Wireless Telecommunications
An Opportunity for Civic Excellence
July 2011

Introduction

The Pasadena City Council will consider an appeal of a wireless telecommunication antenna installation planned for Grand Avenue and California Boulevard in Pasadena, California on July 11, 2011. The Pasadena Department of Public Works failed to provide a photographic image of the proposed antenna until the last day of the public comment period and provided instead a "sample" photo of a similar-but-different antenna. West Pasadena residents and pedestrians using Grand Avenue for recreational purposes were therefore unable to provide meaningful feedback to the City.

Pasadena's Municipal Code, including parts of Titles 12 (Streets and Sidewalks), 17 (Zoning) and 18 (Cable, Video and Telecommunication Service Providers), provides the regulatory framework for wireless telecommunication facilities in Pasadena.

Wireless Telecommunication Comes of Age

We all want cell phones with clear reception wherever we go. In fact we have become so accustomed to staying in touch through cell phones that land lines may become obsolete. In 2009, 285.6 million wireless subscribers generated $152.6 billion in revenue nationally. Nearly one quarter of United States households used wireless service only.[1]

About 180 facilities-based wireless providers operate in the United States. The four largest, in order of subscribers, are Verizon (102 million), AT&T (97 million), Sprint (51 million), and T-Mobile (34 million).[2] AT&T's planned purchase of T-Mobile USA for $39 billion from Deutsche Telecom would make AT&T the largest wireless carrier in the nation with a 43 percent market share.[3]

Unfortunately, there is a *downside* to the benefits of cell phone use—the unattractive cell phone towers and wireless antennas used to activate wireless telecommunications placed in local neighborhoods. Of T-Mobile's 9,447 cell tower sites nationally, 2,768 (29 percent) are in California and of these 1,995 are located in Southern California.[4] Our local neighborhoods have essentially become a "distribution channel" for the telecommunications industry.[5]

Wireless providers' tactics to place cell phone towers and wireless antennas on public right-of-ways in local neighborhoods is causing a ruckus throughout California. More than 20 Southern California neighborhood groups and organizations are in various

[1] Source: Telecommunications Industry Overview, www.plunkettresearch.com/telecommunications, 2011
[2] http://en.wikipedia.org/wiki/List_of_United_States_wireless_communications_service_providers, 2011
[3] http://en.wikipedia.org/wiki/Merger_of_AT&T_and_T-Mobile, 2011
[4] http://t-mobiletowers.com/TowerSearch.aspx, 2011
[5] Traditional marketing distribution channels involve a set of institutions that perform the functions required to move a product from production to consumption

stages of opposing the placement of wireless telecommunication facilities in the communities of: Agoura Hills; Beverly Hills; Burbank; Calabasas; Glendale; Huntington Beach; Irvine (Turtle Rock); Lake Balboa; Los Angeles City; Mission Viejo; Monrovia; Northridge; Oceanside; Pacific Palisades; Palos Verdes; Santa Barbara; San Pedro; Sherman Oaks; Toluca Lake; Tustin; View Park-Windsor Hills; Westchester; and West Covina. Attachment A provides information on the City of Monrovia's intent to adopt a comprehensive ordinance that protects public and private property.

In Northern California the situation is similar. Communities, neighborhood groups and organizations opposing wireless telecommunication facilities include: Camp Meeker; El Cerrito; El Granada; Los Gatos; Menlo Park; Millbrae; Mountain View; Oakland; Pacifica; Palo Alto; Portola Valley; Richmond; San Francisco; San Rafael; Santa Clara; Sunnyvale; and Walnut Creek.[6] Attachment B provides background on one Northern California community (El Cerrito) that has placed a moratorium on cell phone tower installation.

With the number of cell phone towers projected to grow significantly over the next decade, the beneficiary of these community squabbles will likely be the law firms that represent the local municipalities. In fact, a recently announced acquisition of the telecommunication expert, Miller & Van Eaton, PLLC by law firm Best Best & Krieger, LLP is seen by some as a shift in the nature of telecommunications practice by municipal law-focused firms from regulations and transactions to a litigation-oriented approach. This shift is being fueled in part by decisions by the 9th United States Circuit Court of Appeals to expand local zoning control of the aesthetic impacts of cellular sites.[7] For additional information, see Attachment C, *Court Upholds Cities' Ability to Regulate Communication Facilities on Aesthetic Grounds*.

Attachment D, Pennsylvania Legislator's 2006 Deskbook, *Regulation of Wireless Telecommunication Facilities*, succinctly outlines the limitations placed on state and local government by the Telecommunications Act of 1996, which amends Title 47 of the United States Code. Section 332, pertaining to Federal Communications Commission (FCC) mobile services regulations [47 USC Section 332(c)(7)(iv)], prohibits state and local agencies from basing tower/antenna site and construction permits without regard for harmful environmental effects of radiofrequency (RF) electromagnetic radiation emissions. FCC safety standards are designed to protect humans against the thermal effects from high levels of RF radiation. A wireless provider that asserts a municipality has failed to follow the limitations and conditions set by FCC regulation may litigate in a state or federal court, or alternatively, may petition the FCC.[8] In fact, Pasadena was sued

[6] Sources: California Communities Fight (and Win), www.stopthesteeple.com , 2011 and Other Links: Other Communities Saying "No," www.nocelltowerinourneighborhood.com, 2011

[7] "Municipal Firms Beef Up Telecom Experience as Cell Towers Proliferate," Los Angeles Daily Journal, Law Firm Business, Wednesday, June 8, 2011, p. 6

[8] "Regulation of Wireless Telecommunications Facilities," Pennsylvania Legislator's Deskbook, 3rd Edition, 2006 issued by the Pennsylvania General Assembly and Local Government Commission

by T-Mobile's then parent entity, Omnipoint, in 2007 for alleged failure to comply with Federal Communications Commission regulation.

Unfortunately, the adverse biological effect of long term exposure from multiple towers or the impact on children or vulnerable elders is unknown. Recently, mounting concern about the possibility of negative health effects from exposure to electromagnetic fields has led to further study. In May 2011, the World Health Organization/International Agency for Research on Cancer (IARC) classified radiofrequency electromagnetic fields as "possibly carcinogenic to humans" based on an increased risk for a malignant type of brain cancer associated with wireless phone use.[9]

The Telecommunications Act of 1996 preserves limited government authority for the placement and esthetics of wireless telecommunication towers. Local governments are taking a multi-faceted approach to exercising the values that are delineated in municipal plans and local zoning ordinances, including:

- Requiring **safety** set-backs from tower/antenna sites to protect against falling equipment and tower collapse.
- **Preserving** a neighborhood's character and protecting against property devaluation.
- **Taxing** tower/antennas as real estate.

Appeal Proposal

The appeal requests that the Pasadena City Council direct the Pasadena Department of Public Works to:

1. Post an accurate picture of the antenna proposed for Grand Avenue and California Boulevard, including *current* landscaping, at the proposed site and/or on-line at the City of Pasadena web site for 30 days to allow for resident and pedestrian involvement and response to the project.
2. Provide an on-line report that succinctly substantiates the wireless coverage gap, the rationale for the location selection, any alternatives considered, a recommended method of camouflage, and proposed precautionary distance standards.
3. Evaluate in a report to the City Council, the feasibility of the installation of a street light and antenna, or other new, well camouflaged pole with antenna, on California Boulevard, East of Grand Avenue and West of Orange Grove Boulevard.

[9] "Carcinogenicity of Radiofrequency Electromagnetic Fields," The Lancet Oncology, on the web at www.thelancet.com/journals/lanonc/article/PIIS1470-2045(11)70147-4/fulltext,, published on-line June 22, 2011

Wireless Telecommunications: An Opportunity for Civic Excellence

The proposal supports Pasadena's civic mission and principles by honoring Pasadena's heritage, protecting pedestrians, generating resources for municipal responsibilities and promoting community participation.

Pasadena's Mission and Principles

Pasadena's mission statement provides direction for civic activities: *The City of Pasadena is dedicated to the delivering exemplary municipal services, responsive to our entire community and consistent with our history, culture and unique character*. The Pasadena General Plan also begins with seven guiding principles. Five of the principles are particularly relevant to the appeal.

Guiding Principle: *Changes will be harmonized to* ***preserve*** *Pasadena's historic character and environment.*

Grand Avenue, a lovely, historic Pasadena street is located in the Lower Arroyo Seco District and listed in the National Register of Historic Places (National Register designations are processed through the California Office of Historic Preservation). The Arroyo Seco shelters birds, trees and other wildlife and a small school is nestled just 0.2 miles from the Grand Avenue and California Boulevard intersection. During the 1970's two concrete street lights on the northern corners of the intersection were destroyed in traffic accidents and never replaced. Their absence reduced illumination and diminished the historic design of Grand Avenue. Moving the antenna to California Boulevard atop a street light will preserve Grand Avenue's character and protect against property devaluation.

Guiding Principles: *Pasadena will be promoted as a* ***healthy family*** *community*; and *Pasadena will be a city where people can* ***circulate without cars****.*

Hundreds of pedestrians walking along Grand each week pass within one foot of the wooden pole proposed for the antenna base. The pole is aged and unsuitable to support a transponder array. Placing an antenna atop this pole will likely be a recipe for an accident in the event of an earthquake or other natural disaster. Pedestrians could face injury from a falling pole, antenna and debris. A sturdy street light instead of a pole provides a safe antenna base and protects pedestrians. Attachment E provides the signatures gathered from pedestrians and bicyclists along Grand Avenue who support the appeal.

Guiding Principle: ***Economic vitality*** *will be promoted to provide jobs, services, revenues and opportunities.*

Pasadena's approval of the antenna included an annual "license of fee" of $8,000. Following approval of the antenna, the license fee was eliminated on the grounds that the pole proposed for the antenna base is not city-owned property. License fees offer important resources during a period of financial struggle for the City. One antenna

generating $8,000 a year would generate $160,000 over 20 years. City plans to install West Pasadena telephone poles underground within 10 years means the antenna would likely need to be relocated to a City-owned street light at that time—in the meantime, the City will forfeit an opportunity for revenue from the antenna.

Guiding Principle: ***Community participation*** *will be a permanent part of achieving a greater city.*

The City of Pasadena should encourage community participation in telecommunications decisions by: offering resident and pedestrian access to accurate information; and involving residents early-on in the decision process to create buy-in and valuable feedback. Full disclosure of the City's relationship with the antenna provider—including any previous litigation—is a first step. Understanding how other local communities have addressed antenna installation to protect public interest is the next step.

The City should assign oversight of wireless telecommunication facility decisions related to cell towers and antennas to one of the City Council's Standing Committees. For example, both the Economic Development and Technology Committee and the Municipal Services Committee offer an appropriate venue for wireless telecommunication oversight and provide a forum for resident input. Finally, Pasadena may want to consider hosting California city officials, regulators, industry experts and other stakeholders in a conference or webinar to explore the implication of wireless facilities roll-out in local communities throughout the State.

Conclusion

The City of Pasadena has an outstanding opportunity to become a model city for telecommunications decisions related to antenna installation by rigorously addressing the provisions of federal law that allow flexibility in imposing antenna location and aesthetic standards.

As an alternative to the antenna proposed for Grand Avenue and California Boulevard, the Pasadena City Council should direct the Pasadena Department of Public Works to: 1) post an accurate picture of the proposed antenna for 30 days to allow for resident and pedestrian involvement and response to the project; 2) provide an on-line report that succinctly substantiates the wireless coverage gap and rationale for antenna location selection; 3) evaluate in a report to the City Council, the feasibility of installing a street light and antenna, or other new, well camouflaged City-owned pole with antenna, on California Boulevard, East of Grand Avenue and on, or West of, Orange Grove Boulevard.

This appeal is worthy of consideration and supports Pasadena's civic mission and principles by honoring Pasadena's heritage, protecting pedestrians, generating resources for municipal responsibilities and promoting community participation.

at&t

Attachment A

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MAY - 2 2011

Office of the City Clerk
City of Monrovia

Delivered VIA: Hand Delivery

May 2, 2011

Mayor Mary Ann Lutz
City of Monrovia
415 S. Ivy Ave.,
Monrovia, CA 91016

Subject: Proposed Ordinance 2011-04

Dear Mayor Lutz,

The City of Monrovia (the "City") is considering adoption of Ordinance 2011-04, concerning the installation and operation of wireless facilities in the city. This proposed ordinance is intended to cover wireless facilities placed both on private and public property in the City, as well as in the City's Public Rights-of Way. AT&T recognizes that the City, in considering the Proposed Ordinance, is attempting to address some legitimate issues and concerns expressed by some residents. There are aspects of the Proposed Ordinance that merit comment and reconsideration, however.

AT&T appreciates this opportunity to provide comments to the city on its proposed ordinance. AT&T has been providing communications service in Southern California for over a hundred years and its affiliate has been providing wireless telecommunications services since the late 1980's. AT&T is eager to work with the City in its efforts to address concerns about placement of wireless facilities within the City.

AT&T is most concerned about aspects of the proposal that would directly impact the ability of the wireless telecommunications industry to provide service to residents, businesses and visitors in your city, who rely on cellphones and other wireless devices in their daily lives. As you are no doubt aware, the Proposed Ordinance would affect not only cellphones, but wireless data of all kinds (including audio signals, video signals, computer files, e-mail and data of all kinds that now use wireless transmission) are affected.

APPLICABLE LAW

The federal Telecommunications Act of 1996, 47 U.S.C.A. 151 et seq. (1996) (the "Telecom Act") regulates the deployment of wireless telecommunication service. Section 332(c)(3) gives the FCC certain authority that is exclusive and which preempts conflicting acts by state or local governments. At Section 332(c)(3)(7),the Act, while recognizing that local zoning authority is preserved, requires that local regulation not "unreasonably discriminate among providers of functionally equivalent services" and not "prohibit or have the effect of prohibiting the provision of personal wireless services.

California state law also impacts placement of communication facilities within the public rights-of-way. As you are aware, wireless and wireline carriers, as "telephone corporations," have access rights to the public rights-of-way under Section 7901 of the California Public Utility Code. A telephone corporation enjoys a vested right under Section 7901 to construct "telephone lines" and "necessary fixtures" "along and upon any public road." California courts have long upheld this vested right to enter and use the public right-of-way. In our view, the City possesses only a limited right to curtail the rights of telephone corporations under Section 7901. Section 7901.1(a) grants to the City only the ability to exercise "reasonable control as to the time, place and manner in which roads . . . are accessed." Section 7901.1(b) provides that any municipal regulations "at a minimum, be applied to all entities in an equivalent manner," thereby imposing a duty on the City to regulate in a non-discriminatory manner.

COMMENTS

In AT&T's view, some of the provisions of the Proposed Ordinance might constitute a prohibition of services under the Federal Telecom Act. A number of the special requirements outlined in the Proposed Ordinance relating to wireless facilities placed in the public rights-of-way also appear to go well beyond the regulation permitted under Section 7901 of the Public Utility Code. We identify some of the problematic provisions in more detail below.

While the proposed ordinance uses the terminology "Preferred Locations" and "Discouraged Locations," Section 17.46.040 B appears to prohibit placement of facilities in a number of locations within the city. "Wireless telecommunications facilities and wireless telecommunications collocation facilities shall not locate in any of the following districts, zones, areas or locations ("Discouraged Locations") ..." Section 17.46.050.E,2, however, states that a wireless facility located in a Discouraged Location shall require a conditional use permit and approval of an exception. These two provisions appear to be inconsistent. AT&T believes that 17.46.040 B should be modified to more clearly express that these listing of locations are statements of preferences. With that in mind, it would be helpful if the listings were in order of the City's preference for locations of facilities.

Section 17.46.060 B.7 requires the submission of a five year master plan of anticipated future installations. The evolving nature of technology and the rapidly growing demand for wireless services makes any such projections necessarily speculative and without predictive value. AT&T suggests that the requirement of such a master plan be eliminated or the specified time period be shortened to no more than two years.

Section 17.46.060 C requires that an applicant pay an unspecified amount for a third party expert to be retained by the city. There should be a cap placed on the amounts paid under this section; otherwise the third party would have the incentive to run up large bills to be borne by the applicant. Is this requirement imposed on other land use applicants?

Section 17.46.070 D requires that "antennas be situated as close to the ground as possible to reduce visual impact without compromising their function." While AT&T understands the goal of this requirement, it doesn't take into account all design considerations. AT&T suggests that

the antennas be required to "be situated as to minimize visual impact without compromising their function."

Section 17.46.070 E. Building-mounted and roof-mounted facilities are required "to be designed and constructed to be fully concealed or screened in a manner compatible with the existing architecture ..." The further requirement that the screening not increase the bulk of the structure nor alter the character of the structure is superfluous and should be stricken.

Section 17.46.070 F.1 The requirement that towers be located as close as possible to existing utilities needs to be specifically conditioned on safety and operational concerns. Electrical and other utilities have very specific facility placement guidelines that will need to be followed.

Section 17.46.070.F.2. The height restrictions in this section will mean that more facilities will be required and that fewer facilities will support collocation.

Section 17.46.070.M. The requirement of updating all equipment at the time of any modification at a site is burdensome, discriminatory and imposes requirements that aren't supported by any study or related in any way to the proposed modification. Simple modifications that might be desirable from an efficiency or utility perspective might be delayed if they could trigger expensive and unrelated upgrades. This provision should be stricken.

Section 17.046.080.D. The requirements in this section are too detailed for an ordinance. Technology evolves and these requirements should not require City Council approval for any change. Comments to 17.046.070 F.1 apply to this section as well.

Section 17.046.080. O. As with Section 17.46.070.M, the requirement of updating all equipment at the time of any modification at a site is burdensome, discriminatory and imposes requirements that aren't supported by any study or related in any way to the proposed modification. Simple modifications that might be desirable from an efficiency or utility perspective might be delayed if they could trigger expensive and unrelated upgrades. This provision should be stricken.

Section 17.46.090 A 8. Compliance with RF emissions requirements is exclusively in the jurisdiction of the Federal Communications Commission. The City can request from carriers assurances that the facilities are operated in accordance with FCC requirements, but cannot mandate third party testing at the carrier's expense. This requirement should be removed.

Section 17.46.090 A 11. The indemnification obligation imposes a requirement on wireless facilities that is not imposed on other types of land use and should be stricken as discriminatory.

Section 17.46.100. This section imposes a number of requirements on wireless facilities that are not imposed on other types of use of Public Rights of Way and should be stricken as discriminatory and contrary to the terms of Section 7901 of the Public Utility Code.

Section 17.46.190. AT&T objects to the 10 year limit on the term of permits for wireless facilities as discriminatory in that it is not imposed on other land uses.

at&t

This letter summarizes major concerns of AT&T in regard to the Proposed Ordinance. We hope you find these comments helpful. We welcome the opportunity to work with city staff to discuss our legal and practical concerns and to develop solutions.

Sincerely,

Michael van Eckhardt
General Attorney

CC: Scott Ochoa, City Manager
Alice Atkins, City Clerk
Barbara Lynch, Senior City Planner

EC: Rich Roche – AT&T
Lori Ortenstone – AT&T
Mike Roden – AT&T
Mark Rivera – AT&T

Attachment B

El Cerrito keeps cell towers on hold

Decision gives council another year to research alternatives

By Dale F. Mead
Correspondent

El Cerrito has extended its moratorium on wireless antenna installations another year, continuing to block an application by T-Mobile USA to put up a cell phone tower in the middle of a Boy Scout camp.

The City Council approved the extension at its May 2 meeting. The one-year moratorium was approved last year so the city could study alternatives to telecommunications towers, which have stirred opposition as they proliferate to meet skyrocketing demand.

Mt. Diablo Silverado Council of Boy Scouts of America owns Camp Herms at 1100 James Place. The council and T-Mobile contracted for the company to install the 77-foot transmission tower, camouflaged as a tree in the redwood-shrouded camp, and pay $2,200 per month to the Scouts.

The installation was subject to El Cerrito's approval of a conditional use permit. Residents and scout leaders calling themselves Arlington Park Against Cell Towers quickly organized, generating hundreds of names on petitions to the council and the city.

The furor forced the company in March 2010 to put a hold on its permit pending before the Planning Commission. Then the city imposed a 45-day "urgency" moratorium (effective immediately) on all such telecommunications proposals May 17 and extended it to one year June 10.

This month's added extension to two years is the maximum that state law allows for such urgency ordinances.

The staff backed up its request for more study time with a list of impacts that would result in the absence of new regulations encouraging use of other technologies instead of proliferating towers.

They included visual blight, pedestrian and traffic safety hazards from location of wireless transmission equipment, operational conflicts with nearby facilities, and deterioration of the quality of life in neighborhoods.

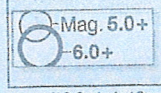
Ending the moratorium now could cause the city to "miss opportunities to accelerate the implementation of new ... technologies" that "might improve service for customers (and) improve business for providers," Planning Manager Jennifer Carman said.

One potential technology is a fiber-fed distributed antenna system of smaller, lower-power antennas that can be installed on more numerous utility poles instead of large towers, Carman said. That system is being used in Huntington Beach.

"Once we're clear on what we're thinking about doing," she added, "we're talking about reaching out to the community," to find out "what is acceptable to the community. If you have to exchange a taller telephone pole for smaller antenna, would the community accept that?"

Residents on Taft Avenue in East Richmond Heights currently are fighting Contra Costa County's approval of a 12-foot taller PG&E utility pole to house T-Mobile antennas.

greater.



Source: U.S. Geological Survey

GOVERNMENT MEETIN

TUESDAY

■ West County Wastew
Plans and Programs Co
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Attachment C

BEST BEST & KRIEGER LLP

Court Upholds Cities' Ability to Regulate Communications Facilities on Aesthetic Grounds

Legal Alert

OCTOBER 30, 2009

Related Practice

Telecommunications
Municipal & Redevelopment Law

In the recently decided *Sprint PCS Assets LLC v. City of Palos Verdes Estates* (Case No. 05-56106; 2009 U.S. App. LEXIS 22514), the Ninth Circuit Court of Appeals held that cities can regulate, on aesthetic grounds, communications facilities locating within a public right-of-way. The decision casts important light on the scope of cities' interests in regulating the aesthetics of city streets under the federal Telecommunications Act of 1996 (TCA). It also interprets narrowly the provisions of the TCA requiring that cities consider the adequacy of a carrier's coverage grid before denying facility applications.

The City of Palos Verdes Estates enacted an ordinance allowing the city to deny permits for wireless communications facilities based on "adverse aesthetic impacts arising from the proposed time, place and manner of use of the public property." The city denied on aesthetic grounds two applications filed by Sprint. The city's expressed planning concerns included the use of streets as part of the city's historic fabric, park borders and contributors to residential ambiance. These concerns were "important social, expressive, and aesthetic functions" granted to cities under the California Constitution and recognized as exempt from federal authority under the TCA. Sprint sued the city, contending that the denial violated both California law and the TCA. Although the trial court granted Sprint's motion for summary judgment, the Ninth Circuit reversed the decision and upheld the city's denial of permits on aesthetic grounds.

The Ninth Circuit found that the city's decision was consistent with the TCA's reservation of local land use control and that the city's decision was based on "substantial evidence contained in [the] written record." The court also found that Sprint's rights to access the right-of-way pursuant to the California Public Utilities Code did not preempt the city's aesthetic considerations in denying

permits.

Sprint tried to characterize the city's aesthetic regulations as a virtual ban on facilities, or a "significant gap," as prohibited under the TCA. The Court of Appeals disagreed with Sprint, noting that the record indicated that Sprint's radio frequency propagation maps were insufficient to establish a "significant gap" in coverage.

This case represents a clear recognition of California cities' ability to regulate communications facilities under the TCA on aesthetic grounds. It also provides useful guidance regarding how much evidence a telephone company must provide under federal law to support its claims that it has a gap in coverage that a city must permit to be filled. It is important to note that all local regulations regarding communications facilities must still be supported by substantial evidence and may not effectively prohibit the provision of wireless service.

Regulation of Wireless Telecommunications Facilities

Regulation of wireless telecommunications facilities, including towers and antennae, is to some extent governed by the federal Telecommunications Act of 1996 ("TCA" or the "Act"), which amends Title 47 of the United States Code (U.S.C.), Section 332, pertaining to mobile services and, with limitations, may be controlled by local zoning, if it exists. In essence, the Act provides certain exceptions to the authority of a state or local government, or an instrumentality thereof, to regulate wireless telecommunications facilities. However, aside from specified exceptions, nothing in the Act "shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."[1] Case law provides that a wireless telecommunications facility is subject to valid local zoning regulations and, in certain cases, may constitute a subdivision or land development subject to other appropriate regulations.[2]

Five limitations on state or local authority as cited in the Act, with commentary on each, are as follows:

1. **The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not unreasonably discriminate among providers of functionally equivalent services . . . . 47 U.S.C. Section 332(c)(7)(B)(i)(I).**

The TCA forbids discrimination between functionally equivalent providers of wireless telecommunications, even if a decision to deny an application was founded on substantial evidence and did not result in prohibiting wireless services.[3] In order to prove discrimination, the provider must make two primary showings. First, it must show that it was discriminated against by the local government agency. Second, it must show that such discrimination was unreasonable.[4] To satisfy the first prong of this test, the plaintiff

[1] 47 U.S.C. § 332(c)(7)(A).

[2] *See Marshall Tp. Bd. of Supervisors v. Marshall Tp. Zoning Hearing Board,* 717 A.2d 1 (Pa. Cmwlth. 1998); *Tu-Way Tower Co. v. Zoning Hearing Board (Tp. of Salisbury),* 688 A.2d 744 (Pa. Cmwlth. 1997) (wireless telecommunications facilities and augmentations thereof did not constitute "subdivisions" or "land development," but were subject to zoning regulation). *But cf. White v. Tp. of Upper St. Clair,* 799 A.2d 188 (Pa. Cmwlth. 2002) (lease of property to wireless telecommunications provider to construct facility constituted a subdivision). *See also Upper Southampton Tp. v. Upper Southampton Tp. Zoning Hearing Board,* 885 A.2d 85 (Pa. Cmwlth. 2005) (land use development approval was required for construction of billboards), *appeal granted,* 895 A.2d 1265 (Pa. Apr. 4, 2006).

[3] *Schiazza v. Zoning Hearing Bd., Fairview Tp., York County, Pennsylvania,* 168 F. Supp. 2d 361 (M.D. Pa. 2001).

[4] *APT Pittsburgh Ltd. Partnership v. Lower Yoder Tp.,* 111 F. Supp. 2d 664, 674 (W.D. Pa. 2000).

must demonstrate that providers of "functionally equivalent" services were treated differently than it was treated.[5] Even if this is the case, the plaintiff must also show that the discrimination was unreasonable. It is unreasonable discrimination if the plaintiff can demonstrate that the proposed wireless service facility site is *not* substantially more intrusive than existing sites "by virtue of its structure, placement, or cumulative impact."[6]

2. The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof shall not prohibit or have the effect of prohibiting the provision of personal wireless services. 47 U.S.C. Section 332(c)(7)(B)(i)(II).

In order for an unsuccessful provider applicant to show a violation of subsection 332(c)(7)(B)(i)(II), it must demonstrate two things:

- First, the provider must show that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network. In this context, the relevant gap, if any, is a gap in the service available to remote users. Not all gaps in a particular provider's service will involve a gap in the service available to remote users. The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider.[7, 8]
- Second, the provider applicant must also show that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve. This will require a showing that a good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.[9]

Based on this interpretation of Section 332(c)(7)(B)(i)(II), it is not essential for a provider whose application has been turned down "to show an express ban or moratorium, a consistent pattern of denials, or evidence of express hostility to personal wireless facilities."[10] However, it is essential for the provider to demonstrate *more than* it was not granted "an opportunity to fill a gap in its service system."[11]

[5] *APT Pittsburgh Ltd. Partnership v. Lower Yoder Tp.,* 111 F. Supp. 2d at 674.

[6] *Schiazza v. Zoning Hearing Bd., Fairview Tp., York County, Pennsylvania,*168 F. Supp. 2d at 371 (citations omitted).

[7] *APT Pittsburgh Ltd. Partnership v. Penn Tp.,* 196 F.3d 469, 480 (3d Cir. 1999).

[8] "[E]ven if the area to be served is already served by another provider, the TCA may invalidate the denial of a variance if it has the effect of unreasonably discriminating between providers. Securing relief under this provision of the statute will require a showing that the other provider is similarly situated, i.e., that the 'structure, placement or cumulative impact' of the existing facilities makes them as or more intrusive than the proposed facility." 196 F.3d at 480 note 8.

[9] 196 F.3d at 480.

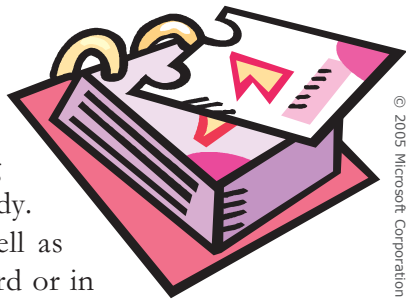
[10] *Id.*

[11] *Id.*

3. 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 after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request. 47 U.S.C. Section 332(c)(7)(B)(ii).

"Litigation under section 332(c)(7)(B)(ii) has arisen generally under two types of circumstances. The first is when local governmental entities have initiated moratoria on the granting of PWS [personal wireless service] facility siting permits or the processing of applications altogether . . . . The other area in which section 332(c)(7)(B)(ii) litigation has arisen is when the local entity simply takes too much time to grant or to deny the PWS provider's application."[12]

With respect to moratoria, the Pennsylvania Supreme Court, in *Naylor v. Township of Hellam,* stated that "the legislature has not acted to authorize municipalities to meet their planning objectives through the suspension, temporary or otherwise, of the process for reviewing land use proposals."[13] The court also indicated that the ability of municipalities to initiate moratoria is neither an expressly granted power nor an extension of, or incidental to, any power to regulate land use or development in Pennsylvania.[14] Therefore, until the Commonwealth enacts legislation that authorizes moratoria, this potential circumstance is most likely a nonissue.



On the possible time concern, Act 2 of 2002 and Act 43 of 2002, both of which amend the Pennsylvania Municipalities Planning Code (MPC),[15] have tightened and made more equitable hearing requirements for variance and special exception applications before the zoning hearing board and conditional use applications before the governing body. The MPC now specifies that failure to conduct or complete, as well as commence, a hearing in a proceeding before the zoning hearing board or in a conditional use request before the governing body in compliance with specified hearing procedures results in a deemed approval. With these amendments, time is most likely a nonissue as well.

[12] Matthew N. McClure, Comment, *Working Through The Static: Is There Anything Left to Local Control in the Siting of Cellular and PCS Towers After the Telecommunications Act of 1996?* 44 Vill. L. Rev. 781 (1999) (citations omitted).

[13] *Naylor v. Township of Hellam,* 773 A.2d 770 (Pa. 2001).

[14] *Id.*

[15] 53 P.S. § 10101 et seq. ("Pennsylvania Municipalities Planning Code").

4. **Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record. 47 U.S.C. Section 332(c)(7)(B)(iii).**

This section states that "any decision to deny a request…shall be in writing." It is also evident that any written negative decision shall be "supported by substantial evidence contained in a written record." However, this begs two questions: (1) What constitutes a "decision…in writing?" and (2) What constitutes "substantial evidence?"

"Decision . . . in Writing"

The MPC requires a "decision . . . in writing" for most subdivision and land development and zoning proceedings, including special exceptions, variances, and conditional uses. In the case of a proceeding before the zoning hearing board for a special exception or a variance, or before the governing body for a conditional use request, the zoning hearing board, the hearing officer, or the governing body, as the case may be,

> shall render a written decision or, when no decision is called for, make written findings on the application…. Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefor. Conclusions based on any provisions of this act [the MPC] or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found.[16]

Requiring a more comprehensive written decision, which includes findings of fact and conclusions of law tied to the record, would facilitate court review if a decision is appealed.[17]

"Substantial Evidence"

"The [United States] Supreme Court explained, in the context of the deference to be afforded to NLRB [National Labor Relations Board] findings, that substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[18] This standard is applied when determining if decisions under the TCA are supported by substantial evidence.[19]

A court in its review under the substantial evidence standard is not "to weigh the evidence contained in that record or substitute its own conclusions for those of the fact-finder" or the local zoning authority.[20]

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[16] 53 P.S. 10908(9) (MPC, Section 908(9)). *See also Simonitis v. Zoning Hearing Board of Swoyersville Borough,* 865 A.2d 284 (Pa. Cmwlth. 2005), and 53 P.S. 10913.2(b)(1) (MPC, Section 913.2(b)(1)).

[17] Schwamberger, Christine, *Zoning and Land Use in Pennsylvania, Cell Tower Regulation,* Lorman Education Services, Eau Claire, Wisconsin, 2002.

[18] *Sprint Spectrum L.P. v. Zoning Hearing Bd. of Willistown Tp.,* 43 F. Supp. 2d 534 (E.D. Pa. 1999), *citing Universal Camera v. NLRB,* 340 U.S. 474, 488, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (internal quotations omitted).

[19] *Sprint Spectrum L.P.,* 43 F. Supp. 2d at 540.

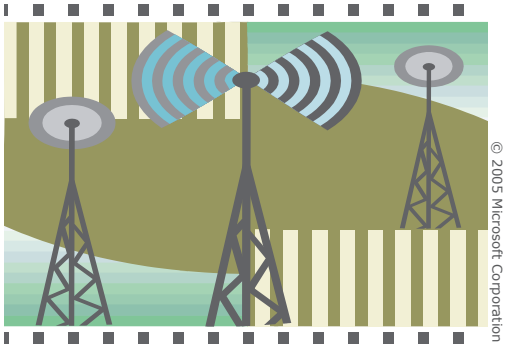
[20] *AT&T Wireless v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus,* 197 F.3d 64, 71 (3d Cir. 1999), *citing Williams v. Sullivan,* 970 F.2d 1178, 1182 (3d Cir. 1992).

Rather, a court is to "determine whether there is substantial evidence in the record as a whole to support the challenged decision."[21] Moreover, when the court evaluates substantial evidence, local zoning laws govern the weight to be given to it.[22]

To enable a meaningful judicial review, a written decision cannot only rely on conclusory assertions, but must also provide some evidentiary foundation to support each assertion.[23] Moreover, "generalized concerns" of opposing parties would not be considered substantial evidence for an unfavorable decision against a personal wireless services provider.[24]

5. **No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions. 47 U.S.C. Section 332(c)(7)(B)(iv).**

This provision prohibits state or local regulation of wireless telecommunications facilities by ordinance or statute or the courts "on the basis of the effects of radio frequency emissions." It was enforced, for example, in *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Tp.,*[25] where the court held that the zoning hearing board could not consider the potential health effects of a proposed wireless telecommunications facility, as alleged by residents, as substantial evidence pursuant to Sections 332(c)(7)(B)(iii), (iv) of the TCA.



Disputes

If a wireless service provider asserts that the state or local government has violated any of the five limitations or conditions cited above,[26] that provider may seek relief in a state or federal court, and the court must hear and decide such action expeditiously.[27, 28] An unsuccessful applicant may also petition

[21] *AT&T Wireless v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus,* 197 F.3d at 71, *citing Universal Camera Corp. v. NLRB,* 340 U.S. 474, 491, 71 S. Ct. 456, 95 L. Ed. 456 (1951).

[22] *Sprint Spectrum L.P. v. Zoning Hearing Bd. of Willistown Tp.,* 43 F. Supp. 2d at 540, *citing Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 493-94 (2d Cir. 1999).

[23] *Omnipoint Communications, Inc. v. City of Scranton,* 36 F. Supp. 2d 222 (M.D. Pa. 1999), *citing Virginia Metronet v. Board of Supervisors of James City County,* 984 F. Supp. 966, 973 (E.D. Va. 1998).

[24] *Omnipoint Communications, Inc.,* 36 F. Supp. 2d at 229, *citing PrimeCo Personal Communications, L.P. v. Village of Fox Lake,* 26 F. Supp. 2d 1052, 1062 (N.D. Ill. 1998).

[25] 181 F.3d 403 (3d Cir. 1999).

[26] 47 U.S.C. §§ 332(c)(7)(B)(i)(I), (i)(II), (ii), (iii), (iv).

[27] *See Local Government Regulation of Wireless Telecommunication Facilities,* 2d ed., Governor's Center for Local Government Services, Pennsylvania Department of Community and Economic Development, Harrisburg, Pa., 2002, p. 4.

[28] 47 U.S.C. § 332(c)(7)(B)(v).

the Federal Communications Commission if it claims that the state or local government based its siting decision in a manner inconsistent with clause (iv), which, again, prohibits state or local regulation of wireless telecommunications facilities "on the basis of the environmental effects of radio frequency emissions."[29]

Resources

Given that the regulation of wireless telecommunication facilities has been and continues to be an issue in many locales, there are numerous court cases and many publications on this topic. With regard to specific questions concerning the regulation of these facilities, we suggest that local officials consult with their municipal solicitor and recommend review of some other publications:

Local Government Regulation of Wireless Telecommunication Facilities, 2d ed., Pennsylvania Department of Community and Economic Development, Harrisburg, Pennsylvania, 2002, 16 pages.

Local Officials Guide, Siting Cellular Towers, What You Need To Know, What You Need To Do, National League of Cities, Washington, D.C., 1997, 26 pages.

The Telecommunications Act of 1996: What It Means to Local Governments, National League of Cities, Washington, D.C.

Taxation of Cellular Towers

The Pennsylvania Commonwealth Court in *Shenandoah Mobile Co. v. Dauphin County Bd. of Assessment Appeals*[30] upheld a court of common pleas decision which held that a cellular communications tower and related equipment are taxable realty. Because cellular towers are not specifically listed in the assessment laws as subject to or exempt from taxation, the Commonwealth Court applied a three-part test established in *Appeal of Sheetz, Inc.*[31] to determine whether cellular towers constitute "real estate" under the General County Assessment Law. When applying this three-part analysis in *Shenandoah Mobile Co.,* the court concluded that a cellular communications tower was a part of the realty and therefore taxable as real estate.

[29] 47 U.S.C. § 332(c)(7)(B)(iv), (v).

[30] 869 A.2d 562 (Pa. Cmwlth. 2005).

[31] 657 A.2d 1011 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied,* 542 Pa. 653, 666 A.2d 1060 (1995). In *Sheetz,* the court had to determine whether a gasoline pump canopy was a fixture and, thus, taxable as realty, or whether it was personalty, and therefore not subject to realty tax.

Attachment E – Petition Summary
Wireless Telecommunications
An Opportunity for Civic Excellence
July 2011

Over one month from June 4th to July 4th, 2011—and 10 hours of canvassing pedestrians walking on Grand Avenue in Pasadena—93 individuals signed a petition indicating support for the appeal of an antenna planned for Grand Avenue and California Boulevard. Two-thirds (62) of the petitioners live in Pasadena. See the attached *Petition for Consideration by the City of Pasadena* with signatures.

Grand Avenue acts like a park, attracting pedestrians and bicyclists from neighboring cities as well as Pasadena. Of the 93 individuals who signed the petition, one-third were from cities other than Pasadena: 12 from South Pasadena; 10 from Los Angeles; two from Altadena; one from Alhambra; one from La Canada; one from Sierra Madre; and four from outside the immediate area (one each from Montebello, Encino, Rowland Heights and Simi Valley).

As one would expect, most signed the petition on a Saturday, Sunday or the Fourth of July holiday, although pedestrians could be seen walking along Grand Avenue every day of the week. Many of the pedestrians had pets. One woman said she suffers from MS, has been walking Grand Avenue everyday for 10 years, and is still going strong! Another said she was taking her granddaughter, who lives out-of-state, to see a new puppy down the street. A couple, who lives in Los Angeles, noted that they love the West Pasadena area and are hoping to move to the neighborhood. A pedestrian from Encino identified herself as a "Pasadena lover" and said she drives to Pasadena every week or so just to walk on Grand Avenue!