Across the Spectrum: Hot Topics in Telecommunications

LITIGATION UPDATES: WIRELESS, CABLE, AND RIGHT-OF-WAY REGULATION

Presented September 19, 2006
IMLA 71st Annual Conference
Portland, Oregon

Pamela J. Beery, Esq.
Beery, Elsner & Hammond, LLP
1750 SW Harbor Way, Suite 380
Portland, Oregon 97201
(503) 226-7191
pam@gov-law.com
www.gov-law.com

TABLE OF CONTENTS

INTRODUCTION **2**

I. LITIGATION IN THE WIRELESS TELECOMMUNICATIONS ARENA **2**

A. Damages and attorney fees liability under 47 U.S.C. § 332(c)(7) 2
B. Authority to Regulate wireless communications facilities based on aesthetic, property value and other similar considerations in zoning regulations 3
C. The anomalous result from the Ninth Circuit, based on California law 5
D. A threat to regulation of cellular facilities located in County rights-of-way under California law 7
E. A challenge to wireless regulations under Section 253 of the TCA 8
F. The risk of litigation for tortious interference: when the city denies a tower application and then lands a lucrative lease for the facility on city property. 8

II. LITIGATION IN THE CABLE COMMUNICATIONS ARENA **9**

A. Deployment of new services: permits and renewal of franchises 9
B. Classification of franchise fees: Fee or tax? 10
C. Increasing reduction in customer service obligations 11
D. And finally, a word from your local public utility commission. 12

III. LITIGATION IN THE RIGHT-OF-WAY REGULATION ARENA **15**

CONCLUSION **17**

APPENDIX A: THE NEW WORLD OF TELECOMMUNICATIONS AS ENVISIONED BY SBC AND VERIZON

APPENDIX B: WOLF V. CITY OF FERNDALE, MICHIGAN ET AL.

APPENDIX C: "THE WIRELESS ALPHABET SOUP," GLOSSARY OF TERMS

INTRODUCTION

It has been said—and not without cause—that these are the most challenging times faced by local government attorneys in recent memory. We are challenged as a matter of both law and policy to maintain our current regulatory authority in the face of litigation, legislation, and technology changes that defy our ability to navigate any course—let alone our desired course. Like explorers Lewis and Clark, from whose venture the theme for this year's IMLA conference is derived, we need far more than a reliable compass and our wits in order to make the best decisions on where to head next in the telecommunications law landscape.

This paper summarizes developments over the past year in the litigation quadrant of the landscape. Other speakers will ably cover legislative and regulatory changes, of which there are many. Three broad litigation themes, all of them complex and worthy of your consideration, will be explored:

- Developments in litigation involving the deployment of wireless communications. In this area, the government attorney can make a difference in the outcome, and liability of the local government for attorneys' fees is becoming less of a threat, but challenges are on the rise.[1]
- Developments in litigation by cable services providers. The new era of competition has changed the paradigm of negotiated business transactions, raising the likelihood of legal challenge in several key areas.
- Developments in litigation concerning local government authority to manage the rights-of-way and to obtain compensation for their use and occupancy. Here, the news is mixed from the local government perspective – but at least some guidance from the courts is emerging, ten years after enactment of the 1996 Telecommunications Act.

I. LITIGATION IN THE WIRELESS TELECOMMUNICATIONS ARENA

A. Damages and attorney fees liability under 47 U.S.C. § 332(c)(7)

By now, the United States Supreme Court decision in ***City of Rancho Palos Verdes v. Abrams*****,** 125 S. Ct. 1453 (2005), is old news to most practitioners. But here is a recap and some additional considerations:

The case turned on an analysis of Section 332(c)(7) of the 1996 Telecommunications Act (TCA). This provision protects the exercise of traditional zoning authority, with some limitations including the concept that local governments cannot adopt or enforce regulations policies which "prohibit or have the effect of prohibiting" wireless service provision.

Citing *Middlesex County Sewerage Authority v. National Sea Clammers Assn*., 453 US 1, 19-20 (1981), the court determined that § 332(c)(7) of the TCA provides a comprehensive enforcement scheme, and Congress intended to preclude additional and inconsistent relief under §§ 1983 and 1988. Because the TCA "limits relief in ways that § 1983 does not" by requiring

[1] See Appendix C for a glossary of terms.

that an aggrieved party file suit within a short 30-day special time limit following a local government decision, and requiring the courts to conduct expedited review, § 1983 damages and § 1988 attorneys fees are not available to a wireless provider filing suit under § 332 of the TCA.

CAVEAT: The unanimous U.S. Supreme Court decision overturning the Ninth Circuit decision gives little guidance on the other big threat for local governments in telecommunications litigation: the possibility of attorneys fees awards under § 253 of the TCA, discussed below.

B. Authority to Regulate wireless communications facilities based on aesthetic, property value and other similar considerations in zoning regulations

The emerging rule in litigation challenging individual local government decisions denying applications for wireless communications facilities is that such decisions, if based on substantial evidence, will be upheld. Some recent examples include:

(1) Voice Stream v. City of Hillsboro, 301 F.Supp.2d 1251 (D. Or. 2004)

On February 2, 2004, the US District Court for the District of Oregon issued its decision affirming the City of Hillsboro's denial of an application for a cellular tower in a residential zone. The applicant Voice Stream PCS (doing business as T-Mobile) filed suit against the City, asserting a number of violations of the Telecommunications Act of 1996. The Court held in favor of the City on all claims, deciding that the City's denial was based on substantial evidence, did not effectively prohibit wireless services, and did not discriminate among wireless service providers.

T-Mobile submitted an application for a conditional use permit to construct and maintain a 120-foot cell tower and equipment on property zoned R-7 Single Family Residential. The proposed site was within 200 feet of existing homes and was in an area "commonly described as scenic." In the City, cell towers are allowed as conditional uses in R-7 zones, and conditional uses can only be approved by the Planning and Zoning Board if they meet the requirements set out in the Hillsboro Zoning Ordinance (HZO).

The Planning and Zoning Board held a public hearing and, after taking testimony on T-Mobile's conditional use application, voted to deny the conditional use permit application based on several criteria from the HZO. T-Mobile appealed the conditional use permit denial to the City Council, and relying on the criteria provided in the Hillsboro Zoning Ordinance, the City Council voted to uphold the Zoning Board's denial of the permit, but on more narrow grounds. In its written decision, the City Council found that the proposed tower failed to satisfy the HZO for several reasons: The tower would create significant visual blight, would be incompatible with neighborhood character, would be closer to established residences than other cellular facilities in the City, would merely improve service coverage, and was not needed to fill a service gap. T-Mobile then filed suit against the City in federal court.

In its decision, the District Court first addressed T-Mobile's claim that the City's denial was not supported by "substantial evidence," the legal standard requiring the City decision to

have sufficient supporting evidence in the record. Noting that the standard allows for the possibility that two different conclusions could have been reached, the court held that the substantial evidence test was merely a procedural safeguard to confirm that a City's decision is consistent with each of its zoning requirements.

Turning to those zoning requirements in this case, the City argued that it properly interpreted its own ordinance and the court agreed. It approved the City's interpretation of "public interest" under the HZO as the consideration of public health, safety, and welfare of the community. The court also endorsed the City's interpretation of "substantial adverse effects" under the HZO as not necessarily requiring a showing of property devaluation by surrounding property owners. In fact the court agreed with appellate court opinions from other parts of the country in concluding that aesthetic judgments were valid grounds for denying these towers under the Telecommunications Act.

The court next concluded that the City had the authority to deny T-Mobile's application solely on the grounds of aesthetic considerations, and that the Telecommunications Act simply requires the court to safeguard against a decision that is irrational or without substance. While the court agreed with T-Mobile that "general, unsubstantiated aesthetic concerns" have very little evidentiary value, it was swayed by the City's legal argument that the Record included sufficient evidence specific to T-Mobile's application to justify the City's decision. The court held that the City was entitled to reject the application on "public interest" grounds where the aesthetic impact outweighed the benefit of merely improving what T-Mobile admitted was already-existing cellular service coverage.

Moving on to T-Mobile's effective prohibition claim, the court held that in order to establish an effective prohibition, a wireless service provider must first show a significant service gap. The City successfully argued that since T-Mobile was merely trying to improve already-existing service, it was incapable of claiming an effective service prohibition. The City also pointed out to the court that T-Mobile had proposed only one plan for improving its service, and that another preliminary plan was not considered by T-Mobile. As such, the court found that T-Mobile did not satisfy its burden of exploring other potential solutions to the purported problem.

T-Mobile's last claim was that the application denial was unlawful discrimination under the Telecommunications Act, charging that the City had previously granted conditional-use permits in residential areas and was denying its application simply because it was located in an affluent area. In response, the City distinguished the physical locations of the other towers in residential zones, and pointed out that there indeed are already towers in residential areas. The court held that the Telecommunications Act allows for some discrimination if it is supported by evidence that the discrimination is reasonable. Based on its conclusion that the City's basis for denying the application was reasonable, the court dismissed T-Mobile's final claim.

This decision was the first of its kind to be issued by the District of Oregon. The case makes clear the importance of creating a thorough factual record and of preparing careful findings in these cases.

(2) ***Linet, Inc., v. The Village of Wellington, Florida,*** No. 04-14759 (S.D. FL. 2005)

- Municipal corporation denies permit for Metro PCS request to site a 120-foot flagpole antenna at Village's Golf and Country Club;
- Citing *Rancho Palos Verdes,* District Court determines Village did not violate 42 U.S.C § 1983 since the Telecommunications Act provides a comprehensive statutory scheme to redress grievances;
- Aesthetic objections, combined with evidence of an adverse effect on property values or safety concerns can constitute substantial evidence;
- Linet had burden of proving the Village's decision was not supported by substantial evidence;
- Linet failed to show that an alternate location was unavailable or unfeasible;
- Telecommunications Act does not preclude Village from reasonably discriminating between telecommunications providers, only doing so unreasonably.

(3) ***Cingular Wireless v. Thurston County***, 131 Wn. App. 756, 129 P.3d 300 (2006), as amended May 2006; and ***Cingular Wireless v. Thurston County***, 425 F.Supp.2d 1193 (2006).

Cingular Wireless, LLC sought a special use permit to erect a cell phone tower in a rural residential area. A hearing examiner denied the permit and the Board of County Commissioners, with some modifications, affirmed the hearing examiner. Cingular appealed to the superior court under the Land Use Petition Act (LUPA), Chapter 36.70C RCW, and the court denied the petition. Cingular again appealed, arguing that (1) the hearing examiner improperly applied general standards from the county's comprehensive plan rather than applying only specific county code provisions, (2) the determination that the tower would have an "undue" adverse impact contravenes the Federal Telecommunications Act, and (3) substantial evidence does not support the hearing examiner's decision. The Washington State Court of Appeals affirmed the denial, holding that under these facts, both the general standards and specific regulations on cell phone towers apply, the hearings officer's decision was not contrary to the federal TCA, and substantial evidence supports the decision.

Under a provision of Washington law, the County was awarded its attorneys' fees. The Court also modified its original opinion (on petition from Cingular) to delete what would have been two helpful (to local government) paragraphs on the application of the TCA to the facts of this case.

Also noteworthy was the Court's comment, consistent with the Voicestream decision from Oregon, that the kind of coverage sought to be provided—adding coverage vs. improving coverage—will generally inform the Court's evaluation of a decision under the TCA.

C. <u>The anomalous result from the Ninth Circuit, based on California law.</u>

Some would say that everything looks different in California. They would be right if they were referring to the local government's ability to address wireless communication facilities based on aesthetic considerations. Consider this decision:

Sprint PCS Assets v. City of La Cañada Flintridge, 448 F.3d 1067, 2006 WL 91541 (9th Cir. January 17, 2006, **amended** May 23, 2006).

- City denied two requests for wireless facility permits from Sprint PCS on two streets
- District Court granted the City's motion for summary judgment finding that the permit denials were supported by substantial evidence, including the City's criteria:
  - Proposed above-ground structure did not preserve the existing character of the surrounding neighborhood, and didn't minimize public views of the structure; and
  - Proposed above-ground structure would result in a negative aesthetic impact on the public rights-of-way or surrounding neighborhood.
- Sprint appealed, arguing the City's actions violated California Public Utility Code § 7901
- California Code §§ 7901 and 7901.1 had preempted significant aspects of local authority, allowing local governments the right to exercise reasonable control for time, place, and manner access to roads and highways

Under these unique facts, the Ninth Circuit held that the City's ordinance conflicted with state law by regulating the appearance of wireless antennas. Because the local ordinance had been preempted by state law, the Court noted:

> "The language of subsection (c)(7)(A) [of Section 332 of the TCA] does not imply that local law should be valid to the exclusion of state law, but merely that local law itself may not be ignored. Thus if the local law is itself invalid—for example, because it conflicts with state law—then subsection (c)(7)(A) will not save it." (Slip op. at 5634-35.)

The Court held that the City's wireless ordinance was not viable, and that this deprived the decision of the required substantial evidentiary support under the TCA.

The League of California Cities reported the decision this way:

> "**9th Circuit Limits City Control of Right-of-Way**
>
> In a decision that has both stunned and baffled city attorneys, the 9th Circuit has held that neither federal nor state law allows cities to prohibit a telephone or cellular phone from locating facilities in the public right-of-way based solely on a city's concerns regarding the facilities' adverse visual impact.
>
> The Court interpreted California Public Utilities Code section 7901 and 7901.1 to allow cities to control time, place, and manner access to the public right-of-way, but that time, place, and manner control did not allow a city (in this case La Canada Flintridge) to regulate based on visual impacts. Therefore, as the city did not have that regulatory authority, under federal, La Canada Flintridge could not reject an application to place facilities in the right-of-way under on the facilities' visual impacts alone.

> No state court has ever held that 7901 or 7901.1 restricted a city from regulating telephone and cellular facilities in the public right-of-way with respect to visual impacts. The 9th Circuit's decision is unique. This decision means that a city cannot prohibit a telephone or cellular company from placing facilities in the public right-of-way if the facilities do not interference with the use of the right-of-way, and the facilities meet all applicable health and safety regulations.
>
> In addition, cities cannot require these companies to "stealth" or otherwise reduce visual impacts as a condition for approval. The likely result is that telephone and cellular companies will look to increase their use of the public right-of-way as a way of avoiding costly private property leases and "stealthing" requirements, thus increasing visual blight in the public right-of-way.
>
> Please note, however, that the 9th Circuit's ruling does not affect regulation of facilities located solely on private property.
>
> The case is *Sprint PCS Assets v. City of La Canada Flintridge,* 2006 WL 91541. La Canada Flintridge will be requesting that the 9th Circuit rehear the case, and the Legal Advocacy Committee has approved the League of California Cities filing a friend-of-the-court brief to support the La Canada Flintridge's request."[2]

CAVEAT: A California appellate court has disapproved of the Ninth Circuit's reading of the impact of federal law, in a recent decision in *Sprint Telephony PCS v. County of San Diego, et al*, 140 Cal. App. 4th 748, 44 Cal. Rptr. 3d 754 (June 20, 2006), noting in footnote 13:

> "FN13. It is here that we part company with the court's decision in *Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge, supra,* 435 F.3d 993. In that case, the court's published opinion, 448 F.3d 1067 (9th Cir.2006), peremptorily states that an analogous local ordinance regulating cellular tower installations in a ROW is preempted by state law (*id.* at p. 1069, fn. 2), but the precise basis or rationale for this statement is shrouded. For the reasons articulated below, we believe the federal *ipse dixit* is wrong and should not be followed."

More on the *San Diego* case follows.

D. A threat to regulation of cellular facilities located in County rights-of-way under California law.

Sprint is an active litigant in California, this time challenging the County of San Diego's authority to regulate wireless facilities in County rights-of-way.

Sprint Telephony PCS v. County of San Diego, et al., 140 Cal. App. 4th 748, 44 Cal. Rptr. 3d 754 (June 20, 2006). The County's ordinance survived preemption in this case. Although unique to California, the case is worth reading based on the numerous state legislative

[2] League of California Cities, "Priority Focus," January 27, 2006.

efforts of the wireless industry in recent years, and includes a fairly traditional preemption analysis.

E. A challenge to wireless regulations under Section 253 of the TCA

Another case in the series of challenges by Sprint of San Diego County's regulations is still pending at the Ninth Circuit. Following is a summary of the lower court's decision:

Sprint Telephony PCS, L.P. v. County of San Diego, 377 F. Supp. 2d 886 (S.D. Cal. July 8, 2005). Sprint filed suit challenging the county's entire cellular tower zoning ordinance. The case is notable because the challenge was filed not under 47 U.S.C. Section 332(c) which imposes certain Federal limits on local zoning of cellular towers. Instead, the challenge was filed under 47 U.S.C. Section 253 (a) which applies to right-of-way matters.

Sprint argued that the zoning ordinance was prohibited under the literal language of Section 253 (a) which bars all state and local regulations that "prohibit or have the effect of prohibiting" the ability of any entity to provide interstate or intrastate telecommunication services. In a ruling that appears to be the first of its kind, the Court ruled in Sprint's favor with the Judge stating that the clear words of Section 253 mandated this result. The decision was based in part upon an earlier Ninth Circuit decision that Section 253 not only preempts regulations that in fact prohibit the provision of services but also preempt those that "may have" the effect of prohibiting service; *City of Auburn v Qwest Corp*., 263 F.3d 1160, 1175 (9th Circuit, 2001).

Among the reasons the Court stated for its decision was that in substance the zoning process was too burdensome and left too much discretion with municipal officials (such as requiring the location, size and design of towers to be "compatible" with adjacent uses). The Court refused to apply exemptions in Section 253 (c) because the zoning ordinance applied to private property not just to public rights-of-way. The Court attempted to reconcile Section 253 with Section 332 (c) (both part of the TCA) by stating that Section 253 allows facial challenges to zoning ordinances whereas Section 332 (c) applies to individual zoning decisions.

As noted above, this case is on review at the Ninth Circuit, which has stayed the effect of the lower court decision pending the appeal.

Finally, the City of San Francisco recently lost a related challenge to wireless regulations governing installation of facilities in City rights-of-way, in the case of ***NextG Networks of California, Inc., v. City of San Francisco***, 2006 WL 1529990 (ND Cal, 6/2/06). The Court's decision is based on the regulatory scheme's violation of Section 253 of the TCA.

F. The risk of litigation for tortious interference: when the city denies a tower application and then lands a lucrative lease for the facility on city property.

Word to the wise: Don't do what Ferndale, Michigan did. See Appendix B for more on this sad story.

II. LITIGATION IN THE CABLE COMMUNICATIONS ARENA

A. Deployment of new services: permits and renewal of franchises

The new era of competition, in which providers are offering multiple services over a single platform, has created new intensity in cable franchise negotiations and other local government regulations that are perceived as creating delays in a company's speed to market.

Two of the nation's biggest companies—SBC and Verizon—are building new networks designed to compete directly with the cable company and to provide all of a consumer's internet access, video and telephony needs on one platform. A brief summary of the two companies' offerings is appended to this paper.

What does this mean for local government attorneys? We need to be aware that the formerly cordial, if somewhat tense cable franchise renewal negotiation may just turn into litigation. And a failure to issue permits for construction is now potentially a very serious matter. Some examples of court decisions follow:

Comcast of California I, Inc. v. The City of Walnut Creek**,** No. C 05-00824 WHA (N.D. Cal 2005) (order on preliminary injunction) and order of April 13, 2006 (granting City's motions to dismiss in part, with leave for AT&T to amend)

- AT&T (now Comcast) approached local governments in California and Illinois for permits to upgrade their telecommunications network (for Project Lightspeed), to ultimately offer Internet-based video programming
- City agreed to issue permits for AT&T to upgrade its facilities, with additional hardware in the rights-of-way, provided the company enter into negotiation for renewal of its expired franchise
- Comcast argued its service—delivering programming in data packets—did not fit the federal cable service definition and challenged City's attempt to franchise, claiming it had a right to deliver video under its local-exchange carrier authority
- Court denied Comcast's motion for a preliminary injunction to require the city to allow immediate installation of fiber optic cable and other improvements
- Court found Comcast had no ongoing right to operate and that the city could terminate the franchise at will, and that Comcast did not prove irreparable injury or hardship nor violation of the company's First Amendment rights
- No specific ruling on whether Internet-protocol-delivered video is a cable service

In its subsequent decision granting the City's motions to dismiss, the Court adhered to its original rulings—including the non-ruling on whether this service is properly classified as a cable service.

A valuable lesson learned from this decision, which is still not a ruling on the merits:

The City's litigation position benefited from its decision to not prohibit the installation of all facilities related to the video service; the City approved AT&T's permits, subject to the following condition:

> "By accepting this permit, SBC agrees on behalf of itself and its affiliates that it will not provide video programming (including but not limited to programming delivered using internet protocol) over its facilities located with [sic] the City's rights-of-way to subscribers within the City without first obtaining a cable franchise or an open video system franchise from the City."

If you can find a way not to delay project construction while still protecting the municipality's interests, you should consider doing so.

***Comcast of California II, LLC v. San Jose*,** No. 5:03-cv-02532-RS (N.D. Cal. 2004)

- Comcast asks court to stop City from pursuing formal cable renewal process, claiming City's demands are unreasonable
- Comcast claims:
  - provision of PEG channels used for other than one-way video violate the Cable Act and the First Amendment;
  - Cable Act limits City's use of Institutional Network (I-Net); and
  - I-Net support should be treated as franchise fees
- District Court rejects Comcast's motion for preliminary injunction, rejected claims that City's proposed procedure violates Cable Act and due process, and finds renewal had not been denied so contentions were not ripe
- This case is on appeal to the Ninth Circuit

A valuable lesson learned: make sure you evaluate your renewal process for reasonableness. Carefully document the need for and history of any institutional network provision in your agreement—this is an area that is a national strategy for Comcast.

B. Classification of franchise fees: Fee or tax?

In this intensely competitive environment, companies are looking for advantages in how their payments to local governments are classified, including under state law. A case in point from Michigan:

On May 4, 2006, the Michigan Supreme Court denied leave to appeal in class actions which challenged cable franchise fees as an illegal tax. The rulings let stand last summer's Michigan's Court of Appeals decisions which tossed out the cases and ends this litigation.

Specifically, the ruling lets stand two "for publication" opinions in which the Michigan Court of Appeals affirmed circuit court rulings dismissing the cases on both substantive and statute of limitations grounds and did not find it necessary to reach some of the other major defenses raised by the municipalities being sued. The Michigan Supreme Court's rejection of the

petitions for leave bring to an end several years of litigation by plaintiffs and preserve what is currently approximately $70 million dollars per year paid to Michigan cities, villages, and townships by cable companies as rent for use of the public rights-of-way.

Legally, the Court of Appeals cases held that cable franchise fees, and more generally the contract price for a governmentally owned commodity (such as space in the rights-of-way or utility charges) are not a tax under Michigan law and could not be a tax. A key statement in this regard upheld the municipalities' argument that there were other permissible categories of municipal revenues than just fees and taxes. But even under a fee/tax analysis, the Court of Appeals held that cable franchise fees were voluntary, proportionate to the cost of service, served a regulatory purpose, and thus were a fee, not a tax. Finally, the Court of Appeals cases hold that if the person challenging a claimed "tax" is not the person paying the "tax," then a one-year statute of limitations applies. The limitation starts to run when the claimed tax is first approved by the unit of government in question, and the cases were not timely filed.[3]

In another case from Colorado, the Colorado Court of Appeals let stand a trial court decision in favor of the City in the case of *Bruce v. City of Colorado Springs*, Case No. 04CA1572 (December 15, 2005). The Court here also ruled that the payments by Adelphia were fees, and not taxes, thwarting a taxpayer challenge.

The strategy of seeking to have payments to municipalities classified as taxes or fees, depending on which classification creates more benefit to the telecom, has also been employed by Qwest in its litigation challenging franchise fees on telecommunications services in Oregon.

C. Increasing reduction in customer service obligations

In a twist probably unexpected by Comcast, the customer loses in terms of notice of the company's practices, but wins in terms of remedies in a recent decision from the First Circuit. The decision underscores how cable companies may bury notice of changes in terms and conditions of service in the fine print in mailers and bill inserts.

In particular, the Court held that the way Comcast gave notice to customers of changes in the arbitration provisions was "good enough" under 47 CFR §§ 76.1602 & 76.1603—the same provisions governing notice of prices and options for programming and other services under 47 U.S.C. § 552(c):

> "The statute and regulations do not specify the type of notice required. Indeed, ***the statute establishes a flexible notice standard***. A company may provide notice "using any reasonably written means at [the cable company's] sole discretion." 47 U.S.C. § 552(c) (2000). ***Here, Comcast provided notice by setting out the entire text of the new subscription agreement. Although this may not be ideal notice***

[3] This decision was reported by John W. Pestle, of the Varnum Riddering law firm, which represented the cities in this litigation (www.varnumlaw.com). The underlying cases are Kowalski v. City of Livonia, 2005 WL 753628, ___ Mich App ___,___ N.W. 2d, ___ (Mich Ct App, July 26, 2005); Morgan v. City of Grand Rapids, 2005 WL 1753311, ___ Mich App ___, ___ N.W. 2d, ___ (Mich App, July 26, 2005).

because it does not draw attention to the changes contained in the 2002/2003 agreements from the 2001 agreement, Comcast was not required to provide any more notice than it did. Rather, Comcast need only provide notice that is a "reasonable written means" in order to satisfy the requirements of 47 U.S.C. § 552(c). While the outer boundary of what is reasonable may not be certain, the notice provided by Comcast here meets the standard…

Additionally, Plaintiffs assert that Comcast did not provide adequate notice in compliance with the Policies & Practices itself, which requires that Comcast will "provide you [the subscriber] notice of the change ***and its Effective Date***." The Policies & Practices does not contain an explicit effective date, notifying a subscriber when the provisions contained in the Policies & Practices begin to apply. However, the Policies & Practices states in its first paragraph that it was distributed by Comcast to subscribers as notice "in order to comply with the Company's obligations under the rules of the Federal Communications Commission." Thus, the Policies & Practices incorporates by reference the Federal Communications Commission's ("FCC") 30-day advance notice regulation, 47 C.F.R. § 76.1603(b). ***Again, Comcast could have complied more clearly with its self-imposed effective date notice requirement, but this compliance is good enough.*** Furthermore, ***neither the statute nor the FCC's regulations require that subscribers receive any explicit statement about the effective date of new terms***. We are satisfied that Comcast provided adequate notice." (Emphasis added.)

In addition, the Court read Comcast's arbitration agreements (or rather, severed certain sections of the agreements) so that contrary to Comcast's arguments (and the holding of the lower court), the customers could recover federal treble damages and attorney's fees and costs in the arbitration and also have the arbitration proceed as a class action/consolidated case.

Kristian v. Comcast Corp, 446 F.3d 25 (1st Cir. April 20, 2006).

D. <u>And finally, a word from your local public utility commission.</u>

In a troubling ruling issued on May 5, 2006, the Connecticut Department of Public Utility Control issued the following findings of fact and conclusion in its order determining that a cable franchise is not required for the delivery of advanced services:

"VI. Findings of Fact

1. The parent company of the Southern New England Telephone Company and the parent company of Verizon New York, Inc. have announced plans to offer video products in Connecticut.
2. SBC has announced its Project Lightspeed initiative, a $4 billion capital project that it claims will enhance the broadband capabilities of its existing communications network.

3. The planned enhancement of SBC's DSL broadband networks will enable bandwidths and connection speeds that are not available over existing DSL or cable broadband networks.

4. The enhancement of SBC's DSL broadband networks will support and integrate an array of voice, data, video and other applications.

5. Cable networks transmit the totality of available programming to all households at the same time, to be unscrambled in the customer's set-top box pursuant to the customer's purchase choices.

6. The Project Lightspeed network will entail a switched, two-way architecture designed to send each subscriber only the programming the subscriber chooses to view at a particular time.

7. The Project Lightspeed network will integrate IP-video with voice, data and other applications.

8. Verizon-NY's FTTP broadband network will have the potential to be deployed to provide video services.

9. Verizon expects that its proposed video product will meet the definition of cable service set forth in Conn. Gen. Stat. § 16-1(a)(15).

10. By letter dated September 16, 2005, the Department granted Verizon's request to be dismissed from this proceeding.

11. IP is a form of packet switching that permits the two-way transmission of data from one computer to another on the Internet.

12. "Packet switching" refers to the protocol in which messages are divided into packets before they are delivered.

13. In an IP network, bits of data are segmented into packets that are individually addressed and then transmitted over a series of physical networks which may be comprised of copper, fiber, coaxial cable or wireless facilities.

14. Network routers examine the address of each passing IP packet, and determine to which other router in the network the IP packet should be sent.

15. When the packets reach their final destination over the IP network, they are "unwrapped" and the data inside is used for an application.

16. When the packets are transmitted via IP between two points, the network does not establish a permanent or exclusive path between the two points.

17. The Telco's IP-enabled video service will utilize IP technology.

18. Cable networks employ a tree and branch topology in which all households within a franchise area share programming signals transmitted concurrently on shared coaxial cable trees.

19. A typical cable system uses a one-to-many network design to deliver many program streams simultaneously to many subscribers over coaxial cable.

20. The Telco's IP network offers digital video signals only.

21. With IPTV programming, only the video data stream requested by the subscriber is transmitted between the Telco's servers and the customer.

22. Without downstream and upstream error correction, and network management data traveling back and forth in the IPTV connection between SBC and its subscriber, the service would not function.

23. Most CATV programming is delivered in a truly one-way path to a multitude of subscribers with little or no two-way or upstream communication.

24. Pulver.com's Free World Dial-Up Service is an Information Service.

25. The Telco will make available through a server, its video product together with its voice and data services.

26. The Telco's IP-video service will depend on constant communication between its servers and consumers.

27. IP set top boxes must select a specific IP address from which the data stream will circulate.

28. In the IP-based network, two-way capability and interaction is ever present, always requiring a dynamic interaction between the customer and network.

29. The Telco will be deploying its network facilities on a node-by-node or on a neighborhood-by-neighborhood basis.

30. The Telco's DSL footprint is greater than 90% in its Connecticut service area.

VII. Conclusion

Based on the above, the Department concludes that the IP-video product proposed by the Telco is merely another form of data stream transmitted over the Internet. In forming this conclusion, the Department has analyzed the Telco's video product in light of the federal and state definitions of what constitutes a cable service. The Telco has satisfactorily demonstrated that its IP-video product is a packet of data bytes streamed over a network fundamentally different from CATV networks, which has the potential to offer consumers yet another, competitive application of Internet-based technology. **Consequently, the Department will not require the Telco to seek a cable franchise before offering its video services**." (Emphasis added.)

III. LITIGATION IN THE RIGHT-OF-WAY REGULATION ARENA

Even as major federal legislation is pending, state legislation is being pursued, and litigation in the above areas continues unabated, we face one last area of challenge: litigation of municipal authority to regulate and receive compensation for the use of municipal rights-of-way by telecommunications companies.

Following is a sampling of some of the most recent and significant decisions, in no particular order:

Puerto Rico Tel. Co. v. Mun. of Guayanilla, 450 F.3d 9 (1st Cir. 2006)

- Municipal ordinance required 5% gross revenue fee on telecom providers using rights-of-way
- Puerto Rico Telephone Company claimed ordinance was preempted by Federal Telecom Act and Puerto Rico Telecom Act
- Court granted summary judgment – fee could be cost-prohibitive and no proof that the fee was "fair and reasonable" under the safe harbor of § 253(a)
- First Circuit on municipal appeal: once the party challenging a regulation proved it violated the limitations of § 253(a), local government had the burden of proving that safe harbor of § 253(c) applied
- Court also accepted plaintiff's claim of dramatic increase in costs and reduction in profits if all municipalities passed similar ordinances

Qwest Communications Inc. v. City of Berkeley, 433 F.3d 1253, 1257 (9th Cir. 2006)

- The fact that Qwest was seeking entry as a competitive local exchange carrier in the case was persuasive to the Court (a new service offering), at 1255
- The Court recognized that *Auburn* did not hold that all non-cost-based fees are preempted by Section 253, at 1257
- Section 253(c), the safe harbor provision, requires an "individualized determination," at 1257
- Note that the City only argued its regulations and their exemption process were what protected them from preemption; the Court looked at that exemption process and found it onerous, at 1257
- The Court was troubled by what it deemed significant discretion, authority to deny permits, and civil and criminal penalties for violating ordinance, at 1258
- The Court cited and relied upon *Auburn's* "control of the rights of way" vs. control over the company itself (concerning the City's evaluation of the applicant's financial, technical and legal qualifications), at 1258
- Because the Court's holdings "disemboweled" the ordinance, it is invalid in toto, at 1259

Qwest Corp. v. City of Santa Fe, New Mexico, 380 F. 3d 1258, 1271 (10th Cir., 2004)

- Preemption occurs when a clear intent to preempt state or local law is expressed by Congress, at 1316.
- § 253 is a 2-step analysis, (a) first and then (c), at 1316 (citing Portland).
- Cites Auburn and White Plains Dist. Ct. in stating that cities may not have "unfettered" discretion to grant or deny permits, 1316.
- Principles of federalism and home rule counsel against judicial micromanagement of local government and require close analysis of regulations before issuing broad conclusions, at 1317.
- § 253(c) carves out safe harbor for ROW management and fair/reasonable compensation, but also acts as a negative restriction on ROW management choices, at 1318 (citing RT Communications and Cablevision of Boston).
- Lease requirement and cost-based registration fees not in violation of § 253(a), at 1322.
- Informational requirements not effective prohibition where Qwest has been operating under them for many years, at 1323 (citing Portland).
- Discretion to grant/deny franchises based on "public interest" in violation of § 253(a) b/c too much discretion, at 1323-24.
- Registration information "as may be reasonably required" too vague, at 1324.
- Cumulative effect of the rental fees, appraisal, dedication, excess-capacity requirements is an effective prohibition, at 1325.
- Broad language outside ROW management allowed by § 253(c), at 1325-26.
- Compensation required by a local government must directly relate to actual use of local rights-of-way, but cost-recovery is the only type of compensation that directly relates to actual use of local rights-of-way, at 1327.
- If Congress had intended to limit local governments to charging cost-based fees for the use of public rights-of-way, the statute would have used the word "costs" instead of the word "compensation," at 1327.
- Adopts "totality-of-circumstances" test from Dearborn, at 1328.
- Forcing earlier market entrants to dedicate all existing conduit to the City and bear the risk of installing excess capacity conduit for which they never will be compensated and allowing later entrants to simply use conduit previously installed and dedicated by others without making any dedication of their own violates § 253(c), at 1330.
- Severability allowed, at 1331-32.

Time Warner Telecom of Oregon, LLC v. City of Portland, 2006 WL 581135 (D.Or. 2006).

- TWT and Q have standing, "zone of interests," at *4
- Challenge more than one regulation, must consider cumulative effect, at *4
- § 253(b) applies because of state's delegation of authority to local government, at *5
- City's burden to prove § 253(c) defense, at *5
- Franchise is a legal requirement within the ambit of § 253, at *8
- TWT in kind violates § 253 but QCC's doesn't at *10 (too open ended)
- Most-favored-rate provisions violate § 253 (concurring with ELI at 38), at *12
- Telecoms are not entitled to relief under § 1983, at *14

City of Portland v. Electric Lightwave, Inc., Civ. No. 03-538-AS (D.Or. May 5, 2005)

Regulation/outcome

- Franchise Grant/upheld, at 15
- City charter and general ordinances apply/upheld: general, City has fettered its discretion by saying "to the extent authorized by law," at 15-17
- 5% fee/upheld, at 22
- Most favorable rate/preempted, at 23
- Books and records/upheld as related to the fee, at 24
- Construction and relocation/upheld under Auburn, at 25
- Use of fiber and ducts by City/preempted "economic impact" is the measure of 253 impact, at 29
- Transfer-assignment/upheld – distinguishable from Auburn (franchise, statement parties will comply with applicable laws, implied good faith in contracts under Oregon law), at 33
- Forfeiture and remedies (notice, cure, $1,000 fine, suspension of franchise rights)/upheld in furtherance of enforcing franchise itself, at 34-35
- Fees as not discriminatory/upheld (including records and auditing), at 52

NOTE: Although this case was appealed to the Ninth Circuit, the parties recently concluded a settlement, which specifically leaves the District Court's opinion intact.

Qwest Corp. v. City of Surprise and City of Tuscon, 434 F.3d 1176 (9th Cir. 2006)

- Qwest lacks standing to assert challenges to city's ordinance, because it suffered no injury in fact (Qwest is exempt from ordinance), at 1180.
- During oral argument, the Court noted that "Courts don't operate on 'sometime in the future maybe' something will happen."
- Qwest's claims are moot, it is exempt from ordinance, city not likely to reenact, at 1181.
- The right of way fee is a tax; district court did not have jurisdiction to invalidate under the Tax Injunction Act, 28 U.S.C. 1341 (601 would have saved from preemption in any case), at 1183.

CONCLUSION

Municipal attorneys need to be aware of rapid changes in the regulatory, litigation and legislative environment where telecommunications and cable services are concerned. If avoiding litigation is the goal, proactive involvement in hearings, negotiations and even permitting decisions is warranted.

APPENDIX A: The new world of telecommunications as envisioned by SBC and Verizon[4]

A. SBC

SBC has announced its Project Lightspeed initiative, a $4 billion capital project that it claims will enhance the broadband capabilities of its existing communications network. That initiative will result in, after the initial deployment phase, the addition of 40,000 miles of fiber to SBC's networks and will be an advanced, Internet Protocol (IP)-enabled broadband network extended to approximately 18 million households in SBC's traditional 13-state service territory. This enhancement of SBC's existing Digital Subscriber Line (DSL) broadband networks will enable bandwidths and connection speeds that are not available over existing DSL or cable broadband networks, and will support and integrate an array of voice, data, video and other applications.

Project Lightspeed will involve Fiber-to-the-Node (FTTN) and Fiber-to-the-Premises (FTTP) network technologies. In general, FTTN will be used in existing neighborhoods while FTTP will be used in new developments. In the FTTN configuration, additional fiber will be deployed in the existing network to nodes located within, on average, 3,000 feet or less from homes and businesses. At the node, the company will connect the new fiber to the existing copper facilities now serving customers. In the FTTP configuration, since no current service or facilities will be in place, fiber will be deployed directly to the customer premises. Both architectures are expected to employ advanced, next-generation electronics in the network and at the customer premises.

The Project Lightspeed network enhancement is expected, in part, to enable one of the components of SBC's overall video strategy, IP-video. According to SBC, and fundamental to its regulatory strategy, this network is unlike a traditional one-way broadcast cable network. That is, cable networks transmit the totality of available programming to all households at the same time, to be unscrambled in the customer's set-top box pursuant to the customer's purchase choices. For IP-video, the Project Lightspeed network will be different, because it will entail a switched, two-way architecture designed to send each subscriber only the programming the subscriber chooses to view at a particular time. This switched system involves: (1) two-way interaction between individual subscribers and SBC; (2) a more tailored "digital feed" to the customer; and (3) more capacity, allowing the company to offer a huge range of video on demand (VOD) options, feeds using different camera angles, advanced picture-in-picture viewing, and other tailored programming.

SBC intends to continue to offer SBC/DISH Network direct broadcast satellite service. In partnership with Echostar, SBC will make available DISH Network service in combination with its other offerings. In this arrangement, the company will offer consumers the ability to obtain the full complement of communications services, voice, high-speed Internet access, and video entertainment. Additionally, the company intends to launch HomeZone, an entertainment

[4] These descriptions are based on representations of the companies to the State of Connecticut's Department of Public Utility Control in Docket No. 05-06-12, in which the Department concluded that the companies' offerings did not support a requirement that they obtain a cable franchise.

service that combines the capabilities of the DISH Network satellite service with those of SBC's existing DSL broadband networks. These capabilities will come together in the home through the use of a next-generation set-top box that will integrate the satellite-delivered program feed and terrestrial DSL features. This product will be made available to any household that has access to SBC's existing DSL Internet service.

Because the various applications will amount to data packets traveling over the same broadband pipe, the services will interoperate and communicate in a way that makes each service more useful than it would be standing alone.

B. Verizon

Through its FTTP initiative, Verizon anticipates enhancing its existing network to provide high-speed telecommunications and information services to residential and business customers, using fiber-optic cable and optical electronics to directly link homes and businesses to its network. The FTTP broadband network will enhance voice and data applications for Verizon's users. In addition, the FTTP network will have the potential to be deployed to provide video services.

At a national or regional level, a "super" headend (SHE) will serve as the single point of national content aggregation. All content will be encoded into MPEG2 streams and transported over nationwide SONET services. In each market where Verizon seeks to offer service, the broadcast cable television traffic will be off-loaded from the long haul network and terminated at a VHO. At general service availability, Verizon will deploy a primary SHE and an additional one will be deployed for redundancy. Network redundancy and route diversity will extend from the SHE to the VHO. Key functions of the SHE will include content reception, signal processing, encoding, and network interface.

The VHO will serve as the metro or local point of aggregation. At that location, off-air and public, education, and government (PEG) channels (where appropriate) will be combined with the broadcast cable television coming from the SHE. Cable television traffic will be converted to optical signals at the VHO and transported over Verizon's service area, inter-office facilities to Video Serving Offices (VSOs). Voice and high-speed data signals will be combined with the cable television at this location for final transport to the subscriber premises over Verizon's FTTP Passive Optical Network (PON).

At the premises, the optical cable television signal will be de-multiplexed and converted to an electrical signal, which meets cable television industry standards for cable services. Standard home wiring practices, using coaxial cables, as well as alternative media, will distribute the signal to cable-ready TVs and standard set top boxes.

There will be 24x7 control and surveillance of the cable television platform from a remote location. This Network Operations Center will be centrally located and will be responsible for the operation and maintenance of the Conditional Access System, which will direct the encryption functions performed back at the VHO.

The majority of cable television sources will be individual content provider programming. A mix of standard and high definition formats will be supported. The VHO will aggregate three basic sources of content: national broadcast channels, local broadcast channels, and PEG channels. The VSO will be a location within the central office containing FTTP equipment. If technically feasible or appropriate, PEG insertion may occur at this location in the network. The key function of the VSO will be to combine broadcast cable television into the Voice and High Speed Data FTTP Network. The VSO will also play a role in supporting upstream signals from the customer premises for pay-per-view services. Pay per view usage data will use the data service's upstream wavelength. The upstream data communications will be sent back to a subscriber database located in the Operations Center located in the VHO.

At initial deployment, an installation and maintenance technician will connect the Optical Network Terminal (ONT) to a central point of demarcation where a cable television installation and maintenance technician will make final connections to provide the cable television service. After the installation of the ONT, a cable television field technician will test the existing in-home coaxial cable to determine if it is technically acceptable and will connect the service. If no coaxial cable exists or the coaxial cable is unacceptable, the technician will install wiring to the first cable outlet, and will install new coaxial wiring to other locations identified by the customer at the customer's request and expense. The customer may choose to self-install such wiring or to obtain inside wiring installation service from a third party or Verizon.

STATE OF MICHIGAN

COURT OF APPEALS

LAURENCE G. WOLF CAPITAL MANAGEMENT TRUST AGREEMENT DATED MARCH 7, 1990, and LAURENCE G. WOLF, as Trustee and individually,

Plaintiffs-Appellants,

v

CITY OF FERNDALE, MARSHA SCHEER, ROBERT G. PORTER, and THOMAS W. BARWIN,

Defendants-Appellees.

FOR PUBLICATION
December 20, 2005
9:00 a.m.

No. 262721
Oakland Circuit Court
LC No. 2003-051450-CK

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

CAVANAGH, P.J.

Plaintiffs appeal as of right the trial court's summary dismissal of their tortious interference claims on the ground that they were barred by governmental immunity, MCL 691.1407. We reverse.

On July 28, 2003, plaintiffs, a trust and a trustee, filed their complaint against defendants, the City of Ferndale, and Ferndale's Director of Development, Marsha Scheer, Mayor, Robert Porter, and City Manager, Thomas Barwin. Plaintiffs averred in their complaint that the trust owned the Ferndale Center Building (Building), located on Nine Mile Road and Woodward Avenue, which included prime roof space for constructing cellular antenna. Consistent with that purpose, in 1999 an agreement was reached with AT & T for such lease and construction, but the City of Ferndale denied their request for a necessary variance to allow its installation. Plaintiffs filed an action in federal court, alleging a violation of the Telecommunications Act of 1996, 47 USC § 332, which was successful, and defendant was ordered to issue a non-use variance. See *Laurence Wolf Capital Management Trust v Ferndale*, 318 F Supp 2d 522, 524 (ED Mich, 2004). However, plaintiffs averred, during that pending litigation the City of Ferndale amended its ordinance; it removed the prohibition against multiple cellular towers but added a special use permit requirement. Once again, negotiations between plaintiffs and AT & T commenced but AT & T subsequently declined to enter into a lease agreement. Instead, AT & T entered into a lease agreement with the City of Ferndale "to place a large cell tower on City owned property just blocks from the location of the Building." Thereafter, plaintiffs brought the instant action, alleging tortious interference with their business relationship with AT & T, and tortious

interference with prospective business relationships between them and other cellular service providers.

On October 7, 2003, defendants filed their motion to dismiss pursuant to MCR 2.116(C)(7), on the ground that they were entitled to governmental immunity. See MCL 691.1407. Defendants argued that the City of Ferndale was engaged in a governmental function, i.e., the enforcement of a City ordinance, when it denied plaintiffs' request for a special use permit, and the defendant City officials, as the highest executive officials, were entitled to absolute immunity. See MCL 691.1407(5). Plaintiffs responded to defendants' motion, arguing that the City was not entitled to immunity because when it sought to usurp plaintiffs' business opportunities for the City's own pecuniary gain, it was engaged in a proprietary function, not a governmental function. Plaintiffs argued that the City's leasing of space on a City-owned massive cell tower to commercial telecommunications providers, after engaging in tortious conduct to gain the commercial advantage over plaintiffs, constituted a proprietary function for which governmental immunity did not apply. See MCL 691.1413. With regard to the individual defendants, plaintiffs argued that they were not entitled to immunity. Defendants disagreed in their reply brief, arguing that the proprietary function exception did not apply because plaintiffs did not allege bodily injury or property damage arising out of the performance of an alleged proprietary activity. And, contrary to plaintiffs' claims, the individual defendants were the highest executive officials at various levels of the City government. On December 11, 2003, the trial court issued its opinion and order granting defendants' motion for summary disposition as to the dismissal of the City's mayor only, holding that further factual development was required as to the dismissal of the other defendants.

On July 20, 2004, defendants filed their second motion for summary disposition and argued that they were entitled to summary dismissal because (1) plaintiffs could not establish either tortious interference claim, and (2) the proprietary function exception to governmental immunity did not apply since plaintiffs did not seek recovery for bodily injury or property damages arising out of the performance of a proprietary function, as required by MCL 691.1413. Plaintiffs opposed the motion, arguing that they could establish that defendants acted improperly to interfere with their established and potential business relationships and that their claims were not barred by governmental immunity because they suffered property damage in the form of lost business as a result of the interference.

The trial court ultimately agreed with defendants and dismissed the case. Relying on *Eyde v Meridian Twp*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 2004 (Docket No. 248312), the trial court held that there was a genuine issue of material fact as to the tortious interference claims, but concluded that defendants were immune from liability because the proprietary function exception did not apply to this "action for prospective economic injury." In other words, the loss of a business expectancy was not "property damage" within the contemplation of MCL 691.1413. Plaintiffs' motion for reconsideration was denied and this appeal followed.

Plaintiffs argue that defendants were not entitled to immunity because their tortious interference claims were actions for "property damage" within the proprietary function exception. After de novo review, construing the contents of the complaint as true and considering the documentary evidence in a light most favorable to plaintiffs, we agree. See MCR 2.116(C)(7); *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999).

Generally, governmental agencies "engaged in the exercise or discharge of a governmental function," i.e., "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law," are immune from tort liability. MCL 691.1401(f), 691.1407(1). But, there are some narrowly construed exceptions to immunity. *Maskery v University of Michigan Bd of Regents*, 468 Mich 609, 614; 664 NW2d 165 (2003); *Ballard v Ypsilanti Twp*, 457 Mich 564, 569; 577 NW2d 890 (1998). At issue in this case is the proprietary function exception which is set forth in MCL 691.1413 and provides:

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees.

The issue here is not whether a proprietary function was involved, but whether plaintiffs' tortious interference claims constitute an action to recover for "property damage" within the contemplation of MCL 691.1413. After de novo review of this question of law, we conclude that they do. See *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Ascertaining and giving effect to the intent of the Legislature is the primary goal of statutory interpretation. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). We first look to the specific language of the statute to determine that intent. *Halloran v Bhan*, 470 Mich 572, 577; 683 NW2d 129 (2004). The statute's words or phrases are accorded their plain and ordinary meaning. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). If the statute is unambiguous, it must be enforced as written. *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

First, we must determine the plain and ordinary meaning of the phrase "property damage" because it is not defined in the statute. It appears that the phrase has not previously been subjected to such judicial scrutiny, but we may consult dictionary definitions and look to accepted legal definitions for guidance. See *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994). The definition of "property" includes "ownership; right of possession, enjoyment, or disposal, esp. of something tangible." *Random House Webster's College Dictionary* (1997). A very similar but more expansive definition of "property" is found in 63C Am Jur 2d, Property, § 1, pp 66-67, which provides:

> As a matter of legal definition, 'property' refers not to a particular material object but to the right and interest in an object. "Property" in a thing does not consist merely in its ownership or possession, but also in the lawful, unrestricted right of its use, enjoyment, and disposal. In its precise legal sense, property is nothing more than a collection of rights.
>
> * * *

> In contemporary jurisprudence, 'property' refers to the various incorporeal ownership rights in a res, such as the right to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the res, as well as to the actual physical object of these rights.

"Damage" is defined as "injury or harm that reduces value, usefulness, etc." *Random House Webster's College Dictionary* (1997). Combining the definitions, then, the plain and ordinary meaning of the phrase "property damage" includes injury or harm to one's rights or interests associated with an object.

In their complaint, plaintiffs alleged tortious interference which has been described as the "intentional invasion of, or interference with, property rights causing injury without just cause or excuse." 45 Am Jur 2d, Interference, § 1, p 273. Specifically, plaintiffs alleged tortious interference with an established business relationship, as well as tortious interference with prospective business advantage, that resulted in property damage in the form of lost business. Like the plaintiffs in *Eyde*, *supra*, plaintiffs' theory was that defendants used their otherwise legitimate governmental function of denying plaintiffs' requested use of their property "for the improper purpose of advancing their own proprietary interests of having exclusive right to the financial benefit of an agreement to erect a communications tower." *Eyde*, *supra*, slip op at 3.

But, the trial court rejected plaintiffs' claim that the loss of business and associated income resulting from defendants' tortious interference constituted property damage, instead holding that the claimed damages were for prospective economic injury. We disagree with that conclusion. Plaintiffs' alleged "property damage" was the harm or injury to their right of lawful, unrestricted use of their res for the particular business purpose that they had negotiated. That the loss of the business deal resulted in lost income is relevant for the purpose of attempting to measure the resulting damages. See, e.g., *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255, 268; 327 NW2d 910 (1982) ("Pecuniary losses are an element of damages that may flow from an injury to persons or property or breach of contract"). Stated another way, if plaintiffs' alleged property damage was structural damage to their building, one measure of the damages might include the loss of income resulting from having to close down the building. But, the "property damage" in that fictitious scenario includes the harm or injury to the right to use and enjoy the building; one method of measuring the damage, i.e., quantifying the loss, is to calculate the associated loss of income. The same is true in plaintiffs' case. A measure of plaintiffs' damages is the income plaintiffs lost from the business deal that was not completed allegedly because of defendants' actions, provided that the damages can be proven with reasonable certainty. See *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995). Defendants seem to argue that there must be physical injury to tangible property for there to be "property damage." We cannot rewrite the statute. See, e.g., *Stringer v Bd of Trustees of Edward W Sparrow Hosp*, 62 Mich App 696, 699-700; 233 NW2d 698 (1975).

To summarize, plaintiffs allege that defendants tortiously interfered with their established and prospective business relationships by wrongfully denying plaintiffs' requested use of their property so that defendants could intercept plaintiffs' negotiated business deal with AT & T which resulted in plaintiffs suffering damages, including pecuniary losses. In other words, defendants wrongfully exercised their governmental power during the course of, and in furtherance of, performing a proprietary function, i.e., leasing space to AT & T for a cellular tower, which gave rise to plaintiffs suffering property damage, including harm to their right of

lawful and unrestricted use of their res, as well as harm to their right to enjoy income derived from their res. We express no opinion as to the merit or likely success of plaintiffs' claims.

We are mindful of our duty to narrowly construe governmental immunity exceptions and of the fact that the purpose of the exceptions is not to place governmental agencies on an equal footing with private tortfeasors. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 148-150, 158-159; 615 NW2d 702 (2000). Nevertheless, under circumstances like those presented in this case, defendants cannot escape scrutiny for their governmental actions that have a direct and beneficial effect on their proprietary endeavors by hiding under the shelter of immunity. In conclusion, plaintiffs pleaded a cause of action in avoidance of governmental immunity and, accordingly, we reverse the trial court's dismissal of this case.

Reversed.

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Pat M. Donofrio

c|net NEWS.COM

The Wireless Alphabet Soup

By CNET News.com Staff
http://news.com.com/The+wireless+alphabet+soup/2100-1039_3-6038991.html

Story last modified Tue Feb 14 10:19:28 PST 2006

Every technology breeds its share of jargon and acronyms, none more so than wireless. As is evident in many stories focused on the 3GSM World Congress, now under way in Barcelona, Spain, there's a code for just about every category of wireless service, every network standard and every technical specification. This glossary, compiled by CNET News.com's Marguerite Reardon, explains many of the most commonly used terms.

3G (third-generation wireless)
The generic term for the next generation of mobile communications networks. 3G technology is commonly described as graceful enhancements to the GSM cellular standards; the GSM networks are intended to be upgraded to 3G networks without service interruption.

3GPP (Third Generation Partnership Project**)**
A collaboration agreement that was established in December 1998 by standards bodies in Europe, Japan, China, North America and South Korea. The scope of 3GPP was to create a globally applicable 3G mobile-phone system that would fit into the International Telecommunications Union's International Mobile Telecommunications-2000, or IMT-2000, project. 3GPP specifications are based on evolved GSM specifications, now generally known as the UMTS (Universal Mobile Telecommunications Service) system.

BREW **(Binary Runtine Environment for Wireless)**
Developed by wireless-technology specialist Qualcomm to provide a standard set of application-programming interfaces for developers to easily add new features and applications to Qualcomm-based wireless hardware. BREW makes it possible for developers to create portable applications that will work on any handset equipped with CDMA chipsets.

CDMA (code division multiple access)
A packet-based wireless-access technology that was improved and commercialized by Qualcomm. CDMA is used in certain cellular phone systems and in some wireless local-area networks, or WLANs. The major benefit of CDMA is increased capacity, up to 20 times that of analog service.

CDMA increases capacity through more efficient use of spectrum. Specifically, it permits many radios to share the same frequency channel. Unlike TDMA (time division multiple access), a competing system used in GSM, all radios using CDMA can be active all the

time because network capacity does not directly limit the number of active radios. Since larger numbers of phones can be served by smaller numbers of cell sites, CDMA-based standards have a significant economic advantage over older, TDMA-based standards.

CDMA2000 **(CDMA version of IMT-2000 standard)**
A family of 3G mobile telecommunications standards that use CDMA. CDMA2000 is an incompatible competitor of the other major 3G standard, known as WCDMA and UMTS.

DVB-H **(Digital Video Broadcasting-Handheld)**
The latest development within the set of DVB transmission standards, which can be used by mobile operators to multicast digital television signals to mobile handsets. DVB-H technology adapts the DVB system for transmission of digital television to handheld, battery-powered receivers.

Commercial launches of DVB-H services are expected in 2006 in Italy, and the Crown Castle International's Modeo is building a U.S. overlay network based on DVB-H that it hopes to sell to mobile operators. Nokia, Intel and Motorola have formed an alliance to promote the standard.

EDGE (Enhanced Data for GSM Environment)
A digital mobile-phone technology that acts as a bolt-on enhancement to 2G (second-generation) and 2.5G General Packet Radio Service (GPRS) networks. This technology works in TDMA and GSM networks. EDGE (also known as EGPRS) can function on any network with GPRS deployed on it, provided the carrier implements the necessary upgrades.

EDGE can offer Internet connectivity and high-speed data applications such as video services and other multimedia benefits. It has been touted as the final stage of GSM standards and is intended to support data rates of up to 384kbps. Cingular Wireless and T-Mobile have EDGE networks in the United States.

EV-DO (Evolution Data Optimized) or 1xEV-DO
A wireless radio broadband data standard adopted by many CDMA mobile-phone service providers in Japan, Korea, Brazil, Israel, the United States, Australia, Canada, New Zealand, Venezuela and Mexico. It was originally developed by Qualcomm and was standardized by 3GPP as part of the CDMA2000 family of standards.

In the U.S., Verizon Wireless and Sprint have completed significant deployments of 1xEV-DO. Alltel has also deployed EV-DO to a few markets as of January 2006. EV-DO roaming between carriers is currently not available in North America.

FLO (Forward Link Only)
A technology developed by Qualcomm and commercialized by a division of the company called MediaFlo. FLO is a multicast technology that was designed to increase the capacity and reduce the cost of delivering video, audio and other content to large numbers of users simultaneously.

It transmits packets using OFDM (orthogonal frequency division multiplexing), a modulation technology that sends multiple signals at different frequencies to get the maximum use out of spectrum bandwidth. It was designed for markets where dedicated spectrum is available and where regulations permit high-power transmission from one or a small number of towers. FLO is also complementary to existing cellular networks using the CDMA2000, EV-DO or WCDMA cellular links. FLO is intended to be an alternative to other multimedia multicasting technologies, such as DVB-H.

GPRS **(General Packet Radio Service)**
A mobile data service available to users of GSM mobile phones. It is often described as 2.5G--that is, a technology between the second generation (2G) and third generation (3G) of mobile telephony. It provides moderate-speed data transfer by using unused TDMA channels in the GSM network.

GSM **(Global System Mobile Communications)**
The standard digital cellular phone service that you will find in Europe, Japan, Australia and elsewhere. GSM is also used in the U.S., but it uses a different frequency than that in other parts of the world. Cingular supports GSM.

HSDPA **(High-Speed Downlink Packet Access)**
A new mobile-telephony protocol that's often called 3.5G or 4G Internet. Its purpose is to increase the download speeds of the WCDMA networks. Other technologies it competes with include CDMA2000 1x (or CDMA2000 1xEV-DO), as well as data communication standards such as WiMax.

Cingular announced in December that it plans to deploy UMTS with expansion to HSDPA in 18 markets. By the end of 2006, Cingular will have UMTS service in the top 100 markets in the United States. Cingular currently has 16 cities using HSDPA with speeds of 400kbps to 700kbps under the brand name BroadbandConnect. Cingular faces competitive pressure from operators such as Verizon Wireless and Sprint, which are using EV-DO.

HSUPA **(High-Speed Uplink Packet Access)**
A data access protocol for mobile-phone networks that aims to increase upload speeds of WCDMA networks. As they do with HSDPA, some people refer to HSUPA as 3.5G or 4G mobile Internet. While most Internet applications, such as Web surfing, music and video downloads, and e-mail, rely heavily on downlink speeds, applications such as video conferencing also require fast upload speeds. The specifications for HSUPA are still under development.

MIMO **(multiple input, multiple output)**
Refers to the use of more than one antenna to send and receive two or more unique data streams over the same channel simultaneously in wireless devices, resulting in networks with long ranges and high throughputs. It is currently the primary basis for the proposed 802.11n wireless transmission standard. In some cases, wireless networks

using MIMO technology can reach more than 300 feet and still send and receive data at 30mbps.

TD-SCDMA **(Time Division-Synchronous Code Division Multiple Access)**
A 3G standard developed by Siemens and Datang of China. TD-SCDMA has spectrum efficiency (a measure of the number of users that can receive a transmission in a given geographic area) that makes it appropriate for densely populated regions. The spectral efficiency is three to five times better than GSM.

WCDMA **(wideband code division multiple access)**
Another name for UMTS (Universal Mobile Telecommunications System), a cellular network also referred to as 3GPP. As the name suggests, WCDMA is based on CDMA technology and was envisioned for the next generation of GSM. It's a European standard designed to support data transmission rates of 144kbps for use in vehicles, 384kbps for pedestrian use and up to 2mbps for use indoors.

WiBro **(Wireless Broadband)**
A wireless broadband Internet technology being developed by Korean telecommunications companies. In February 2002, the Korean government allocated 100MHz of electromagnetic spectrum in the 2.3GHz band, and in late 2004, WiBro Phase 1 was standardized by the TTA (Telecommunications Technology Association) of Korea.

WiBro base stations will offer an aggregate data throughput of 30mbps to 50mbps and allow Internet usage within a radius of 3.1 miles. WiBro uses only licensed radio spectrum, which all but eliminates the chance of interference from other transmissions. SK Telecom and Hanaro Telecom have announced a partnership to roll out WiBro nationwide in Korea, excluding Seoul and six provincial cities, where independent networks will be installed.

Wi-Fi or WLAN (Wireless Local Area Networks)
A wireless network based on a series of specifications from the Institute of Electrical and Electronics Engineers (IEEE) called 802.11. Wi-Fi uses unlicensed radio frequency, mostly in the 2.4GHz band. It enables a person with a wireless-enabled computer or PDA to connect to the Internet via a wireless access point. The geographical region covered by one or several access points is called a hot spot.
Wi-Fi was intended to be used for mobile devices and local-area networks, but it is now often used for Internet access outdoors. Several cities, including Philadelphia and San Francisco, plan to install citywide Wi-Fi systems for use by all citizens in each municipality.

There are several types of Wi-Fi: 802.11a (offering transmission speeds of 24mbps to 54mbps), 802.11b (6mbps to 11mbps) and 802.11g (24mbps to 54 mbps). 802.11n (50mbps to 100mbps) is a proposed specification that will become a Wi-Fi standard once it's finalized by the IEEE, and the Wi-Fi Alliance completes its interoperability testing.

WiMax **(Worldwide Interoperability for Microwave Access)**
Also known as the IEEE 802.16 group of standards, defines a packet-based wireless technology that provides high-throughput broadband connections over long distances. WiMax can be used for a number of applications, including "last mile" broadband connections, hotspots and high-speed connections for businesses. The mobile standard 802.11e was just ratified by the Institute of Electrical and Electronics Engineers (IEEE), a standards-making body, in January 2006.

WiMax is similar to Wi-Fi in concept, but it has certain features aimed at improving performance and that should permit usage over much greater distances. WiMax supports peak data speeds of about 20mbps, with average user data rates between 1mbps and 4mbps. Transmission distances range from a few hundred feet in densely populated areas to between 1 and 2 miles in suburban areas. It uses a combination of licensed and unlicensed bandwidth. Intel, along with several corporate sponsors, is working with the wireless industry to drive deployment of WiMax networks.

Copyright ©1995-2006 CNET Networks, Inc. All rights reserved.