CITY OF CALABASAS
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In The Matter of the City of Calabasas
Proposed Calabasas Municipal Code Section
17.12.050 entitled
"Antennas/Wireless Communication Facilities"

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SUGGESTED REVISIONS TO:

I REVISED DRAFT OF PROPOSED CITY ORDINANCE 17.12.050

II PROPOSED APPLICATION

Respectfully Submitted to the
City of Calabasas, California,

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Dated: Garden City, NY
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I. Suggested Revisions/Changes to the <u>revised draft of 17.12.050 are as follows:</u>

Section C(2)(e)(2) - "will be FCC compliance" should be changed to "will be FCC compliant"

Section C(9)(a) - I suggest that the language of subparagraph (a) be replaced with the following:

a. The applicant has established by clear and convincing evidence that installation of the proposed facility is necessary to close a significant gap in the operator's service coverage. Unless precluded from obtaining same, each applicant shall submit results of actual *in-kind* signal strength testing conducted within the geographic area where the applicant purports the existence of a significant gap in its service coverage. *In-kind* testing means signal strength testing for the specific type of coverage for which the applicant claims to suffer from a gap, whether for *in-building* coverage, *in-vehicle* coverage, or *outdoor* coverage.
To the extent that an applicant is precluded from access into the interior of buildings to conduct signal strength testing, the applicant shall submit a sworn affidavit of the efforts made to secure in-building signal strength testing and the cause which precluded it from conducting same.
In determining the existence or absence of a significant gap in coverage, the Commission shall consider any actual call testing results proffered by the applicant or any persons or entities supporting or opposing the applicant's application. In considering any such call testing results proffered as evidence of a significant gap, or the absence of same, the Commission may consider, in addition to other factors raised by those supporting or opposing respective applications: (i) the number of calls conducted in respective call tests, (ii) whether the calls included in the tests were undertaken on different days, at different times, and under differing conditions, and (iii) whether calls could be successfully initiated, received and maintained in the area where the applicant claims to suffer from a significant gap in its coverage.

II Comments and Suggested Changes to the proposed Wireless Facility Application

A. Comments

The Minimum Application

From a cautionary standpoint, I am constrained to note that the more burdensome a wireless facility application is, the more likely it is to be viewed by carriers as being intended to prohibit or unduly burden the ability of applicants to install wireless facilities within the respective jurisdiction.

Inasmuch as I was not involved in the discussions which lead to the creation of the draft application forms, I can only assume that the requirements presented within pages four (4) through twelve (12) are consistent with the requirements applied to applications for installations other than wireless facilities, and whether such other applications similarly require items such as Oak tree maps, drainage plans, HOA notice requirements etc.

If such requirements are similarly applied to other types of applications currently employed by the City, then they can be equally employed in applications for wireless facilities, so long as they are rationally related thereto.

If such requirements are not similarly applied to other types of applications, they should be considered for possible removal.

In addition, to the extent that the application requires disclosures pertaining to FCC licensing and RF emissions, the greater the extent of the requirements imposed in this regard, the greater the likelihood that a claim can be raised that the City's application requirements intrude into an area which is pre-empted by federal law.

I do not believe that FCC disclosure requirements presented within the application rise to such a level that they will be the subject of a successful challenge. Still, the question of how far any local government can require evidence of compliance with FCC regulations remains unanswered.

The Supplemental Application

Within the "Supplemental Application Form For Wireless Projects And Distributed Antenna System (DAS) Projects" Section 4 is problematic, and I strongly suggest that several of its subparagraphs be deleted.

As an initial matter, it requires an applicant to define the term "significant gap."

The United States Court of Appeals for the Ninth Circuit has, in essence, recognized that the term cannot be defined, because determining what constitutes a significant gap involves a factual inquiry which is unique to each individual case.

Federal courts have, however, widely recognized that for purposes of determining whether a carrier suffers from a significant gap, the gap must be "*truly significant*," and that local laws are not required to permit carriers to have perfect, 100% or "seamless" coverage.

As a practical matter, establishing the existence or absence of a significant gap is most often simple, and inexpensive for both the applicants, and persons and/or entities which either support or oppose their respective applications.

Simple call testing provides a cheap and (in my view) highly accurate means of determining the absence or existence of a "significant gap" in an applicant's "wireless coverage."

Beyond requiring an applicant to define what federal courts have been unable to define, the application further requires applicants to not only identify who "came up with" such definition, but also to state whether the same definition is being used by other carriers.

For more reasons than I can easily explain, from a local government's standpoint, there is absolutely nothing good that can come from imposing such requirements.

It is all but certain, that if wireless carriers and their attorneys could "fashion" a uniform definition for a significant gap, and have that definition apply to applications for the installations of wireless facilities, the definition they would embrace would virtually guarantee that they would be able to establish a significant gap for every application they filed.

As such, I strongly suggest that several proposed sections of the Supplemental Application be deleted.

In the absence of those sections which I hereinafter suggest be deleted, each applicant shall bear the burden of establishing, on a case-by case-basis, that it suffers from a significant gap in its wireless coverage, in a specific geographic area.

To do so, each applicant will be required to establish before the Commission exactly what they purport to be their gap in coverage, especially in those cases where actual call testing has revealed that calls can be initiated, maintained and concluded, employing their wireless service, in the very area where they purport to suffer from a gap.

B. Suggested Changes

In view of the forgoing, I suggest the following changes be made to the application.

Section 4.12

I strongly suggest that the following subparagraphs of Section 4.12 be deleted:

4.12(d)
4.12(e)
4.12(f)
4.12(g)
4.12(i)
4.12(j)

I suggest the City also consider deleting subparagraph 4.12(h)

The provisions of 4.12(h) address issues which can properly be taken into consideration when determining whether or not there exists a "significant gap" in the applicant's wireless coverage. As such, applicants should be permitted to raise such issues before the Commission when they are trying to establish that they are suffering from a significant gap in their wireless coverage.

Based upon my experience, however, in my personal opinion, by transforming such issues into *application requirements,* the City will merely be creating a roadmap for applicants and their attorneys to "create" or "customize" factual data which will be custom-crafted by attorneys or experts, for the sole purpose of establishing that one or more of the issues outlined in section (h) exists, and to serve as proof of the existence of a significant gap.

Worst of all, in cases where this is done, the City would have no way of knowing whether the proffered factual data is accurate or completely false.

Consider, by way of example, the issues described in subparagraph 4.12(i).

To the extent that an applicant submits data of the type described in 4.12(i), how could the City possibly know if any of such information was true, or was completely false, and whether it was fabricated for the sole purpose of securing approval of an application to install a new wireless facility.

In stark contrast, call testing results are easily verified. All one needs is a cell phone.

Section 4.15

For reasons similar to those stated above, I suggest that the following provisions of 4.15 also be deleted:

4.15(c)
4.15(d)
4.15(e)

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