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Honorable Jeffrey D. Downes
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Vestavia Hills, Alabama 35266-0854

**Municipalities – Right of Way –
Telecommunications – Jefferson County**

Section 37-17-2 of the Code of Alabama does not allow a city to deny a wireless provider the right to place Small Wireless Facilities in the city's rights-of-way if the wireless provider meets the city's permitting and fee requirements and any other requirements adopted by the city that are not in conflict with the state law or any final order of the FCC (Federal Communications Commission).

The City's requirements for small wireless facilities must also be in writing, generally applicable, and adopted in advance.

The City may not determine the exact location for the installation or placement of a new or replacement pole.

The wireless infrastructure provider, the wireless provider, or the wireless service provider is allowed to determine the exact location for the installation of a new or replacement pole.

Act 2021-5 allows the City to require a pole to be decorative to fit aesthetically within the neighborhood if the requirement is reasonable, in writing, and adopted in advance. The City may not require underground placement and thus preclude pole placement.

Dear Mr. Downes:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Vestavia Hills ("City").

QUESTIONS ONE, TWO, & THREE

(1) Does Act 2021-5 allow the City to reject small cell facilities from being placed in the City rights-of-way and what conditions are valid reasons for such denial?

(2) Does the Act allow the City to determine the exact location for the installation of a new or replacement pole on a City right-of-way?

(3) Does the Act allow the wireless infrastructure provider, the wireless provider, or the wireless service provider to determine the exact location for the installation of a new or replacement pole on a City right-of-way?

FACTS AND ANALYSIS

Your request refers to section 220 of the Constitution of Alabama and section 11-49-1 of the Code of Alabama which provide that consent of a municipality is required before any public or private entity may the use of streets or public property. ALA. CONST. art. XII, § 220; ALA. CODE § 11-49-1(a) (Supp. 2022). Section 220 of the Constitution states as follows:

No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town, or village.

ALA. CONST. art. XII, § 220.

Section 11-49-1(a) of the Code states as follows:

(a) No person, firm, association, or corporation shall be authorized to use the streets, avenues, alleys, and other public places of cities or towns for the construction or operation of any public utility or private enterprise without first obtaining the consent of the proper authorities of the city or town.

ALA. CODE § 11-49-1(a) (Supp. 2022).

Your request also references section 11-43-62 of the Code that states as follows:

The council shall regulate the use of the streets for the erection of telegraph, telephone, electric, and all other systems of wires and conduits and may require the same to be placed underground if deemed necessary for the public convenience and safety and generally to control and regulate the use of the streets for any and all purposes.

The council may sell or lease in such manner as it may deem advisable any franchise which it has power to grant, and the moneys received therefor shall be paid into the city treasury.

ALA. CODE § 11-43-62 (2008).

The provisions cited above require consent of a municipality before any public or private entity may use the street or public property. Act 2021-5 was enacted to allow wireless service providers to install small wireless facilities on the right-of-way and to set forth the conditions for allowing the installation. 2021 Ala. Acts No. 2021-5. The stated purpose of the Act is as follows:

(1) establish a procedure to authorize wireless providers to collocate, mount, or install small wireless facilities on existing poles on the right-of-way of the state or any agency, county, or municipality thereof; (2) to exempt small wireless facilities from certain zoning review and approval procedures; (3) to establish a procedure for the permitting of the development of small wireless facilities and poles in the rights-of-way of the state; and (4) to establish rates and fees for all permits for small wireless facilities.

2021 Ala. Acts No. 2021-5.

The Act is codified in sections 37-17-1 through 37-17-12 of the Code. ALA. CODE §§ 37-17-1 through 37-17-12 (Supp. 2022). A “Small Wireless Facility” is specifically defined in section 37-17-1(14) of the Code, and it must meet several conditions set forth therein. ALA. CODE § 37-17-1(14) (Supp. 2022). Section 37-17-3 of the Code sets the fees that an authority may charge for a small wireless facility. ALA. CODE § 37-17-3 (Supp. 2022). An “Authority” is defined as “[t]he state or any agency, county, *municipality*, district, or instrumentality thereof.” ALA. CODE § 37-17-1(5) (Supp. 2022) (emphasis added).

Section 37-17-2(a) and (c) of the Code states as follows:

(a) An *authority may not deny* a wireless provider the right, as a permitted use *subject to Section 37-17-3 and the authority's requirements not in conflict with this chapter or a then-existing final order of the Federal Communications Commission (FCC)*, to do either of the following:

(1) Collocate, mount, or install small wireless facilities on or adjacent to existing, new, or replacement poles in the right-of-way.

(2) Install, modify, or replace its own poles, or, with the permission of the owner, a third party's poles, associated with a small wireless facility, along, across, upon, and under the right-of-way controlled by the authority.

* * *

(c) The small wireless facilities and associated poles ***shall be installed and maintained in accordance with the authority's requirements not in conflict with this chapter or a then-existing final order of the FCC*** and as not to obstruct or hinder the usual travel and public safety on the right-of-way and adjacent roads and bridges or obstruct the legal use of the right-of-way by utilities.

ALA. CODE § 37-17-2(a) & (c) (Supp. 2022) (emphasis added).

We note that legislative acts are presumed to be valid and constitutional. *McInnish v. Riley*, 925 So. 2d 174, 178 (Ala. 2005). When interpreting a statute, the words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used, a court is bound to interpret that language to mean exactly what it says. *Ex parte Cove Properties, Inc.*, 796 So. 2d 331, 333-34 (Ala. 2000); *Ex parte T.B.*, 698 So. 2d 127, 130 (Ala. 1997).

The plain language of section 37-17-2 of the Code does not allow a City to deny a wireless provider the right to place Small Wireless Facilities in the City's rights-of-way if the wireless provider meets the City's permitting and fee requirements and any other requirements adopted by the City that are not in conflict with the state law or any final order of the FCC.

Based upon the language of the act, the City's permitting and fee requirements cannot conflict with the provisions set forth in section 37-17-3 of the Code or the final rulings of the FCC. The FCC issued a Declaratory Ruling and Third Report and Order on September 26, 2018, entitled "Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment," pursuant to the Telecommunications Act of 1966, codified at 47 U.S.C. §§151, *et seq.* The FCC ruling became effective January 14, 2019, and is codified at 83 Fed. Reg. 51867 (2018).

Section 37-17-3(a) and (d) of the Code states:

(a) Subject to the limitations established in this chapter, small wireless facilities and associated poles are ***not subject to zoning review or approval*** if they are located in the right-of-way under the control of an authority and otherwise comply with this chapter and a then-existing final order of the Federal Communications Commission.

(d) An authority ***shall approve*** an application ***if it complies with the authority's requirements*** for deploying small wireless facilities and associated poles in the right-of-way that are ***written, generally applicable, and adopted in advance.***

ALA. CODE § 37-17-3(a) & (d) (Supp. 2022) (emphasis added).

The plain language of section 37-17-3 of the Code provides that an authority shall approve an application that complies with the authority's requirements for small wireless facilities that are written, generally applicable, and adopted in advance. Thus, the City's requirements for small wireless facilities must be in writing, generally applicable, and adopted in advance.

Section 37-17-10(b) of the Code also states as follows:

(b) Except as it relates to small wireless facilities ***subject to the permit and fee requirements established pursuant to this chapter***, and except as it relates to any activities of an electric provider, and except as it relates to regulations or requirements on communications service specifically established by the constitution or by state law, local law enacted by the Legislature, or federal law, ***an authority may not otherwise adopt or enforce regulations or requirements on the placement, operation, or maintenance of communications facilities*** by a communications service provider authorized to be in the rights-of-way; or otherwise impose or collect any additional or separate tax, fee, or charge for any service existing on July 1, 2021, or for the provision of additional communications services provided by a communications service provider that is authorized to be in the rights-of-way.

ALA. CODE § 37-17-10(b) (Supp. 2022) (emphasis added).

Pursuant to section 37-17-10(b) of the Code an authority is allowed to enforce regulations or requirements set by the constitution, by state law, by local law enacted by the Legislature, or federal law. Section 37-17-10(b) of the Code, however, specifically prohibits an authority from adopting or enforcing regulations or requirements on the placement, operation, or maintenance of

communication facilities by a communications service provider authorized to be in the rights-of-way.

With respect to who has the authority to determine the exact location of a new or replacement pole, it is noted that section 37-17-10(b) of the Code prohibits an Authority from adopting regulations or requirements as to the placement of facilities; thus, the City may not determine the exact location for the installation or placement of a new or replacement pole. The wireless infrastructure provider, the wireless provider, or the wireless service provider (as defined in section 37-17-1 of the Code) is allowed to determine the exact location for the installation of a new or replacement pole.

CONCLUSION

Section 37-17-2 of the Code does not allow a city to deny a wireless provider the right to place Small Wireless Facilities in the city's rights-of-way if the wireless provider meets the city's permitting and fee requirements and any other requirements adopted by the city that are not in conflict with the state law or any final order of the FCC (Federal Communications Commission). The city's requirements for small wireless facilities must also be in writing, generally applicable, and adopted in advance.

The City may not determine the exact location for the installation or placement of a new or replacement pole. The wireless infrastructure provider, the wireless provider, or the wireless service provider is allowed to determine the exact location for the installation of a new or replacement pole.

QUESTION FOUR

(4) If a new pole is installed on the City right-of-way, does the Act allow the City to require that the pole be a decorative pole to fit aesthetically with the neighborhood? If so, does the Act further preclude pole placement if the neighborhood has underground utilities and the small cell facility cannot be placed underground due to technical limitations?

FACTS AND ANALYSIS

As stated above, section 37-17-3 of the Code provides that an Authority may require a wireless provider to meet requirements that are written, generally applicable, and adopted in advance. Section 37-17-10(b) of the Code also states that “an authority may not otherwise adopt or enforce regulations or requirements on the *placement, operation, or maintenance* of communications facilities.” ALA. CODE § 37-17-10(b) (Supp. 2022) (emphasis added). This language does not prohibit an authority from adopting and enforcing regulations on the *design* of communication facilities; it only prohibits regulations on the placement, operation, and maintenance. Thus, the City may require a pole to be decorative to fit aesthetically within the neighborhood if the requirement is in writing and adopted in advance. Furthermore, any requirements by the City for the design cannot be in conflict with the final rulings of the FCC.

The Attorney General does not interpret federal law and cannot determine whether local requirements are in conflict with federal law but offers the following for informational purposes. The FCC has issued a ruling with regard to underground requirements which states:

33. *Undergrounding requirements.* The Commission understands that some local jurisdictions have adopted undergrounding provisions that require infrastructure to be deployed below ground based, at least in some circumstances, on the locality's aesthetic concerns. A number of providers have complained that these types of requirements amount to an effective prohibition. In addressing this issue, the Commission first reiterates that while undergrounding requirements may well be permissible under state law as a general matter, any local authority to impose undergrounding requirements under state law does not remove the imposition of such undergrounding requirements from the provisions of Section 253. In this sense, the Commission notes that a requirement that *all* wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals. Thus, undergrounding requirements can amount to effective prohibitions by materially inhibiting the deployment of wireless service.

83 Fed. Reg. 51867, at 51872 (2018). The federal courts have ruled that an ordinance requiring all facilities to be underground is preempted by the FCC's orders. *Crown Castle Fiber, L.L.C. v. City of Pasadena, Texas*, No. 22-20454, 2023 WL 4994300, at 8 (5th Cir. Aug. 4, 2023); *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied sub nom. City of Portland, Or. v. FCC*, 141 S. Ct. 2855 (2021). Thus, based upon case law, the FCC ruling prohibits regulations that require that all facilities must be placed underground.

The FCC also issued a ruling with regard to aesthetics which states:

29. *Aesthetics*. The Commission sought comment on whether deployment restrictions based on aesthetic or similar factors are widespread and, if so, how Sections 253 and 332(c)(7) should be applied to them. The Commission provides guidance on whether and in what circumstances aesthetic requirements violate the Act. This will help localities develop and implement lawful rules, enable providers to comply with these requirements, and facilitate the resolution of disputes. The Commission concludes that aesthetics requirements are ***not preempted if*** they are (1) ***reasonable***, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and ***published in advance***.

83 Fed. Reg. 51867, at 51871 (2018) (emphasis added).

The Ninth Circuit Court reviewed the FCC's aesthetic requirement conclusions as set forth above and held: (1) the requirement that aesthetics requirements be "reasonable" was not unduly vague, (2) the requirement that they be no more burdensome than those applied to other types of infrastructure deployments exceeded the scope of the FCC's authority, and (3) the requirement that aesthetic requirements be "objective" was unduly vague. *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied sub nom. City of Portland, Or. v. FCC*, 141 S. Ct. 2855 (2021). Thus, based upon this decision, the FCC ruling provides that aesthetic requirements adopted by an Authority must be reasonable and published in advance.

Again, the Attorney General does not make determinations as to whether actions or requirements are reasonable or in compliance with federal law. It is the opinion of the Attorney General that the Act allows the City to require a pole to be decorative to fit aesthetically within the neighborhood if the requirement is reasonable, in writing, and adopted in advance. The Attorney General, however,

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does not make determinations as whether regulations are reasonable. Furthermore, the City may not require underground placement and thus preclude pole placement.

CONCLUSION

Act 2021-5 allows the City to require a pole to be decorative to fit aesthetically within the neighborhood if the requirement is reasonable, in writing, and adopted in advance. The City may not require underground placement and thus preclude pole placement.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact me.

Sincerely,

STEVE MARSHALL
Attorney General
By:

A handwritten signature in black ink, appearing to read "Ben Baxley", written in a cursive style.

BEN BAXLEY
Chief, Opinions Division

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