QUESTIONS FOR A PROSPECTIVE
WIRELESS FACILITY MUNICIPAL CONSULTANT

Do you believe a gap in wireless coverage can be determined based on a drive test using hand-held mobile phones, and if so, have you ever advocated the use of such a test?
Many consultants advocate the use of hand-held drive tests using mobile devices to determine coverage gaps. Federal courts have determined that such tests are not reliable. Further, new wireless facilities are needed for both coverage and capacity, and a drive test is ineffective at determining the need for additional capacity.

Do you believe that municipalities can regulate interference with other communications and electronic devices?
While interference between wireless carriers—which are licensed to operate within a specific band of radio frequency spectrum—is rarely a problem, some consultants use what can only be deemed scare tactics to assert that such interference is widespread. The Federal Communications Commission has exclusive authority to regulate radio frequency interference. State and local governments are preempted by federal law from regulating radio frequency interference. Further, wireless carriers are vigilant in protecting their own service from being interfered with and ensuring they don’t interfere with other services.

Have you or your firm’s services ever been terminated? If so, under what circumstances?
There are instances where municipalities have terminated their relationship with a consultant retained to review wireless facility applications, and this must be considered when interviewing a prospective consultant. For example, Aiken County, SC effectively wrote a consultant out of its revised ordinance because of excessive delays in reviewing applications. Columbia County, GA stopped using the services of a consultant following problems with application reviews. Person County, NC stopped using the services of a consultant and effectively removed the consultant’s ordinance from its code.

Are you a registered professional engineer with significant experience dealing with radio frequency propagation analysis? Are you an attorney licensed to practice in this state?
Sometimes consultants hold themselves out to be experts in particular areas including radio frequency analysis, structural engineering, or the law, but may lack actual training or certification. If the consultant purports to offer such specialized advice or has such specialized skills and training, it is important to verify that the person has the appropriate certification or licensing.

Do you require or encourage a jurisdiction to enact your “model ordinance” or otherwise revise its existing code?
Some consultants will require or strongly encourage a jurisdiction to adopt its “model ordinance” or revise its existing ordinance. Some consultant’s “model ordinances” may inject subjectivity, delay, and expense into the jurisdiction’s review of wireless facility applications, with the intent of maximizing fees for the consultant. Further, some force the jurisdiction to give up control over the application review process to the consultant.

Has a federal, state, or local court ever invalidated any provision of an ordinance that you or your firm drafted or helped draft?
Some consultants will suggest that the only or best way to revise a jurisdiction’s ordinance is to replace the existing code with the consultant’s “model ordinance.” Some of these ordinances are not drafted by land use experts, planners, or attorneys and may contain provisions that violate local, state, or federal law.

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1 See 47 U.S.C. §§ 301, 302a, 303.
For example, in the recent federal court decision *MetroPCS v. The City of Mt. Vernon*, the court invalidated the consultant drafted fee provision of the City’s ordinance because it resulted in unreasonable fees in violation of state law.

**Has a jurisdiction followed you or your firm’s opinion or advice and taken an action or failed to take an action with respect to an application that was challenged in local, state, or federal court?**

While wireless service and infrastructure providers always strive to work cooperatively with jurisdictions, sometimes they must pursue litigation for actions that violate local, state, or federal law. It is important for a jurisdiction considering a consultant to know the instances where a jurisdiction faced litigation due to the advice of the consultant. The jurisdiction should place significant weight on whether action or inaction by a jurisdiction on the basis of a consultant’s opinion or suggestion was overturned by a court, and should always require the consultant to indemnify the jurisdiction from any legal actions relating to their revised ordinance or application review.

**Do you believe a state or local government has the authority to mandate or favor a particular type of wireless technology over another?**

Under federal law, state and local governments have considerable authority over the construction and placement of wireless facilities. The intent of the federal law is to preserve local authority over land use decisions. Some consultants improperly inject themselves and the jurisdictions they represent into technological decisions regarding the design of wireless networks and the particular technology used. The federal government has the sole authority to regulate the technical and operational aspects of wireless telecommunications technology, and local land use regulations may not mandate a particular technology or establish a preference for a type of technology.³

**How do your fees compare to fees charged by other consultants retained by this jurisdiction to aid in other land use decisions or processes?**

Local governments retain consultants to aid in all types of land use planning efforts. Consultants retained to review wireless facility applications sometimes charge excessive fees that are unnecessary, have been deemed unlawful, and are inconsistent with the fees charged by other municipal consultants for similar applications. A prospective consultant should have to demonstrate that their fees are consistent with fees charged to aid in other land use decisions in the jurisdiction, and should be willing to accept a firm and reasonable ceiling on the fees they can collect from an applicant or from the jurisdiction.

**Are you committed to a cooperative, thorough, and inclusive process if you intend to draft or revise the jurisdiction’s wireless facility ordinance?**

As noted above, some consultants arrive with their “model ordinance” in hand, along with the assurance that, with minimal revisions, it will serve the local jurisdiction’s needs perfectly. However, that is rarely the case. Such model ordinances are not crafted with any outside input, which is contrary to the principles of an open and fair legislative and regulatory process. Accordingly, we advocate a process whereby the local staff, elected officials, citizens, and industry representatives work cooperatively to craft an ordinance that truly reflects the individual character of the jurisdiction and allows for the effective and responsible siting of telecommunications facilities within the jurisdiction.

**Are you willing to participate in a competitive selection process?**

Some consultants urge jurisdictions to retain them outside of a competitive bidding process, arguing that because the cost of their service is passed on to the applicants, they need not be retained through a competitive process. Such practices distort the selection process and run contrary to the goals of open government.

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³ *MetroPCS N.Y. v. The City of Mount Vernon and The City of Mount Vernon Planning Board, No. 09 Civ. 8348 (SCR) (S.D.N.Y. July 22, 2010).*

³ *See N.Y. SMSA Ltd. P’ship v. Town of Clarkstown, 612 F.3d 97, 105 (2nd Cir. 2010).*
Do you review applications for eligible facilities requests under Section 6409 of The Middle Class Tax Relief and Job Creation Act of 2012 ("the Act")?  

When reviewing an application for modification that qualifies for protection under the Act, state and local officials must approve and cannot deny that request. The Act preempts zoning review, so eligible facilities requests may be subject only to administrative review processes and not discretionary review processes that allow a State or local government to deny or condition an eligible facilities request.

Under the Act, local jurisdictions are now limited to a hard and fast determination of whether the request for modification of an existing wireless tower or base station (1) is an eligible facilities request and (2) substantially changes the physical dimensions of the tower or base station. An eligible facilities request means any request for modification of an existing wireless tower or base station that involves the collocation of new transmission equipment, the removal of transmission equipment, or the replacement of transmission equipment. A “substantial change” is: “The mounting of a proposed antenna on the tower that would increase the existing height of the tower by more than 10%, or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to avoid interference with existing antennas; or the mounting of a proposed antenna that would involve adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater, except that the mounting of the proposed antenna may exceed the size limits set forth in this paragraph if necessary to shelter the antenna from inclement weather or to connect the antenna to the tower via cable.”

If a consultant insists that review of eligible facilities requests under Section 6409 requires more than a standard administrative review process and/or charge a fee for such a review, they may contravene federal law by trying to inject subjectivity, delay, and expense into the jurisdiction’s review of eligible facilities requests.

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5 The Act, supra note 2.