

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The text is centered within the hourglass.

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*The Siting of Wireless Communications Facilities: An
Overview of Federal, State, and Local Law*

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The Siting of Wireless Communications Facilities: An Overview of Federal, State, and Local Law

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Summary

The siting of wireless communications facilities has been a topic of controversy in communities all over the United States. Telecommunications carriers need to place towers in areas where coverage is insufficient or lacking to provide better service to consumers, while local governing boards and community groups often oppose the siting of towers in residential neighborhoods and scenic areas. The Telecommunications Act of 1996 governs federal, state, and local regulation of the siting of communications towers by placing certain limitations on local zoning authority without totally preempting state and local law. This report provides an overview of the federal, state, and local laws governing the siting of wireless communications facilities.¹

Federal Law Governing the Placement of Wireless Telecommunications Facilities

Section 704 of the Telecommunications Act of 1996 governs federal, state, and local regulation of the siting of “personal wireless service facilities” or cellular communication towers.² Under the 1996 Act, state and local governments are prohibited from unreasonably discriminating among “providers of functionally equivalent services.”³ This prohibition has been interpreted to provide state and local governments with the “flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even

¹ This report was originally written by Angie Welborn, formerly a Legislative Attorney, American Law Division.

² Codified at 47 U.S.C. 332(c)(7).

³ 47 U.S.C. 332(c)(7)(B)(i)(I).

if those facilities provide functionally equivalent services.”⁴ However, state and local governments cannot adopt policies that prohibit or have the effect of prohibiting the provision of personal wireless services.⁵ This provision not only applies to outright bans on tower siting, but also to situations where a state or local government’s “criteria or their administration effectively preclude towers no matter what the carrier does.”⁶ In these cases, the carrier must show “not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try.”⁷

The act also prescribes certain procedures that a state or local government must follow when reviewing a request to place, construct, or modify personal wireless service facilities. The state or local government must “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.”⁸ If the state or local government denies the request, the denial must be in writing and supported by “substantial evidence contained in a written record.”⁹ Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁰

Courts have found that aesthetics may constitute a valid basis for the denial of a wireless permit so long as there is substantial evidence of the adverse visual impact of the proposed tower.¹¹ In fact, according to one court, “nothing in the Telecommunications Act forbids local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and ... aesthetic harmony is a prominent goal underlying almost every such code.”¹² Federal courts therefore have routinely upheld the denials of applications to construct wireless towers where the decisions of local entities were in writing and based on evidence that the tower would diminish property values, reduce the ability of property owners in the vicinity of the proposed tower to enjoy their property, or damage the scenic qualities of the proposed location.¹³ However, generalized aesthetic

⁴ Sprint Spectrum, L.P. v. Willoth, 176 F.3d 630, 639 (2nd Cir. 1999).

⁵ 47 U.S.C. 332(c)(7)(B)(i)(II).

⁶ Town of Amherst, New Hampshire v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 14 (1st Cir. 1999).

⁷ *Id.*

⁸ 47 U.S.C. 332(c)(7)(B)(ii).

⁹ 47 U.S.C. 332(c)(7)(B)(iii).

¹⁰ Nextel Partners of Upstate New York, Inc. v. Town of Canaan, 62 F.Supp.2d 691, 695 (N.D. N.Y. 1999), citing *Universal Camera v. NLRB*, 340 U.S. 474, 477 (1951).

¹¹ *See e.g.*, Preferred Sites, LLC v. Troup County, 296 F.3d 1210 (11th Cir. 2002), *Southwestern Bell Mobile Sys. v. Todd*, 244 F.3d 51 (1st Cir. 2001), *Omnipoint Corp. v. Zoning Board*, 181 F.3d 403 (3d Cir. 1999), *AT&T Wireless PCS, Inc. v. Winston-Salem Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999).

¹² *Aegerter v. City of Delafield*, 174 F.3d 886, 891 (7th Cir. 1999).

¹³ *See USCOC of Greater Iowa, Inc. V. Zoning Bd. of Adjustment*, 465 F.3d 817 (8th Cir. 2006) (upholding the denial of a permit to construct a tower based in part upon the fact that the tower would obstruct the view from the window of nearby residential property), *Omnipoint Commc’n*

(continued...)

concerns will not be considered “substantial evidence” to support the denial of a permit.¹⁴ For example, the Seventh Circuit upheld the reversal of a denial of a petition based on aesthetic concerns where the only evidence that the proposed tower would be unsightly was the testimony of a few residents that they did not like poles in general, and those residents admitted that they had no objection to flagpoles, the proposed disguise for the wireless tower.¹⁵ Blanket opposition to poles could not constitute “substantial evidence,” in the opinion of the court.¹⁶

Many community groups also oppose the siting of towers based on health and environmental concerns.¹⁷ However, the Telecommunications Act of 1996 prohibits state and local governments from regulating the placement of personal wireless service facilities on the basis of the effects of radio frequency emissions if the facility in question complies with the Federal Communications Commission’s regulations concerning such emissions.¹⁸ “As written, the purpose of the requirement is to prevent telecommunications siting decisions from being based upon unscientific or irrational fears that emissions from the telecommunications sites may cause undesirable health effects.”¹⁹ Courts have enforced this provision of the act and have noted that “concerns of health risks due to the emissions may not constitute substantial evidence in support of denial.”²⁰

The act also provides for the appeal of a state or local government’s denial of a request to place, construct, or modify a facility.²¹

Section 704(c) of the Telecommunications Act provided that within 180 days of the enactment of the act, “the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for

¹³ (...continued)

v. *City of White Plains*, 430 F.3d 529 (2nd Cir. 2005) (concluding that the zoning board was entitled to rely on aesthetic objections raised by members of the community that are familiar with the area); *Voicestream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818 (7th Cir. 2003) (holding that the county’s denial of a wireless tower permit was supported by substantial evidence that the proposed tower would mar an especially scenic stretch of land).

¹⁴ *New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir. 2002).

¹⁵ *Prime Co Personal Commc’n v. City of Mequon*, 352 F.3d 1147, 1151 (7th Cir. 2003).

¹⁶ *Id.*

¹⁷ Malcolm J. Tuesley, *Not in My Back Yard: The Siting of Wireless Communications Facilities*, 51 Fed. Comm. L. J. 887, 902.

¹⁸ 47 U.S.C. 332(c)(7)(B)(iv). Cellular Phone Task Force challenged the FCC’s RF radiation guidelines. *Cellular Phone Task Force v. FCC*, 205 F.3d 82 (2nd Cir. 2000). The Court upheld the FCC’s radiation guidelines, finding that they were not arbitrary and capricious under the circumstances. *Id.* at 96.

¹⁹ 51 Fed. Comm. L. J. at 902.

²⁰ *Telespectrum, Inc. v. Public Service Commission of Kentucky*, 227 F.3d 414 (6th Cir. 2000). *See also Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F.Supp. 732, 745 (C.D. Ill. 1997).

²¹ 47 U.S.C. 332(c)(7)(B)(v).

the placement of new telecommunications services.”²² President Clinton issued a memorandum on August 10, 1995, directing the Administrator of General Services, “in consultation with the Secretaries of Agriculture, Interior, Defense, and the heads of such other agencies as the Administrator may determine, to develop procedures necessary to facilitate appropriate access to Federal property for the siting of mobile services antennas.”²³ The General Services Administration published procedures for the placement of commercial antennas on federal property in the Federal Register on March 29, 1996.²⁴ On March 14, 2007, the General Services Administration published updated procedures for the placement of commercial antennas on federal property in the Federal Register.²⁵ These replacement procedures shall remain in effect indefinitely.²⁶

State Statutory Provisions

Apart from the specific limitations set forth in the Telecommunications Act of 1996, federal law does not appear to affect state or local zoning authority with regard to the placement of wireless communications towers.²⁷ Most states delegate zoning authority to local bodies. However, some states offer guidance on what factors should be considered by the local entities when considering applications for permits to construct wireless communications facilities. For example, the State of New Hampshire has enacted a law concerning the visual effects of tall wireless antennas.²⁸ The law does not alter any municipal zoning ordinance or preempt the Telecommunications Act of 1996.²⁹ It does, however, recognize that the visual effects of tall antennas “may go well beyond the physical borders between municipalities,” and in doing so it encourages local governing bodies to address the issue “so as to require that all affected parties have the opportunity to be heard.”³⁰ The statute also provides that carriers, wishing to build personal wireless service facilities, should consider commercially available alternatives to the tall towers, such as lower antenna mounts, disguised or camouflaged towers, and custom designed facilities to minimize the visual impact on the surrounding area.³¹

An Illinois law sets forth guidelines for telecommunications carriers to consider when choosing a location for and designing a facility.³² The law specifically states that it does “not abridge any rights created by or authority confirmed in the federal

²² P.L. 104-104, § 704(c).

²³ *Facilitating Access to Federal Property for the Siting of Mobile Services Antennas*, 31 Weekly Comp. Pres. Doc. 1424 (August 10, 1995).

²⁴ 61 Fed. Reg. 14,100 (1996).

²⁵ 72 Fed. Reg. 11,881 (2007).

²⁶ 72 Fed. Reg. 11,881 (2007).

²⁷ 47 U.S.C. 332(c)(7)(A).

²⁸ R.S.A. 12-K:1, effective August 7, 2000.

²⁹ R.S.A. 12-K:1(I) and (VI).

³⁰ R.S.A. 12-K:1(II).

³¹ R.S.A. 12-K:1(III).

³² 55 ILCS 5/5-12001.1.

Telecommunications Act of 1996.”³³ Rather, the law offers a list of locations - from “most desirable” to “least desirable” - for the siting of telecommunications facilities, with non-residentially zoned lots as the most desirable and residentially zoned lots that are less than 2 acres in size and used for residential purposes as the least desirable.³⁴ The guidelines set forth for designing a facility include preserving trees in the area or replacing trees removed during construction, landscaping around the facility, and designing facilities that are compatible with the residential character of the area.³⁵

In addition to the alternatives listed above, states can encourage the use of existing infrastructure as opposed to the construction of new facilities in order to reduce the total number of towers in an area. For example, in Kentucky, state law allows the local planning commission to require the company applying for the construction permit “to make a reasonable attempt to co-locate” their equipment on existing towers if space is available and the co-location does not interfere with the structural integrity of the tower or require substantial alterations to the tower.³⁶ The statute gives the planning commission the authority to deny an application for construction based on the company’s unwillingness to attempt to co-locate.³⁷ Connecticut has also enacted a law which allows local entities to require the sharing of towers whenever it is “technically, legally, environmentally and economically feasible, and whenever such sharing meets public safety concerns.”³⁸

Local (Municipal or County) Law

Many local governments, through the use of their zoning authority, attempt to limit the impact cellular towers have on the surrounding environment. One county in Georgia, enacted a “Telecommunications Tower and Antenna Ordinance,” which set up a new permit system for the construction of cellular towers in an effort to encourage construction in nonresidential areas.³⁹ In commercial or light industrial areas, a wireless service provider can build a tower without review by the County Board of Commissioners as long as a certain set of specifications are met.⁴⁰ However, if a service provider wanted to construct a tower in a residential area, a hearing is held on the matter, and construction

³³ 55 ILCS 5/5-12001.1(b).

³⁴ 55 ILCS 5/5-12001.1(d).

³⁵ 55 ILCS 5/5-12001.1(e).

³⁶ K.R.S. § 100.987(6). Under federal law, utilities are required to provide telecommunications carriers “with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by [the utility].” 47 U.S.C. 224(f)(1).

³⁷ K.R.S. § 100.987(7).

³⁸ Conn. Gen. Stat. § 16-50aa.

³⁹ Robert Long, *Allocating the Aesthetic Costs of Cellular Tower Expansion: A Workable Regulatory Regime*, 19 Stan. Envtl. L. J. 373, 378. The full text of the ordinance is available at [<http://www.gwinnettcounty.com/departments/planning/pdf/tower.pdf>].

⁴⁰ *Id.*

permits are subject to denial if a set of nine criteria are not met.⁴¹ In an effort to reduce the number of facilities in the area, the City of Bloomington, Minnesota, enacted an ordinance that requires wireless facilities to be designed to accommodate multiple users.⁴²

In direct response to the limitations set forth in the Telecommunications Act of 1996, several communities enacted moratoria on permits for cellular towers in an effort to prevent or delay the construction of cellular communications towers.⁴³ Under the act, local governments cannot act to prohibit or have the effect of prohibiting wireless communication services in their communities.⁴⁴ Local governments justify the imposition of moratoria by claiming that they need time to study the problems with tower siting and how they should change their zoning ordinances to accommodate construction.⁴⁵ Courts have upheld moratoria that have a fixed length, such as six months.⁴⁶ However, they are less likely to uphold those that are for long periods of time or indefinite.⁴⁷

Recent Developments

The FCC's Wireless Telecommunications Bureau is seeking comment on a petition for a declaratory ruling filed by CTIA - The Wireless Association in July of 2008.⁴⁸ In its petition, CTIA expressed concerns about the delays many wireless providers face when applying to local and state zoning authorities to site wireless facilities. As a result, CTIA has asked the FCC (1) to clarify the time period in which a state or local zoning authority must act on a wireless facility siting request; (2) to declare that a failure by a state or local zoning authority to act on a siting request within that time shall result in the application being "deemed granted," or, alternatively, that the applicant is entitled to a court-ordered injunction granting the application, unless the zoning authority can justify the delay; (3) to clarify that Section 332(c)(7)(B)(i) prohibits zoning decisions that have the effect of prohibiting additional entrants from offering service in a given area (in other words, to declare that Section 332(c)(7)(B)(i) is not satisfied by the presence of a single wireless provider in an area); and (4) to preempt all ordinances and regulations that automatically require all wireless siting applications to obtain a variance.⁴⁹ Comments are due on September 15, 2008.

⁴¹ *Id.* The ordinance states that towers built in residential areas must comply with certain requirements, such as topography, height, setback, access driveways or easements, parking, fencing, landscaping, and adjacent uses. *Id.* at n. 35.

⁴² 51 Fed. Comm. L. J. at 909, citing Bloomington, Mn., Code 19.63.05(a)(1)-(4)(1996).

⁴³ David W. Hughes, *When NIMBY's Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 Iowa J. Corp. L. 469, 488.

⁴⁴ 47 U.S.C. 332(c)(7)(B)(i).

⁴⁵ 23 Iowa J. Corp. L. at 488.

⁴⁶ *See* Sprint Spectrum L.P. v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996).

⁴⁷ *See e.g.* Spring Spectrum L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997).

⁴⁸ Public Notice, Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling by CTIA, (released August 14, 2008).

⁴⁹ *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, WT Docket No. 08-165, July 11 2008.