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MEMORANDUM

To: Easton Board of Selectmen c/o David Bindelglass, First Selectman

Author: The Law Offices of Keith R. Ainsworth, Esq., LLC

Questions Posed:

1. What Options Are Available to the Town of Easton to Restrict or Regulate the Deployment of 5G Installations in the Town of Easton?
2. If the Town Decided to Pursue a Moratorium or the Implementation of Another Strategy to Restrict the Deployment of 5G Facilities What is the Probability that the Strategy Would Be Effective?

Date: November 5, 2022

Statement of limitations: This office has been retained to advise the Town on practical strategies relating to the ability to deploy successful methods of restricting 5G technology in the Town of Easton. Based upon my discussions with the First Selectman, a comprehensive and definitive guide to the topics raised by this inquiry is beyond the scope of the engagement as it would require a far greater investment than the town would like to invest in research of what is a

national and state-by-state topic. I have reviewed the current status of federal and Connecticut law regarding moratoria and local regulations of 5G wireless installations and the current position of the FCC and industry providers sufficiently to advise on available strategies to the Town of Easton.

ANSWER to QUESTION 1:

Short answer:

Effectively none that could survive legal challenge.

Extended Answer:

Existing caselaw review reveals there are no cases in CT that speak to the strategy of a municipal regulatory by ordinance or otherwise that effects a limitation on the installation of 5G small cell service. This is because in Connecticut, almost uniquely in the United States, the installation of wireless telecommunication services is regulated by the Connecticut Siting Council pursuant the Public Utilities Environmental Standards Act ("PUESA"). As a result of the state enabling legislation for the CSC, all municipal regulation and ordinances relating to the subject of wireless infrastructure ar pre-empted by state law.

> Conn.Gen.Stat. §16-50x. **Exclusive jurisdiction of council**; exception. Eminent domain after certification. Municipal regulation of proposed location. **(a) Notwithstanding any other provision of the general statutes, except as provided in section 16-243, the council shall have exclusive jurisdiction over the location and type of facilities and over the location and type of modifications of facilities subject to the provisions of subsection (d) of this section.** When evaluating an application for a telecommunication tower within a particular municipality, the council shall consider any location preferences or criteria (1) provided to the council pursuant to section 16-50gg, or (2) that may exist in the zoning regulations of said municipality as of the submission date of the application to the council. In ruling on applications for certificates or petitions for a declaratory ruling for facilities and on requests for shared use of facilities, **the council shall give such consideration to other state laws and municipal regulations as it shall deem appropriate**. **Whenever the council certifies a**

> **facility pursuant to this chapter, such certification shall satisfy and be in lieu of all certifications, approvals and other requirements of state and municipal agencies** in regard to any questions of public need, convenience and necessity for such facility.

Land or structures owned by a municipality are solely within the control of the municipal governing authority, which in the case of Easton Charter is the Board of Selectman and the Town Meeting. In short, the town can never[1] be required to lease, sell or make available to a wireless infrastructure provider land or facilities owned by the Town. This is distinct from public rights of way which are deemed to be managed for the public benefit to which utilities cannot be denied access.

The preemption of local regulation by PUESA is probably the greatest hurdle to Easton preventing or regulating 5G installations in the town. 5G installations are used for telecommunications as well as many other purposes related to the internet of things – wireless connections and control of devices as diverse as household appliances to traffic controls and agricultural irrigation systems. PUESA §16-50i defines "facility" as including, in relevant part,

> (6) such telecommunication towers, **including associated telecommunications equipment**, owned or operated by the state, a public service company or a certified telecommunications provider or **used in a cellular system**, as defined in the Code of Federal Regulations Title 47, Part 22, as amended, which may have a substantial adverse environmental effect, as said council shall, by regulation, prescribe;[2][3]

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[1] The exception to this rule is where the state or federal government engages in a taking by eminent domain. There are limitations on when the power of eminent domain can be utilized but for the purposes of this memo I have not taken them into account as I have no knowledge of eminent domain being employed to facilitate the installation of a wireless telecommunications facility. It is not impossible, just highly improbable.

[2] Part 22 defines "Cellular service" as "Radio telecommunication services provided using a cellular system."

[3] Public Acts 1984, No. 84-249 added subsection 6 to the definitions of § 16-50i(a). The act as initially passed in the Senate gave the council exclusive jurisdiction to regulate telecommunications towers used for public cellular radio communication services. 27 S.Proc., Pt. 3, 1984 Sess., p. 842, remarks of Senator John B. Larson. In the House proceedings, Representative David Lavine first generally pointed out that the purpose of the legislation was to end ad hoc town-by-town regulation in favor of regulation by the council. He also introduced an amendment that changed the Senate language to the current 'used in a cellular system' terminology with a reference to the federal definition of a cellular system. 27 H.R.Proc., Pt. 9, 1984 Sess., pp. 3206-11, especially pp. 3209-10. The Senate later joined in the bill as amended in the House. Public Act 84-249 as enacted thus contains broader language than as initially proposed.

Thus, PUESA exclusively regulates the location of wireless towers including both macro towers and small cell poles operating 5G technology. Functionally, 5G is simply a different band of the radio spectrum on which data/voice/sound is transmitted by radio. This includes towers that are used for multiple purposes. In *Town of Westport v. Connecticut Siting Council*, 47 Conn. Supp. 382, 797 A.2d 6555 (2001), *affirmed*, 260 Conn. 266, 796 A.2d 510 (2002), it was held that the Council had exclusive jurisdiction over mixed use towers (towers used in part, but not exclusively, for cellular service).

The result is that in Connecticut, the environmental compatibility and location of 5G installations are exclusively regulated by the Connecticut Siting Council and PURA, the Public Utility Regulatory Authority which governs the use of utility poles[4] by telecommunications providers.

Recent Federal Case Law

This memorandum continues to discuss federal law on the topic of regulation by municipalities for the reason that to the extent there is an ability to create a moratorium or other regulatory challenge to 5G wireless infrastructure, it would arise under the federal regulatory system which exclusively governs radio telecommunications nationwide.

RF Exposure

"In the Telecommunications Act, Congress preempted all municipal regulation of radiofrequency emissions to the extent that such facilities comply with federal emissions standards. 47 U.S.C. § 332(c)(7)(B)(iv)." *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

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[4] A Commercial Mobile Radio Service (CMRS) provider must obtain authorization from the Public Utilities Regulatory Authority (Authority) to install telecommunications fixtures in the public right-of-way (ROW) in accordance with Conn. Gen. Stat. §§ 16-234(f) "No utility shall exercise any powers which may have been conferred upon it to change the location of, or to erect or place, wires, conductors, fixtures, structures or apparatus of any kind over, on or under any public road, public highway or public ground, without the consent of the adjoining proprietors or, if such company is unable to obtain such consent, without the approval of the Public Utilities Regulatory Authority, which shall be given only after a hearing upon notice to such proprietors. The authority may, if it finds that public convenience and necessity require, authorize the changing of the location of, or the erection or placing of, such wires, conductors, fixtures, structures or apparatus over, on or under such public road or highway or public ground" and 16-247h "The authority shall authorize any certified telecommunications provider to install, maintain, operate, manage or control poles, wires, conduits or other fixtures under or over any public highway or street for the provision of telecommunications service authorized by section 16-247c, if such installation, maintenance, operation, management or control is in the public interest..."

Access to Municipal Infrastructure

Recent 9th Circuit law holds that even with respect to municipal rights-of-way (e.g. town roads), the FCC's rules that municipal regulation of the municipal right-of-way is pre-empted by the Telecommunications Act of 1996. "The FCC's regulations in the Small Cell Order were premised on the agency's determination that municipalities, in controlling access to rights-of-way, are not acting as owners of the property; their actions are regulatory, not propriety, and therefore subject to preemption. Small Cell Order ¶ 96." *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

Existing Municipal Infrastructure

To the extent that Easton may already host wireless communications facilities under existing contracts, the Spectrum Act, 47 U.S.C. § 1455, federal successor legislation to the TCA, mandates approval (prohibits denial) of any qualified application for modification, including upgrades to 5G, of an existing facility.

The Telecommunications Act requires cities make a decision on applications within a reasonable period of time. See 47 U.S.C. § 332(c)(7)(B)(ii) ("A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time...." (emphasis added)). The Spectrum Act provides that the local government must grant all qualifying applications. 47 U.S.C. § 1455(a)(1) ("[A] State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station...." (emphasis added)).

Aesthetic Regulation

To the extent that a municipality has any regulatory authority at all that has not been pre-empted by federal law, it is aesthetic, but even then, the aesthetic regulation must be reasonable. The TCA expressly permits some difference in the treatment of different providers, so long as the treatment is reasonable. Indeed, we have previously recognized that Section 332(c)(7)(B)(i)(I) of the Telecommunications Act "explicitly contemplates that some discrimination among providers ... is allowed." *MetroPCS, Inc . v. City & Cty. of S.F.* , 400 F.3d 715, 727 (9th Cir. 2005) (internal quotation marks omitted), *abrogated on other grounds by*

T-Mobile S., LLC v. City of Roswell, 574 U.S. 293, 135 S.Ct. 808, 190 L.Ed.2d 679 (2015). We explained that to establish unreasonable discrimination, providers "must show that they have been treated differently from other providers whose facilities are similarly situated in terms of the structure, placement or cumulative impact as the facilities in question." *Id* . (citation and internal quotation marks omitted). We explained that this "similarly-situated" standard is derived from the text of Section 332, and "strike[s] an appropriate balance between Congress's twin goals of promoting robust competition and preserving local zoning authority." Id . at 728.

City of Portland v. United States, 969 F.3d 1020 (9th Cir. 2020)

ANSWER to QUESTION 2:

Short answer:

Unlikely. While there are a couple of legal theories under which a municipality might attempt to wedge open a loophole in the law, it would require surviving a federal court challenge by the industry. The probability of being successful is negligible.

Extended Answer:

In addition to the discussion in response to the answer to Question 1 above, a review of current law on strategies being attempted by municipal entities nationwide indicates that the FCC has responded to these attempts with orders interpreting the TCA and the Spectrum Act as prohibiting any meaningful attempt to regulate wireless infrastructure generally, including small cells which is the primary type of installation deploying 5G. The FCC largely been upheld by the federal courts, though in certain limited aspects, those related to aesthetic standards, the federal courts have ruled that the FCC overreached. *City of Portland v. United States, supra*.

Because Connecticut authority to regulate environmental compatibility of 5G installations in invested in the Siting Council, that would encompass aesthetic concerns since §16-50x gives the Siting Council exclusive jurisdiction over “the location and type of facilities” related to wireless communications. This is in

contrast to locations in New York, for example, where municipal entities regulate access to local rights of way under the residual authority granted to them by the TCA. *Extenet Systems, Inc. v. Village of Flower Hill*, Case No. 19-CV-5588-FB-VMS, (USDC, E.D. New York, July 29, 2022)(order granting summary judgment in favor of municipality denying permit for 5G small cell on grounds of aesthetics and that there was no gap in service that required filling). The discussion in *Extenet* is illuminating in that it held that the FCC's interpretation that densifying coverage with greater data throughput capacity, as opposed to simply being able to make a reliable telephone call, was not a reason to claim a gap in service[5]. The District Court upheld the municipalities denial of a permit for a small cell array. Unsurprisingly, Extenet has appealed that decision to the Second Circuit Court of Appeals the decisions of which govern Connecticut, Vermont and New York.

Another interesting aspect of the *Extenet* case is that the District Court declared the TCA ambiguous and that it did not cover the new technology (obliquely referring to 5G).[6]

The lesson here is that under *Extenet v. Village of Flower Hill*, Easton might be able to challenge a Siting Council decision on the same grounds if the carrier did not demonstrate a gap in coverage for calls and not just a need for data capacity[7]. Connecticut state law does not indicate that this strategy would have a reasonable chance of success. The United States District Court in Connecticut has shown a slightly greater inclination to challenge wireless industry positions, but the appeal in *Extenet* will be binding.

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[5] The Connecticut Siting Council, by contrast, has always interpreted the adding of capacity alone is sufficient for a determination of public need.

[6] "Improved capacity and speed are desirable (and, no doubt, profitable) goals in the age of smartphones, but they are not protected by the Act. See *Willoth*, 176 F.3d at 643 ("We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines."). The circuit court may wish to reconsider its definition in light of new technology, but the Court is not in a position to ignore its binding pronouncement. *Accord, Crown Castle NG East LLC v. Town of Hempstead*, 2018 WL 6605857, at *9 (E.D.N.Y. Dec. 17, 2018) ("A gap in 4G coverage does not establish that the target area is underserved by voice cellular telephone service."); *Clear Wireless LLC v. Bldg. Dep't of Vill. of Lynbrook*, 2012 WL 826749, at *9 (E.D.N.Y. Mar. 8, 2012) ("[I]t is not up to the FCC to construe the [Act] to say something it does not say, nor up to the Court to find broadband communication encompassed by the law."

[7] In this author's experience, the carriers claim that they need both coverage and capacity, but not always, giving rise to a possible avenue of challenge by Easton to the siting of a 5G facility or array.

There are other cases which are based on *Willoth*[8], which allow a governing entity (in Connecticut the Siting Council) to reject a proposed facility siting if there is no existing gap in ability of users to reach an interconnection with the national telephone network. For example, in *Crown Castle NG E. LLC v. Town of Hempstead*, CV 17-3148 (GRB), 13 (E.D.N.Y. Dec. 17, 2018) a District Court noted:

> [O]nce an area is sufficiently serviced by a wireless service provider, the right to deny applications becomes broader: State and local governments may deny subsequent applications without thereby violating subsection B(i)(II). The right to deny applications will still be tempered by subsection B(i)(I), which prohibits unreasonable discrimination. However, it is not unreasonably discriminatory to deny a subsequent application for a cell site that is substantially more intrusive than existing cell sites by virtue of its structure, placement or cumulative impact. We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines.

Id.

If Easton wanted to precipitate a challenge on this ground, because of the exclusive jurisdiction of the Siting Council, it would have to do so on a case-by-case basis. Easton would have the choice of passing an ordinance prohibiting installation of any 5G service in any area in Easton where adequate access to the national telephone service network is provided through existing service. The ordinance would be considered[9], but almost certainly ignored the Siting Council. Easton, could argue to the Siting Council that there was no gap in service in the area of Easton where an application was seeking to implement 5G service, but was doing so in an area covered by 3G or 4G service. Thus, under the TCA there is no public need. If it were unsuccessful before the Siting Council, Easton would initially take its appeal to the Connecticut Superior Court under Conn.Gen.Stat.

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[8] *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 641 (2d Cir. 1999).

[9] The Siting Council has the duty to consider state and local laws other than PUESA, but "...the council shall give such consideration to other state laws and municipal regulations as it shall deem appropriate" which the Connecticut Supreme Court has interpreted to mean they can wholly ignore them. *FairWindCT v. CT Siting Council*, 313 Conn. 669 (2014).

§4-183 and then to the Appellate Court/Supreme Court and then United States Supreme Court[10].

The prospects of precipitating this challenging successfully would be daunting in that the existing federal and state law provides a narrow gauntlet and the cost at any stage beyond the state Superior Court or the federal District Court would be significant for a municipality. Decreasing the likelihood of success would be that a carrier would likely claim in its application proceeding before the Siting Council that there exists at least a partial gap in ability to connect to the telephone network (which in Easton is not likely to be a difficult case to make) thereby establishing the carrier's rights to the protection of the TCA.

A Word About Health Impacts of 5G

There has been an ongoing debate among activists and various health officials internationally about the potential for health-related impacts arising out of various pathways for exposure to non-ionizing radiation emitted by cellular installations and wireless infrastructure of all sorts. This memorandum does not attempt to summarize or take a position on the issue, but instead will note that legally, health related impacts are pre-empted by federal law and the exposure regulations developed many years ago when different technologies prevailed. This continues to be the case as expressed in a recent case arising out of the D.C Circuit Court of Appeals. *Environmental Health Trust (EHT), et al. v. FCC*, 20-1025, (Aug 13, 2021).

In the *EHT* case, the DC Circuit granted a petition by an environmental health organization ordering the FCC to justify why it chose not to update its wireless exposure limits last set in 1996. The Court found that the FCC relied upon an FDA finding regarding wireless exposure limits that had no foundation in science noting "One agency's unexplained adoption of an unreasoned analysis just compounds rather than vitiates the analytical void. Said another way, two wrongs do not make a right". With that, the DC Circuit stated that the law remains as it is currently until further agency action is taken (or not without justification) at

[10] As an alternative track, a defending carrier would have the option of removing the case to the USDC for Connecticut to ensure a path of review to the Second Circuit.

which time the courts may review that action and gave the FCC the following order:

> It must, in particular, (i) provide a reasoned explanation for its decision to retain its testing procedures for determining whether cell phones and other portable electronic devices comply with its guidelines, (ii) address the impacts of RF radiation on children, the health implications of long-term exposure to RF radiation, the ubiquity of wireless devices, and other technological developments that have occurred since the Commission last updated its guidelines, and (iii) address the impacts of RF radiation on the environment. *To be clear, we take no position in the scientific debate regarding the health and environmental effects of RF radiation-we merely conclude that the Commission's cursory analysis of material record evidence was insufficient* as a matter of law.
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> Id.

While the court's conclusion was certainly a win for the forces seeking to hold the industry and government accountable for potential health impacts, the law remains that if a wireless facility, including a 5G facility, is in compliance with the FCC regulatory exposure limits, it is legal and cannot be questioned or denied a permit by State of local authorities.