

MOTION BY SUPERVISORS ZEV YAROSLAVSKY AND  
MICHAEL D. ANTONOVICH

December 1, 2009

On November 18, the Federal Communications Commission issued a decision in which it established a "shot clock" by which local jurisdictions must take final action on land use applications for the siting of wireless telecommunication facilities—that being 90 days from the date of filing the application for co-located facilities and 150 days for other wireless applications. These new time frames would apply to all cases, even, in the case of our County, those appealed from the Hearing Officer and/or Regional Planning Commission up to this Board. If the County, or any other jurisdiction, does not meet these time lines, then the wireless company can file suit, claiming that the local jurisdiction has failed to act within the "reasonable" period of time that is required by the Federal Telecommunications Act. In court, the County would then be required to present evidence to overcome a presumption that it acted in an untimely manner.

Up until the FCC decision, most courts had concluded that a jurisdiction had acted within a reasonable period of time as long as it acted in the same time frame for wireless applications as it did for other zoning permits. The burden was on the wireless

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MOLINA \_\_\_\_\_

RIDLEY-THOMAS \_\_\_\_\_

YAROSLAVSKY \_\_\_\_\_

ANTONOVICH \_\_\_\_\_

KNABE \_\_\_\_\_

industry to prove that the time taken was unreasonable. The FCC ruling switches that burden and places relatively short time frames on local governments.

As a result, this ruling will require giving special favored treatment to wireless telecommunication applications over other land use applications. In short, the FCC decision undermines the County's ability to utilize its typical zoning processes for the careful and thorough consideration of wireless facilities, which is inconsistent with the intent of the relevant federal law.

While the FCC claims its decision does not preempt local zoning, it does exactly that. For example, in the County, if a permit decision is appealed up to this Board, the majority of the 150 days would be taken up simply by providing the required statutory notice of the various hearings. That then leaves little time: for staff to conduct an initial review to determine if the application is complete; to assess the application on its merit and prepare a staff report with a recommendation; and, for County Counsel to prepare final findings and/or findings and conditions for approval or denial of the application.

It is the contention of the County and other jurisdictions that it is doubtful that the FCC had the legal authority to make this decision, but unless challenged it will be applied to the County and all other land use jurisdictions in the country.

The County was part of a coalition of local governments that participated in the FCC process and strongly opposed the proposed FCC decision. The County may elect to appeal the FCC's decision in court, either on its own or with the coalition or another combination of parties. Under federal law, such an appeal must be filed in the federal court of appeals in which one of the parties is located. The time for filing such an appeal is normally 60 days. However, this is an issue of nationwide interest and other jurisdictions are also entitled to file suit in their federal court of appeals. If the case is

filed in more than one circuit, then a lottery system is used to determine which circuit will hear the appeal. We learned only yesterday that in order for a specific circuit court to be considered as part of the lottery process, the notice of appeal must be filed earlier, within 10 business days of the FCC decision. That 10-day deadline is this Thursday, December 3, 2009.

**WE, THEREFORE, MOVE THAT THE BOARD OF SUPERVISORS:**

- 1) Find that there is a need to take immediate action and that the need to take action came to the attention of the Board subsequent to the posting of the Board's agenda pursuant to Government Code section 54954.2(b)(2);
- 2) Authorize County Counsel on or before December 3, 2009, to either file a notice of appeal (petition for review) in the Ninth Circuit Court of Appeals or, join with other parties, to file an appeal in another circuit following completion of discussions with the County's outside law firm on these issues and with other local governments who are also contemplating legal action; and
- 3) Authorize County Counsel to thereafter take appropriate additional steps to protect the County rights on appeal in this matter.

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