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MEMORANDUM

To: Michael B. Lavery, Esq.
From: Igor V. Bykov, Law Clerk
Date: December 3, 2020
Re: Mansfield Township | Petition for Consent re: Right of Way

Question Presented:

What are the rights of Township of Mansfield in regards to Planet Networks, Inc.'s request to utilize the public right of way?

Brief Answer:

Municipal rights in relation to a telecommunications carrier's request for utilization of Municipal Right of Way (hereinafter ROW) are provided predominantly by the Telecommunications Act as well as relevant FCC orders. In short, municipalities must first consent to the use of the ROW, the consent must be given within a 150-day period, and municipalities must not unreasonably withhold consent. Municipalities, by consenting to the use of the ROW, subject providers to local zoning laws. Furthermore, although the charging of fees for actual services made by any municipal or governmental agency are permitted, these fees must not be unreasonable.

Discussion:

In order for a Telecommunications Carrier to utilize a Municipal Right of Way, the company seeking permission from the Township must first obtain Municipal Consent for the use thereof. Before any action is taken, the company seeking to use the Right of Way must receive permission from the Municipality to do so, as required by N.J.S.A. 48:3-19. As provided by the Telecommunications Act, the Municipality reserves the right to regulate the siting of telecommunications facilities (e.g. telephone/utility poles).¹ This section allows Municipal corporations to require the telecommunications carriers to comply with local zoning, thereby subjecting the carriers (and other public utilities with the same purpose) to local zoning powers. This notion is underscored in the Appellate Division's opinion of *New Jersey Nat. Gas Co. v. Borough of Red Bank*, 438 N.J. Super, 164, 180 (N.J. App. Div. 2014), where the court opined that public utilities are subject to municipal zoning power, which, if adverse, can be appealed to the Board of Public Utilities.² Any denial thereof must be "be in writing and supported by substantial evidence contained in a written record," as required by 47 U.S.C.A. § 332(c)(7)(B)(iii).

A municipality shall not unreasonably discriminate among providers offering similar services, nor "shall not prohibit or have the effect of prohibiting the provision of personal wireless services."³ This procedural requirement "applies to determinations of factual issues

¹ 47 U.S.C.A. § 332(c)(7)(A) (stating that "nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.").

² N.J.S.A. 40:55D-19.

³ 47 U.S.C.A. § 332(c)(7)(B).

made by state or local authorities when they apply state and local zoning law[,]” and “applies to decisions made solely on the basis of the factual record before the agency and are the subject of deferential substantial evidence review.”⁴ Although neutral competition among providers is encouraged, denial of company’s requests for the utilization of a right of way due to preferential treatment is impermissible.⁵ As pointed out by the Third Circuit in *New Jersey Payphone Ass’n, Inc. v. Town of West New York*, 399 F.3d 235, 247 (3rd Cir. 2002), the Town shall not “create a set of rules the purpose of which is to select one company over others for preferential treatment.”

Municipalities must also be aware of the necessary time periods during which an action must be taken, pursuant to 47 U.S.C.A. § 332(c)(7)(B)(i)(I). The FCC has defined “the reasonable time period” to be “90 days for processing collocation applications, and 150 days for processing applications other than collocations.”⁶ And, in the same vein, municipalities may only charge “reasonable fees for actual services made by any municipal, regional or county governmental agency.”⁷

⁴ *Sprint Spectrum, L.P. v. Zoning Bd. of Adjustment of Borough of Paramus New Jersey*, 606 Fed.Appx. 669, 672 (3rd Cir. 2015).

⁵ *See* 12 McQuillin Mun. Corp. § 34:16 (3d ed):

Section 253(b) preserves state authority to regulate telecommunications on a competitively neutral basis, subject to the universal service requirements of § 254, by imposing requirements necessary to preserve and advance universal service, protect the public safety and welfare, to ensure the continued quality of telecommunication services, and to safeguard the rights of consumers.

Id.

⁶ FCC Ruling 14-153 at 103.

⁷ N.J.S.A. 54:30A-124(a), which states:

Given that the interplay of local, state, and federal law invites complications when analyzing the Telecommunications Act as well as relevant FCC rulings, the New Jersey League of Municipalities suggests adopting uniform standards for the use of the Municipal Right of Way.⁸ It should also be noted that “zoning ordinances requiring variances for all wireless siting requests [violates the TCA].”⁹ If the Township of Mansfield follows the provisions of the cited statutes and abides by the orders issued by the FCC, the Municipality should be free of legal issues.

No municipal, regional or county governmental agency may impose any fees, taxes, levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against energy companies subject to the provisions of P.L. 1940, c.5 (C.54:30A-49 et seq.) prior to January 1, 1998 or telecommunications companies. Nothing in this section shall be construed as a bar to reasonable fees for actual services made by any municipal, regional or county governmental agency.

Id.

⁸ Wireless Systems in the Right of Way, NEW JERSEY LEAGUE OF MUNICIPALITIES at 12 (2016) available at <https://www.njlm.org/DocumentCenter/View/1666/Wireless-Systems-in-the-Right-of-Way-What-you-Need-to-Know-September-20-2016-PDF?bidId=>.

⁹ Id.