Stop Cell Towers in Carmel Neighborhoods
"We are for cellular service in the least intrusive means to the residential neighborhoods"

Problem: "Material Inhibition" is a Misinterpretation of "Effective Prohibition"

The city's wireless ordinance checklist asks applicants to explain a "material inhibition claim" (application checklist page 13-14). The problem is that the city defines the FCC's misinterpretation of "material inhibition".

The FCC cannot reinterpret the "effective prohibition" standard and replace it with its own "material inhibition" definition, which is not defined by federal law. The city validates the FCC's false interpretation of the term by parroting the misuse of the term.

This error concerning the interpretation of the Portland case is of critical importance because the City staff seems poised to accept a law based on an incorrect interpretation.

In fact, the traditional treatment of "effective prohibition" is much more compatible with the intent of Congress at the time it enacted the Telecommunications Act in 1996. The Congress' goal at that time was to strike a balance between the needs of advancing technology and the reasonable concerns of the affected local communities -- indeed, it was that balancing that led to the traditional understanding of the law.

The FCC's newly announced "material inhibition" standard badly skews this balance, leaving local communities almost no voice in how technology will affect their residents. We believe it would be a great mistake to abandon the sensible standards that Congress intended and that the federal courts have long implemented.

Resource:
Regulating
Small Cell Towers
Five Lawyers Present
Legal rationale for controlling small cell towers
By Robert C. Janku, MLS

https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/agenda/col/2022/20220913/testimony/item7-RobertJanku.pdf

Understanding the FCC's misinterpretation of "material inhibition":

A) The Portland case did not change the ruling of effective prohibition. The FCC cannot reinterpret the "effective prohibition" standard and replace it with its own "material inhibition" definition, which is not defined by federal law.

B) Nationally recognized telecom attorneys Janku, McCollough, Pine, Kahn and Campanelli state how the Portland case did not change the ruling of effective prohibition and how the material inhibition standard defined by FCC is not able to reinterpret law. The FCC does not have the authority to issue a new interpretation of federal law; that is the province of the federal courts.

The Ninth Circuit did not adopt a new and more liberal standard governing wireless facilities installations in the City of Portland case; rather, it simply applied a standard that it has used since 1997, and which the court in that case very explicitly announced it was not changing. the standard the court applied, however, is of no relevance whatever to the question of whether new wireless facilities may be installed, and how they may be regulated by local jurisdictions, because that case dealt with a completely different provision of the 1996 Telecommunications Act than that which governs the placement or construction of so-called "personal

wireless service facilities," and thus does not affect the standard applied in placement or installation cases in any way whatever.

C) The power of local governments in this area is especially strong, because according to the coverage maps published by Verizon, it is clear that almost every spot in CBTS already has more-than-adequate cell service, and thus according to the telecoms' own coverage maps, there can be no effective prohibition of service nearly anywhere in the City, even if further 5G installations were to be entirely forbidden. There is simply no need on legal grounds for the City to accept a material inhibition claim because the City is already entirely in compliance with the relevant federal laws.

D) The Portland Case and Section 253 of the 1996 Telecommunications Act
The City of Portland v FCC case dealt with a number of regulatory rules imposed by the FCC, which were challenged by local jurisdictions. The local jurisdictions claimed that the FCC regulations dealing with fees, shot clocks, aesthetic issues, and nondiscrimination requirements limited local authority unnecessarily. The Court upheld all but the aesthetics requirements on the basis of Section 253(a) of the Telecommunications Act of 1996 (henceforward "the Telecom Act"). That provision states:
(a) In General – No State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services.
In applying that provision, the court applied the very same standard for judging Section 253 cases that the FCC had first announced in 1997, and that the Ninth Circuit had first applied in 2008. In Sprint v City of San Diego, 543 F.3d 571 (2008), the court accepted the FCC's "material inhibition" standard with respect to Section 253. The Court in City of Portland applied that very same standard in 2020, again to a case involving Section 253 of the Telecom Act. There was no change in standards, no overruling of any existing cases or standards, no announcement of new law.
The "Effective Prohibition" standard in cases under Section 332 . Thus, Section 253 has been applied in evaluating various local regulatory requirements unrelated to the placement or construction of wireless telecom facilities similar to 5G antennas. However, a completely different provision of the Telecom Act governs "the placement, construction, and modification of personal wireless service facilities," and the federal courts have uniformly applied a
different standard in evaluating local regulations in these matters. Section 332(7) of the Telecom Act states in part:
(7) Preservation of Local Zoning Authority
(A) General Authority -- Except as provided in this paragraph, 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
(B) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local instrumentality thereof (1) shall not unreasonably discriminate among providers of functionally equivalent services; and (2) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Thus, the "placement, construction, and modification of personal wireless service facilities" is governed by a different section of the Telecom Act than that which governs local regulations of telecommunications services, and essentially since the passage of the Telecom Act in 1996 a different judicial standard has been applied to the evaluation of local controls on "placement, construction, and modification."

The traditional standard governing "effective prohibition" still applies:
To prevail on a prohibition of service claim, a wireless carrier must show either "that a local government has a general policy that essentially guarantees rejection of all wireless facility applications," or that denial of an application for one particular site is 'tantamount' to a general prohibition of service. . . . Under the latter theory, a plaintiff must demonstrate both "a legally cognizable deficit in coverage amounting to an effective absence of coverage" and a lack of "reasonable alternative sites to provide coverage. . . . A plaintiff's burden of proof on a prohibition of service claim "is substantial and is particularly heavy when . . . the plaintiff already provides
some level of wireless service to the area," because "the Act cannot guarantee 100 percent coverage."

All of the federal circuits that have had the opportunity to examine Section 332. This standard was not abandoned by the Ninth Circuit in City of Portland – the court in that case was examining a different provision of the Telecom Act that has from the beginning been governed by the standard that was applied in that case. There has been no change of standards in any of the cases. The traditional "effective prohibition" standard for evaluating prohibition of service claims remains fully in effect throughout the country. It is staff incorrect to assert that it has changed, and further incorrect in asserting that a change in existing Carmel by the Sea law is necessitated by some change in legal standards.

Limitations on the FCC's Power to Change Interpretation of Federal Law

Indeed, at this time it seems clear that, though the FCC may advocate for a different standard for Section 332 cases, it has no power whatsoever to reinterpret the meaning of that standard, or to force an alternative interpretation on the federal courts. Only once federal appellate court has ruled on the question of whether the FCC may reinterpret the meaning of the Telecom Act's "effective prohibition" standard. The Second Circuit, in the case of Crown Castle N.G. East LLC v. Town of Hempstead, 2019 Westlaw 5188923, made clear that, as far as that court was concerned, the FCC does not have the power to adopt a new interpretation of that statutory language. Rather, the Second Circuit followed the practice of the federal courts across the country in relying on what is now the traditional understanding of that language. It is the role of the federal courts to interpret federal law, and in the court's view, a regulatory agency may not by fiat force a new interpretation on the courts.

In fact, no other federal circuit court has addressed the issue. The court in City of Portland v. FCC did not attempt to choose between the traditional interpretation of "effective prohibition" and the FCC's recently announced reinterpretation of that standard, and certainly did not overrule or reject the traditional understanding. Rather, it avoided that issue, and ruled simply that certain regulatory requirements, including the FCC's rules on fees, shot clocks, and discrimination among carriers and types of facilities, were valid uses of the FCC's discretion.

Similarly, the Third Circuit, in the case of T-Mobile N.E. LLC v City of Wilmington, 2020 Westlaw 245306, avoided ruling on the FCC's proposed reinterpretation on the grounds that it had to apply the law as it existed at the time the conflict between the parties arose, i.e., it applied the traditional interpretation. Only the Second Circuit has addressed the issue, and it ruled unambiguously that the FCC does not have the power to force a reinterpretation of a federal law.

An evaluation of a material inhibition claim is unnecessary because CBTS is already in compliance with unchanged federal law.

In fact, the traditional treatment of "effective prohibition" is much more compatible with the intent of Congress at the time it enacted the Telecommunications Act in 1996. The Congress' goal at that time was to strike a balance between the needs of advancing technology and the reasonable concerns of the affected local communities -- indeed, it was that balancing that led to the traditional understanding of the law. The FCC's newly announced "material inhibition" standard badly skews this balance, leaving local communities almost no voice in how technology will affect their residents. We believe it would be a great mistake to abandon the sensible standards that Congress intended and that the federal courts have long implemented.