



**JOHN DI BENE**  
Assistant Vice President-  
Senior Legal Counsel  
Legal Department

AT&T Services, Inc.  
2600 Camino Ramon  
Room 2W901  
San Ramon, CA 94583

925.543.1548 Phone  
jdb@att.com

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***VIA E-MAIL***

Town of Los Gatos Town Council  
110 E. Main St.  
Los Gatos, CA 95030

Re: AT&T's Comments on the Town of Los Gatos' Amendments to Chapter 23  
(Streets and Sidewalks) of the Town Code Regarding Right of Way Dedication,  
Installation of Curbs, Gutters and Sidewalks and Undergrounding of Utilities

Dear Mayor Leonardis, Vice Mayor Jensen and Councilmembers Rennie, Sayoc and Spector:

I write on behalf of New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) to provide comments on the Town of Los Gatos' amendments to Chapter 23 (Streets and Sidewalks) of the Town Code regarding right of way dedication, installation of curbs, gutters and sidewalks and undergrounding of utilities ("Draft Amendments"). AT&T respectfully requests that activities by telephone corporations be excepted from the Draft Amendments. While it is unclear whether the Town intends the Draft Amendments would apply to utility deployments in the public rights-of-way, it needs to significantly revise its Draft Amendments to avoid unlawful impacts to deployments by telephone corporations, including small wireless facilities. Specifically, the Draft Amendments need to be revised to avoid interfering with AT&T's state law franchise right to install communications equipment and to avoid running afoul of federal law's preemption of city regulations that effectively prohibit wireless services.

### ***Key Legal Concepts***

AT&T has a statewide franchise right to access and construct communications facilities in the public rights-of-way. Under Public Utilities Code Section 7901, AT&T, as a telephone corporation, has the right to access and construct facilities in public rights-of-way in order to furnish wireline and wireless services, so long as it does not "incommode" the public use of the public right-of-way.<sup>1</sup> And under Section 7901.1, AT&T's right is subject only to the Town's reasonable and equivalent time, place, and manner regulations.

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<sup>1</sup> See *T-Mobile West, LLC v. Town and County of San Francisco*, 3 Cal. App. 5th 334, 358 (1st Dist. 2016) ("[T]he section 7901 franchise 'provide[s] the telephone corporations with the right to construct and maintain their facilities. Local government has limited authority to manage or control that construction.'" (emphasis removed)), quoting Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, pp. 1, 3, aff'd 6 Cal. 5th 1107 (2019).

In addition, the Federal Telecommunications Act of 1996 (“Act”) establishes key limitations on local regulations. The Act defines the scope and parameters of the City’s review of AT&T’s applications. Importantly, the Act prohibits a local government from denying an application for a wireless telecommunications facility where doing so would “prohibit or have the effect of prohibiting” AT&T from providing wireless telecommunications services.<sup>2</sup> The FCC has ruled that an effective prohibition occurs when the decision of a local government materially inhibits wireless services.<sup>3</sup>

Under the *Small Cell Infrastructure Order*, the FCC established a standard for local aesthetic regulations regarding small cells, and these apply to installations in public rights-of-way. Such regulations must be (1) reasonable, (2) no more burdensome than those applied to other infrastructure deployments, and (3) objective and published in advance.<sup>4</sup> Regulations that do not meet these criteria are preempted as they are presumed to effectively prohibit wireless service in violation of the Act.<sup>5</sup>

### ***The Town Cannot Require AT&T to Provide New Amenities***

Section 23.10.005 of the Draft Amendments being considered by the Town Council requires “Any person who proposes a substantial remodel . . . or who seeks a use permit, planned development permit, or architectural and site approval from the Town for land adjacent to an unimproved street” must make significant improvements to the rights-of-way, including installing curbs, gutters, sidewalk, pavement, making bicycle improvements, or undergrounding utilities. The Town, however, cannot require AT&T to make significant improvements to the rights-of-way unrelated to and out of proportion with installing telecommunications facilities, especially small wireless facilities.

If AT&T disturbs or damages the right-of-way during its construction of communications facilities in the Town, AT&T will certainly make the appropriate repairs. But requiring significant improvements is unreasonable and overly burdensome, it is not related to operating a communications facility and is likely to violate both federal and state law. Further, AT&T cannot be required to underground utilities in ways that would effectively prohibit and materially inhibit wireless services, or that are inconsistent with its Section 7901 rights. This is particularly true for small cells, as wireless telecommunications facilities cannot operate with all equipment underground. Antennas must be above ground to broadcast and receive and radio units must be placed above ground near antennas to function properly.

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<sup>2</sup> 47 U.S.C. § 332(c)(7)(B)(i)(II).

<sup>3</sup> See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, FCC 18-133* (September 27, 2018) at ¶¶ 35-42; see also, *In the Matter of California Payphone Assoc. Petition for Preemption, Etc.*, Opinion and Order, FCC 97-251, 12 FCC Rcd 14191 (July 17, 1997).

<sup>4</sup> See *id.* at ¶ 86.

<sup>5</sup> See *id.*

Town of Los Gatos

November 5, 2019

Page 3 of 3

For these reasons, AT&T respectfully requests that the Town exempt activities by telephone corporations from the scope of the Draft Amendments or revise them to accommodate all communications facilities as required by federal and state law.

Very truly yours,

*/s/ John di Bene*

John di Bene