troutman sanders

Memorandum

TO: City of Aurora

FROM: Troutman Sanders LLP on behalf of CyrusOne, LLC

DATE: November 8, 2017

RE: *In the Matter of the Application of Scientel Solutions, LLC for a Special Use Permit for the Construction of a Telecommunications Tower on the Property located at Diehl Road, Aurora, IL*, Docket No. 17-00520

On or about October 10, 2017, Scientel Solutions, LLC ("Scientel"), through its counsel Telecommunications Law Professionals, submitted a statement to the City concluding that the City lacked the authority to consider potential interference between telecommunications towers in exercising its zoning authority. In particular, Scientel seeks a variance from existing zoning regulations that require separation between towers so as to place a new tower within a zoning boundary adjacent to the previously authorized CyrusOne, LLC ("CyrusOne") tower[1]. By focusing on the narrow issue of actual radio frequency interference ("RFI"), rather than the land use implications of towers in close proximity on adjoining parcels of property, Scientel hopes to persuade the City that it should abandon its duty under the zoning code where Scientel's variance application is concerned. The City should not abandon its broader zoning authority to regulate telecommunications tower separation when its authority to regulate land use can peacefully coexist with the FCC's authority to regulate RFI.

To the contrary, the City may consider RFI, and should do so when exercising its authority to control land uses within its boundaries, so as to minimize the interference and related loss of business productivity that would result. The authority cited by Scientel to the contrary is non-binding and distinguishable on the facts, and to conclude otherwise would counterintuitively require the City to ignore a pertinent factor in making its land use decisions in order to avoid giving the impression of conflicting with exclusive FCC regulatory authority. Moreover, the proposition that the City must ignore all RFI issues in this matter runs contrary to the multiple City ordinances that explicitly consider RFI.

In its memorandum, Scientel Solutions argues that issues concerning RFI may not be considered whatsoever in relation to applications for permits to construct telecommunications towers. That memo overstates federal authority over telecommunications facilities, relies on a strained reading of non-binding authority from outside the Seventh Circuit, and analogizes to case law that considered vastly different factual circumstances.

A close reading of precedent suggests, contrary to Scientel's memo, that the City may and should consider potential RFI in determining whether to grant a variance to allow Scientel to construct a telecommunications tower closer to CyrusOne's tower site than otherwise would be allowed under City ordinances.

[1] In fact, the Scientel tower would require variances from the setback requirements from five (5) other towers, in addition to CyrusOne's approved tower.

A. The Precedent Cited by Scientel is Non-Binding and Distinguishable

The starting point in the analysis is Congress' recognition that local government zoning and federal telecommunications law can peacefully coexist where they are not irreconcilably in conflict. Thus, in the Federal Telecommunications Act of 1996 (the "FTCA"), Congress wrote: "Except as provided in this paragraph, nothing in this Act 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." 47 U.S.C. § 332(c)(7)(A).

Scientel's memorandum, which purports to convey the considered opinion of "numerous state and federal courts throughout the country," relies principally on two cases, both from outside the Seventh Circuit.[2] In *SW Bell Wireless Inc. v. Johnson Cty. Bd. of Cty. Comm'rs*, 199 F.3d 1185 (10th Cir. 1999), the Tenth Circuit Court of Appeals considered a challenge to a zoning law that required applicants for a special use permit to build a communications tower to investigate and remedy potential RFI with public safety communications channels. *Id.* at 1186. At the outset, Scientel glosses over the Court's acknowledgement that "federal communications legislation lacks any statement expressly preempting local regulation of RFI." *Id.* at 1190. Scientel also ignores the Court's explicit citation to the FTCA, quoting a conference report: "The Conference Report on the Telecommunications Act of 1996 explains that "the limitations on the role and powers of the Commission under [§ 332(c)(7)] relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities." H. Rep. No. 104-458, at 209 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 223." *Id.* at 1191 (emphasis in original). The Court later held that the specific regulation at issue in that case was preempted by the Federal Communication Commission's ("FCC") regulatory authority over matters involving RFI. *Id.* at 1191. Importantly, the regulation at issue in *SW Bell Wireless Inc.* allowed the county zoning administrator to "force [an] antenna site to cease operations" if it interfered with public safety communications. *Id.* at 1188. That is a far cry from this situation, in which the City contemplates carving out an exception to its existing setback ordinance to allow the construction of a tower that will affirmatively create RFI with a pre-approved tower.

Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311 (2d Cir. 2000), the second case on which Scientel relies, is also distinguishable. There, the Second Circuit Court of Appeals considered a preemption challenge to a law that required applicants for a telecommunications tower permit to remedy RFI with radio devices in local homes. *Id.* at 314. *Freeman* is distinguishable in much the same way *SW Bell Wireless Inc.* is: the statute at issue is a broadly applicable attempt by the city to regulate and proscribe the ability of any future applicant to create RFI interference with certain devices.

[2] Scientel does cite a Supreme Court case, *Head v. N.M. Bd. of Examiners in Optometry*, 374 U.S. 424, 430 n.6 for the proposition that the FCC's "jurisdiction over technical matters such as a frequency allocation . . . is clearly exclusive." *Head*, however, addressed the question of whether New Mexico could permissibly disallow out of state optometrists from advertising eyeglasses without running afoul of the commerce clause. As such, the reference to frequency allocation was mere dicta, and the Court did not have occasion to consider zoning, the FCC, or the Federal Telecommunications Act at all, let alone the specific situation facing Aurora.

These cases do not prevent the City from considering the likelihood of costly and avoidable interference between two communications towers when deciding whether to grant a reduction in the otherwise applicable setback requirement established in the City's telecommunications ordinance. Were that the case, the very setback ordinance for which Scientel seeks its variance would itself be preempted as it contemplates avoiding interference and promoting collocation on fewer towers. Instead, these cases strongly suggest that these matters are fully within the City's local zoning authority. Rather than challenging the ordinance, however, Scientel affirms its validity by seeking a variance.

B. The City Should Adopt a Policy of "Prudent Avoidance" to Avoid Unnecessarily Creating Radio Interference

A case decided by the United States District Court for the Southern District of New York suggests that the City may refuse Scientel's variation request from its telecommunications ordinance setback and separation requirements based on the RFI that the variance would cause. In *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 99 F. Supp. 2d 381 (S.D.N.Y. 2000), the court considered a plaintiff wireless provider's request for a mandatory injunction compelling town zoning officials to issue a permit for construction of a wireless tower. The town had denied plaintiff's application in favor of a different telecommunications facility that would expose residents to a lower average volume of electromagnetic radio frequencies. *Id.* at 383.

The plaintiff argued that, because FCC regulations set maximum standards for radio frequency exposure, the town was prevented from considering the health effects of radio frequency exposure on the community in selecting among the competing towers. The Court disagreed. All tower-site applicants met the FCC's maximum radio frequency exposure limits, and the Court held that nothing prevented the town from choosing among the applicants in order to "minimize [the] perceived health effects" of radio frequency exposure. *Id.* at 392. The court held that, "[f]rankly, any other reading . . . would virtually compel the municipality to award the permit to whatever applicant's site was closest to homes and schools, so as to avoid any implication that the decision was based on perceived health effects. That cannot be what Congress intended." *Id.*

By the same token, Congress cannot have intended to require the City to blind itself to substantial radio interference, and the negative impact on the telecommunications businesses involved, to avoid giving the impression of treading on a field reserved to Federal regulation. Rather, the only reasonable reading of the precedent cited by Scientel (to the extent that that precedent, as non-binding authority, should limit City action at all) is that Aurora may not establish regulations concerning the amount and type of impermissible RFI. This does not mean that Aurora may not consider potential RFI issues with respect to those providers. Like the competing towers at issue in *New York SMSA Ltd. P'ship*, neither Scientel nor CyrusOne have, as yet, run afoul of FCC regulations[3], and the City, in recognition of CyrusOne's preexisting approval for construction, should uphold its previous approval of CyrusOne's tower over Scientel's to avoid the electromagnetic interference that would otherwise result. If the City declines to take this path, it opens itself up to similar arguments in the future, and may find itself

[3] In *New York SMSA Ltd. P'ship*, the regulations at issue concerned the maximum allowable radio frequency exposure; here they pertain to radio frequency interference.

"virtually compel[led] . . . to award [a] permit to whatever applicant's site [causes interference with neighboring towers], so as to avoid any implication that the decision was based on" the RFI related issues. *See id.*

C. Multiple City Ordinances Show that, Contrary to Scientel's Argument, Aurora is not Required to Abstain Entirely from Considering RFI

As discussed above, no court decisions under these specific facts require the City to ignore the serious RFI issues that will develop if it chooses to grant Scientel's variance. Any contrary conclusion necessarily implies that a number of City ordinances, some of which directly relate to zoning, are also preempted by federal law and unconstitutional.

The City currently considers RFI issues in the context of telecommunications towers. Section § 19-68(n) requires applicants wishing to build "a new tower, or pole with antennas" to demonstrate "that no existing tower, pole, structure or alternative technology which does not require the use of towers or additional structures can accommodate the applicant's proposed pole or antenna." *Id.* One way to make this demonstration is by showing that "[t]he applicant's proposed pole or antenna *would cause electromagnetic interference* with antenna on existing towers or structures, or the antenna on the existing towers or structures *would cause interference* with the applicant's proposed antenna." *Id.* § 19-68(n)(4) (emphasis supplied). If Aurora must ignore the RFI that will result from the grant of Scientel's variance, then it would likewise be prevented from considering other RFI issues in other, similar contexts. If this is so, the City cannot maintain a uniform policy of considering RFI when determining whether an applicant has established the need for a new telecommunications tower, or when making any other permitting decisions. A review of existing City of Aurora Ordinances demonstrates that numerous ordinances require consideration of such impacts.

For example, City of Aurora Ordinance § 17-36 authorizes the City to require the installation of special equipment "when conditions exist" which interfere with emergency radio communications. The City is also authorized to require interfering structures be vacated, *id.* § 17-36(c), pending compliance with the ordinance, *id.* § 17-36(d).[4]

Aurora's Code of Ordinances and Zoning Code contain many additional examples. *See, e.g.*, Aurora Code of Ordinances § 5-42(1) (disallowing any use of land zoned for airports "which would create unreasonable interference with the radio communication between the airport, or communication facilities in the vicinity thereof, and aircraft"); *id.* § 19-36(g) (requiring that, for Community Antenna Television Systems, "RF leakage shall be checked at reception locations for emergency radio services so as to prove that no interference signal combinations are possible"); City of Aurora Zoning Ordinances § 7.3-2.2(B) ("No home occupation and/or equipment used in conjunction with the home occupation shall cause or produce . . . radio interference beyond the boundaries of the lot . . . ."). These examples underscore the fact that the FCC's regulatory authority over issues related to radio frequencies cannot impose constraints on local lawmaking authority as boundless as those Scientel proposes.

[4] This ordinance section does not pertain solely to radio frequency interference; it is likely that the interference in question may also result from building materials that block radio communication. Still, Scientel says the City must be RFI-blind, so presumably the "technical matter" of emergency radio transmissions into buildings is likewise an issue of exclusive Federal concern.

The City should not embrace a strained reading of non-binding precedent that would negate enforcement of large swaths of its well-considered code. Rather, the more reasonable interpretation—uncontradicted by any binding caselaw—is that, though the City by and large may not legislate to control RFI itself, it may consider potential interference issues in deciding whether to allow telecommunications companies a variance from existing city ordinances. This view represents an appropriate exercise of the City's authority to regulate land use within its jurisdiction, and dictates that the City deny Scientel's application and variance to avoid the serious RFI issues and economic harms that would result. Moreover, this view is consistent with good public stewardship of economic resources. Conversely, to adopt Scientel's view would be to say that local governments could, or must, grant variances without regard to any RFI concerns and let the FCC sort out the mess created by mass tower construction within confined spaces. Populating the landscape with useless and interfering towers lacks common sense, and hardly qualifies as good stewardship of public resources, nor does it comport with the available resources of the FCC to combat RFI on an unfettered basis. For these reasons, the City Council should reject Scientel's strained reading of the scope of the FCC's authority, and should exercise its proper authority to consider the significant interference effects that would result from construction of Scientel's proposed tower, and deny Scientel's Special Use Permit application for the proposed telecommunication tower and the associated request for variance.

4812-2929-7748, v. 1