UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

T-MOBILE WEST LLC and INDEPENDENT TOWER HOLDINGS, LLC, Plaintiffs, v. CITY OF MEDINA, WASHINGTON, Defendant, and RESPECT MEDINA and MEDINA RESIDENTS Intervenor Defendants.	No. C14-1455RSL ORDER DENYING JOINT MOTION FOR ENTRY OF STIPULATED JUDGMENT

This matter comes before the Court on "Plaintiffs' and Defendant's Joint Motion for Entry of Stipulated Judgment." Dkt. # 31. While plaintiffs and defendant have reached an agreement to resolve their dispute, the Intervenor Defendants object to the proposed settlement and are prepared to defend the City's permit denial with or without the City's help. Having reviewed the memoranda, declarations, and exhibits submitted by the parties,[1] the Court finds as

[1] The moving parties' objection to the timeliness of the Intervenors' expert disclosure is overruled. A new case management scheduled will be entered, with the discovery deadline far enough into the future so that all parties can marshal their evidence and depose the opposing experts.

follows:

Independent Tower Holdings, LLC, hopes to construct a cell phone tower in Fairweather Park and Nature Preserve in Medina, Washington, for T-Mobile West LLC. Independent Tower applied to the City of Medina for the permits necessary to construct the tower. After a public hearing, the Hearing Examiner denied the application on a number of grounds, including the lack of evidence that an 80 foot structure was necessary to avoid a service gap on SR 520, the lack of evidence that the proposed tower was the least intrusive on the residential community, and the lack of an alternative site analysis.[2] Plaintiffs unsuccessfully sought reconsideration of this denial.

State and local restrictions on the placement and construction of cell phone towers are expressly preserved under the Telecommunications Act of 1996 ("the Act") (47 U.S.C. § 332(c)(7)(A)), and height and location are common and important areas of regulation that have implications for both the cell companies and the surrounding neighborhood. In the interests of the national telecommunications network, however, local restrictions can be overridden if a court of competent jurisdiction finds that the state or local action exceeds one of the limitations Congress imposed on local regulatory power. 47 U.S.C. §332(c)(7)(B). Plaintiffs filed this lawsuit, arguing that the Hearing Examiner's denial of the permit application effectively prohibits T-Mobile from providing wireless communication services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II).[3] A locality violates the "effective prohibition" clause if its decision prevents a wireless provider from closing a "significant gap" in cell phone coverage. T-Mobile

[2] In light of the decision to deny a height variance for the Fairweather Park location, the Hearing Examiner did not address plaintiffs' requests for variances to the residential setback and undergrounding requirements.

[3] The other statutory ground asserted in the Amended Complaint is that the Hearing Examiner's decision was not "supported by substantial evidence" in violation of 47 U.S.C. § 332(c)(7)(B)(iii). The adequacy of the administrative record has not been discussed by the parties.

USA, Inc. v. City of Anacortes, 572 F.3d 987, 995 (9th Cir. 2009). The provider must show both that there was a "significant gap" in service coverage and that the manner in which it proposes to fill that gap "is the least intrusive on the values the denial sought to serve." Id. In evaluating whether the proposed facility is "the least intrusive," the Court must make a meaningful comparison of alternative facilities, with the carrier bearing the burden of establishing "the lack of available and technologically feasible alternatives." Id. at 996.

Plaintiffs' claim that local zoning regulations must give way to federal interests in this case is colorable, but the original parties no longer want the Court to decide the issue on the merits. Rather, plaintiffs and the City have resolved the matter between themselves and ask the Court to make the necessary factual findings "[i]n light of the agreement of the Parties in the Settlement Agreement." The moving parties seek a Court order directing the City to grant Independent Towers a special use permit and variance to install, operate, and maintain an 80 foot tall tower in Fairweather Park as set forth in Independent Towers' application. Dkt. # 31-1 at 2.[4] While the City, like any other defendant, is free to settle a suit rather than prolong the litigation, it may not do so in a way that violates its own ordinances and zoning regulations. St. Charles Tower, Inc. v. Kurtz, 643 F.3d 264, 268-70 (8th Cir. 2011) ("State actors cannot enter into an agreement allowing them to act outside their legal authority, even if that agreement is styled as a 'consent judgment' and approved by a court."); League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052, 1056 (9th Cir. 2007) ("Municipalities may not waive or

[4] In reply, the moving parties argue that any other potential site in the City of Medina is not a legally relevant alternative because a code amendment or variance would be necessary to allow construction at those sites. The facility proposed in the original application requires at least one variance, however (MMC 20.37.070(B)(4)), and maybe two more depending on the factual showing made at the hearing (MMC 20.37.070(B)(3)(b), MMC 20.37.100(D)(1)). The moving parties have, in fact, requested an order compelling the City to grant the variances required to build the proposed Fairweather Park facility: with a variance needed at all potential sites, it remains plaintiffs' burden to show that their preferred option is the "least intrusive."

consent to a violation of their zoning laws, which are enacted for the benefit of the public."). Thus, a Court order overriding the local regulations is necessary and can be obtained only upon a showing that there has been or will be an actual violation of federal law (*i.e.*, that the City's permit denial has effectively prohibited T-Mobile from closing a substantial service gap). Indus. Commc'ns and Elecs., Inc. v. Town of Alton, 646 F.3d 76, 78 (1st Cir. 2011).[5]

Plaintiffs and the City are, in effect, seeking a summary determination that (a) there is a substantial gap in service in the area of SR 520 and (b) the proposed 80 foot tower at the Fairweather Park location is the least intrusive means of correcting that gap. The Intervenors oppose the motion, arguing that the moving parties failed to evaluate any alternative sites and facilities other than a 45 foot pole at the Fairweather Park site, offering evidence regarding other alternative sites, and requesting a Rule 56(d) continuance so that they may take discovery regarding both the existence of a gap and the "least intrusive" analysis. At the time the joint motion was filed, the Intervenors had been involved in the litigation for less than four months, and discovery was on-going.[6] The Intervenors subsequently obtained documents from the City's expert witness and filed a motion for leave to supplement the record. Dkt. # 64. The Court has

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[5] As noted by the First Circuit,

> Nothing we have said is intended to suggest that a district court, faced with a proposed consent decree and no opposition from anyone, is obliged to conduct hearings and make supported findings. It is one thing to resolve a case by agreement of all parties; it is another when a party to the case is protesting and the court's authority to wipe out the rights of the protesting party depends on findings that the court has not made. [Plaintiffs] claim[] to be entitled to relief under the Act; all [they] need[] to do now is prove it.

Id. at 81.

[6] With full knowledge of the Intervenors' interest in this litigation and that they had not agreed to the proposed settlement, plaintiffs and the City brought these issues before the Court as a "Joint Motion," forcing the Intervenors to respond in less than two weeks.

not reviewed the proposed supplemental memorandum (Dkt. # 64-1) and has considered the motion and responsive papers only for the purpose of evaluating the Intervenors' claim that this dispositive motion is premature.

The Court finds that the moving parties have failed to show the absence of a genuine issue of fact regarding the "least intrusive" step of the analysis and that the Intervenors have specified reasons why they need additional time in which to fully investigate the "substantial coverage gap" and the relative intrusiveness of the proposed facility. The moving parties correctly point out that Mr. Lockwood, the City's expert, has signed off on Mr. Conroy's coverage gap methodology and analysis, but the Intervenors should be permitted an opportunity to obtain documents and testimony on this issue that are not shrouded in the secrecy afforded by ER 408. With regards to the second step of the analysis, all potential sites would likely require a variance of one sort or another: whether an 80 foot pole with aboveground equipment housing structures less than 500 feet from residential properties in Fairweather Park is the "least intrusive" option cannot be determined as a matter of law on the existing record.

For all of the foregoing reasons, the Court declines to enter the "Stipulated Judgment" and the "Joint Motion" (Dkt. # 31) is hereby DENIED. Because it was not necessary to consider the supplemental memorandum offered by Intervenors in order to resolve the motion, their "Motion for Relief from Briefing Deadline" (Dkt. # 64) is DENIED as moot.

Dated this 25th day of August, 2015.

Robert S. Lasnik
United States District Judge