

Thurston County Wireless Code Amendments Planning Commission Presentation March 17, 2021



Ken Fellman, Esq.

Kissinger & Fellman, PC

kfellman@kandf.com

Why are we doing this?

- County began looking at updating/rewriting all chapters related to telecommunications/broadband in 2011
- Focused first on chapters related to rights of way code provisions, utilities, franchises
- Began working on wireless code provisions in 2016

Why are we doing this?

- Telecommunications Act of 1996 - first comprehensive update to the foundational statute governing communications law in the United States – The Communications Act of 1934
- Impacted local authority in a variety of ways, and especially with respect to management of rights of way and land use authority over siting of wireless communications facilities
- Since the 1996 Act, the Congress has passed additional laws impacting local authority over wireless facilities, and the FCC has adopted multiple orders imposing new and restrictive conditions on local control
- Local codes need to be amended to preserve the ability to assert the authority that remains
- TCC updated in 2003, with minor amendments in 2007, 2012

Telecommunications Act: Wireless Facilities

- Section 704 establishes framework for regulating “personal wireless service” facilities
- Applies to wireless facilities on private property AND within public rights-of-way
- Preserves local authority, but creates 5 categories for federal preemption



Section 704 (codified at 47 U.S.C. 332(c)(7))

The Federal “box” in which state and local regulatory authority must operate:

- Regulations shall not unreasonably discriminate among providers of functionally equivalent services
- Regulations shall not prohibit or have the effect of prohibiting the provision of personal wireless services
- The government regulator must act on an application within a reasonable period of time after the request is duly filed
- No governmental entity may regulate personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such emissions comply with FCC regulations
- Decisions to deny an application to place, construct, or modify a personal wireless service facility shall be in writing and supported by substantial evidence contained in a written record



Section 704: No Unreasonable Discrimination

- Cannot favor one similarly situated provider over another
- Can treat providers differently when applying land use regulations to address individual conditions regarding aesthetics, visual impacts, safety issues, etc.
- But remember ... if you can't "unreasonably" discriminate, that suggests that equal treatment is not required – some discrimination can be appropriate



Section 704: No Prohibition

- Outright bans are preempted
- Regulations that “have the effect of prohibiting” the provision of wireless services are preempted
- Can impose conditions that may increase provider cost to minimize negative impacts, if they do not have the effect of prohibiting service
- Can require provider to demonstrate application is for least intrusive site

Section 704: Acting Within a “Reasonable Period of Time”

- FCC interpreted the term in 2009 Declaratory Ruling
- Presumed “reasonable period of time” to act on wireless site applications
- New structures: 150 days
- Collocations: 90 days
- Remedy for failure to act: may ask court for order directing governmental authority to act (or to order a grant of application)

NOTICE



Radio frequency fields beyond this point may exceed the FCC general public exposure limit.

Obey all posted signs and site guidelines for working in radio frequency environments.

In accordance with Federal Communications Commission rules on radio frequency emissions 47 CFR 1.1307(b)

No Local Regulation Based Upon Environmental Effects of Radio Frequency Emissions

- The biggest question local governments and their attorneys get when developing new wireless code provisions relates to radio frequency emissions
- FCC adopts regulations governing RF emissions
- Most sites for personal communications services are “categorically exempt” under FCC rules
- Local governments are preempted from creating own rules, but can require a demonstration of compliance with federal regulations

Denials Must be in Writing

- Decisions to deny applications for wireless facilities must be in writing and based upon evidence contained in a written record
- Local decisions given deference by the court if some credible evidence is in the record
- Denials based on aesthetics should be supported by more than unsubstantiated opinions
- Evidence should relate to some criteria in local Code or Master Plan
- Practice of most local governments is that any decision on a request to site wireless facilities is in writing



**Fast Forward:
Mandatory
Collocation
Under the
Middle-Class
Tax Relief and
Job Creation
Act of 2012**

- **Section 6409(a) Facility Modifications-**
(1) IN GENERAL- Notwithstanding section 704 of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

FCC 2014 Infrastructure Order

- Because Section 6409 left so many terms unclear, the FCC opened a rulemaking which filled in the gaps and defined numerous key terms, such as:
 - Eligible facilities request
 - Substantial change
 - Tower
 - Base station
 - Collocate
 - Existing
- All need to be incorporated into a new code

FCC Orders 2018-2020



- March 2018 – Order restricting applicability of certain environmental and historic preservation laws to wireless site applications
- August 2018 - Order preempting all government moratoria over wireless facilities siting
- September 2018 – Order creating new shot clocks, process requirements, fee and design limitations and related rules regarding small wireless facilities (small cells), many of which will be located in public rights of way
- November 2019 – determined that nothing more than minor changes were needed in longstanding rules governing exposure limits to RF emissions
- June 2020 – Order “clarifying” 2014 rules implementing the Section 6409 mandatory collocation requirements, changing definitions of key terms like what it means to “conceal” a site

FCC 2018 Small Cell Order

- Interpreted “prohibit or effectively prohibit” under Sections 253 and 332 to mean “materially inhibit”
- Creates tests to see if local government action exceeds “materially inhibit” standard:
 - Tests for when fees, aesthetics, undergrounding & spacing, “act in a timely manner,” and other requirements materially inhibit service
 - Creates “cost caps” for regulatory fees both inside and outside of rights-of-way; caps rent within ROW
 - Creates 2 new shot clocks for “small wireless facilities”
 - Redefines “Collocation”

FCC 2018 Small Cell Order: City of Portland v. FCC

- Small Cell Order partially upheld on appeal
 - The Court upheld that part of the FCC small cell order setting presumptively reasonable fees
 - Upheld the FCC's decision that moratoria materially inhibit provision of service and are therefore preempted
 - The Court upheld the FCC's ruling that shot clocks are appropriate
- Partially overturned
 - The court vacated the FCC's rule that aesthetic requirements must be objective and no more burdensome than requirements imposed on other users in the right of way



FCC Order in 2020

- “5G Upgrade Order” or “Clarification of 6409 Mandatory Collocation Rules”
- Changes rules for what it means to “conceal” a site, and when an expansion will not be considered as defeating the concealment elements of a site (leading to mandatory approvals under federal law)





Developing Thurston County's Wireless Code

- Staff has reached out to wireless providers and received feedback
- Wireless providers were engaged through the early parts of the process and initial drafts – have not been involved recently and will be seeing the updated draft at the same time as Planning Commission
- We expect industry will have issues they want to raise with us now that a revised, updated draft is being finalized



Developing Thurston County's Wireless Code

- Will see modifications in definitions to conform to changing FCC definitions (will be located in TCC 20.03.040)
- TCC 20.33 – issues addressed include:
 - Application requirements for different types of wireless facilities
 - Permit review for different types of wireless facilities
 - Review timing to comply with shot clocks
 - Impact of shot clock on pre-submission conferences
 - Design standards
 - Tower spacing in various zoning districts
 - Small wireless facilities in the rights of way
 - Criteria for adjustments to standards in site-specific cases



THANK YOU!

**Ken Fellman, Esq.
Kissinger & Fellman, P.C.
www.kandf.com
kfellman@kandf.com
303-320-6100**

Thurston County Staff

Kaitlynn Nelson

Associate Planner

kaitlynn.nelson@co.thurston.wa.us

(360) 522-0508