

CELL TOWER LAW



By

Jon Paladini

City Attorney

(928)-777-1274

jon.paladini@prescott-az.gov



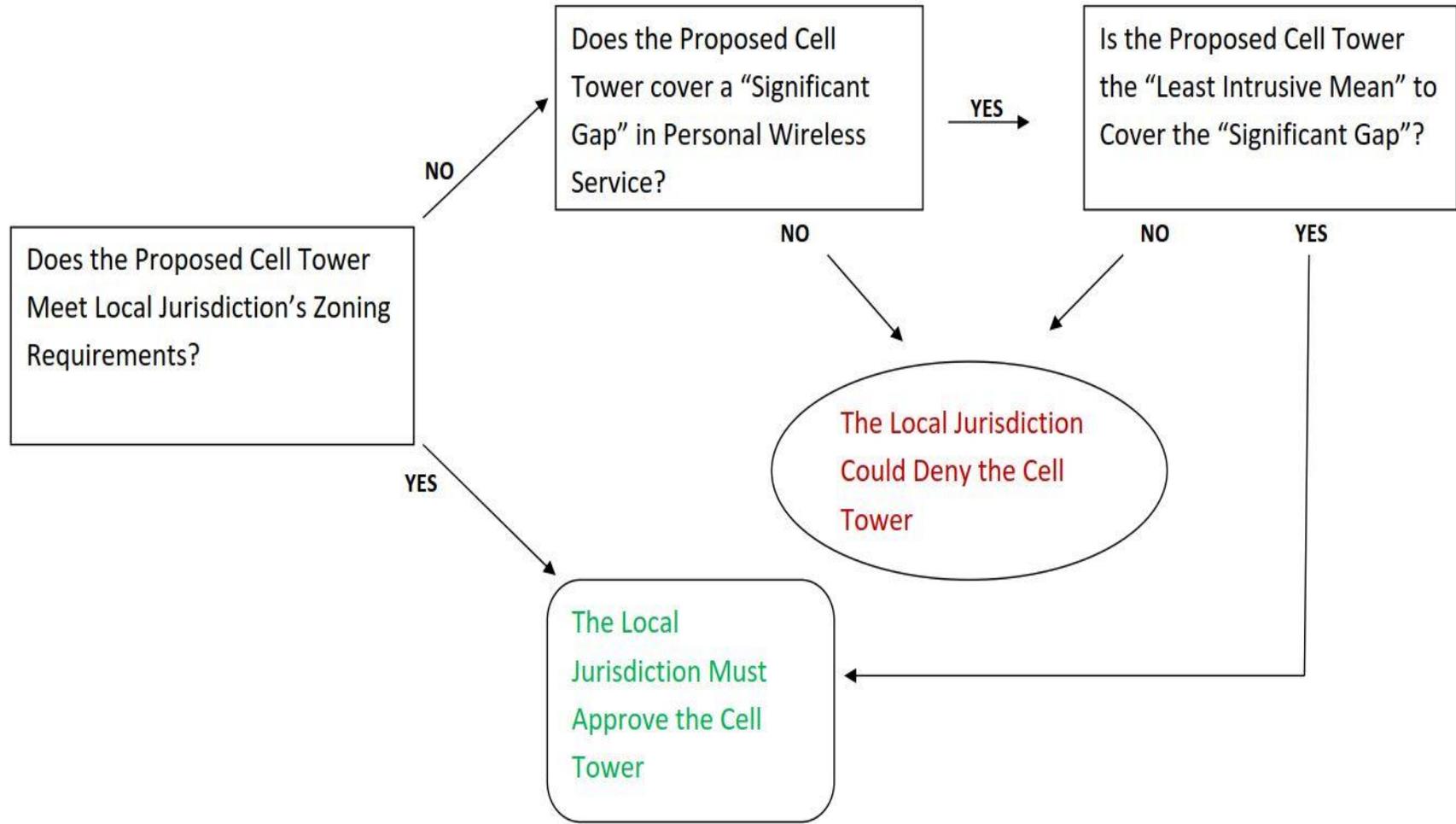
INTRODUCTION

- Regulatory - Cell Tower Permitting and Zoning
- Modifications to Existing Cell Towers
- Proprietary – Negotiating Cell Tower Leases
- Questions



TELECOMMUNICATIONS ACT OF 1996 (TCA)

- Congress enacted TCA to “provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapid deployment of telecommunications and information technologies and services.”
- TCA preserves state and local zoning authority subject to five express restrictions.





LIMITATIONS ON CITY AUTHORITY TO REGULATE CELL TOWERS

- Cannot discriminate.
- Cannot prohibit or have effect of prohibiting personal wireless service.
- Must act within a reasonable period of time.
- Cannot deny on the basis of environmental effects of radio frequency emissions.
- Denial of application must be in writing supported by substantial evidence.



APPLICANT/PROVIDER MUST SHOW OR PROVIDE

- That the proposed cell tower closes a significant gap in its own coverage in the least intrusive way possible.
- A meaningful comparison of various sites.
- That the proposed site is the best available.
- That the proposed site is the best technologically feasible site.
- That the application complies with the city's land development code.



PROCEDURAL REQUIREMENTS UNDER TCA

- Local jurisdiction must act on cell tower “**within a reasonable period of time.**” (Shot Clock Rule)
- Denial of a cell tower siting application must be “**supported by substantial evidence contained in a written record.**”



SHOT CLOCK RULE

- FCC defined “reasonable period” as 150 days for new cell tower siting.
- Local jurisdiction has up to 30 days for administrative completeness review.
- The clock tolls until application is administratively complete.
- 150 days is rebuttable presumption. Meaning you can work with applicant to avoid lawsuit.



SUBSTANTIAL EVIDENCE AND WRITTEN DENIAL

- “Substantial Evidence” means facts, expert opinions, data used to justify the reasons for denial.
- Must provide a written denial of the application and reasons for denial in a timely manner.



FEDERAL COURT JURISDICTION

- TCA authorizes the cell tower applicant to seek relief in federal court.
- Under TCA, court must hear the case on an expedited basis.



PROHIBITION OF PERSONAL WIRELESS SERVICE

- Local jurisdiction's regulation on cell tower cannot "prohibit or have the effect of prohibiting the provisions of personal wireless services."
- This means a local jurisdiction cannot deny a cell tower application if the proposed cell tower is the "least intrusive mean" to cover a "significant gap" in personal wireless service.



SIGNIFICANT GAP

- Decided on a case-by-case basis.
- Only applicant's coverage gap is relevant.
- The courts seem to be particularly concerned about two factors in determining whether a service gap is significant:
 - 1) Number of potential users affected by the service gap;
 - 2) the severity of the service gap.



LEAST INTRUSIVE MEANS

- Applicant must show a lack of available and technologically feasible alternatives to its proposed cell tower.
- It is appropriate to ask applicant to study:
 1. Alternative sites
 2. Alternative designs
 3. Alternative technologies



DISCRIMINATION AMONG PROVIDERS PROHIBITED

- No unreasonable discrimination among providers of functionally equivalent services.
- Not difficult to overcome (visual, aesthetic, or safety concerns are permitted).
- Only problematic when the denial has the effect of shielding existing wireless providers from future competitions.



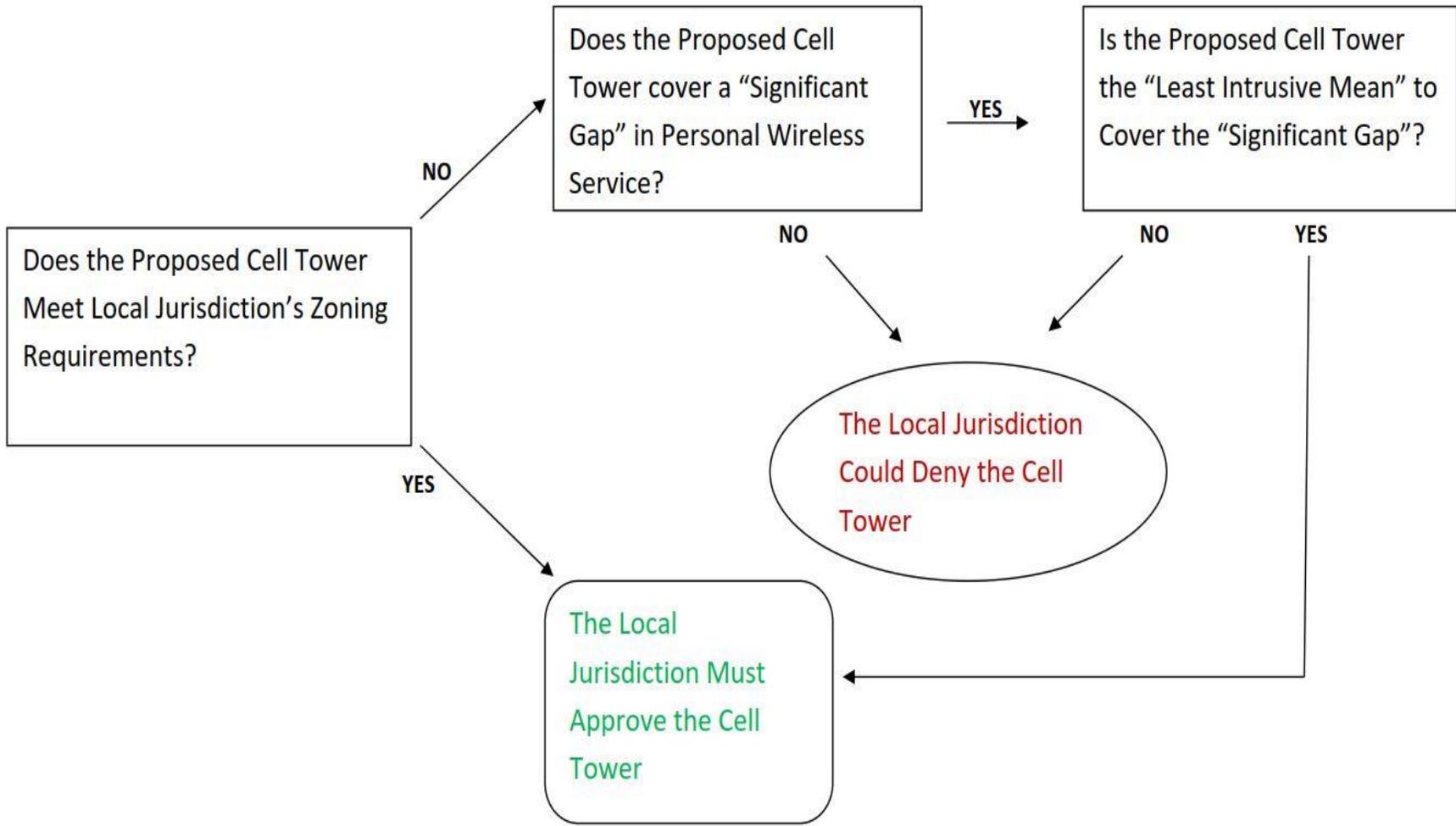
RADIO FREQUENCY EMISSION

- Environmental effect of radio frequency emission cannot be used to deny a cell tower application.
- Can ask— does the cell tower comply with FCC regulation on RF Emission?



DO I NEED AN EXPERT?

- Local jurisdiction may require the cell tower applicant to prove the existence of coverage gap.
- Expert may be necessary to rebut the existence of significant coverage gap. Marketing material and person drive-by tests are not persuasive.





SPECTRUM ACT AND COLLOCATION

- Spectrum Act enacted as part of the Middle Class Tax Relief and Job Creation Act of 2012.
- Under Section 6409(a) of Spectrum Act, a local jurisdiction cannot deny “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.”



DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING

June 9, 2020

- Final Rules:
 1. Primarily affects enforcement of aesthetic standards and concealment.
 2. Limit local jurisdiction review to 60 days.
 3. “Deemed Granted” if not acted upon in 60 days.



DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING

Narrowed the definition of “concealment elements” to constitute “elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station”.



ELIGIBLE FACILITIES REQUEST

Eligible Facilities Request (EFR) includes any application to enhance existing tower or base station to support additional antenna.



TOWER AND BASE STATION

“Tower” means any structure built for the sole or primary purpose of supporting any Commission–licensed or authorized antennas and their associated facilities.

“Base Station” means structure that supports or houses an antenna, transceiver, or other associated equipment.



SUBSTANTIALLY CHANGE THE PHYSICAL DIMENSION

Allows EFRs that increase tower height by 10 percent or the height of one additional antenna array with separation from the nearest existing antenna not to exceed 20 feet, whichever is greater *plus* the height of the new antenna, and the height of the new antennas is *unlimited*.



SUBSTANTIALLY CHANGE THE PHYSICAL DIMENSION

For all installations:

1. Installation of 4 or more additional cabinets.
2. Cap of four cabinets applies to each eligible facilities request individually. There is no cumulative cap.



ENVIRONMENTAL ASSESSMENTS

An environmental assessment is not needed when the FCC and applicants have entered into a memorandum of agreement to mitigate effects of a proposed undertaking on historic properties, ...if the only basis for the preparation of an environmental assessment was the potential for significant effects on such properties.”



COMPLYING WITH FCC FINAL RULES

- Create a collocation application form. Ask the applicant to provide evidence supporting collocation.
- NO MORATORIUM.
- Understand the effect of initial cell tower approval. (A 55-foot cell tower may become 75-foot in the future).



NEGOTIATING CELL TOWER LEASE

- TCA does not preempt or affect local jurisdiction authority to negotiate cell tower leases on properties owned by the local jurisdiction.
- Omnipoint Communication v. City of Huntington Beach, 738 F. 3d 192 (9th Cir. 2013)



NEGOTIATION TIPS

- Maximizing Revenues v. Greater Connectivity
- Political/Neighborhood Concerns
- Regulatory approval/FCA compliance for cell tower leases not required
- Standard Rates v. Case-by-Case Negotiation

QUESTIONS?



Jon Paladini
(928) 777-1274

jon.paladini@Prescott-az.gov