

Dalton Gardens, Idaho -- City Council Meeting

Paul McGavin, Speaking

Source: This is a transcript of Paul McGavin's presentation of wireless law to Dalton Gardens, Idaho City Council Meeting on October 7, 2021. To listen to the aural portion, see: <https://youtu.be/ZT79ffwPGuU>.

SUMMARY KEYWORDS

FCC, tower, facilities, wireless, ordinance, problem, feet, state, commercial district, cell tower, attorney, veto, case, telecommunications, Dalton Gardens, local authority, power, decisions, telecommunications act, act

SPEAKERS

Mayor Dan Edwards, Cary, Paul McGavin

Mayor Dan Edwards 00:05

Let's go on with Cary.

Cary 00:07

Oh, I was gonna ask for the equal time for Paul McGavin to speak equal time.

Mayor Dan Edwards 00:13

You can time it but it was 10 minutes but I don't care if you need 20 minutes, I'll give him 20 minutes. So, this, like I said in the email, they said back to you I don't care if this meeting is 10 hours long. I want to hear what's going on my attorney and Brian said like 10 hours, "Mayor, come on. Are you serious?" Yeah, I am serious. If it takes 10 hours to hear this tonight. It's that important so. So, Paul, can you state your name and your credentials

Cary. 00:37

please an expert.

Paul McGavin 00:38

My name is Paul McGavin. I'm a software engineer. I'm an expert in measuring and mitigating microwave radiation. For five years, I've been working on this

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issue at the federal, state and local levels. I've successfully passed ordinances in different communities, including my own in Petaluma, California. I work with the top telecommunications attorneys in the United States, including W. Scott McCullough, who is the one who argued the case for Children's Health Defense and Environmental Health Trust against the FCC. We work very closely together, also, with Andrew Campanelli, the nation's number one top telecommunications attorney. I understand it very much what is possible for cities to do. And that's why I talked my city into doing smart things. I do this on behalf of communities because I care and I too am electromagnetically sensitive.

So, I know that if a small cell went outside of my house, I would have to move. And that is unfortunate, because that is called an environmentally induced illness. And it's because there's just way too much microwave radiation that comes out of these things. Now, you have to understand where the foundations of things are. So. the important thing to understand is that I was working very hard in California, not just this summer, but four years ago, and we got a veto of California, SB 649, which was our bad state bill and 2017, because I'm the one that talked to Governor Jerry Brown on October 14, and he vetoed on October 15.

Paul McGavin 01:56

And what I shared with him was important to be able to preserve local control. So. each city can decide on their own exactly how they should be able to put broadband into their town. Wireless broadband is not covered by the 1996 Telecommunications Act. This is where your attorney is confused. He is believing that telecommunications includes wireless broadband, it does not.

Paul McGavin 02:22

So essentially, what you have is a business idea that's not supported by the underlying laws. And that's very easy to figure out once you go to the exact words that he was quoting from the 1996 Telecommunications Act, and to the conference report, which explains what the congressional intent is behind the act. See, there is a was a Supreme Court decision in 2005. And it was *Palace Verdes*

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vs. Abrams. And what they did then is they identified the definitive source of the congressional intent of the 1996 Act. That would be the conference report. And they used it in the ruling. So. that anoints it, and it makes it federal law.

Paul McGavin 03:02

So the words of the conference report now become important when you actually sit down and try to figure out this issue for yourself. You're in the Ninth Circuit, you're bound by the decisions of the Ninth Circuit Court of Appeals, just like we are in California. So. all of those great decisions, including the 2005 decision in Metro PCS versus San Francisco, which defines for the Ninth circuit what is a significant gap in telecommunication service, and what is the least intrusive means in order to fill that gap? Absolutely apply. And anything that happened at the FCC from 2017 forward doesn't undo 20 years of case law.

Paul McGavin 03:39

What you have in from the FCC is a list of preferences and guidance. These are called presumptive orders. This is their presumption, something they would like to happen. It does not have the force of law, what it is really set up to do. And you can hear it in the very arguments other than that case, which happened in February of 2020. And you will hear that the FCC itself admitted that they expect case-by-case adjudication on all of the points that are in that order from September 2018. And so what you have is you have a serial losses by the FCC from 2019, all the way through 2021. With some more losses expected in the future, the whole small cell agenda is falling apart. So, the smart cities are skating to where the puck will be not where the puck has been. Your city attorney is just by repeating propaganda from the wireless industry about where the puck has been.

Paul McGavin 04:35

So let me just lay it out for you very clearly, telecommunications services the ability to make a wireless phone call period, the end. [editor's note: and text messages] There is no wireless broadband in it. Information Service is separate

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from telecommunication service. Information Service would be the Internet and you have complete control over having a preference over which way you would like your residents to receive internet and particularly since you have such good coverage with fiber already, that is the most energy efficient, citizen preferred, and most secured way to get internet. And if anyone has a problem with begin making a call inside their house, well, they can easily do something called Wi Fi calling in order to use and make that call.

Paul McGavin 05:19

You see, the industry has to prove there's a significant gap in outside telephone wireless call service. And the amount of power to do that is very, very, very low. Let me tell you how low maybe people in science don't understand the term orders of magnitudes just means how many zeros are on a number. So. let's compare 10 million. So. that would be seven zeros 2.002, which has another two zeros. That's nine total zeros. So. five bars on the cell phone, you only need 0.002. And what is allowed by the FCC 10 million. That's nine orders of magnitude difference. That's a problem. And that's exactly what was then recognized by the US DC Circuit Court of Appeals. On August 13 of 2021. The wireless world changed on August 13 2021. The FCC has been trying to not do environmental review on this small cell agenda. And they've tried everything they can to run away from it. But the courts have slapped them twice, once on August 2019. That case was Keetoowah [United Keetoowah Band of Cherokee Indians] et. al. versus the FCC and once again in 2021 in August [13th], and that was Environmental Health Trust and Children's Health Defense versus the FCC, the FCC must now do environmental review. They cannot avoid it. You don't have to go along with a wireless industry point of view that says oh, we have a right to build everywhere.

Paul McGavin 06:55

No, you're bound by two things. You derive your power from the state constitution and from the Idaho Land Use and Property Act. And then the FCC has no say in that matter. And now I'll show you why that is I'm going to go to the same section

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that your city attorney talked about. And it's 47 USC 332. And I'm going to go to a section of my website where I compare the 1995 and 1996 versions of that law. And what you're going to see in the past one that passed in 1996 is that opens up with Section A which your attorney didn't quote, it's called General Authority. It says except as provided in this paragraph, nothing in this Act shall limit or effect the authority of a state or local government. Regarding decisions of the placement, construction and modification of personal wireless service facilities, there it is.

Paul McGavin 07:58

So instead of actually adopting in 95, they thought would be a top down FCC would run it kind of scheme, they actually went with this scheme, which was to preserve all local authority. And the only thing we are is we are going to preempt some few narrow items for the purpose of telecommunications coverage. And once you have telecommunications coverage defined as making an outdoor wireless phone call, then all preemption falls away. There is no more preemption. And that is the case in Dalton Gardens, Idaho right now in 2021. Everyone can make a wireless phone call outdoors, you have no significant gap in coverage; period, the end.

Paul McGavin 08:41

Therefore, it's very safe for you to basically say without even having an ordinance that you can demand proof of significant gaps and wireless coverage. And if they cannot provide it with substantial written evidence in the record, you can safely say no, and you will win in court. This whole thing about oh, we're gonna get sued by the wireless industry is a boogeyman. That's all there is. You're 2.4 square miles, you have a commercial district, you have a lovely place to put a cell phone tower. There's no problem with saying we're gonna allow cell towers in the commercial district and not in the residential district. That's your right to do you have your authority and police power to do that, because of the Land Use and Planning Act. That's title 67. State government state affairs, it's got a purpose

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what is the purpose say, quote, to protect property rights while making accommodations for other necessary types of development.

Paul McGavin 09:32

That also says to ensure that adequate public facilities and services are provided also to ensure that the important environmental features of the state localities are protected. And there you go in paragraph eyes[?] to protect the life and property from disasters and hazards. Well, there you go. That's what a cell tower is. It's a disaster in front of a house because the power is just too high. How many orders of magnitude too high nine orders of magnitude too high.

Paul McGavin 10:01

See, we have a tower that's in Sacramento, and it was turned on a small cell. And it's about right there at the driveway, it's maybe 60 feet from a little girl's bedroom. And so to have these little girls slept there just over the garage, turn the tower on within weeks, they got sick, they had to go to the doctor, they got diagnoses, they worked with the city, they tried to move the tire, they really invited Verizon and Verizon actually measured the whole thing. And then they stonewalled this poor family and did nothing for them. They had to spend about \$25,000 to shield their house, and they lost the use of their front yard. That's what happened in that case.

Paul McGavin 10:39

But guess what happened on August 13, of 2021? Well, we have a building biologist who is a professional measurer he went by and check that tower for Verizon wisely turned it off. It's been off for about two months. Why is that? Because that evidence was placed into the record for that lawsuit. That's why and they know there's a problem. It's a big problem. And you can avoid the whole thing.

Paul McGavin 11:09

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And how do you avoid the whole thing? You use Land Use and Planning just like they said, it's very much laid out by Andrew Campanelli. You know, what a cell tower is? It is a necessary evil of modern society. Yes, the federal government says that you have to have cell service. Well, you already have it. So. you don't have a need for any other towers. But hey, if you want to be very clear, and allow some places to go, well, you can restrict it to your commercial area, because at 2.4 square miles, one tower there and colocation on that tower while allowed everyone to broadcast from there and easily cover your 2.4 square miles. Case closed, there's no chance of you getting sued if that's what you do. So. that's the whole point. This thing about putting antennas in front of houses was always a bad idea. And it's not being upheld by the courts. And it's not where the puck is going. It's going to fiber optics directly to the premises. And you're already getting served with that. So. you guys are in good shape.

Paul McGavin 12:07

Hey, what's your best place today? Tonight? The best thing to do tonight is do not pass that ordinance. No, no, no, stay exactly where you are, you're better off without the ordinance than with the ordinance. Now, if you feel you want an ordinance, I would do exactly what Sue suggested, copy paste the Petaluma code, change a few numbers. So. it actually worked for Dalton gardens. What are you going to find? There was an ordinance that was passed in 1996. That did a good job of just saying, here's what a macro facility is, here's what a minor facility is. And oh, by the way, we added the definition for a small facility in 2018. And we said a couple of things in that ordinance that you probably should just wrap your minds around. Because we've got the whole thing done in less than 400 words, it was totally simple.

Paul McGavin 12:50

And it's just easy, easy peasy. All right. And that way you get out of the box, you don't have any more controversy, and you can move on with your life and fix your Mountain Lion problem and your other Deer problem. The other things because this one can be easily handled just by leaning on cities that have already solved

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this problem. And so why did they solve this problem? Because I actually after I got the veto in 2017, went in and asked them to solve the problem. And I pulled experts into the room. And we talked to the top attorneys in the country. We talked to the top scientists, and they made a good decision based on that information. Great, you can take advantage of all that. And I did all this work again. And guess what happened two days ago, a very similar bill in California was also vetoed by Governor Newsom. And why is that? Because we made a direct address to him on September 18. And September 18, was two days after I spoke to the FCC for the fourth time with attorneys on the line to get clarification from them on exactly what's happening with the rule changes and how will they change now that this decision has been come down on August 13. I got them to admit a bunch of things there, these towers are going in without NEPA review. That means that these these carriers can lose their licenses by not doing NEPA review, that is a federal requirement. Yet they're doing it all the time without it. This is what your code needs to require NEPA review for every single tower that way, you know, you're not damaging your environment. That way, you know, you're not going to be hutting your town.

Paul McGavin 14:22

So the whole thing here is very simple. You're so small, you'll never get sued. You don't ever want to totally prohibit service. That's why you open up your commercial zone. And when you do you make standards that says cell towers and Dalton Gardens are 200 feet tall and no shorter because we want our tower registered in the FCC database because only one is 200 feet tall. Do you get registered in the FCC database and real FCC oversight? See if your 199 You don't have to get in the database and they have no idea where that tower is. You want the FCC overlooking this tower you want it to be 200 feet, and then when it's 200 feet tall, now it's so tall that it's not ever going to really hurt your residence. And so now you can easily say, here's the place to put your tower. Our problem is solved. Let's get on to some other things.

Paul McGavin 15:13

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So before I leave, I just want to make sure that you understand what's in this lawsuit from 2005. This is the US Supreme Court of City of Rancho Palos Verdes vs. Abrams. I'm going to quote directly from the ruling. This is justices Briar, with whom a Connor Souter and Ginsburg concurred with Justice Scalia, quote, Congress initially considered a single national solution, namely, an FCC wireless tower siting policy that would preempt state and local authority. But Congress ultimately rejected this national approach and substituted system based on cooperative federalism, state and local authorities would remain free to make siting decisions, they would do so however, subject to minimum federal standards, meaning just placement, construction, and modification of personal wires, service facilities. That's it.

Paul McGavin 16:08

So the whole point here is in that list of placement, where am I going to put it, construction, I'll build it and modifying it, I'm going to change it. There's some word that was taken out of the 95 version, that word was operation. You see, they wanted to actually prevent all four placement, construction, modification or operation. But the Congress changed it and pulled operation out. Why? Because they wanted the local facilities and the local governments to be able to regulate the operations of cell phone towers in order to protect their residents. That's why because everybody knows this is toxic pollution. And you have to provide public safety. This is how you do it,

Paul McGavin 16:55

you have to jigger three variables, vertical, horizontal, and power, all three, hey, if you don't want to regulate power, because you think that's controversial, go for vertical, go for 200 feet. Now your problem is solved. We'll have one 200-foot tower in the commercial district. Thank you very much. We're done. That's all you need to do.

Paul McGavin 17:19

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Last thing I'm going to visit here is the conference report, because it's very interesting to see what was the intent of the Act. And they get very, very clear about it. They say exactly this. The conferees those your elected representatives, quote, intend that the phrases unreasonably discriminate among providers of functionally equivalent services will provide localities with the flexibility to treat facilities that create different visual aesthetic or safety issues differently to the extent permitted under generally applicable zoning requirements. They are referring to your zoning laws here. And they say even if those facilities provide functionally equivalent services, quote, for example, the conferees do not intend that if a state or local government grants a permit in a commercial district, it must also grant a permit for competitors 50-foot tower in a residential district bang, right there. It's not the intent of the Telecommunications Act to put 50-foot towers in residential districts period, the end, that's federal law.

Paul McGavin 18:27

We would like you to follow federal law, we would like you to open up your commercial district to a 200-foot tower, then you don't have to allow them in residential districts. And you can defend that all the way. There's no way they're going to go to court on this. They know they would lose. That's the whole point. So, what you want to do is just make sure you read the laws carefully. You don't go by what the wireless industry wants you to believe, because many of these laws are not written on their behalf. Everything that's in the September 2018 order that your city attorney thinks is federal law is not it's presumptive guidance only. And all you want to do is do the right thing to represent the needs of your residents. Get good broadband by fiber optic and get your outdoor phone calls taken care of by the towers that are outside your town and possibly one large one in your town. That's it. That's all you need to do.

Paul McGavin 18:32

Is there anything in the an order 18-133 That takes away zoning powers? Nothing does. The FCC can't do it. They don't have any rights over your zoning powers. So. it's all up to you and your zoning and your police powers to operate

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as you wish and as you wish should be to support your residents. And it should be to recognize that you don't not going to get sued by the wireless industry. It's not going to happen. Just do something reasonable. Open up your commercial zone. Leave off the residential zones. That's it.

Paul McGavin 19:59

Back to what we did in Petaluma, we listed a whole bunch of stuff and said these zones are appropriate. And we didn't put residential on there. There it is. We didn't have to say prohibit residential, we just left it off the list, because you do have different zones for different purposes. And so, as a wireless telecommunications facility, [is a] necessary evil, think about it like a sewage treatment plant. Right? Some you have to have, but you force people to live next to it. No, you don't. So, what would happen if they decided they had to put a sewage treatment plant in and break it up in small pieces and put in front of people's houses? Could you do that without mitigating it? No, you pretty much have to mitigate it. So, that's what I'm trying to say here. You have to think about mitigating the radiation coming off these towers. And you don't do it by regulating frequencies. No one said that would happen. No one's even asking you to regulate frequencies.

Paul McGavin 20:53

What we are saying to do is think about your zoning laws, how you can enact them, and how you can set up standards that work for you. Hey, if I were going to do it, "Hi, here's your zone. Nothing smaller than 200 feet. We want to register with the FCC. That's just how we are and we'd like everybody to co-locate on that one tower." There you go. Y'all get to put there your antennas there. And there it is. You're not effectively prohibiting anything. problem solve.

Paul McGavin 21:21

Any questions?

Mayor Dan Edwards 21:25

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Sounds like you solved the problems of Dalton Gardens. Paul. Thank you so much.

Paul McGavin 21:29

I hope so. I really do. You have good people.