.

2904. "Municipal corporation" means a city and county or incorporated city.

2905. "Legislative body" means the board of supervisors, municipal council, commission, or other legislative or governing body of a municipal corporation.

2906. "Powers of control" means all powers of control vested in a municipal corporation to supervise and regulate (a) the relationship between public utilities and their present or prospective customers, consumers, or patrons. The term does not include the powers of control vested in any municipal corporation to supervise and regulate the relationship between such public utilities and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and (b) the speed of common carriers operating within the limits of the municipal corporation.
i http://www.leginfo.ca.gov/cgi-bin/displaycode?section=puc&group=07001-08000&file=7901-7912

3 attachments

T-Mobile v SF, Supreme Ct decision 4-4-19.PDF
200K

T-Mobile v SF, Appellate Decision 9-15-16 T-Mobile v SF.doc
157K

T-Mobile v SF, amicus_Supreme-Court 2017.pdf
724K

IN THE SUPREME COURT OF CALIFORNIA

T-MOBILE WEST LLC et al.,
Plaintiffs and Appellants,
v.
CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants and Respondents.

S238001

First Appellate District, Division Five
A144252

San Francisco City and County Superior Court
CGC-11-510703

April 4, 2019

Justice Corrigan authored the opinion of the court, in which Chief Justice Cantil-Sakauye and Justices Chin, Liu, Cuéllar, Kruger, and Groban concurred.

T-MOBILE WEST LLC v. CITY AND COUNTY OF SAN FRANCISCO

S238001

Opinion of the Court by Corrigan, J.

By ordinance the City and County of San Francisco (the City) requires wireless telephone service companies to obtain permits to install and maintain lines and equipment in public rights-of-way. Some permits will not issue unless the application conforms to the City's established aesthetic guidelines. Plaintiffs assert a facial challenge urging that (1) the ordinance is preempted by state law and (2) even if not preempted, the ordinance violates a state statute. The trial court and the Court of Appeal rejected both arguments. We do likewise.

I. BACKGROUND

Plaintiffs are telecommunications companies. They install and operate wireless equipment throughout the City, including on utility poles located along public roads and highways.[1] In January 2011, the City adopted ordinance No.

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[1] The plaintiffs named in the operative complaint were T-Mobile West Corporation, NextG Networks of California, Inc., and ExteNet Systems (California) LLC. T-Mobile West Corporation has also appeared in this litigation as T-Mobile West LLC. NextG Networks of California, Inc. has also appeared as Crown Castle NG West LLC and Crown Castle NG West Inc. (*T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 340, fn. 3 (*T-Mobile West*).)

12-11 (the Ordinance),[2] which requires "any Person seeking to construct, install, or maintain a Personal Wireless Service Facility in the Public Rights-of-Way to obtain" a permit. (S.F. Pub. Works Code, art. 25, § 1500, subd. (a).) In adopting the Ordinance, the board of supervisors noted that the City "is widely recognized to be one of the world's most beautiful cities," which is vital to its tourist industry and an important reason that residents and businesses locate there. Due to growing demand, requests from the wireless industry to place equipment on utility poles had increased. The board opined that the City needed to regulate the placement of this equipment to prevent installation in ways or locations "that will diminish the City's beauty." The board acknowledged that telephone corporations have a right, under state law, "to use the public rights-of-way to install and maintain 'telephone lines' and related facilities required to provide telephone service." But it asserted that local governments may "enact laws that limit the intrusive effect of these lines and facilities."

The Ordinance specifies areas designated for heightened aesthetic review. (See S.F. Pub. Works Code, art. 25, § 1502.) These include historic districts and areas that have " 'good' " or " 'excellent' " views or are adjacent to parks or open spaces.

Not all plaintiffs install and operate the same equipment, but there is no dispute that they are all " 'telephone corporation[s],' " as that term is defined by Public Utilities Code section 234, nor that all of the equipment in question fits within the definition of " 'telephone line' " in Public Utilities Code section 233. All unspecified statutory references are to the Public Utilities Code.

[2] The Ordinance was codified as article 25 of the San Francisco Public Works Code.

(*Ibid.*) The Ordinance establishes various standards of aesthetic compatibility for wireless equipment. In historic districts, for example, installation may only be approved if the City's planning department determines that it would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. (S.F. Pub. Works Code, art. 25, § 1502; see also *id.*, §§ 1508, 1509, 1510.) In "view" districts, proposed installation may not "significantly impair" the protected views.[3] (S.F. Pub. Works Code, art. 25, § 1502.)

Plaintiffs sought declaratory and injunctive relief. The operative complaint alleged five causes of action, only one of which is at issue.[4] It alleges the Ordinance and implementing regulations are preempted by section 7901 and violate section 7901.1. Under section 7901, "telephone corporations may construct . . . telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt

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[3] The Court of Appeal discussed other provisions of a previous enactment of the Ordinance that are not in issue here. (*T-Mobile West*, *supra*, 3 Cal.App.5th at pp. 340-341.) We review the current version of the Ordinance. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6.)

[4] Plaintiffs' first, second, fourth, and fifth causes of action are not before us. The first cause of action was resolved in plaintiffs' favor by summary adjudication. The second was dismissed by plaintiffs before trial. The fourth was resolved in City's favor by summary adjudication. And the fifth was resolved in plaintiffs' favor after trial.

the navigation of the waters."[5] According to plaintiffs, section 7901 preempted the Ordinance to the extent it allowed the City to condition permit approval on aesthetic considerations.

Section 7901.1 sets out the Legislature's intent, "consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed." (§ 7901.1, subd. (a).) But section 7901.1 also provides that, to be considered reasonable, the control exercised "shall, at a minimum, be applied to all entities in an equivalent manner." (§ 7901.1, subd. (b).) Plaintiffs alleged the Ordinance violated subdivision (b) of section 7901.1 by treating wireless providers differently from other telephone corporations.

The trial court ruled that section 7901 did not preempt the challenged portions of the Ordinance and rejected plaintiffs' claim that it violated section 7901.1. The Court of Appeal affirmed. (*T-Mobile West*, *supra*, 3 Cal.App.5th at pp. 339, 359.)

II. DISCUSSION

A. Section 7901 Does Not Preempt the Ordinance

1. Preemption Principles

Under the California Constitution, cities and counties "may make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) General laws are those that apply statewide and deal with matters of statewide

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[5] This case does not involve the construction or installation of lines or equipment across state waters. Thus, we limit our discussion to lines installed along public roads and highways, which we refer to collectively as public roads.

concern. (*Eastlick v. City of Los Angeles* (1947) 29 Cal.2d 661, 665.) The "inherent local police power includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within a local jurisdiction's borders." (*City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.* (2013) 56 Cal.4th 729, 738 (*City of Riverside*); see also *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 (*Big Creek Lumber*).) The local police power generally includes the authority to establish aesthetic conditions for land use. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886; *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1416.)

"[L]ocal legislation that conflicts with state law is void." (*City of Riverside*, *supra*, 56 Cal.4th at p. 743, citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) A conflict exists when the local legislation " ' " 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.' " ' " (*Sherwin-Williams*, at p. 897.) Local legislation duplicates general law if both enactments are coextensive. (*Ibid.*, citing *In re Portnoy* (1942) 21 Cal.2d 237, 240.) Local legislation is contradictory when it is inimical to general law. (*Sherwin-Williams*, at p. 898, citing *Ex parte Daniels* (1920) 183 Cal. 636, 641-648.) State law fully occupies a field "when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1068 (*O'Connell*), citing *Sherwin-Williams*, at p. 898.)

The party claiming preemption has the burden of proof. (*Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1149.) "[W]hen local government regulates in an area over which it traditionally has

exercised control, such as the location of particular land uses, California courts will presume" the regulation is not preempted unless there is a clear indication of preemptive intent. (*Ibid.*, citing *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 93.) Ruling on a facial challenge to a local ordinance, the court considers the text of the measure itself, not its application to any particular circumstances or individual. (*San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 487, citing *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 894, which in turn cites *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)[6]

2. Analysis

Section 7901 provides that telephone corporations may construct lines and erect equipment along public roads in ways and locations that do not "incommode the public use of the road." We review the statute's language to determine the scope of the rights it grants to telephone corporations and whether, by

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[6] There is some uncertainty regarding the standard for facial constitutional challenges to statutes and local ordinances. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.) Some cases have held that legislation is invalid if it conflicts in the generality or great majority of cases. (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1126.) Others have articulated a stricter standard, holding that legislation is invalid only if it presents a total and fatal conflict with applicable constitutional prohibitions. (*Ibid.*; see also *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.) We need not settle on a precise formulation of the applicable standard because, as explained below, we find no inherent conflict between the Ordinance and section 7901. Thus, plaintiffs' claim fails under any articulated standard.

granting those rights, the Legislature intended to preempt local regulation based on aesthetic considerations. These questions of law are subject to de novo review. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724; *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10.)

The parties agree that section 7901 grants telephone corporations a statewide franchise to engage in the telecommunications business.[7] (See *Western Union Tel. Co. v. Visalia* (1906) 149 Cal. 744, 750 (*Visalia*).) Thus, a local government cannot insist that a telephone corporation obtain a *local* franchise to operate within its jurisdiction. (See *Visalia*, at p. 751; see also *Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal.2d 766, 771 (*Pacific Telephone I*).) The parties also agree that the franchise rights conferred are limited by the prohibition against incommoding the public use of roads, and that local governments have authority to prevent those impacts.

Plaintiffs argue section 7901 grants them more than the mere right to operate. In their view, section 7901 grants them the right to construct lines and erect equipment along public roads so long as they do not obstruct the path of travel. The necessary corollary to this right is that local governments cannot prevent the construction of lines and equipment unless the installation of the facilities will obstruct the path of travel. Plaintiffs urge that the Legislature enacted section 7901 to promote technological advancement and ensure a functioning, statewide telecommunications system. In light of those

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[7] In this context, a franchise is a "government-conferred right or privilege to engage in specific business or to exercise corporate powers." (Black's Law Dict. (10th ed. 2014) p. 772, col. 2.)

objectives, they contend that their right to construct telephone lines must be construed broadly, and local authority limited to preventing roadway obstructions.

Preliminarily, plaintiffs' argument appears to rest on the premise that the City only has the power to regulate telephone line construction based on aesthetic considerations if section 7901's incommode clause can be read to accommodate that power. That premise is flawed. As mentioned, the City has inherent local police power to determine the appropriate uses of land within its jurisdiction. That power includes the authority to establish aesthetic conditions for land use. Under our preemption cases, the question is not whether the incommode clause can be read to permit the City's exercise of power under the Ordinance. Rather, it is whether section 7901 divests the City of that power.

We also disagree with plaintiffs' contention that section 7901's incommode clause limits their right to construct lines only if the installed lines and equipment would obstruct the path of travel. Contrary to plaintiffs' argument, the incommode clause need not be read so narrowly. As the Court of Appeal noted, the word " 'incommode' " means " 'to give inconvenience or distress to: disturb.' " (*T-Mobile West, supra,* 3 Cal.App.5th at p. 351, citing Merriam-Webster Online Dict., available at <http://www.merriam-webster.com/dictionary/incommode> [as of April 3, 2019].)[8] The Court of Appeal also quoted the definition of "incommode" from the 1828 version of Webster's Dictionary. Under that definition, "incommode" means " '[t]o

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[8] All Internet citations in this opinion are archived by year, docket number, and case name at <http://www.courts.ca.gov/38324.htm>.

give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition.' " (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 351, citing Webster's Dict. 1828—online ed., available at <http://www.websterdictionary1828.com/Dictionary/incommode> [as of April 3, 2019].) For our purposes, it is sufficient to state that the meaning of incommode has not changed meaningfully since section 7901's enactment.[9] Obstructing the path of travel is one way that telephone lines could disturb or give inconvenience to public road use. But travel is not the sole use of public roads; other uses may be incommoded beyond the obstruction of travel. (*T-Mobile West*, at pp. 355-356.) For example, lines or equipment might generate noise, cause negative health consequences, or create safety concerns. All these impacts could disturb public road use, or disturb its quiet enjoyment.

Plaintiffs assert the case law supports their statutory construction. For example, *City of Petaluma v. Pac. Tel. & Tel. Co.* (1955) 44 Cal.2d 284 (*Petaluma*) stated that the "franchise tendered by [section 7901] . . . [is] superior to and free from any grant made by a subordinate legislative body." (*Id.* at p. 287; see also *Pacific Telephone I*, *supra*, 51 Cal.2d at p. 770; *County of Inyo v. Hess* (1921) 53 Cal.App. 415, 425 (*County of Inyo*).)

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[9] The predecessor of section 7901, Civil Code section 536, was first enacted in 1872 as part of the original Civil Code. (*Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 419, citing *Sunset Tel. and Tel. Co. v. Pasadena* (1911) 161 Cal. 265, 273.) Civil Code section 536 contained the "incommode" language, as did its predecessor, which was adopted as part of the Statutes of California in 1850. (Stats. 1850, ch. 128, § 150, p. 369.)

Similarly, *Pac. Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272 (*City of Los Angeles*), held that the "authority to grant a franchise to engage in the telephone business resides in the state, and the city is without power to require a telephone company to obtain such a franchise unless the right to do so has been delegated to it by the state." (*Id.* at pp. 279-280.)

But these cases do not go as far as plaintiffs suggest. Each addressed the question whether a telephone corporation can be required to obtain a local franchise to operate. (See *Pacific Telephone I, supra*, 51 Cal.2d at p. 767; *Petaluma, supra*, 44 Cal.2d at p. 285; *City of Los Angeles, supra*, 44 Cal. 2d at p. 276; *County of Inyo, supra*, 53 Cal.App. at p. 425.) None considered the distinct question whether a local government can condition permit approval on aesthetic or other considerations that arise under the local police power. A permit is, of course, different from a franchise. The distinction may be best understood by considering the effect of the denial of either. The denial of a franchise would completely bar a telephone corporation from operating within a city. The denial of a permit, on the other hand, would simply prevent construction of lines in the proposed manner at the proposed location.

A few published decisions have tangentially addressed the scope of the inherent local police power to regulate the manner and location of telephone line installations. Those cases cut against plaintiffs' proposed construction.

In *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1961) 197 Cal.App.2d 133 (*Pacific Telephone II*), the City argued it could require a telephone corporation to obtain a local franchise to operate within its jurisdiction because the power to grant franchises fell within its police power. (*Id.* at p. 152.) The

court rejected the City's argument, reasoning that the phrase " 'police power' has two meanings, 'a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people.' " (*Ibid.*) "Where a corporation has a state franchise to use a city's streets, the city derives its rights to regulate the particular location and manner of installation of the franchise holder's facilities from the narrower sense of the police power. Thus, because of the state concern in communications, the state has retained to itself the broader police *power of granting franchises*, leaving to the municipalities the narrower police *power of controlling location and manner of installation*." (*Ibid.*, italics added.)

This court, too, has distinguished the power to grant franchises from the power to regulate the location and manner of installation by permit. In *Visalia, supra*, 149 Cal. 744, the city adopted an ordinance that (i) authorized a telephone company to erect telegraph poles and wires on city streets, (ii) approved the location of poles and wires then in use, (iii) prohibited poles and wires from interfering with travel on city streets, and (iv) required all poles to be of a uniform height. (*Id.* at pp. 747-748.) The city asserted its ordinance operated to grant the company a " 'franchise,' " and then attempted to assess a tax on the franchise. (*Id.* at p. 745.) The company challenged the assessment. It argued that, because the ordinance did not create a franchise, the tax assessment was invalid. (*Id.* at pp. 745-746.) We concluded the ordinance did not create a local franchise. (*Id.* at p. 750.) By virtue of its state franchise, "the appellant had the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city." (*Ibid.*) "[N]evertheless it could not maintain its poles and wires

in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of plaintiff's placing and maintaining its poles and wires *as to prevent unreasonable obstruction of travel*." (*Id.* at pp. 750-751, italics added.) "[T]he ordinance in question was not intended to be anything more . . . than the exercise of this authority to regulate." (*Id.* at p. 751)[10]

Plaintiffs argue the italicized language above shows that local regulatory authority is limited to preventing travel obstructions. But the quoted language is merely descriptive, not prescriptive. *Visalia* involved an ordinance that specifically prohibited interference with travel on city streets, and the court was simply describing the ordinance before it, not establishing the bounds of local government regulatory authority. Moreover, the *Visalia* court did not question the propriety of the ordinance's requirement that all poles be a uniform height, nor suggest that requirement was related to preventing obstructions to travel. Thus, *Visalia* does not support the conclusion that section 7901 was meant to restrict local government power in the manner plaintiffs suggest. The "right of telephone corporations to construct telephone lines in public rights-of-way is not absolute." (*City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, 590 (*City of Huntington Beach*).) Instead, it is a " 'limited right to use the highways . . . only to the extent necessary for the furnishing of services to the

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[10] *Visalia* interpreted a predecessor statute, Civil Code section 536, which was repealed in 1951 and reenacted as section 7901. (Stats. 1951, ch. 764, pp. 2025, 2194, 2258 [reenacting Civ. Code, former § 536 as Pub. Util. Code, § 7901].)

public.' " (*Ibid.*, quoting *County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 387; see also *Pacific Tel. & Tel. Co. v. Redevelopment Agency* (1977) 75 Cal.App.3d 957, 963.)[11]

Having delineated the right granted by section 7901, we now turn to its preemptive sweep. Because the location and manner of line installation are areas over which local governments traditionally exercise control (*Visalia, supra*, 149 Cal. at pp. 750-751), we presume the ordinance is not preempted absent a clear indication of preemptive intent. (*Big Creek Lumber, supra*, 38 Cal.4th at p. 1149.) Plaintiffs put forth a number of preemption theories. They argue the Ordinance is contradictory to section 7901. At oral argument, they asserted the Legislature occupied the field with section 7901, the terms of which indicate that a paramount state concern will not tolerate additional local action. And in their briefs, many of plaintiffs' arguments were focused on what has been labeled, in the federal context, as obstacle preemption.

"The 'contradictory and inimical' form of preemption does not apply unless the ordinance directly requires what the state

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[11] The Ninth Circuit has addressed this issue twice, coming to a different conclusion each time. In *Sprint PCS Assets v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, the Ninth Circuit found no conflict between section 7901 and a local ordinance conditioning permit approval on aesthetic considerations. (*Palos Verdes Estates*, at pp. 721-723.) In an unpublished decision issued three years earlier, the Ninth Circuit had reached the opposite conclusion. (*Sprint PCS v. La Cañada Flintridge* (9th Cir. 2006) 182 Fed.Appx. 688, 689.) Due to its unpublished status, the *La Cañada Flintridge* decision carries no precedential value. (*T-Mobile West, supra*, 3 Cal.App.5th at p. 355, citing *Bowen v. Ziasun Technologies, Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6.)

statute forbids or prohibits what the state enactment demands." (*City of Riverside*, *supra*, 56 Cal.4th at p. 743, citing *Big Creek Lumber*, *supra*, 38 Cal.4th at p. 1161.) "[N]o inimical conflict will be found where it is reasonably possible to comply with both the state and local laws." (*City of Riverside*, at p. 743.) As noted, section 7901 grants telephone corporations the right to install lines on public roads without obtaining a local franchise. The Ordinance does not require plaintiffs to obtain a local franchise to operate within the City. Nor does it allow certain companies to use public roads while excluding others. Any wireless provider may construct telephone lines on the City's public roads so long as it obtains a permit, which may sometimes be conditioned on aesthetic approval. Because section 7901 says nothing about the aesthetics or appearance of telephone lines, the Ordinance is not inimical to the statute.

The argument that the Legislature occupied the field by implication likewise fails. Field preemption generally exists where the Legislature has comprehensively regulated in an area, leaving no room for additional local action. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1252-1257; *O'Connell*, *supra*, 41 Cal.4th 1061, 1068-1074.) Unlike the statutory schemes addressed in *American Financial* and *O'Connell*, section 7901 does not comprehensively regulate telephone line installation or provide a general regulatory scheme. On the contrary, section 7901 consists of a single sentence. Moreover, although the granting of telephone franchises has been deemed a matter of statewide concern (*Pacific Telephone I*, *supra*, 51 Cal.2d at p. 774; *Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 152), the power to regulate the location and manner of line installation is generally a matter left to local regulation. The City is not attempting to

regulate in an area over which the state has traditionally exercised control. Instead, this is an area of regulation in which there are " 'significant local interest[s] to be served that may differ from one locality to another.' " (*Big Creek Lumber, supra,* 38 Cal.4th at p. 1149.)

City of Riverside, supra, 56 Cal.4th 729, is instructive. There, the question was whether state statutes designed to enhance patient and caregiver access to medical marijuana preempted a local zoning law banning dispensaries within a city's limits. (*Id.* at pp. 737, 739-740.) An early enactment had declared that physicians could not be punished for recommending medical marijuana and that state statutes prohibiting possession and cultivation of marijuana would not apply to patients or caregivers. (*Id.* at p. 744.) A subsequent enactment established a program for issuing medical marijuana identification cards and provided that a cardholder could not be arrested for possession or cultivation in permitted amounts. (*Id.* at p. 745.) We concluded that the "narrow reach of these statutes" (*ibid.*) showed they did not "expressly or impliedly preempt [the city's] zoning provisions" (*id.* at p. 752).

Preemption was not implied because the Legislature had not tried "to fully occupy the field of medical marijuana regulation as a matter of statewide concern, or to partially occupy this field under circumstances indicating that further local regulation will not be tolerated." (*City of Riverside, supra,* 56 Cal.4th at p. 755.) While state statutes took "limited steps toward recognizing marijuana as a medicine," they described "no comprehensive scheme or system for authorizing, controlling, or regulating the processing and distribution of marijuana for medical purposes, such that no room remains for local action." (*Ibid.*) Moreover, there were significant local

interests that could vary by jurisdiction, giving rise to a presumption against preemption. (*Ibid.*)

Similarly, here, the Legislature has not adopted a comprehensive regulatory scheme. Instead, it has taken the limited step of guaranteeing that telephone corporations need not secure a local franchise to operate in the state or to construct local lines and equipment. Moreover, the statute leaves room for additional local action and there are significant local interests relating to road use that may vary by jurisdiction.

Finally, plaintiffs' briefing raises arguments that sound in the theory of obstacle preemption. Under that theory, a local law would be displaced if it hinders the accomplishment of the purposes behind a state law. This court has never said explicitly whether state preemption principles are coextensive with the developed federal conception of obstacle preemption. (See, e.g., *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 867-868; cf. *City of Riverside*, *supra*, 56 Cal.4th at pp. 763-765 (conc. opn. of Liu, J.).) But assuming for the sake of argument that the theory applies, we conclude there is no obstacle preemption here.

The gist of plaintiffs' argument is that section 7901's purpose is to encourage technological advancement in the state's telecommunications networks and that, because enforcement of the Ordinance *could* hinder that purpose, the Ordinance is preempted. But no legislation pursues its objectives at all costs. (*Pension Ben. Guar. Corp. v. LTV Corp.* (1990) 496 U.S. 633, 646-647.) Moreover, the Legislature made clear that the goal of technological advancement is not paramount to all others by including the incommode clause in section 7901, thereby leaving room for local regulation of telephone line installation.

Finally, we think it appropriate to consider the Public Utilities Commission's (PUC) understanding of the statutory scheme. In recognition of its expertise, we have consistently accorded deference to the PUC's views concerning utilities regulation. The PUC's "interpretation of the Public Utility Code 'should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.' " (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796, quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411.) Here, the PUC has made determinations about the scope of permissible regulation that are on point.

The state Constitution vests principal regulatory authority over utilities with the PUC, but carves out an ongoing area of municipal control. (Cal. Const., art. XII, § 8.) A company seeking to build under section 7901 must approach the PUC and obtain a certificate of public necessity. (§ 1001; see *City of Huntington Beach, supra,* 214 Cal.App.4th at p. 585.) The certificate is not alone sufficient; a utility will still be subject to local control in carrying out the construction. Municipalities may surrender to the PUC regulation of a utility's relations with its customers (§ 2901), but they are forbidden from yielding to the PUC their police powers to protect the public from the adverse impacts of utilities operations (§ 2902).

Consistent with these statutes, the PUC's default policy is one of deference to municipalities in matters concerning the design and location of wireless facilities. In a 1996 opinion adopting the general order governing wireless facility construction, the PUC states the general order "recognize[s] that primary authority regarding cell siting issues should continue to be deferred to local authorities. . . . The [PUC's] role continues to be that of the agency of last resort, intervening only

when a utility contends that local actions impede statewide goals . . . ." (*Re Siting and Environmental Review of Cellular Mobile Radiotelephone Utility Facilities* (1996) 66 Cal.P.U.C.2d 257, 260; see also *Re Competition for Local Exchange Service* (1998) 82 Cal.P.U.C.2d 510, 544.)[12] The order itself "acknowledges that local citizens and local government are often in a better position than the [PUC] to measure local impact and to identify alternative sites. Accordingly, the [PUC] will generally defer to local governments to regulate the location and design of cell sites . . . ." (PUC, General order No. 159-A (1996) p. 3 (General Order 159A), available at <http://docs.cpuc.ca.gov/PUBLISHED/Graphics/611.PDF> [as of April 3, 2019].)

The exception to this default policy is telling: the PUC reserves the right to preempt local decisions about specific sites "when there is a clear conflict with the [PUC's] goals and/or statewide interests." (General Order 159A, *supra*, at p. 3.) In other words, generally the PUC will not object to municipalities dictating alternate locations based on local impacts,[13] but it will step in if statewide goals such as "high quality, reliable and widespread cellular services to state residents" are threatened.

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[12] In its 1996 opinion adopting general order No. 159-A, the PUC left implicit the portions of the statutory scheme it was applying. In its 1998 opinion, the PUC clarified the respective regulatory spheres in response to arguments based on sections 2902, 7901, 7901.1 and the constitutional provisions allocating authority to cities and the PUC. (See *Re Competition for Local Exchange Service*, *supra*, 82 Cal.P.U.C.2d at pp. 543–544.)

[13] Among the PUC's express priorities regarding wireless facility construction is that "the public health, safety, welfare, and zoning concerns of local government are addressed." (General Order 159A, *supra*, at p. 3.)

(General Order 159A, at p. 3.) Contrary to plaintiffs' view of the respective spheres of state and local authority, the PUC's approach does not restrict municipalities to judging only whether a requested permit would impede traffic. Instead, the PUC accords local governments the full scope of their ordinary police powers unless the exercise of those powers would undermine state policies.

Plaintiffs argue our construction of section 7901, and a decision upholding the City's authority to enforce the Ordinance, will "hinder the roll-out of advanced services needed to upgrade networks [and] promote universal broadband" and will "stymie the deployment of 5G networks, leaving California unable to meet the growing need for wireless capacity created by the proliferation of . . . connected devices." This argument is premised on a hypothetical future harm that is not cognizable in a facial challenge. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180; see also *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267.)

In sum, neither the plain language of section 7901 nor the manner in which it has been interpreted by courts and the PUC supports plaintiffs' argument that the Legislature intended to preempt local regulation based on aesthetic considerations. The statute and the ordinance can operate in harmony. Section 7901 ensures that telephone companies are not required to obtain a local franchise, while the Ordinance ensures that lines and equipment will not unreasonably incommode public road use.[14]

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[14] We dispose here only of plaintiffs' facial challenge and express no opinion as to the Ordinance's application. We note, however, that plaintiffs seeking to challenge specific

B. The Ordinance Does Not Violate Section 7901.1

Plaintiffs next contend that, even if not preempted, the Ordinance violates section 7901.1 by singling out wireless telephone corporations for regulation. Section 7901.1 provides in relevant part that, consistent with section 7901, municipalities may "exercise reasonable control as to the time, place, and manner" in which roads are "*accessed*," and that the control must "*be applied to all entities in an equivalent manner*." (§ 7901, subds. (a), (b), italics added.)

Before trial, the parties stipulated to the following facts. First, that the City requires all utility and telephone corporations, both wireless and non-wireless, to obtain temporary occupancy permits to "access" public rights-of-way during the *initial* construction and installation of equipment facilities. These permits are not subject to aesthetic review. Second, that the City requires only wireless telephone corporations to obtain site-specific permits, conditioned on aesthetic approval, for the *ongoing* occupation and maintenance

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applications have both state and federal remedies. Under state law, a utility could seek an order from the PUC preempting a city's decision. (General Order 159A, *supra*, at p. 6.) Thus, cities are prohibited from using their powers to frustrate the larger intent of section 7901. (*Pacific Telephone II*, *supra*, 197 Cal.App.2d at p. 146.) Under federal law, Congress generally has left in place local authority over "the placement, construction, and modification of personal wireless service facilities" (47 U.S.C. § 332(c)(7)(A)), but it has carved out several exceptions. Among these, a city may not unduly delay decisions (47 U.S.C. § 332(c)(7)(B)(ii)) and may not adopt regulations so onerous as to "prohibit or have the effect of prohibiting the provision of wireless services" (47 U.S.C. § 332(c)(7)(B)(i)(II)). If a city does so, a wireless company may sue. (*Sprint PCS Assets v. City of Palos Verdes Estates*, *supra*, 583 F.3d at p. 725.)

of equipment facilities in public rights-of-way. The trial court and the Court of Appeal held that section 7901.1 only applies to *temporary* access to public rights-of-way, during initial construction and installation. Because the parties had stipulated that the City treats all companies equally in that respect, the lower courts found no violation of section 7901.1.

Plaintiffs argue the plain language of section 7901.1 does not limit its application to temporary access to public rights-of-way. Rather, the introductory phrase, "consistent with section 7901," demonstrates that section 7901.1 applies to both short- and long-term access. Plaintiffs also suggest that the legislative history of section 7901.1 supports their position, and that the lower courts' interpretation of section 7901.1 "results in an incoherent approach to municipal authority."

Plaintiffs' arguments are unpersuasive. Section 7901.1 allows cities to control the time, place, and manner in which roads are "accessed." (§ 7901.1, subd. (a).) As the competing arguments demonstrate, the "plain meaning of the word 'accessed' is ambiguous." (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 358.) It could refer only to short-term access, during the initial installation and construction of a telephone equipment facility. But it could also refer to the longer term occupation of public rights-of-way with telephone equipment. (*Ibid.*) Though it would be odd for a statute authorizing local control over *permanent* occupations to specifically allow for control over the "time" of such occupations, the statute's plain language does not render plaintiffs' construction totally implausible.

However, the legislative history shows that section 7901.1 only deals with temporary access to public rights-of-way. "This bill is intended to bolster the cities[']abilities with regard to

construction management . . . ." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, p. 3, italics added.) Before section 7901.1's enactment, telephone companies had been taking the "extreme" position, based on their statewide franchises, that "cities [had] absolutely no ability to control construction." (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2.) Section 7901.1 was enacted to "send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone [corporations'] statewide franchise." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, p. 3.) Under section 7901.1, cities would be able to "plan maintenance programs, protect public safety, minimize public inconvenience, and ensure adherence to sound construction practices." (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2.)

To accept plaintiffs' construction of section 7901.1, we would have to ignore this legislative history. (*T-Mobile West*, *supra*, 3 Cal.App.5th at p. 358.) Contrary to plaintiffs' argument, construing section 7901.1 in this manner does not render the scheme incoherent. It is eminently reasonable that a local government may: (1) control the time, place, and manner of temporary access to public roads during construction of equipment facilities; and (2) regulate other, longer term impacts that might incommode public road use under section 7901. Thus, we hold that section 7901.1 only applies to temporary access during construction and installation of telephone lines

and equipment. Because the City treats all entities similarly in that regard, there is no section 7901.1 violation.

III. DISPOSITION

The judgment of the Court of Appeal is affirmed.

CORRIGAN, J.

We Concur:

CANTIL-SAKAUYE, C. J.
CHIN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.
GROBAN, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion T-Mobile West LLC v. City and County of San Francisco

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Unpublished Opinion
Original Appeal
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T–MOBILE WEST LLC et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.

A144252

Decided: September 15, 2016

Davis Wright Tremaine, Martin L. Fineman, San Francisco, T. Scott Thompson and Daniel P. Reing for Plaintiffs and Appellants. Dennis J. Herrera, City Attorney, Yvonne R. Meré, Chief of Complex and Affirmative Litigation, William K. Sanders and Erin B. Bernstein, Deputy City Attorneys, for Defendants and Respondents. Rutan & Tucker, Jeffrey T. Melching and Ajit Singh Thind, Costa Mesa, for League of California Cities, California State Association of Counties and SCAN NATOA, Inc. as Amici Curiae on behalf of Defendants and Respondents.

Sometimes tension exists between technological advancement and community aesthetics. (Sprint PCS Assets v. City of Palos Verdes Estates (9th Cir. 2009) 583 F.3d 716, 720 (Palos Verdes Estates).) We address here the scope of local government authority to adjust the balance of those interests, consistent with state-wide regulation.

Telephone and telegraph companies have long exercised a franchise under state law to construct and maintain their lines on public roads and highways "in such manner and at such points as not to incommode the public use." (Pub. Util. Code, § 7901; 1 Pac. Tel. & Tel. Co. v. City & County of S.F. (1959) 51 Cal.2d 766, 771 (Pacific Telephone I).) State law also provides that local government maintains the right "to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. [¶] … The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner." (§ 7901.1, subds. (a), (b).) In 2011, the City and County of San Francisco (City) enacted an ordinance requiring all persons to obtain a site-specific permit before seeking to construct, install, or maintain certain telecommunications equipment, known as "Personal Wireless Service Facilities" (hereafter wireless facilities), in the public right-of-way.2 In this appeal, we consider whether the ordinance, on its face, is preempted by sections 7901 and 7901.1. We affirm the trial court's determination that portions of the ordinance that authorize consideration of aesthetics are not preempted by state law.

I. Factual and Procedural Background

T–Mobile West LLC, Crown Castle NG West LLC,3 and ExteNet Systems (California) LLC (collectively Plaintiffs) are considered "telephone corporations" under California law. (§ 234.) Plaintiffs' business requires installation and operation of wireless facilities, including antennas, transmitters, and power supplies, on existing utility poles in the City's public rights-of-way. These wireless facilities are considered "telephone lines." (§ 233.)

In January 2011, the San Francisco Board of Supervisors adopted Ordinance No. 12–11 (Wireless Ordinance or Ordinance), which required Plaintiffs to obtain a wireless facility site permit (Wireless Permit) from the City's Department of Public Works (DPW) before installing or modifying any wireless facility in the public right-of-way.[4] In adopting the Ordinance, the Board of Supervisors observed:

"(1) Surrounded by water on three sides, San Francisco is widely recognized to be one of the world's most beautiful cities. Scenic vistas and views throughout San Francisco of both natural settings and human-made structures contribute to its great beauty.

"(2) The City's beauty is vital to the City's tourist industry and is an important reason for businesses to locate in the City and for residents to live here. Beautiful views enhance property values and increase the City's tax base. The City's economy, as well as the health and well-being of all who visit, work or live in the City, depends in part on maintaining the City's beauty.

"(3) The types of wireless antennas and other associated equipment that telecommunications providers install in the public rights-of-way can vary considerably in size and appearance. The City does not intend to regulate the technologies used to provide personal wireless services. However, the City needs to regulate placement of such facilities in order to prevent telecommunications providers from installing wireless antennas and associated equipment in the City's public rights-of-way either in manners or in locations that will diminish the City's beauty." (Italics added.) After the Ordinance was enacted, DPW adopted implementing regulations.

The Ordinance required a showing of technological or economic necessity for permit approval and created three "Tiers" of facilities based on equipment size. Tier I was defined to include only the smallest equipment (essentially, primary and secondary equipment enclosures, each less than 3 cubic feet in volume and no greater than 12 inches wide and 10 inches deep). Tier II was defined to allow equipment slightly larger in overall volume than Tier I (4 cubic feet), but with the same limits on width and depth. Tier·III was defined as any equipment larger than Tier II. The Ordinance conditioned approval of permits for equipment in Tiers II and III on aesthetic approval by a City department responsible for the proposed site.

Within Tiers II and III, three additional subdivisions were created, depending on whether the proposed wireless facility was in a location designated as (1) unprotected, (2) "Planning Protected" or "Zoning Protected," or (3) "Park Protected."[5] Each of those subdivisions, in turn, triggered different aesthetic standards for approval. For example, if a wireless facility was proposed to be installed near a historic building or in a historic district, the City's Planning Department needed to determine that it would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. Additionally, for any Tier III facility, a "necessity" standard required DPW to find that "a Tier II Facility is insufficient to meet the Applicant's service needs." DPW would not issue a Wireless

Permit unless the relevant City department determined the proposed wireless facility "satisfie[d]" the applicable aesthetic compatibility standard. The Ordinance also prohibits issuance of a Wireless Permit if the applicant seeks to "[i]nstall a new Utility or Street Light Pole on a Public Right-of-Way where there presently are no overhead utility facilities."

If DPW approved a Tier III application after recommendation by the Planning Department, the approval from DPW was only "tentative," and the applicant was then required to notice the public. "Any person" could protest tentative approval of a Tier III application within 20 days of the date the notice was mailed and then subjected the application to public hearing. After a final determination on a Tier III application, "any person" could appeal to the Board of Appeals.

On May 3, 2011, Plaintiffs filed an action for declaratory and injunctive relief. The operative second amended complaint asserted five causes of action: (1) violation of Government Code section 65964, subdivision (b); [6] (2) an unlawful taking of Plaintiffs' property without due process of law; (3) violation of and preemption by sections 7901 and 7901.1; (4) preemption of DPW regulations granting the Planning Department review authority under the California Environmental Quality Act; and (5) violation of and preemption by the then-newly enacted section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 (47 U.S.C. § 1455). Plaintiffs' first and fourth causes of action were resolved by summary adjudication. Plaintiffs voluntarily dismissed their second cause of action before trial.

During the bench trial on the remaining third and fifth causes of action, Plaintiffs and the City stipulated that Comcast, AT & T, and PG & E have also installed certain equipment, including backup battery units, antennas, cut-off switches, power meters, and transformers, on utility poles in the City's public right-of-way. With respect to PG & E, it was stipulated the City granted PG & E a franchise to install its facilities in the public right-of-way and requires it to obtain temporary occupancy permits if the installation will take more than one day. The parties also stipulated that telephone corporations installing facilities on utility poles other than wireless facilities, such as AT & T, and state video providers, such as Comcast, need only obtain utility conditions permits and temporary occupancy permits if the installation will take more than one day. Comcast, AT & T, and PG & E are not required to obtain any site-specific permit as a condition of installing such facilities on existing utility poles.[7]

Following posttrial briefing and argument, the trial court issued its proposed statement of decision, to which both parties objected. On November 26, 2014, the trial court overruled the objections, issued its final statement of decision, and entered final judgment. The court ruled in favor of Plaintiffs on their fifth cause of action, holding that modification provisions of the Ordinance and DPW regulations violate section 6409 of the Middle Class Tax Relief and Job Creation Act. With respect to Plaintiffs' third cause of action, the trial court found portions of the Ordinance, conditioning issuance of a permit on economic or technological necessity,

were preempted by section 7901. However, the court held the Ordinance's aesthetics-based compatibility standards were not preempted by sections 7901 or 7901.1.

In concluding that sections 7901 and 7901.1 did not impliedly preempt the City's power to impose aesthetic conditions, the court rejected Plaintiffs' argument that the public right-of-way is incommoded only by physical obstruction of travel. The court concluded Palos Verdes Estates, supra, 583 F.3d 716 “correctly viewed the public's right to the ‘use of the road’ as encompassing far more than merely getting from place to place.” The trial court also agreed with the Palos Verdes Estates court that “the passage of [section] 7901.1 in 1995 codified and bolstered the right of local government to control and regulate construction of telecommunications facilities and for that reason the Wireless Ordinance is not pre-empted by [section] 7901.1.”

The trial court found Plaintiffs' equipment and facilities installed in the public rights-of-way to be “generally similar in size and appearance” to equipment installed by “landline” telephone corporations, cable television operators, and PG & E. Nonetheless, the trial court also rejected Plaintiffs' “secondary argument” that the Ordinance directly conflicts with the equivalence requirement found in section 7901.1, subdivision (b). The court agreed Plaintiffs had failed to sustain their burden of proving the Ordinance was invalid on its face because of this lack of equivalency. The court further explained: “[T]urning to the merits of Plaintiffs' contention[,] the Court agrees that the term all entities means just that and is not limited to telephone and telegraph corporations. However, Plaintiffs have failed to provide reasoning or authority that justifies a finding that [section] 7901.1 requires that all entities, whatever or whoever they may be, must be subject to regulation under the Wireless Ordinance or something similar.”

Plaintiffs filed a timely notice of appeal from the judgment.[8] After Plaintiffs filed their notice of appeal, the Board of Supervisors adopted Ordinance No. 18–15 (the Amended Ordinance) in order to comply with the trial court's judgment.[9] In relevant part, the Amended Ordinance retains the same basic permitting structure, but simplifies the standards applicable to proposed wireless facilities by removing the size-based tiers. (See S.F. Public Works Code, §§ 1502–1503.) The Amended Ordinance continues to require compliance with aesthetics-based compatibility standards, but the applicable standard is now determined solely by the location of the facility. (See id., §§ 1502, 1508–1510.) All wireless facilities are now subject to the public notice and protest provisions formerly only applicable to Tier III facilities. (See id., §§ 1512–1513.) [10]

II. Discussion

The question on appeal is whether the Ordinance, on its face, conflicts with and is preempted by sections 7901 and 7901.1. Plaintiffs contend the Legislature preempted local regulation by giving Plaintiffs the right to install telephone lines in the public right-of-way “in such manner and at such points as not to incommode the public use of the road or highway or interrupt the

navigation of the waters." (§ 7901, italics added.) Plaintiffs also argue the Ordinance violates the "equivalent treatment" requirement of section 7901.1, subdivision (b), because only wireless providers are required to obtain site-specific permits to install their equipment within the right-of-way. The City, on the other hand, maintains the Ordinance is not preempted by either section 7901 or section 7901.1.[11] Specifically, the City insists the plain meaning of the term "incommode" is broad enough "to be inclusive of concerns related to the appearance of a facility" and section 7901.1, subdivision (b), does not apply to the Ordinance. We agree with the City on both points.

We review questions of statutory interpretation and preemption de novo. (Farm Raised Salmon Cases (2008) 42 Cal.4th 1077, 1089, fn. 10; Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist. (2001) 90 Cal.App.4th 64, 69.) " '[T]he construction of statutes and the ascertainment of legislative intent are purely questions of law. This court is not limited by the interpretation of the statute made by the trial court' " (Bravo Vending v. City of Rancho Mirage (1993) 16 Cal.App.4th 383, 391–392.)

"Facial challenges consider only the text of a measure, not the application of the measure to particular circumstances." (San Diego Gas & Electric Co. v. City of Carlsbad (1998) 64 Cal.App.4th 785, 803; accord, Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1084.) "Facial challenges to legislation are the most difficult to successfully pursue because the challenger must demonstrate that ' " 'no set of circumstances exists under which the [law] would be valid.' " [Citation.]' [Citation.] Thus, the moving party must establish that the challenged legislation inevitably is in total, fatal conflict with applicable prohibitions." (Sierra Club v. Napa County Bd. of Supervisors (2012) 205 Cal.App.4th 162, 173.) "[O]ur task is to determine whether the statute can constitutionally be applied. 'To support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute Rather, [plaintiffs] must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.' " (Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal.4th 251, 267.)[12]

Preemption analysis "consists of four questions, which in order of increasing difficulty may be listed as follows: (1) Does the ordinance duplicate any state law? (2) Does the ordinance contradict any state law? (3) Does the ordinance enter into a field of regulation which the state has expressly reserved to itself? (4) Does the ordinance enter into a field of regulation from which the state has implicitly excluded all other regulatory authority?" (Bravo Vending v. City of Rancho Mirage, supra, 16 Cal.App.4th at p. 397.) " '[A]bsent a clear indication of preemptive intent from the Legislature,' we presume that local regulation 'in an area over which [the local government] traditionally has exercised control' is not preempted by state law. [Citation.] 'The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption.' " (Action Apartment Assn., Inc. v. City of Santa Monica

(2007) 41 Cal.4th 1232, 1242; Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal.4th 1139, 1149.)

“A local ordinance duplicates state law when it is ‘coextensive’ with state law. [Citation.] [¶] A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law. [Citation.] [¶] A local ordinance enters a field fully occupied by state law in either of two situations—when the Legislature ‘expressly manifest[s]’ its intent to occupy the legal area or when the Legislature ‘impliedly’ occupies the field. [Citations.] [¶] When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has impliedly done so. This occurs in three situations: when ‘ “(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the” locality.’ ” (O'Connell v. City of Stockton (2007) 41 Cal.4th 1061, 1067–1068.)

A. Implied Preemption by Sections 7901 and 7901.1

Plaintiffs raise several discrete arguments for reversal. First, Plaintiffs urge section 7901 gave them a right to construct and maintain their facilities in public rights-of-way throughout the state “without further discretionary approval by local governments.” They do not claim “the City lacks all authority to regulate the telephone corporations' exercise of their [s]ection 7901 rights, rather Plaintiffs argue that the Wireless Ordinance is an act in excess of the limited [ministerial] authority the Legislature reserved to the City.” In the alternative, Plaintiffs argue that section 7901's plain language indicates the Legislature impliedly sought to prohibit any local government regulation of aesthetics.

Plaintiffs' first argument appears to be premised on the mistaken understanding that local government has no authority to regulate Plaintiffs' installations unless specifically authorized to do so by statute. The relevant question is not, as Plaintiffs posit, whether section 7901 or section 7901.1 “grants” the City discretionary regulatory power or the power to consider aesthetics. The question is really whether either section divests the City of its constitutional powers. Our review of the California Constitution, statutory provisions, and the relevant case law lead us to believe section 7901 is a limited grant of rights to telephone corporations, with a reservation of local police power that is broad enough to allow discretionary aesthetics-based regulation.

The California Constitution provides: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const., art. XI, § 7.) “Often referred to as the ‘police power,’ this constitutional authority of counties or cities to adopt local ordinances is ‘ “the power of sovereignty or power

to govern—the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare." [Citation.] The police power extends to legislative objectives in furtherance of public peace, safety, morals, health and welfare.' " (Cotta v. City and County of San Francisco (2007) 157 Cal.App.4th 1550, 1557.) "Under the police power □, [municipalities] have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation.] □ [¶] If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878, 885.) The local police power generally includes the power to adopt ordinances for aesthetic reasons. (Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 886 [imposition of aesthetic permit conditions "have long been held to be valid exercises of the city's traditional police power"]; Disney v. City of Concord (2011) 194 Cal.App.4th 1410, 1416 ["settled □ that cities can use their police power to adopt ordinances for aesthetic reasons"].)

Telegraph and telephone corporations have long been granted the right (franchise) to construct their lines along and upon public roads and highways throughout the state. (Sunset Tel. and Tel. Co. v. Pasadena (1911) 161 Cal. 265, 272–273 [discussing former Civ. Code, § 536]; Pacific Telephone I, supra, 51 Cal.2d at pp. 770–771.) That franchise, however, also has long been subject to regulation to ensure such lines do not "incommode" the public's use of those roads and highways. (Former Civ. Code, § 536, as amended by Stats. 1905, ch. 385, § 1, pp. 491–492; Stats. 1951, ch. 764, pp. 2025, 2194, 2258 [reenacting former Civ. Code, § 536 as Pub. Util. Code, § 7901].) Since 1951, section 7901 has provided: "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." (Italics added.) The Legislature later confirmed local government's "right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed" in its enactment of section 7901.1. (§ 7901.1, subd. (a), added by Stats. 1995, ch. 968, § 1, p. 7388.)

The City concedes Plaintiffs are "telephone corporations" seeking to install "telephone lines" under section 7901. (See §§ 233, 234; City of Huntington Beach v. Public Utilities Com. (2013) 214 Cal.App.4th 566, 587–588; GTE Mobilenet of Cal. Ltd. v. City of San Francisco (N.D.Cal. 2006) 440 F.Supp.2d 1097, 1103 ["wireless carriers are included in the definition of 'telephone corporation' in § 7901, and □ the definition of 'telephone line' in § 7901 is broad enough to reach wireless equipment"].) It is undisputed that local government cannot entirely bar a telephone corporation from installing its equipment in the public right-of-way. (Pacific Telephone I, supra, 51 Cal.2d at p. 774.) Furthermore, cities may not charge franchise fees to telephone corporations for the privilege of installing telephone lines in the public right-of-way. (Huntington Beach, at p. 587.) But section 7901 does not grant telephone corporations

unlimited rights to install their equipment within the right-of-way. Rather, section 7901 clearly states that such installations must not “incommode the public use of the road or highway or interrupt the navigation of the waters.” (§ 7901.) Furthermore, “section 7901 grants [Plaintiffs] the privilege to construct infrastructure upon public rights-of-way, subject to a municipality's ‘right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.’ (§ 7901.1, subd. (a).)” (Huntington Beach, at p. 569, fn. omitted.)

In Pacific Telephone I, supra, 51 Cal.2d 766, our Supreme Court held the construction and maintenance of telephone lines in public streets is a matter of state concern, not a municipal affair, under article XI of the California Constitution. (Id. at p. 768.) It was, by then, “settled that [former] section 536 of the Civil Code constitutes ‘a continuing offer extended to telephone and telegraph companies □ which offer when accepted by the construction and maintenance of lines' [citation] gives a franchise from the state to use the public highways for the prescribed purposes without the necessity for any grant by a subordinate legislative body.” (Id. at p. 771.) Accordingly, the City could not require the telephone company to obtain a separate local franchise (ibid.), in addition to the state franchise, or in the absence of such a local franchise “exclude telephone lines from the streets upon the theory that ‘it is a municipal affair’ ” (id. at p. 774).

Plaintiffs suggest the Pacific Telephone I holding is determinative and that, if the construction and maintenance of telephone lines is a statewide concern, localities may not regulate Plaintiffs' access to the right-of-way by requiring a discretionary permit. Plaintiffs read the opinion far too broadly. The Pacific Telephone I holding is a narrow one: cities cannot exclude telephone lines from the public right-of-way on the basis that no local franchise has been obtained.13 Opinions are not authority for propositions not considered. (People v. Avila (2006) 38 Cal.4th 491, 566.) Importantly, in Pacific Telephone I, the telephone company conceded the City retained the power to require it to obtain permits before installation or excavation in the right-of-way. (Pacific Telephone I, supra, 51 Cal.2d at pp. 773–774.)

“The right of telephone corporations to construct telephone lines in public rights-of-way is not absolute. It has been observed by our Supreme Court that section 7901 grants ‘a limited right to use the highways and [does so] only to the extent necessary for the furnishing of services to the public.’ (County of L.A. v. Southern Cal. Tel. Co. (1948) 32 Cal.2d 378, 387.) The text of section 7901 provides that telephone lines may not ‘incommode the public use of the road or highway□’ (Ibid.) Section 7901.1 states ‘[i]t is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed.’ (§ 7901.1, subd. (a).) ‘The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner.’ (§ 7901.1, subd. (b).) [¶] In addition, section 2902 states that municipal corporations may not ‘surrender to the [Public Utilities Commission] its powers of control to supervise and regulate the relationship between a public utility and the general public in

matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation.' " (City of Huntington Beach v. Public Utilities Com., supra, 214 Cal.App.4th at pp. 590–591.) Thus, "the Public Utilities Code specifically contemplates potential conflicts between the rights of telephone corporations to install telephone lines in the public right-of-way and the rights of cities to regulate local matters such as the location of poles and wires." (Id. at p. 591.)

Instead of preempting local regulation, the statutory scheme (§§ 2902, 7901, 7901.1) and the above authority suggest the Legislature intended the state franchise would coexist alongside local regulation. In arguing "[t]here is no meaningful difference between regulating entry in a blanket fashion versus regulating entry on a case-by-case basis," Plaintiffs seek to divert our attention from the only question before us. Case-by-case regulation is meaningfully different. Requiring a local franchise, as the City did in Pacific Telephone I, has the immediate effect of prohibiting the telephone corporations' use of the public right-of-way, whereas local regulation on a site-by-site basis does not have the same impact. As stated by Amici Curiae, the exercise of local planning discretion "is not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of [telephone corporations]. It is used to harmonize the interest and rights of [telephone corporations] with cities' and counties' other legitimate objectives□" Plaintiffs cannot meet their burden on a facial challenge by suggesting the City may apply the Ordinance so as to prohibit their use of the right-of-way altogether. (Arcadia Unified School Dist. v. State Dept. of Education, supra, 2 Cal.4th at p. 267 [" '[t]o support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiffs] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute' "].) Plaintiffs have not met their burden to show local government can never, in any situation, exercise discretion to deny a permit for a particular proposed wireless facility. Thus, we turn to Plaintiffs' second argument—that section 7901 implicitly prohibits any local government regulation of wireless facility aesthetics.

Plaintiffs appear to concede the Ordinance does not duplicate or contradict state law. Instead, they appear to focus on whether the Ordinance has "manifested its intent to 'fully occupy' " any area of regulation exceeding that necessary to prevent physical obstruction of travel on the public right-of-way. (Sherwin–Williams Co. v. City of Los Angeles (1993) 4 Cal.4th 893, 898.) Accordingly, the question is whether the Legislature impliedly preempted the City's power to condition approval of a Wireless Permit on aesthetics-based standards? "The Legislature's 'preemptive action in specific and expressly limited areas weighs against an inference that preemption by implication was intended elsewhere.' [Citations.] In addition, □ '[p]reemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the

statutory scheme recognizes local regulations.' " (Big Creek Lumber Co. v. County of Santa Cruz, supra, 38 Cal.4th at p. 1157.)

"In general, courts are cautious in applying the doctrine of implied preemption: '[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.' [Citation.] Where local legislation clearly serves local purposes, and state legislation that appears to be in conflict actually serves different, statewide purposes, preemption will not be found." (San Diego Gas & Electric Co. v. City of Carlsbad, supra, 64 Cal.App.4th at p. 793.)

The Ordinance unquestionably allows the City to condition approval of a particular Wireless Permit on aesthetic considerations. Plaintiffs contend the Legislature impliedly preempted such local regulation by giving telephone corporations the power to install telephone lines in the public right-of-way "in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." (§ 7901, italics added.) Plaintiffs' position is that "incommode" means only physical obstruction of travel in the public right-of-way. The City, on the other hand, points out that the dictionary definition of "incommode" is broader and includes "inconvenience, discomfort, and disturbance beyond mere blockage." (See Merriam Webster Online Dictionary < http://www.merriam-webster.com/dictionary/incommode> [as of Sept. 15, 2016] [defining "incommode" as "to give inconvenience or distress to: disturb"]; Webster's Dictionary (1828) < http://webstersdictionary1828.com/Dictionary/ incommode> [as of Sept. 15, 2016] [defining "incommode" as "[t]o give inconvenience to; to give trouble to; to disturb or molest in the quiet enjoyment of something, or in the facility of acquisition"; denoting "less than annoy, vex or harass"; e.g., "We are incommoded by want of room to sit at ease"].) We must construe the statute.

"The relevant principles that guide our decision are well known. ' "Our function is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. [Citation.] To ascertain such intent, courts turn first to the words of the statute itself [citation], and seek to give the words employed by the Legislature their usual and ordinary meaning. [Citation.] When interpreting statutory language, we may neither insert language which has been omitted nor ignore language which has been inserted. (Code Civ. Proc., § 1858.) The language must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute [citation], and where possible the language should be read so as to conform to the spirit of the enactment. [Citation.]" ' [Citations.] [¶] We also must endeavor to harmonize, both internally and with each other, separate statutory provisions relating to the same subject." (Lewis C. Nelson & Sons, Inc. v. Clovis Unified School Dist., supra, 90 Cal.App.4th at pp. 69–70.) " ' "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the

provision is the result of obvious mistake or error.' " (Rodriguez v. Superior Court (1993) 14 Cal.App.4th 1260, 1269.)

"When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (Wasatch Property Management v. Degrate (2005) 35 Cal.4th 1111, 1121–1122.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute)□" (Lungren v. Deukmejian (1988) 45 Cal.3d 727, 735.) "When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (People v. Woodhead (1987) 43 Cal.3d 1002, 1008.) "We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (People v. Jenkins (1995) 10 Cal.4th 234, 246.) "The court will apply common sense to the language at hand and interpret the statute to make it workable and reasonable." (Wasatch Property Management, at p. 1122.)

In contending the trial court erred by adopting the broader interpretation of "incommode," Plaintiffs rely on Western Union Tel. Co. v. Visalia (1906) 149 Cal. 744, 750 (Visalia) and Pacific Tel. & Tel. Co. v. City & County of San Francisco (1961) 197 Cal.App.2d 133, 152 (Pacific Telephone II). In Visalia, a telegraph company challenged an assessment imposed on a purported local franchise to operate telegraph lines within the city of Visalia. (Visalia, at p. 745.) Our Supreme Court concluded there was no such local franchise because former Civil Code section 536 had already given the telegraph company "the right, of which the city could not deprive it, to construct and operate its lines along the streets of the city." (Visalia, at p. 750.) The court continued: "[N]evertheless [the telegraph company] could not maintain its poles and wires in such a manner as to unreasonably obstruct and interfere with ordinary travel; and the city had the authority, under its police power, to so regulate the manner of □ placing and maintaining its poles and wires as to prevent unreasonable obstruction of travel." (Id. at pp. 750–751.)

In Pacific Telephone II, supra, 197 Cal.App.2d 133, the City argued that the telephone company could not claim a franchise under former section 536 of the Civil Code without first proving that the construction and maintenance of its poles and lines in San Francisco streets would not "incommode" the public use thereof. (Id. at p. 145.) Division One of this court rejected the argument, reasoning that the City's interpretation of former Civil Code section 536 was too restrictive. "Obviously, the Legislature in adopting section 536 knew that the placing of poles, etc., in a street would of necessity constitute some incommodity to the public use, but the restriction necessarily is limited to an unreasonable obstruction of the public use. [¶] □ [¶] It is absurd to contend that the installation of telephone poles and lines, under the

control by the city of their location and manner of construction, is such an ‘incommodation’ as to make section 536 inapplicable. Such a construction of that section would make it completely inoperable.” (Pacific Telephone II, at p. 146, italics added.)

Neither Pacific Telephone II nor Visalia considered the issue presented here—whether the aesthetic impacts of a particular telephone line installation could ever “incommode the public use.” We decline Plaintiffs' invitation to consider the opinions as authority for propositions not considered. (People v. Avila, supra, 38 Cal.4th at p. 566.) In fact, the Pacific Telephone II court stated, “because of the state concern in communications, the state has retained to itself the broader police power of granting franchises, leaving to the municipalities the narrower police power of controlling location and manner of installation.” (Pacific Telephone II, supra, 197 Cal.App.2d at p. 152, italics added.) Thus, the case does not support Plaintiffs' position that section 7901 prohibits local government from considering aesthetics when issuing individual Wireless Permits. It simply leaves open the question—what kind of control over location and manner can local government exercise?

Although California courts have not yet addressed this precise issue in any published opinion, authority from the United States Court of Appeals for the Ninth Circuit is directly on point. In Palos Verdes Estates, supra, 583 F.3d 716, the city of Palos Verdes Estates denied, for aesthetic reasons, two permits to construct wireless facilities in the public right-of-way. (Id. at p. 719.) A city ordinance authorized Palos Verdes Estates to deny such permit applications on aesthetic grounds. (Id. at pp. 720–721.)

When the telephone company challenged the permit denials, the Palos Verdes Estates court found no conflict between the city's consideration of aesthetics and section 7901. The key to that conclusion was the court's observation that article XI, section 7 of the California Constitution grants local government authority to regulate local aesthetics and “neither [section] 7901 nor [section] 7901.1 divests it of that authority.” (Palos Verdes Estates, supra, 583 F.3d at pp. 721–722.) The court construed the statutory language, “to ‘incommode’ the public use,” as meaning “to ‘subject [it] to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience’ or ‘[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.).’ ” (Id. at p. 723.) It also observed, “ ‘public use’ of the rights-of-way is not limited to travel” and that “[i]t is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions.” (Ibid.)

Likewise, section 7901.1 did not preempt the local ordinance, as it “was added □ in 1995 to ‘bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction□’ ” (Palos Verdes Estates, supra, 583 F.3d at p. 724, italics added, quoting Sen. Com. on Energy, Utilities, and Communications, Analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.).) “If the preexisting [‘incommodation’] language of [section] 7901 did not divest cities of the authority to consider aesthetics in denying [wireless facility] construction permits, then, a fortiori, neither

does the language of [section] 7901.1, which only ‘bolsters' cities' control.” (Palos Verdes Estates, supra, 583 F.3d at p. 724.) The court concluded, “there is no conflict between [the city's] consideration of aesthetics in deciding to deny a [wireless] permit” and sections 7901 and 7901.1. (Palos Verdes Estates, at p. 724.)

Three years earlier, another panel of the Ninth Circuit reached the opposite conclusion in an unpublished decision Sprint PCS v. La Cañada Flintridge (9th Cir. 2006) 182 Fed.Appx. 688, 689, 691 (La Cañada Flintridge). The La Cañada Flintridge court rejected the dictionary definition of “incommode” and, instead, relied on Pacific Telephone II's narrow construction of “incommode.” (Id. at pp. 690–691.) The court determined the city could only prevent “ ‘unreasonable obstruction of the public use,’ ” because “[t]he text focuses on the function of the road—its ‘use,’ not its enjoyment. Based solely on § 7901, it is unlikely that local authorities could deny permits based on aesthetics without an independent justification rooted in interference with the function of the road.” (Id. at pp. 690–691.)

Plaintiffs ask us to rely on La Cañada Flintridge, contending that Palos Verdes Estates inadequately addresses California authority. Plaintiffs' criticism is not well taken. The Palos Verdes Estates court cites Pacific Telephone I for the proposition that a “telephone franchise is a matter of state concern but city still controls the particular location and manner in which public utility facilities are constructed in the streets.” (Palos Verdes Estates, supra, 583 F.3d at pp. 722–723, fn. 3.) We have already expressed our disagreement with Plaintiffs' broader reading of Pacific Telephone I and thus cannot fault the Palos Verdes Estates court for implicitly reaching the same conclusion or not discussing Visalia, supra, 149 Cal. 744, In re Johnston, supra, 137 Cal. 115, or Sunset Tel. and Tel. Co. v. Pasadena, supra, 161 Cal. 265.

Of course, we are not bound by the Ninth Circuit's opinion on matters of state law. (Campbell v. Superior Court (1996) 44 Cal.App.4th 1308, 1317.) Although the Palos Verdes Estates opinion is not binding, we find it persuasive. (Adams v. Pacific Bell Directory (2003) 111 Cal.App.4th 93, 97; Mesler v. Bragg Management Co. (1985) 39 Cal.3d 290, 299.) We agree with the City and the Palos Verdes Estates court that Plaintiffs' interpretation of “incommode” is too narrow and inconsistent with the term's plain meaning. Plaintiffs' other textual arguments, grounded in La Cañada Flintridge, are no more convincing. According to Plaintiffs, because the express language of section 7901 provides that telephone corporations may not install their equipment in a location or manner that “incommode[s] the public use of the road or highway or interrupt[s] the navigation of the water,” the Legislature must have intended “incommode” be limited to physical obstructions of travel.[14]Plaintiffs' argument rests on the faulty assumption that “use” of a public road means nothing beyond transportation thereon. We agree with the Palos Verdes Estates court that public use of the right-of-way is not limited to travel and that streets “may be employed to serve important social, expressive, and aesthetic functions.” (Palos Verdes Estates, supra, 583 F.3d at p. 723.)

We believe the La Cañada Flintridge court reached the wrong result through a cursory analysis, in which it interpreted "incommode" too narrowly and adopted a myopic view of the function of public roads. (La Cañada Flintridge, supra, 182 Fed.Appx. at pp. 690–691.) Furthermore, although we are not precluded from considering unpublished federal decisions, we note that even within the Ninth Circuit La Cañada Flintridge has no precedential value. (Bowen v. Ziasun Technologies, Inc. (2004) 116 Cal.App.4th 777, 787, fn. 6; U.S. Cir. Ct. Rules (9th Cir.), rule 36–3(a) ["[u]npublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion"].)

Nothing in section 7901 explicitly prohibits local government from conditioning the approval of a particular siting permit on aesthetic concerns. In our view, "incommode the public use" means "to unreasonably subject the public use to inconvenience or discomfort; to unreasonably trouble, annoy, molest, embarrass, inconvenience; to unreasonably hinder, impede, or obstruct the public use." (See Palos Verdes Estates, supra, 583 F.3d at p. 723.)

We cannot agree with Plaintiffs that our construction of the term "incommode" is limitless and "effectively nullif[ies] the Section 7901 franchise." We can certainly imagine that a large wireless facility might aesthetically "incommode" the public use of the right-of-way, if installed very close to Coit Tower or the oft photographed "Painted Ladies," but present no similar "incommodation" in other parts of the urban landscape.[15] Plaintiffs also argue: "Even if aesthetics were a theoretically proper basis for regulating the installation of telephone lines in the public rights of way under Section 7901, the City's treatment of other equipment in the public rights of way emphasizes that there are no legitimate grounds for claiming that wireless equipment may incommode the use of the public rights of way." Should Plaintiffs be denied a Wireless Permit in an area already cluttered with other electrical and telecommunications equipment, we again have no doubt they may pursue an as-applied challenge. Presented only with a facial challenge, we cannot assume the City will apply the Ordinance in this manner. (Arcadia Unified School Dist. v. State Dept. of Education, supra, 2 Cal.4th at p. 267.)

The trial court did not err in determining the Ordinance is not facially preempted by sections 7901 and section 7901.1.

B. Direct Conflict Preemption by Section 7901.1

Plaintiffs also argue that the Ordinance directly conflicts with section 7901.1, subdivision (b), because the City "has singled out wireless equipment" by requiring providers of commercial mobile services alone to obtain site-specific permits while "ignoring the aesthetics of identical equipment installed by other right of way occupants." Plaintiffs assert the trial court's conclusion the Ordinance does not facially conflict with section 7901.1, subdivision (b), "is inconsistent with its [other] factual and legal holdings"—i.e., that other occupants' equipment is similar in size and appearance and that site-specific permitting requirements are not imposed on other occupants of the right-of-way.

Section 7901.1 provides: “(a) It is the intent of the Legislature, consistent with Section 7901, that municipalities shall have the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed. [¶] (b) The control, to be reasonable, shall, at a minimum, be applied to all entities in an equivalent manner. [¶] (c) Nothing in this section shall add to or subtract from any existing authority with respect to the imposition of fees by municipalities.” (Italics added.) Plaintiffs and the City agree that section 7901.1, subdivision (b), applies only to construction activities. They use the term in different senses, however.

The City maintains: “[T]he use of the phrase ‘time, place, and manner in which the roads, highways, and waterways are accessed’ clearly refers to local authority to control temporary uses of the public right-of-way during construction. This term implies that the legislature intended to make clear local governments could prevent incommodations both through section 7901 and by controlling the use of the public right-of-way during construction—even if the facilities once constructed (i.e., underground utility facilities) could not themselves incommode the public right-of-way.” (Italics added.) In other words, “[t]he inquiry under section 7901 is whether, once installed, those facilities would ‘incommode’ the public right-of-way. Construction management regulations permitted under section 7901.1 □ address how the applicant intends to install its facilities in the public right-of-way.” Under the City's interpretation subdivision (b) of section 7901.1 has no application to the Ordinance because it is not a regulation of “time, place, and manner of construction—but is instead a regulation that permits Wireless Facilities to be installed in the public right-of-way subject to certain siting criteria.” (Italics added.)

Plaintiffs, in their opening brief, contend section 7901.1 defines the limited authority local governments have under section 7901. In their view, sections 7901 and 7901.1 give local governments limited construction management authority, but only to prevent physical obstruction of the roads, not aesthetic incommodation. In the alternative, they contend that, even if the City has the authority to impose discretionary aesthetic regulation, the City's application of such control must be equivalent for “all entities.” (See § 7901.1, subd. (b).) In their reply brief and a petition for rehearing, Plaintiffs refine their position and contend that section 7901.1 does not relate solely to temporary construction access to the right-of-way. However, Plaintiffs continue to maintain that section 7901.1 “does not expand [local government] authority,” but defines the limited authority section 7901 reserved for local governments to regulate how the public right-of-way is accessed and occupied. “In other words, Section 7901.1 tells us that the way local governments can enforce the limits of telephone corporations' statewide franchise rights and ensure they do not ‘incommode the public use’ of the streets is to assert ‘reasonable control’ over the ‘time, place, and manner’ in which telephone corporations access the public rights of way.” (Fn. omitted.) Plaintiffs maintain “[s]ection 7901 does not describe local authority, [s]ection 7901.1 does.”

“Access” means “a way of getting near, at, or to something or someone”; “a way of being able to use or get something”; “permission or the right to enter, get near, or make use of something or to have contact with someone.” (See Merriam Webster Online Dictionary < http://www.merriam-webster.com/dictionary/accessed> [as of Sept. 15, 2016].) Although the plain meaning of the word “accessed” is ambiguous, the remainder of section 7901.1 and its legislative history make clear the section is concerned solely with “temporary access” for construction purposes. (See Palos Verdes Estates, supra, 583 F.3d at pp. 724–725 [agreeing the Legislature's use of phrase “time, place and manner” in which rights-of-way “are accessed” “can refer only to when, where, and how telecommunications service providers gain entry to the public rights-of-way”].)

Enactment of section 7901.1 was premised on an understanding that the section 7901 franchise “provide[s] the telephone corporations with the right to construct and maintain their facilities. Local government has limited authority to manage or control that construction. [¶] □ [¶] □ This bill is intended to bolster the [cities'] abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise.” (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, pp. 1, 3, italics added.)

The legislative history of section 7901.1 also provides: “To encourage the statewide development of telephone service, telephone corporations have been given state franchises to build their networks. This facilitates construction by minimizing the ability of local government to regulate construction by telephone corporations. Only telephone companies have statewide franchises; energy utilities and cable television companies obtain local franchises. [¶] □ [¶] Cities interpret their authority to manage telephone company construction differently. Telephone corporations represent their rights under state franchise differently as well, sometimes taking the extreme position that cities have absolutely no right to control construction. This lack of clarity causes frequent disputes. Among the complaints of the cities are a lack of ability to plan maintenance programs, protect public safety, minimize public inconvenience, and ensure adherence to sound construction practices. Cities are further concerned that multiple street cuts caused by uncoordinated construction shortens the life of the streets, causing increased taxpayer costs, as described in a recently commissioned study.”16 (Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, pp. 1–2, italics added.)

If we were to accept Plaintiffs' construction of section 7901.1, we would necessarily ignore this legislative history and, more importantly, eliminate the effect of section 7901.1's “consistent with section 7901” language. Had the Legislature intended to narrow and restrict local government's existing authority under section 7901, we cannot imagine it would have included the “consistent with section 7901” language. Nor would an enrolled bill report make clear that Senate Bill No. 621 “would not change current law, but would simply clarify existing

municipality rights” and “reduce disputes between telephone companies and cities, as well as result in fewer inconveniences to citizens without infringing on the telephone companies ['] right to construct and maintain their facilities.” (Governor's Off. of Planning & Research, Enrolled Bill Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) Aug. 31, 1995, p. 3.)

We understand section 7901.1 as affirming and clarifying a subset of the local government powers, reserved under section 7901, to regulate telephone lines in the right-of-way. Even if the meaning of “all entities” is not limited to telephone and telegraph corporations, Plaintiffs have not met their burden to show the Ordinance is preempted because section 7901.1 applies only to construction itself. With respect to temporary access to the right-of-way for construction purposes, the record shows the City uniformly requires AT & T, Comcast, PG & E, and Plaintiffs to obtain temporary occupancy permits to access the right-of-way during construction. Of course, if the Legislature disagrees with our conclusions, or wishes to grant the wireless industry further relief from local regulation, it remains free to amend sections 7901 and 7901.1.

III. Disposition

The judgment is affirmed. The City is to recover its costs on appeal.

FOOTNOTES

1. Undesignated statutory references are to the Public Utilities Code. Section 7901 provides: “Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.”

2. Under the City's ordinance, wireless facilities are antennas and related facilities used to provide or facilitate the provision of “Personal Wireless Service,” which is defined as commercial mobile services provided under a license issued by the Federal Communications Commission.

3. Crown Castle NG West LLC has also appeared in this litigation as Crown Castle NG West Inc. and NextG Networks of California, Inc.

4. The Wireless Ordinance was codified as Article 25 of the San Francisco Public Works Code.

5. A “Planning Protected” location generally involves proposed locations adjacent to national historic landmarks or that the City has designated as having views rated as “good” or “excellent.” A “Zoning Protected” location is “within a Residential or Neighborhood Commercial zoning district under the San Francisco Planning Code.” A “Park Protected” location is adjacent to a City park or open space.

6. Government Code section 65964 provides: “As a condition of approval of an application for a permit for construction or reconstruction for a development project for a wireless telecommunications facility, as defined in Section 65850.6, a city or county shall not do any of the following: [¶] (a) Require an escrow deposit for removal of a wireless telecommunications facility or any component thereof. However, a performance bond or other surety or another form of security may be required, so long as the amount of the bond security is rationally related to the cost of removal. In establishing the amount of the security, the city or county shall take into consideration information provided by the permit applicant regarding the cost of removal. [¶] (b) Unreasonably limit the duration of any permit for a wireless telecommunications facility. Limits of less than 10 years are presumed to be unreasonable absent public safety reasons or substantial land use reasons. However, cities and counties may establish a build-out period for a site. [¶] (c) Require that all wireless telecommunications facilities be limited to sites owned by particular parties within the jurisdiction of the city or county.”

7. AT & T also installs “surface-mounted” facilities in the public right-of-way. By separate ordinance, the City requires AT & T to publicly notice its intent to install such a facility at a particular location, allows protests to be filed, and requires a hearing if protests are filed.

8. The City filed a cross appeal, which was voluntarily dismissed.

9. On December 10, 2015, the City asked us to take judicial notice of, among other things, the Amended Ordinance. We deferred ruling on the unopposed request and now grant it with respect to the Amended Ordinance, its implementing regulations, and dictionary definitions of “incommode.” (Evid. Code, §§ 451, subd. (e), 452, subds. (b), (h), 459; Dailey v. City of San Diego (2013) 223 Cal.App.4th 237, 244, fn. 1 [“we may take judicial notice of postjudgment legislative changes that are relevant to an appeal”].) In all other respects, the request is denied because the documents the City asks us to notice are irrelevant.

10. Intervening legislative amendments may moot an appeal (Callie v. Board of Supervisors (1969) 1 Cal.App.3d 13, 18), but it is undisputed that the Amended Ordinance reenacted aesthetic conditions for issuance of a Wireless Permit. The differences between the 2011 Wireless Ordinance and the Amended Ordinance are irrelevant to our analysis, and we refer to them interchangeably as the Ordinance.

11. The League of California Cities, the California State Association of Counties, and SCAN NATOA, Inc. (the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors) filed an amicus curiae brief in support of the City's position.

12. In a petition for rehearing, Plaintiffs insist the correct standard requires them “ ‘to show the statute is unconstitutional in all or most cases.’ ” (City of San Diego v. Boggess (2013) 216 Cal.App.4th 1494, 1504.) “The precise standard governing facial challenges ‘has been a

subject of controversy within [the California Supreme Court].' " (Zuckerman v. State Bd. of Chiropractic Examiners (2002) 29 Cal.4th 32, 39.) "Under the strictest test, the statute must be upheld unless the party establishes the statute ' "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." ' [Citation.] Under the more lenient standard, a party must establish the statute conflicts with constitutional principles ' "in the generality or great majority of cases." ' [Citation.] Under either test, the plaintiff has a heavy burden to show the statute is unconstitutional in all or most cases, and ' "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." ' " (Coffman Specialties, Inc. v. Department of Transportation (2009) 176 Cal.App.4th 1135, 1145, italics added; accord, Boggess, at p. 1504.) In suggesting we are compelled to apply a more lenient standard, Plaintiffs misplace their reliance on facial challenges involving First Amendment and abortion rights. (See, e.g., American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307, 342–343, 347 (plur. opn. of George, C.J.).)

13. Sunset Tel. and Tel. Co. v. Pasadena, supra, 161 Cal. 265 stands for a similarly narrow proposition. Plaintiffs also misplace their reliance on In re Johnston (1902) 137 Cal. 115, which is not on point. Johnston involved former section 19 of article XI of the California Constitution, which gave gas and water companies a franchise to install pipes in the right-of-way, limited only by " 'such general regulations as the municipality may prescribe for damages and indemnity for damages.' " (Johnston, at p. 119.)

14. The Legislature's use of the terms "use" and "enjoyment" in other, unrelated provisions of state law does not convince us that the omission of the latter term here is significant. (See Katie V. v. Superior Court (2005) 130 Cal.App.4th 586, 595 ["when ' " 'a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted' " ' " (italics added)].) Nor are we persuaded by Plaintiffs' reliance on out-of-state tort cases that involved liability related to a utility company's actual physical obstruction of public roads. Neither these opinions, nor other inapposite out-of-state cases cited by Plaintiffs, address the question before us. Nor do they suggest the meaning of "incommode" is limited to physical obstruction of travel.

15. Plaintiffs claim this hypothetical assumes facts that are not possible under the Ordinance because all utilities are underground at the former locations. The Ordinance provides: "The Department shall not issue a [wireless permit] if the Applicant seeks to: [¶] (1) Install a new Utility or Street Light Pole on a Public Right-of-Way where there presently are no overhead utility facilities." However, Plaintiffs simply ask us to assume there are no overhead utility facilities near Coit Tower or the Painted Ladies. Even if we can assume as much, the Ordinance's ban on new utility poles is itself a challenged, but seemingly reasonable, aesthetic restriction. By referencing Coit Tower and the Painted Ladies, we do not mean to suggest these are the only areas of aesthetic value where installation of a wireless facility

could incommode public use. We merely seek to illustrate why a facial challenge is inappropriate. We decline Plaintiffs' invitation to assume the Ordinance's aesthetic restrictions will only affect proposed installation of wireless facilities on existing utility poles that are already cluttered with other electrical and telecommunications equipment.

16. In their petition for rehearing, Plaintiffs argue for the first time that the Ordinance regulates temporary construction activities. We are not required to address this forfeited argument. (See People v. Holford (2012) 203 Cal.App.4th 155, 159, fn. 2 [“it is ‘too late to urge a point for the first time in a petition for rehearing, after the case ha[s] been fully considered and decided by the court upon the points presented in the original briefs' ”].) Suffice it to say, Plaintiffs have not met their burden to show the challenged portions of the Ordinance require anything different of them, as compared to AT&T, Comcast, or PG&E, with respect to temporary access to the right-of-way for construction purposes.

BRUINIERS, J.

WE CONCUR: SIMONS, Acting P.J. NEEDHAM, J.

Case No. S238001

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

T-MOBILE WEST LLC, et al.,

Plaintiffs and Appellants,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants and Respondents.

After a Decision of the Court of Appeal of the State of California,
First Appellate District Division Five, Case No. A144252

The Superior Court of the State of California in and for the
County of San Francisco, Case No. CGC-11-510703
The Honorable James McBride Judge

APPLICATION OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND SCAN NATOA, INC. FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO, ET AL.; PROPOSED AMICI CURIAE BRIEF

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APPLICATION TO FILE AMICUS CURIAE BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.520(f), the League of California Cities (the "League"), the California State Association of Counties ("CSAC"), the International Municipal Lawyers Association ("IMLA") and the States of California and Nevada Chapter of the National Association of Telecommunications Officers and Advisors ("SCAN NATOA") (collectively, "*Amici*") hereby submit this application to file an *amicus curiae* brief in support of Defendants and Respondents City and County of San Francisco and the City and County of San Francisco Department of Public Works (collectively, the "City").

II. IDENTITY OF *AMICI CURIAE*, STATEMENT OF INTEREST, AND EXPLANATION OF HOW THIS BRIEF WILL ASSIST THE COURT

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this is a matter affecting all counties.

IMLA is a non-profit, non-partisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, as well as state supreme and appellate courts.

SCAN NATOA has a history spanning over 20 years representing the interests of over 300 members consisting primarily of local government

telecommunications officials and advisors located in California. SCAN NATOA has identified this case as a matter of significance to its members.

Amici have an interest in preserving local governments' ability to engage in review processes that allow for intelligent and informed management of the public rights of way, including but not limited to, aesthetic review of telecommunications facilities. Cities and counties throughout California spend considerable time, money, and effort to plan and maintain rights of way that, in contrast to Appellants' allegations, ***both*** achieve the utilitarian purposes (*e.g.*, transmission of utility services and creation of public paths of travel) ***and*** serve as aesthetically pleasing public spaces (*e.g.*, through the placement of pedestrian walkways, landscaped parkways, landscaped medians, imposition of utility undergrounding requirements, sign programs, street sweeping requirements, and other means).

Because rights of way are varied and diverse spaces – in terms of available space, surrounding land uses and character, level of congestion, and a variety of other factors – they do not lend themselves to "one size fits all" planning approaches that Appellants advocate. Rather, local regulatory authority is designed to ensure that, in the context of the unique physical characteristics of each proposed use of the rights of way, the government respects both the important rights of telephone corporations and the rights and goals of other uses of, and users in, the rights of way. That authority is

not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of telecommunications applicants; it is used to harmonize the interest and rights of telecommunications applicants with cities' and counties' other legitimate objectives, which include maintaining the quality and experience of travelling along, and being within, the rights of way.

Amici and their counsel are familiar with the issues in this case, and have reviewed the lower court proceedings and the briefs on the merits filed with this Court. Counsel in this case for *Amici* has represented multiple public agencies in actions involving local authority to regulate telecommunications facilities. As statewide and nationwide organizations with considerable experience in this field, *Amici* believe that they can provide important perspective on the issues before the Court.

III. IDENTIFICATION OF AUTHORS AND MONETARY CONTRIBUTIONS

Pursuant to Rule 8.520(f)(4), of the California Rules of Court, the only persons who played a role in authoring the accompanying brief, in whole or in part, are the attorneys listed in the caption of this application, Jeffrey T. Melching and Ajit S. Thind of Rutan & Tucker, LLP. No parties to this case (or entities who are not parties to this case other than the listed attorneys) authored the brief in whole or in part. The undersigned prepared and

authored the brief *pro bono,* and no persons or entities were paid for the preparation or submission of the accompanying brief.

Respectfully submitted,

Dated: May 11, 2017

RUTAN & TUCKER, LLP
JEFFREY T. MELCHING
AJIT S. THIND

By: _____
Jeffrey T. Melching
Attorneys for *Amici Curiae*, League Of California Cities, California State Association of Counties, International Municipal Lawyers Association and SCAN NATOA, Inc.

AMICUS CURIAE BRIEF

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Because rights of way are varied and diverse spaces — in terms of available space, surrounding land uses and character, level of congestion, and a variety of other factors — they do not lend themselves to "one size fits all" planning approaches that Appellants advocate. Rather, local regulatory authority is designed to ensure that, in the context of the unique physical characteristics of each proposed use of the rights of way, the government respects both the important rights of telephone corporations and the rights and goals of other uses of, and users in, the rights of way. That authority is not used to prohibit the use of the public rights of way, or to abridge any state-conferred rights of telecommunications applicants; it is used to harmonize the interests and rights of telecommunications applicants with

cities' and counties' other legitimate objectives, which include maintaining the quality and experience of travelling along, and being within, the rights of way.

III. POINTS TO BE ARGUED BY *AMICI*

The Court should affirm the Court of Appeal's holding that local governments have the authority to exercise discretion in the regulation of telecommunications facilities, that such exercise of discretion is consistent with Public Utilities Code section 7901 ("Section 7901"), and that such discretion may take into account aesthetic matters. In addition, the Court should affirm the Court of Appeal's ruling that Public Utilities Code section 7901.1 ("Section 7901.1") applies only to temporary construction activities.

IV. FACTUAL BACKGROUND

Amici agree with and adopt the Factual Background in the Answering Brief filed by the City.

V. THE PUBLIC RIGHTS OF WAY MUST ACCOMMODATE A DIVERSE SET OF FACILITIES AND INTERESTS

The rights of way are crowded public spaces. (See *San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, 1025.) They are occupied by streets, sidewalks, curbs, and gutters; cars, bicycles, and pedestrians; trees, grass, landscaping, and irrigation equipment; overhead and underground transmission lines for power, telephone, cable television and internet services; water, sewer, and storm drain pipes and

infrastructure; signage, signal, and other traffic control infrastructure; and fire hydrants, parking meters, transit shelters, news racks, advertising kiosks, and bicycle racks. The purposes served by these facilities are equally diverse. They include transportation, communication, information, commerce, public health, and public safety.

In addition to those utilitarian purposes, the public rights of way are also important community spaces. They are arguably the most utilized public spaces in many of our lives. Recognizing this, cities and counties throughout California have devoted considerable thought and resources to make travel along the public rights of way both useful and pleasing. Examples of those efforts include the establishment of public art programs, the installation of meandering sidewalks and decorative landscaping, the formation of undergrounding districts, and the imposition of limitations on billboard advertising.

Cities and counties are the agencies primarily responsible for managing the rights of way to ensure that all of the uses, infrastructure, and interests implicated in these public spaces are accommodated. The Legislature has placed limitations, but not prohibitions, on that management authority to ensure that local regulations do not unduly hinder the deployment of telecommunications infrastructure. The rules are simple: (1) local agencies may not prohibit telephone corporations from using the public rights of way (Pub. Util. Code § 7901); (2) local agencies may regulate the

relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including the location of the poles, wires, mains, or conduits on, under, or above public streets (Pub. Util. Code § 2902), (3) local agencies may regulate the time, place, and manner in which the public rights of way are accessed (Pub. Util. Code § 7901.1), and (4) local agencies may regulate telephone corporations' infrastructure to ensure that it does not incommode the public use of the rights of way (Pub. Util. Code § 7901).

Following those mandates, cities and counties throughout California have created local regulatory processes to manage, not prohibit, the deployment of multiple generations of wireless infrastructure by ensuring that installations occur in a manner that best harmonizes with the other interests at play in the public rights of way. In San Francisco, this process has yielded permit approvals in 98% of the applications received. A survey of other cities in California revealed similar results: dozens of cities have ordinances that regulate aesthetics for telecommunications facilities in the public rights of way, and the overwhelming majority of all applications have been granted. (See, e.g., Pasadena Municipal Code § 12.22 *et seq.*; Irvine Municipal Code § 2-37.5-1 *et seq.*) Permit denials occur only as a last resort, in outlier cases. As-applied review of those denials is appropriate to ensure that the local agency decisions comply with the legislative mandates.

Appellants nevertheless claim the City's ordinance is so "burdensome" as to run afoul of an asserted paramount State interest in the deployment of new and emerging technologies. The claim of burden is largely unsupported by facts, and the assertion of a paramount state interest is overstated. The overwhelming approval rate for applications to place telecommunications facilities in the right of way belies the Appellants' naked assertion of undue burden in the permit application, review, and approval processes. If any burden is imposed on a telephone corporation, it is through the denial of an application — the appropriate subject of an as-applied challenge to the City's ordinance, not a facial challenge. As to the state's interest in new technologies, *Amici* acknowledge the existence of state-conferred rights, but maintain that the Legislature has charged local agencies with a responsibility to reconcile those rights with other competing important uses and purposes attendant to the right of way.

As detailed below, the City's ordinance balances the Appellants' state franchise rights with the multitude of other right of way management interests, in a manner that comports with all applicable laws.

VI. LOCAL AGENCIES MAY ADOPT REVIEW PROCESSES THAT ALLOW FOR INTELLIGENT AND INFORMED MANAGEMENT OF THE PUBLIC RIGHTS OF WAY, INCLUDING BUT NOT LIMITED TO AESTHETIC REVIEW OF TELECOMMUNICATIONS FACILITIES

Appellants contend that "the Court of Appeal's decision. . . allows municipalities to impose unique burdens on particular communications

services . . .[and]. . . allows municipalities to stand in the way of progress by enacting discriminatory regulations" that conflict with Section 7901. (Appellants' Opening Brief ["AOB"], p. 34.) As the Court of Appeal found, Appellants' view is contradicted by the California Constitution, the Public Utilities Code, case law, and the plain text and application of the City's ordinance.

A. Under The California Constitution, The City May Regulate Public Utility Infrastructure In Order To Protect The Public Health, Safety, And Welfare

The root of local agency authority is the Constitutional police power. Specifically, California Constitution, article XI, section 7, states "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Under that power, local agencies may protect the public health, safety, and welfare of its residents. Avoidance of aesthetic degradation is one unquestionable facet of the police power:

> An attempt to define [the police power's] reach or trace its outer limits is fruitless, for each case must turn on its own facts. . . . The concept of public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

(*Berman v. Parker* (1954) 348 U.S. 26, 32-33; see also *Metromedia Inc. v. City of San Diego* (1980) 26 Cal.3d 848, 861; see, e.g., *Landgate, Inc. v.*

California Coastal Comm'n. (1998) 17 Cal.4th 1006, 1023 [aesthetic preservation is "unquestionably [a] legitimate government purpose"]; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 881-882 [aesthetic regulations fall within police power].)

Consistent with those authorities, California Constitution article XI, section 9, recognizes that a city may, under its organic law, regulate persons or corporations that furnish its inhabitants with "means of communication." Thus, the California Constitution allows cities and counties to impose regulations, including discretionary and aesthetic regulations, on utilities so long as those regulations are "not in conflict with general laws." (Cal. Const., art. XI, § 7; see also Cal. Const., art XII, § 8 ["A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [California Public Utilities] Commission."].)

As discussed below, to ensure that local regulations do not "conflict with general laws" the Legislature, state courts, and federal courts, have carefully preserved local regulatory authority over matters involving the location and manner of proposed fixtures in the rights of way.

B. Public Utilities Code Section 2902 Confirms Local Agencies' Authority To Regulate Matters Affecting The Health, Convenience, And Safety Of The General Public

The Legislature intended that a state-conferred franchise to use the rights of way coexist with local regulations. For example, Public Utilities Code section 2902 ("Section 2902") provides:

> [municipal corporations may] regulate the relationship between a public utility and the general public in matters affecting the health, ***convenience***, and safety of the general public, including matters such as the use and repair of public streets by any public utility, ***the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets***, and the speed of common carriers operating within the limits of the municipal corporation.

(Pub. Util. Code, § 2902, emphasis added.) While Section 2902 "does not confer any powers upon" local agencies, it does enumerate the "[pre-] existing municipal powers [that] are retained by the municipality" — including the power to regulate telecommunications fixtures for the convenience of the general public. (*Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 217.)

In *City of Huntington Beach v. Public Utilities Commission* (2013) 214 Cal.App.4th 566, the Court of Appeal reviewed Section 2902 in the context of wireless facilities and specifically found that "municipal corporations may not 'surrender to the [CPUC] its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public'." (*Id.*, at 590.) Those powers flow from California Constitution, article XI, section 7, and Section 2902 confirms that the Public Utilities Code does not require the surrender of the City's authority.

C. Public Utilities Code Section 7901 Does Not Prohibit Consideration of Aesthetic Issues.

Section 2902's right to regulate for the protection of the public convenience is echoed in Section 7901, which applies specifically to telecommunications facilities. Under Section 7901, telecommunications companies may only operate "in such manner and at such points as not to incommode the public use of the road or highway." (*County of Los Angeles v. Southern California Tel. Co.* (1948) 32 Cal.2d 378, 384; see also *Pacific Tel. & Tel. Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 277 ["the state franchise held by Pacific gave it the right to construct and maintain its lines and equipment in the streets"].) The carrier's right to operate conferred under Section 7901 is qualified. It may not be exercised in a "manner" and at "points" that "incommode" the "public use of the road."[1] Neither the plain language nor the structure of Section 7901 indicate an intent to strip local governments of the pre-existing municipal powers to regulate public utilities that is provided by the California Constitution and acknowledged in Section 2902.

Appellants nevertheless seek to unreasonably limit the scope and meaning of Section 7901 by claiming that the words "incommode the public

[1] The term "incommode" means to "subject to inconvenience or discomfort; to trouble, annoy, molest, embarrass, inconvenience" or "[t]o affect with inconvenience, to hinder, impede, obstruct (an action, etc.)" (7 Oxford English Dict. (2d ed. 1989) p. 806.)

use of the road or highway" are limited to the obstruction of travel alone. (AOB, pp. 45-47.) This utilitarian view of the "use" of the rights of way is too narrow. As the Ninth Circuit Court of Appeals has acknowledged, in addition to their utilitarian purposes "it is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions." (*Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716, 723-724 ("*Palos Verdes Estates*"), citing Ray Gindroz, *City Life and New Urbanism* (2002) 29 Fordham Urb. L.J. 1419, 1428 ["A primary task of all urban architecture and landscape design is the physical definition of streets and public spaces as places of shared use."]; Kevin Lynch, The Image of the City (1960) p. 4 ["A vivid and integrated physical setting, capable of producing a sharp image, plays a social role as well. It can furnish the raw material for the symbols and collective memories of group communication."]; Camillo Sitte, City Planning According to Artistic Principles (Rudolph Wittkower ed., Random House 1965) (1889) pp. 111-12 ["One must keep in mind that city planning in particular must allow full and complete participation to art, because it is this type of artistic endeavor, above all, that affects formatively every day and every hour of the great mass of the population . . . ."].) On this point, the Ninth Circuit continued "[a]s Congress and the California Legislature have recognized, the 'public use' of the roads might also encompass recreational functions." (*Palos Verdes Estates*, *supra*, 583 F.3d at 723-724, Pub. Util.

Code § 320 [burying of power lines along scenic highways]; 23 U.S.C. § 131(a) [regulation of billboards near highways necessary "to promote . . . recreational value of public travel . . . and to preserve natural beauty"].)

The Ninth Circuit has it right. The rights of way are used by the public for more than mere travel, and therefore the public's use can be "incommoded" by more than mere obstruction of travel.

D. State and Federal Case Law Supports the City's Exercise of Regulatory Authority Over Telecommunication Facilities.

California and federal cases lend further support to the City's exercise of regulatory authority over telephonic facilities. In *Western Union Telegraph Company v. City of Visalia* (1906) 149 Cal. 744, this Court upheld a municipal requirement that all telephone poles be a uniform height of 26 feet, and that the poles be made available to the city for purposes of hanging fire alarms and police wires. (*Id.* at 748.) Neither of those requirements directly impacted the ability to use the roads for travel and traffic. It is, after all, the base of the poles, and not their height or the equipment strung on them, that affects travel and traffic. The uniform height regulation was plainly aesthetic, and the alarm and police wire regulations were plainly for public safety purposes that had nothing to do with "obstruction" of traffic along the roads in Visalia. Yet both of those purposes were upheld by this Court as a proper exercise of the city's regulatory authority under Section 7901's predecessor statute. (*Id.* at 751.)

In *Pacific Telephone & Telegraph Company v. City & County of San Francisco* (1961) 197 Cal.App.2d 133 ("*San Francisco II*"), San Francisco attempted to prohibit outright the installation of telecommunications fixtures on the basis that they "incommode" the public use. (*Id.* at 146.) In striking down the prohibition, the court acknowledged that "the city controls the particular location of and manner in which all public utility facilities, including telephone lines, are constructed in the streets and other places under the city's jurisdiction" and that "the telephone company concedes the existence of the power in the city to extract these requirements." (*Ibid.*, citing *Pacific Tel. & Tel. Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 773-774 ["*San Francisco* "].)

In light of the City's abundant regulatory authority, the *San Francisco II* court found it "absurd to contend that the installation of telephone poles and lines, ***under the control by the city of their location and manner of construction***, is such an 'incommodation' as to make [the predecessor to Section 7901] inapplicable." (*San Francisco II*, *supra*, 197 Cal.App.2d at 146, emphasis added; see also *id.* at 152 ["because of the state concern in communications, the state has retained to itself the broader police power of granting franchises, leaving to municipalities the narrower police power of controlling the location and manner of installation."]; *City of Petaluma v. Pacific Tel. & Tel. Co.* (1955) 44 Cal.2d 284, 287 [recognizing the power of a city to regulate the location and manner of installation of telephone lines

and equipment].) Thus, *San Francisco II* confirms that local governments may properly regulate the location and manner of telecommunications facilities.

The most recent case to address local authority under California law over telecommunications facilities and the definition of "incommode" is *Palos Verdes Estates*, *supra*, 583 F.3d at 726, a case that was heavily relied on by the Court of Appeal in the case at bar. (See *T-Mobile West LLC v. City and County of San Francisco* (2016) 3 Cal.App.5th 334, 353-355.) In *Palos Verdes Estates*, a wireless telecommunications provider claimed, *inter alia*, that local aesthetic regulations of wireless antennas violated the Federal Telecommunications Act, 47 U.S.C. section 151 *et seq.*, because such regulations are not permitted under "applicable local standards." (*Id.* at 722, citing 47 U.S.C. § 332, subd. (c)(7)(B)(iii).) Like the City's Ordinance, the ordinance in *Palos Verdes Estates* provided that permit applications for wireless communication facilities may be denied for "adverse aesthetic impacts from the proposed time, place, and manner of use of the public property" — a clearly discretionary evaluation. (*Id.* at 720.) To resolve whether aesthetic regulation was permissible, the Ninth Circuit was required to determine whether the local regulations were consistent with state law, including Section 7901 and Section 7901.1. (*Id*. at 721-722.)

The Ninth Circuit initially requested guidance from this Court on the question, but this Court declined the request. (*Palos Verdes Estates*, *supra*,

583 F.3d at 721.) In the absence of guidance, the Ninth Circuit undertook the task of predicting "how the California Supreme Court would resolve the issue," (*id.* at 722, n.2) and held "the California Constitution gives the City the authority to regulate local aesthetics, and neither section 7901 nor section 7901.1 divests it of that authority." (*Id.* at 721-722).

Elaborating on its analysis of Section 7901, the Ninth Circuit found that telecommunications fixtures can result in aesthetic degradation that "incommodes" the use of the rights of way, stating:

> The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a Wireless Communications Facility, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter. After all, travel is often as much about the journey as it is about the destination.

(*Palos Verdes Estates*, *supra*, 583 F.3d at 723.) Consistent with that reasoning, the court found that urban planning requires local decision making that reflects particular issues of local concern such as neighborhood personality. (*Id.* at 724.) The court further observed "it is a widely accepted principle of urban planning that streets may be employed to serve important social, expressive, and aesthetic functions." (*Id.* at 723-724.)

The Ninth Circuit thus held that under California law, local governments may regulate (and deny) telecommunications permit applications based on aesthetic considerations and reject "aesthetically offensive" attempts to utilize the right of way. (*Id.* at 724-725; see also *GTE*

Mobilenet of Calif. Ltd. Partnership v. San Francisco (N.D. Cal. 2006) 440 F.Supp.2d 1097, 1107 ["[T]he City has the authority to regulate the placement and appearance of telecommunications equipment installed on its public rights of way"].) While affirming the ability to regulate on the basis of aesthetics, the Ninth Circuit also warned that local agencies cannot "run roughshod over WCF permit applications simply by invoking aesthetic concerns" and would have to demonstrate substantial evidence for the decision and comply with federal law. (*Palos Verdes Estates*, *supra*, 583 F.3d at 725.)

Appellants attempt to minimize *Palos Verdes Estates* as "non-binding and controversial Federal authority." (AOB, p. 46.) *Amici* are mindful that "decisions of the federal courts interpreting California law are persuasive but not binding." (*Mesler v. Braggs Mgmt. Co.* (1985) 39 Cal.3d 290, 299.) However, while the decision is not binding, it is nevertheless entitled to great weight. (See *Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97 ["although not binding, we give great weight to federal appellate court decisions"].)

Appellants also suggest that *Palos Verdes Estates* "directly conflicts" with the Ninth Circuit decision in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge* (9th Cir. 2006) 182 F. App'x 688, 690-91. (AOB, p. 47, fn. 15.) Appellants ignore that *Sprint PCS Assets* is an unpublished opinion and is not citable. In fact, the *Palos Verdes Estates* court noted that the

opinion in *Sprint PCS Assets* was not "a published opinion on which we may rely." (*Id.* at 722, n. 2.) More importantly, *Palos Verdes Estates* was decided by the Ninth Circuit ***three years later*** in 2009 and remains good law.

VII. THE DEPLOYMENT OF TELECOMMUNICATIONS INFRASTRUCTURE IS NOT THE ONLY IMPORTANT STATE INTEREST IMPLICATED IN THE USE AND MANAGEMENT OF THE RIGHTS OF WAY.

Amici readily acknowledge that the State has expressed an interest, dating back to the 19th Century, in ensuring the deployment of telecommunications infrastructure by granting telephone corporations rights to use the rights of way. But it is a false dichotomy to imply, as Appellants do, that local agencies must choose between respecting telephone corporations' state franchise rights and protecting other interests (such as aesthetic interests). To the contrary, the law and common sense both favor intelligent and informed decisions that accommodate the interests of Appellants, other utility providers, and other users of the rights of way.

The plain text of Section 7901 undermines Appellants' attempt to establish the deployment of new technologies as the paramount interest at stake in the use of the rights of way. Indeed, nothing in that statute indicates an intent to provide new or special benefits to "new" technologies:

> Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to

> incommode the public use of the road or highway or interrupt the navigation of the waters.

The franchise right granted in Section 7901 was originally created in the 19th Century. While it admittedly applies to the deployment of new telecommunications technologies, the Legislature has not revised the franchise right to expand its scope. The rights available to Appellants are largely ***the same*** as those afforded to telegraph services, wireline telephone services, and the prior four generations of wireless telephone services. While the advent of 5G and the anticipated increase in applications for the use of the rights of way may have prompted the City to update its regulations, the City's update appropriately ensures that the multitude of interests at play in the rights of way continue to be advanced in harmony with one another.

The Court should disregard Appellants' erroneous efforts to suggest that the Legislature somehow favors the deployment of new technologies at the expense of other interests, even when the compromise of other interests is not necessary. First, Appellants mistakenly rely on citation to *San Francisco I*, *supra*, 51 Cal.2d 766. In that case, this Court rejected the notion that a local government could require a local franchise for a telephone company to operate, but acknowledged the city's authority to enact a permit process and regulate "the particular location and manner" in which public utilities are constructed. (*Id.* at 773-774.). Here, the City does not do what *San Francisco I* forbids (require a franchise), but does do what *San Francisco*

I allows (regulating the particular location and manner of wireless facility installations in the rights of way).

Second, Appellants cite to *Pacific Telephone & Telegraph Company v. City of Los Angeles* (1955) 44 Cal.2d 272 ("*Los Angeles*") as evidence that Section 7901 is designed to promote innovation. *Los Angeles* has little to do with innovation; rather, the central dispute was whether "the grant of a state franchise to use highways and other public places in operating a telephone system necessarily contemplates that new streets will be opened and old ones lengthened as undeveloped areas become settled" (*id.* at 277) and whether the telephone corporation had forfeited its rights under the predecessor to Section 7901 by way of a franchise ordinance (*id.* at 278). As an aside, the city argued Section 7901's predecessor statute did not allow for the telephone corporation to transmit anything other than "articulate speech" through its lines. (*Id.* at 281.) Here, there is no dispute that Appellants' 5G technology is covered by Section 7901; nonetheless, any rights that Appellants have to construct are still limited by the rights of local agencies to prevent incommoding of public use of roads and highways.

Third, Appellants claim *San Francisco II* "interpreted Section 7901 to promote innovation and preclude discrimination against new communications systems." (AOB, p. 40.) Appellants overstate the scope of the opinion, which instead dealt with the city's attempt to outright prohibit the installation of telecommunications fixtures. On the issue of innovation,

the Court of Appeal, like this Court in *Los Angeles*, merely found that new technologies also fall within the rights offered by Section 7901's predecessor (197 Cal.App.2d at 147), not that those particular technologies were of special importance or somehow given extra protection from local agency regulation as Appellants seek to argue now.

Fourth, in *Williams Communications v. City of Riverside* (2003) 114 Cal.App.4th 642, 649 ("*Williams*"), the central issue for the Court of Appeal was whether the plaintiff's roll out of a fiber optic network qualified as a use of the right of way to provide telephone services. The Court of Appeal ultimately agreed with the plaintiff that it did qualify as a telephone corporation and was afforded the benefits of Section 7901. (*Id.* at 649-650.) Since there is no dispute here that Appellants possess statewide franchise rights under Section 7901, *Williams* does not stand for any proposition that is in dispute in this matter.

A. Appellants' Ominous Warnings Are Misplaced as Technological Innovation and Local Regulation Can Coexist

Throughout their brief, Appellants paint a bleak picture of the future, warning that the Court of Appeal's opinion "will have far-reaching and harmful consequences for Californians" and "threatens to unleash a new era of discriminatory regulation." (AOB, p. 7.) Appellants' scenario is an exaggeration — telephone corporations and local agencies have successfully co-existed for well over a century, despite carriers being subject to local right

of way regulations (including regulations that impose aesthetic standards). (See *Western Union Tel. Co.*, *supra*, 149 Cal. at 751.) Moreover, as demonstrated by the City's actual enforcement and interpretation of its Ordinance, the City granted 173 wireless facility permit applications under the Ordinance through the time of trial, while denying only three — a grant rate of more than 98%. (Respondent's Answering Brief, p. 8.) This high approval rate makes it clear that technological advancement and local regulation can still exist together, as they have through all of the prior generations of wireline and wireless infrastructure deployment.

Notably, when the Legislature intends to curb local agency discretion in the evaluation of a right-of-way permit, it does so explicitly. (See, e.g., Gov. Code § 65850.6(a) ["A collocation facility shall be a permitted use ***not subject to a city or county discretionary permit*** if it satisfies the following requirements . . ."], emphasis added.) The Legislature made no parallel restriction in Section 7901 and Section 7901.1 (nor later amended them) because those statutes do not prohibit discretionary processes.

To the contrary, in 2015, the Legislature placed new limits on the time within which telecommunications applications must be processed without purporting to place any limits on local government discretion. (Gov. Code § 65964.1(e) ["Except as provided in subdivision (a) [relating to deemed approval for failure to timely act on an application], ***nothing in this section limits or affects the authority of a city or county over decisions regarding***

the placement, construction, and modification of a wireless telecommunications facility"], emphasis added.)[2] Thus, when the Legislature had the opportunity to curb the exercise of discretion, it expressly declined to do so.

Ultimately, the "real world" need for the preservation of local government discretion is evident. The public rights of way are diverse and varied. *Amici's* city and county members' streets include dense urban thoroughfares, quiet country roads, bucolic neighborhoods, and countless other streetscapes. Some rights of way are amenable to undergrounding of equipment, while in other rights of way the area beneath the street is crowded with pre-existing infrastructure. Some rights of way have medians, parkways, and sidewalks, while others do not. The variation in neighborhood character, pre-existing infrastructure, and streetscape designs, coupled with the specific facets of each proposed installation, make "one-size-fits-all"

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[2] Rather than acknowledging this express preservation of local agency authority, Appellants claim that "municipal affairs" language in a different portion of Government Code section 65964.1 was intended to result in broad preemption of local agency regulatory authority. That interpretation is wrong. The "municipal affairs" language was added to clarify that Government Code section 65964.1 was intended to apply to charter cities (in addition to general law cities). (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 57 (2015-2016 Reg. Sess.) as amended Aug. 18, 2015, p. 9 ["AB 57 includes a legislative finding and declaration that a wireless telecommunications facility has a significant economic impact in California and is a matter of statewide concern. Accordingly, the bill's provisions apply to all cities and counties in California, including charter cities and counties, although the bill does not explicitly state it."].)

(i.e., non-discretionary) approaches to permitting a recipe for poor outcomes and unintended consequences.[3]

The common sense means to avoid those outcomes and consequences — which is permitted under existing law — is to use discretionary processes that (1) recognize wireless applicants' state-conferred rights while (2) preserving local discretion to ensure that access is provided in a manner that avoids unnecessary degradation to the quality of the rights of way. To the extent Appellants are concerned that local agencies will routinely deny permit applications simply by invoking baseless aesthetic concerns (AOB, pp. 56-60), their concern is of no consequence. As the Ninth Circuit easily addressed, "a city that invokes aesthetics as a basis for a [wireless] permit denial is required to produce substantial evidence to support its decision" and comply with federal law. (*Palos Verdes Estates*, *supra*, 583 F.2d at 725.) Therefore, even with an ordinance that allows for consideration of aesthetics or other discretionary criteria, the local agency will still need to produce more

[3] Instead of acknowledging this reality, Appellants fall prey to the doomsday assumption that local agencies will exercise discretion irresponsibly and/or without regard to wireless applicants' state and federally conferred rights. But well established tenets of statutory construction require (i) that ordinances be construed in a manner consistent with other laws and (ii) the assumption that an ordinance will be applied illegally is improper in the facial challenge context. (*Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267; *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814.)

than a "mere scintilla of evidence"[4] to have its decision affirmed. (See *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

VIII. PUBLIC UTILITIES CODE SECTION 7901.1 CONFIRMS, BUT DOES NOT CIRCUMSCRIBE, LOCAL AGENCY AUTHORITY OVER TELECOMMUNICATIONS PERMITTING FOR FACILITIES IN THE PUBLIC RIGHTS OF WAY.

Section 7901.1 reinforces, rather than limits, local governments' regulatory authority over telecommunications facilities. That provision was added to the Public Utilities Code in 1995 to "bolster the cities' abilities with regard to construction management and to send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone corporations' statewide franchise." (Sen. Com. on Energy, Utilities, and Communications, Analysis of Sen. Bill No. 621 (1995-1996 Reg. Sess.) April 25, 1995.) Indeed, the legislative history of Section 7901.1 makes it clear that the design of the statute was to deal with construction activities of telephone corporations:

> To encourage the statewide development of telephone service, telephone corporations have been given state franchises to build their networks. This facilitates construction by minimizing the ability of local government to regulate construction by telephone corporations. Only telephone companies have statewide franchises; energy utilities and cable television companies obtain local franchises. [¶] … [¶] … Cities interpret their authority to manage telephone company

[4] Substantial evidence must be "of ponderable legal significance" and is not synonymous with "any" evidence. (*Lucas v. Southern Pacific Co*. (1971) 19 Cal.App.3d 124, 136.) Such evidence must be reasonable in nature, credible, and of solid value. (*Ibid.*)

> ***construction*** differently. Telephone corporations represent their rights under state franchise differently as well, sometimes taking the extreme position that cities have absolutely no right to control ***construction***. This lack of clarity causes frequent disputes. Among the complaints of the cities are a lack of ability to plan maintenance programs, protect public safety, minimize public inconvenience and ensure adherence to sound construction practices. Cities are further concerned that ***multiple street cuts caused by uncoordinated construction*** shortens the life of the streets, causing increased taxpayer costs, as described in a recently commissioned study.

(Assem. Com. on Utilities and Commerce, Rep. on Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended July 7, 1995, p. 2, emphasis added.)

In its briefing, Appellants attack the Court of Appeal's finding that Section 7901.1 only applies to construction activities, seeking to instead construe Section 7901.1 as a limitation on the powers afforded to local agencies under Section 7901. There are multiple fundamental problems with Appellants' argument.

First, by its plain words, Section 7901.1 states only that the "exercise of reasonable control over the time, place, and manner in which roads, highways, and waterways are accessed" is consistent with Section 7901. Nothing in Section 7901.1 says that it is intended to place limits on whatever other powers local governments may have under Section 7901. Second, the legislative history plainly states that Section 7901.1 is intended to "bolster" Section 7901. Under no circumstance could one credibly claim that "bolster" means "limit." Third, the legislative history of Section 7901.1 indicates that it was intended to focus on construction management, while Section 7901

contains no parallel restriction on the scope of its application. Fourth, and finally, Section 7901.1 does not purport to limit, restrict, or redefine the regulatory authority, conferred by the California Constitution and acknowledged in Section 2902, to regulate "the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets" to protect the public convenience.

In summary, in the public utility context, the Legislature has specifically confirmed — through Public Utilities Code sections 7901, 7901.1, and 2902 — local agencies' authority to regulate facilities installed by telephone corporations.

IX. CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the decision of the Court of Appeal and trial court.

Respectfully submitted,

Dated: May 11, 2017

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.520(b)(1) of the California Rules of Court, the enclosed brief is produced using 13-point Roman type including footnotes and contains approximately 7,274 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Respectfully submitted,

Dated: May 11, 2017

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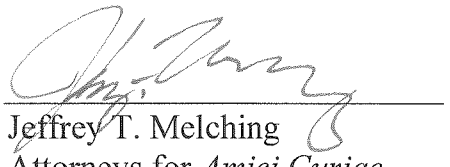
By: 
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PROOF OF SERVICE

(T-Mobile West LLC, et al. v. City and County of San Francisco, et al.
California Supreme Court, Case No. S238001*)*

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-1931.

On May 11, 2017, I served on the interested parties in said action the within:

APPLICATION OF LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND SCAN NATOA, INC. FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO, ET AL.; PROPOSED AMICI CURIAE BRIEF

as stated below:

☒ (BY FEDEX) by depositing in a box or other facility regularly maintained by FedEx, an express service carrier, or delivering to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed as shown above, with fees for overnight delivery provided for or paid.

I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 11, 2017, at Costa Mesa, California.

I declare under penalty of perjury that the foregoing is true and correct.

Shelley Aronson
(Type or print name)

S Aronson
(Signature)

SERVICE LIST
T-Mobile West LLC v. City and County of San Francisco
Supreme Court of the State of California Case No. S238001

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