

Chapter 35

The Telecommunications Act of 1996 and Wireless Telecommunications

35-100 Introduction

Congress enacted the Telecommunications Act of 1996 (the “Act”) to promote competition and higher quality in American telecommunications services and to “encourage the rapid deployment of new telecommunications technologies.” *110 Stat. 56, cited in City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005), *see also H.R. Conf. Rep. No. 104–458, at 113* (1996), explaining that the purpose of the Act is “to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services ... by opening all telecommunications markets to competition.”

“Congress saw a national problem, namely, an ‘inconsistent and, at times, conflicting patchwork’ of state and local siting requirements, which threatened ‘the deployment’ of a national wireless communication system. [citation omitted]. Congress initially considered a single national solution, namely, a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. [citations omitted]. But Congress ultimately rejected the national approach and substituted a system based on cooperative federalism. [citation omitted] State and local authorities would remain free to make siting decisions. They would do so, however, subject to minimum federal standards – both substantive and procedural – as well as federal judicial review.” *City of Rancho Palos Verdes*, 544 U.S. at 127-128 (Breyer concurring).

In Section 704 of the Act (codified at 47 U.S.C. § 332(c)(7)), Congress “struck a balance between the national interest in facilitating the growth of telecommunications and the local interest in making zoning decisions” over the siting of towers and other facilities that provide wireless services. *360 Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86 (4th Cir. 2000).¹ While expressly preserving local zoning authority (47 U.S.C. § 332(c)(7)(A)), the Act requires that decisions denying wireless facilities be in writing and supported by substantial evidence (47 U.S.C. § 332(c)(7)(B)(iii)). The Act also prohibits localities from adopting regulations that prohibit or have the effect of prohibiting wireless services, or unreasonably discriminate against functionally equivalent providers. 47 U.S.C. § 332(c)(7)(B)(i). Finally, the Act requires that localities act on applications for approval of wireless facilities within a reasonable period of time. 47 U.S.C. § 332(c)(7)(B)(ii).

The only complete preemption contained in 47 U.S.C. § 332(c)(7)(B) is found in subparagraph (iv), which preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions if those facilities comply with the Federal Communications Commission’s regulations concerning emissions.

A locality may not deny a request for a modification to “an existing wireless tower or base station that does not substantially change the physical dimensions of the tower or base station.” *Middle Class Tax Relief and Job Creation Act of 2012 (also known as the “Spectrum Act”), § 6409*. Section 6409 is discussed in section 35-400.

35-200 The Telecommunications Act of 1996: the local zoning authority preserved

Because 47 U.S.C. § 332(c)(7) does not affect or encroach upon the substantive standards to be applied under established principles of state and local law, *Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490 (2nd Cir. 1999), a locality retains its authority to:

¹ The United States Courts of Appeal have interpreted some provisions of 47 U.S.C. § 332(c)(7) differently from one another. This chapter focuses primarily on the district court and appellate decisions from the Fourth Circuit Court of Appeal, whose jurisdiction includes Virginia.

- Determine the appropriate height, location and bulk of wireless facilities. *Virginia Code* § 15.2-2280(2).
- Allow wireless facilities, by special use permit, subject to suitable regulations and safeguards. *Virginia Code* § 15.2-2286(A)(3).
- Deny applications for special use permits if the requisite findings for the granting of a permit cannot be made. See, e.g., *County of Lancaster v. Cowardin*, 239 Va. 522, 391 S.E.2d 267 (1990).
- Deny applications for special use permits if the proposed uses are inconsistent with the comprehensive plan. *National Memorial Park, Inc. v. Board of Zoning Appeals of Fairfax County*, 232 Va. 89, 348 S.E.2d 248 (1986).
- Prohibit uses, including wireless facilities, within certain zoning districts. *Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989).

Of course, the exercise of this authority must otherwise comply with state and local land use laws, and may not violate the limitations set forth in section 332(c)(7)(B). See *T-Mobile Northeast, LLC v. Frederick County Board of Appeals*, 761 F. Supp. 2d 282 (D. Md. 2010) (court didn't reach Telecommunications Act issues because the county failed to comply with the requirements for a special use exception). Moreover, section 332(c)(7)(A)'s preservation of local zoning authority does "not alter the FCC's general authority over radio telecommunications granted by earlier communications legislation." *Southwestern Bell Wireless, Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1191 (10th Cir. 1999) (rejecting the assertion that preserving local zoning authority allows local regulation of radio frequency interference, and holding that such regulation is preempted by federal law and does not violate the Tenth Amendment).

Finally, note that the protections to the wireless industry found in the Telecommunications Act of 1996 apply to *telecommunications* services. Some federal courts in other jurisdictions have concluded that 4G service is not a *telecommunications* service entitled to the limited protections from local zoning authority under the Act, finding that 4G service is a broadband internet *information* service. See, e.g., *Clear Wireless LLC v. Building Department of Lynbrook*, 2012 U.S. Dist. LEXIS 32126, 2012 WL 826749 (E.D.N.Y. 2012), and cases and Federal Communications Commission rulings cited therein. This distinction is not critical as far as implementation of the Albemarle County Zoning Ordinance is concerned because, as a broadband internet service, 4G service is within the definition of *personal wireless service facility* in the Zoning Ordinance.

35-300 The Telecommunications Act of 1996: the requirements and limitations in 47 U.S.C. § 332(c)(7)

As noted in section 35-100, 47 U.S.C. § 332(c)(7) expressly preserves local zoning authority on applications for personal wireless service authorities, subject to five limitations: (1) decisions denying wireless facilities must be in writing (47 U.S.C. § 332(c)(7)(B)(iii)); (2) decisions denying wireless facilities must be supported by substantial evidence (47 U.S.C. § 332(c)(7)(B)(iii)); (3) localities may not adopt regulations that prohibit or have the effect of prohibiting wireless services (47 U.S.C. § 332(c)(7)(B)(i)); (4) localities may not adopt regulations that unreasonably discriminate against functionally equivalent providers (47 U.S.C. § 332(c)(7)(B)(i)); and (5) localities must act on applications for approval of wireless facilities within a reasonable period of time (47 U.S.C. § 332(c)(7)(B)(ii)).

47 U.S.C. § 332(c)(7) also preempts localities from regulating the placement, construction, and modification of wireless facilities on the basis of the environmental effects of radio frequency emissions if those facilities comply with the Federal Communications Commission's regulations concerning emissions (47 U.S.C. § 332(c)(7)(B)(iv)).

These requirements and limitations are discussed below.

35-310 The decision must be in writing

The requirement that a decision be in writing is easily satisfied. A letter stamped with the word "Denied," or writing the word "Denied" on the wireless provider's application, satisfies the requirement. *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998); *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning*

Board of Adjustment, 172 F.3d 307 (4th Cir. 1999); *Shenandoah Mobile Co. v. Frederick County Board of Supervisors*, 83 Va. Cir. 113 (2011) (minutes of board meeting suffice as a written denial). There is no need for a locality to issue a written rationale with factual and legal conclusions as part of its decision. *T-Mobile South v. City of Roswell, Georgia*, 574 U.S. ___, 135 S. Ct. 808 (2015). However, those reasons must be provided “essentially contemporaneously” with the written decision. *T-Mobile South*, *supra* (although holding that the reasons can be stated separately from the decision, they must be provided “essentially contemporaneously” with the written denial; here the City failed to satisfy the court’s newly created “essentially contemporaneously” requirement because the written minutes were not available until 26 days after the denial, just 4 days before the wireless provider had to seek judicial review).

As a practical matter, a locality that denies an application should delay issuing its written decision, which triggers the running of the time to seek judicial review, if there is any doubt as to whether the reasons for the decision can be issued “essentially contemporaneously” with the decision. A verbatim transcript accompanied by a cover letter is sufficient to satisfy the writing requirement. *Cellco Partnership v. Board of Supervisors of Fairfax County*, ___ F. Supp. 3d ___ (E.D. Va. 2015).

35-320 The decision must be supported by substantial evidence

The United States Supreme Court has defined “substantial evidence” to mean “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951). It requires more than a mere scintilla but less than a preponderance. *360 Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79 (4th Cir. 2000). In reviewing the decision of an elected body, the courts will consider the “reasonable mind” to be that of a reasonable legislator. *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). The courts will not substitute their judgment for the governing body’s but will uphold the decision if it has “substantial support in the record as a whole.” *Virginia Beach*, 155 F.3d at 430. The court’s inquiry is to ask whether a reasonable legislator would accept the evidence in the record as adequate to support the governing body’s decision. *USCOC of Va. RSA # 3, Inc. v. Montgomery County Board of Supervisors*, 343 F.3d 262 (4th Cir. 2003).

Following is a list of some of the facts found by the courts in the Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, and the district courts within the Fourth Circuit, to be *substantial evidence* under the Act:

- *Facility’s consistency with the comprehensive plan*: The governing body may consider whether the proposed facility is consistent with the comprehensive plan. In *Montgomery County*, the location and design of the applicant’s 240-foot tower did not conform to the comprehensive plan or the regional approach for wireless facilities. In *Albemarle County*, the applicant proposed to construct a 100-foot tower on a mountain top, and the county’s comprehensive plan and open space plan discouraged the construction of structures that would modify ridge lines and would contribute to erosion in mountainous areas. *See also Crown Castle Atlantic, LLC v. The Board of Supervisors of Loudoun County*, 2002 U.S. Dist. LEXIS 22000 (E.D. Va. 2002) (documented concerns about the proposed height and design of the tower and the evidence that the tower could be shorter and still achieve similar functional results, as well as the location of the proposed tower, adequately supported the board’s finding that the application did not substantially conform to the comprehensive plan); *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors*, 672 F.3d 259 (4th Cir. 2012) (substantial evidence supported the board of supervisors’ denial of a special exception for a proposed wireless facility where the county’s relevant policy called for facilities that provided “the least visual impact on residential areas” where the facility: (1) would be located 100 feet from two of the neighboring residences; (2) would extend 38 feet above the closest tree; (3) would rise approximately 48 feet above the average height of the existing trees on the adjacent property; (4) was to be located on a site containing concrete pads, with only a few trees and a small, grassy area with dense brush; and (5) called for supplemental vegetation that, when fully grown, would not reach a sufficient height to minimize the tree monopole’s visual impact).
- *Facility’s compliance with applicable zoning regulations*: The governing body may consider whether the proposed facility complies with applicable zoning regulations. In *Albemarle County*, the proposed tower violated the zoning ordinance’s limitations on a structure’s proximity to neighboring lots. Although the tower’s noncompliance with the zoning regulations was not the only evidence presented to justify the denial of the application, it was a significant factor in the court’s substantial evidence analysis. In *Montgomery County*, the court held that the

proposed facility's noncompliance with the county's zoning regulations was, in and of itself, substantial evidence. In *T-Mobile Northeast LLC v. Howard County Board of Appeals*, 2013 U.S. App. LEXIS 9079, 2013 WL 1849126 (4th Cir. 2013) (unpublished), the court held that substantial evidence supported the board's finding that T-Mobile failed to make a diligent effort to site the facility on government property as required by the Howard County regulations where it made only telephone inquiries regarding siting the facility at a high school, the inquiries were poorly documented, and there was no evidence of any specifics of the request or a written proposal.

- *Height of the facility*: The governing body may consider the height of a proposed facility. *Montgomery County, supra* (rejecting the argument that the board's decision was impermissibly based solely on aesthetic considerations in violation of Virginia law under *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975) since Virginia localities are enabled to regulate the size, height and bulk of structures under Virginia Code § 15.2-2280(2)); *see T-Mobile Northeast, supra* (county's denial of request to increase height of 100-foot pole an additional 10 feet to allow additional antennas was supported by substantial evidence that the additional height would increase the facility's visibility; substantial evidence included the reasonable concerns of a local residential community and the negative visual impact of the facility on a historic and scenic byway); *New Cingular Wireless PCS v. Fairfax County Board of Supervisors*, 674 F.3d 270 (4th Cir. 2012) (proposed 88-foot treepole/wireless facility in a residential neighborhood, which would extend 38 feet above the closest tree and 48 feet above the average height of the existing trees on the adjacent property was inconsistent with various provisions in the comprehensive plan and its zoning regulations regarding the siting and visibility of wireless facilities).
- *Design of the facility*: The governing body may consider whether the design of a proposed facility is proper, to the extent the design implicates the structure's size and bulk. *Montgomery County, supra* (the board could properly consider the adverse impacts arising from the applicant's more visually intrusive lattice design).
- *Location of the facility*: The governing body may consider the location of the facility on the lot, since Virginia law expressly enables a locality to regulate the location of structures under *Virginia Code § 15.2-2280(2)*. *See Montgomery County, supra*.
- *Impacts of the facility on surrounding neighborhood*: The governing body may consider the impacts of the facility on the surrounding neighborhood. *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307 (4th Cir. 1999) (board considered visual impacts of tower on surrounding neighborhood); *Cellco Partnership v. Board of Supervisors of Roanoke County*, 2004 U.S. Dist. LEXIS 27348, 2004 WL 3223288 (W.D. Va. 2004) (concerns regarding property values, aesthetics, and fit within the surrounding community are objectively reasonable and constitute substantial evidence supporting the board's decision); *New Cingular Wireless PCS, supra* (concerns that proposed 88-foot treepole/wireless facility "do not belong in a residential community such as ours" and would "disrupt the neighborhood and country-like setting").
- *Where structures similar in appearance are regulated differently under the locality's zoning regulations*: In *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*, 748 F.3d 185 (4th Cir. 2014), the special exception for one of two facilities disapproved by the board of supervisors at issue in the case would have been an 80-foot tall bell tower that would house the antenna. T-Mobile contended that the board's aesthetic considerations were not legitimate because Loudoun County's zoning regulations would have allowed the church to construct a bell tower up to 74 feet in height for its own use, by right. The court rejected this argument and concluded that there was substantial support in the record for the board's action, explaining that: (1) the fact that a church bell tower without a wireless facility was allowed by right did not imply that citizens may not have legitimate objections to the tower; and (2) "any zoning decision reflects a balance between the benefit provided by the facility and the aesthetic harm caused, and thus a local government might be willing to tolerate what is aesthetically displeasing for one type of use but not for another."

These factors may be presented to the governing body in a number of ways, ranging from the testimony of members of the public, to staff reports, to the decision-makers' personal knowledge. Widespread public opposition to the construction of a telecommunications tower also may provide substantial evidence to support a local government's denial of a permit. *See Virginia Beach, supra; Petersburg Cellular Partnership v. Board of Supervisors of Nottoway*

County, 205 F.3d 688 (4th Cir. 2000) (noting that public opposition, if based upon rational concerns, provides substantial evidence to deny a permit); *Albemarle County*, *supra* (determining that public opposition was a factor that contributed to a finding of substantial evidence); *Winston-Salem*, *supra* (same); *New Cingular Wireless PCS*, *supra* (47 nearby residents signed a petition in opposition and 21 attended the public hearing, and the citizen concerns were reasonably-founded concerns were rational upon which the board could rely); *Cellco Partnership v. Board of Supervisors of Fairfax County*, ___ F. Supp. 3d ___ (E.D. Va. 2015) (photographs and photo simulations showing visual impacts). However, public opinion does not mandate a particular local zoning decision under the Act. *Montgomery County*, *supra*.

Public opposition, in whatever form it may be, must have at least some relevance and materiality to the decision before the governing body. Thus, in *T-Mobile Northeast LLC v. City Council of the City of Newport News*, 674 F.3d 380 (4th Cir. 2012), the court concluded that substantial evidence did not support a city council’s denial of a conditional use permit for a wireless facility at a school where the staff report and the planning commission recommended approval of the facility, and at the city council public hearing 6 persons spoke in favor of the application but only 3 spoke in opposition. The court noted that two of the three who spoke in opposition only expressed concerns about their property values; other comments in opposition included only brief passing comments about the tower’s aesthetics, which were not relevant, concern that workers servicing the tower might pose a risk to students, which was speculative, and concern about potential health effects from the facility, which was not relevant under the Telecommunications Act.

The governing body’s known experiences also may be a source of substantial evidence. *Nottoway County*, *supra*; *Roanoke County*, *supra* (“known experiences” would allow the board to reasonably conclude that the tower would have an adverse impact on residential property values and would not be aesthetically pleasing).

Neither the governing body nor the public is obligated to call, at its expense, experts to opine about the adverse impacts arising from a proposed wireless facility when its effects are reasonably apparent to non-experts. *See Virginia Beach*, *supra* (“In all cases of this sort, those seeking to build will come armed with exhibits, experts, and evaluations. Appellees, by urging us to hold that such a predictable barrage mandates that local governments approve applications, effectively demand that we interpret the Act so as always to thwart average, non-expert citizens . . .”).

35-330 A locality’s regulations or decisions may not prohibit or have the effect of prohibiting wireless service

Section 332(c)(7)(B)(i)(II) forbids regulations that prohibit or have the effect of prohibiting the provision of personal wireless services:

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.

This provision provides protection for wireless providers who are unable to enter a new market, but are unable to show unreasonable discrimination by a locality.

In order to establish a prohibition under section 332(c)(7)(B)(i)(II), a plaintiff must show: (1) that the locality has a general policy that effectively guarantees the rejection of all wireless facility applications; or (2) that the denial of an application for a single site is “tantamount” to a general prohibition of service. *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors*, 672 F.3d 259 (4th Cir. 2012); *360 Communications Co. v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 87-88 (4th Cir. 2000). To make the latter showing, the wireless provider must demonstrate: (1) that there is an *effective absence of coverage* in the area surrounding the proposed facility; and (2) that there is a lack of reasonable alternative sites to provide coverage or that further reasonable efforts to gain approval for alternative facilities. *T-Mobile*, 672 F.3d at 266. The effective absence of coverage does not mean a total absence; it may mean coverage containing significant gaps. *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*, 748 F.3d 185 (4th Cir. 2014) (holding that T-Mobile had failed to show that there was a lack of alternative sites from which to provide coverage or that further efforts to gain approval for alternative facilities would be fruitless). “This cannot, however, be defined metrically by simply looking at the geographic percentage of coverage or the percentage of dropped calls. It

is a contextual term that must take into consideration the purposes of the Telecommunications Act itself.” *T-Mobile Northeast*, 748 F.3d at 198.

To establish that the denial of an application constitutes an *effective* prohibition, a wireless provider bears a *heavy* burden of proof to establish that the locality’s regulation or decision has the effect of prohibiting service. *T-Mobile*, 672 F.3d at 268. *Albemarle County*, 211 F.3d at 87-88. The simple fact of denial with respect to a particular site is not enough to establish a prohibition of wireless service. *Albemarle County, supra*. “[T]here must be something more, taken from the circumstances of the particular application or from the procedure for processing that application, that produces the ‘effect’ of prohibiting wireless services.” *Albemarle County, supra*. The wireless provider might show that the locality has indicated that repeated individual applications will be denied because of a generalized hostility to wireless services. *Albemarle County, supra*. As noted above, the courts have recognized the “theoretical possibility that the denial of an individual permit could amount to a prohibition of service if the service could only be provided from a particular site,” but noting “that such a scenario ‘seems unlikely in the real world.’” *Albemarle County, supra*. In *T-Mobile Northeast, supra*, the court concluded that T-Mobile could not meet its burden of proving that the board’s denial of its application was “tantamount” to a general effective prohibition on services by showing only that the rejected alternative sites would not close the entire deficiency in coverage, or would not provide the same level of service as the proposed facility. Whatever those circumstances may be, the prohibition clause does not divest the locality of its discretion, under its site-specific review, to determine whether certain uses are detrimental to a zoning area. *AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment*, 172 F.3d 307 (4th Cir. 1999) (denial of tower in residential area on lot on which a historic building was located was supported by substantial evidence).

In *Montgomery County*, the board denied the 240-foot tower sought by U.S. Cellular, but approved the construction of a 195-foot tower, which would provide wireless capabilities to a significant area of the county currently without quality wireless service. The court found no prohibition because the board’s careful consideration of the application provided no indication that future tower requests would be “fruitless.” The court concluded that “[f]ar from seeking to prohibit service, Board members indicated a willingness to ensure coverage for the entire target area.”); *see also, Celco Partnership v. Board of Supervisors of Roanoke County*, 2004 U.S. Dist. LEXIS 27348, 2004 WL 3223288 (W.D. Va. 2004) (no prohibition where board denied application for 127-foot tower and associated facilities where it had previously approved 12 special use permits for towers, wireless service provider already provided service to a substantial portion of the county, and the proposed facilities would duplicate services already provided); *Crown Castle Atlantic, LLC v. The Board of Supervisors of Loudoun County*, 2002 U.S. Dist. LEXIS 22000 (E.D. Va. 2002) (no prohibition of service even though denial of 140-tower left significant gap in coverage because there was no evidence that further amendment to the current application or seeking approval for a facility at another location would be fruitless).

A wireless service provider fails to demonstrate that a locality effectively prohibited the provision of wireless service where: (1) the locality has previously approved numerous applications, especially those of the applicant; (2) the wireless service provider already provides coverage throughout the area; and (3) the wireless service provider fails to demonstrate that no reasonable alternative exists. *T-Mobile Northeast*, 672 F.3d at 268-269. Service that is less than optimal is not the prohibition of service.

In *New Cingular Wireless PCS v. Fairfax County Board of Supervisors*, 674 F.3d 270 (4th Cir. 2012), the court rejected the wireless service provider’s assertion that the board’s denial of a proposed 88-foot treepole/wireless facility had the effect of prohibiting service. The only evidence was the service provider’s “mere reference to a competitor’s prior experience in seeking to locate undescribed and unknown facilities in different parks.” *New Cingular Wireless PCS*, 674 F.3d 277. The court noted that the service provider had not even submitted an application to the local federal park. The court also said that where, as here, the service provider claimed that the board’s denial was tantamount to a general prohibition of service, it failed to demonstrate that further reasonable efforts to gain approval for alternative facilities would be fruitless. The service provider merely had argued that obtaining approval of an application from park authorities could “take years to process with no certain of outcome.”

In *T-Mobile Northeast LLC v. Howard County Board of Appeals*, 2013 U.S. App. LEXIS 9079, 2013 WL 1849126 (4th Cir. 2013) (unpublished), the court rejected the wireless service provider’s claim that the board’s denial of a facility had the effect of prohibiting service where there was evidence that there was some level of wireless coverage in the

area, the provider failed to show that locating the facility at alternative sites would be fruitless, and the board had a strong record of approving conditional use permits sought by this provider.

An FCC ruling prohibits localities from denying an application where the sole basis for the denial is the presence of other wireless service providers in the area (known as the “one-provider rule” used by some courts). *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review, et al., WT Docket No. 08-165.*

35-340 A locality’s regulations may not unreasonably discriminate among providers of functionally equivalent services

Section 332(c)(7)(B)(i)(I) prohibits regulations that unreasonably discriminate against functionally equivalent wireless services (*i.e.*, PCS versus cellular or one wireless company versus another):

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 . . .

Congress intended that localities not favor one technology over another, or favor one service provider over another. However, this limitation does not require that all wireless providers be treated identically. The fact that a decision has the effect of favoring one competitor over another, in and of itself, is not a violation of the discrimination clause. The discrimination clause provides a locality 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 if those facilities provide functionally equivalent services. *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).*

The denial of an application for a wireless facility that is based on legitimate, traditional zoning principles is not “unreasonable discrimination.” *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors*, 672 F.3d 259 (4th Cir. 2012). *AT&T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). For example, if a city council approves a special use permit for a wireless facility in a commercial district, it is not necessarily required to approve a permit for a competitor’s facility in a residential district. *H.R. Conf. Rep. No. 104-458, 104th Congress, 2nd Sess. 208 (1996).*

Unreasonable discrimination will not be found when the denial complained of was subject to a different application process than the approvals against which it is compared or when there is a difference in visual impacts or the aesthetic character of the individual facility. *T-Mobile Northeast LLC v. Fairfax County Board of Supervisors, supra.* (even where a prior application from a carrier for a 10-foot height extension, and an application for additional antennas, were approved on the same tower, the denial of a 10-foot height extension sought by T-Mobile Northeast was denied).

35-350 A locality must act on an application for approval of a wireless facility within a reasonable period of time

Section 332(c)(7)(B)(ii) requires that a locality act on a request for a wireless permit within a reasonable period of time:

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.

The Act does not define what a “reasonable period of time” is. However, in *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review, et al., WT Docket No. 08-165*, the Federal Communications Commission issued a declaratory ruling that a “reasonable period for a wireless permit is 90 days

for collocation applications and 150 days for all other applications. The reader should note that the declaratory ruling defines a “collocation” to include changes to the height of a facility not exceeding 10%, regardless of the procedure for approving such a change under the locality’s zoning regulations. See *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. ___, 133 S. Ct. 1863 (2013) (upholding authority of the FCC to issue the declaratory ruling).

35-360 A locality may not regulate radio frequency emissions and interference or base a decision on those grounds

One clear area of federal preemption under the Telecommunications Act is the regulation of radio frequency emissions and interference. With respect to radio frequency emissions, 47 U.S.C. § 332(c)(7)(B)(iv) provides:

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.

In *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*, 748 F.3d 185 (4th Cir. 2014), the board of supervisors denied a special exception and a “commission permit” for the construction of a wireless facility. Its decision on the special exception included a number of legitimate grounds to disapprove the application, but it also included the possible negative effects of radio frequency emissions as a basis. The district court ordered that the facility be approved, and the board appealed. The Fourth Circuit affirmed, holding that the board’s basis for its decision violated the prohibition against regulating on the basis of radio frequency emissions. In so holding, the court concluded: (1) the fact that the board gave valid reasons for its decision, which by themselves would have been sufficient to uphold the disapproval of the special exception, did not immunize the board from its violation of the statutory prohibition of using radio frequency emissions as a basis for disapproval; and (2) the fact that only the board’s decision on the special exception, but not the commission permit, referred to radio frequency emissions as a basis for its decision did not validate the board’s ultimate decision to disapprove the project because the two decisions were a single regulatory action.

Attempts by state or local governments to regulate in the field of radio frequency interference have been found to be preempted by federal law. *Freeman v. Burlington Broadcasters Inc.*, 204 F.3d 311 (2^d Cir. 2000); *Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185 (10th Cir. 1999). In *Freeman*, the court struck down a permit condition requiring users of a communications tower to remedy any interference with reception in homes in the area. In *Southwestern Bell*, the court voided a zoning regulation that prohibited wireless telecommunications towers and antennas from operating in a manner that interfered with public safety communications.

In *In the Matter of Petition of Cingular Wireless, et al.*, WT Docket No. 02-100, the Federal Communications Commission issued a memorandum opinion and order in an administrative proceeding pertaining to Anne Arundel County, Maryland. At issue was a county ordinance requiring that, prior to county issuance of a zoning certificate, owners and users of telecommunications facilities had to show that their facilities would not degrade or interfere with the county’s public safety communications systems. The FCC found that the county ordinance regulating radio frequency interference was preempted by federal law.

35-400 Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012: a locality is required to approve certain modifications to existing wireless towers and base stations

Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 is found in Title VI of that law. Title VI is commonly known as the “Spectrum Act.” As explained by the FCC in its Report and Order (FCC 14-153), adopted on October 17, 2014 (the “FCC Report and Order”), the Spectrum Act, among other things, required the FCC “to allocate specific additional bands of spectrum for commercial use” and established a governmental authority to “oversee the construction and operation of a nationwide public safety wireless broadband network.” *FCC Report and Order*, ¶ 136.

Section 6409(a) (codified at 47 U.S.C. § 1455(a)) provides that localities *must approve* any application to collocate, remove, or replace (collectively, “modify” or “modification”) transmission equipment on an existing wireless tower or base station if the modification does not substantially change the physical dimensions of the tower or base station. The FCC explained that Section 6409 contributes to the “twin goals of commercial and public safety wireless broadband deployment through several measures that promote the deployment of the network facilities needed to provide broadband wireless services.” *FCC Report and Order*, ¶ 137.

35-410 Implementing Section 6409: the FCC’s 2013 Guidance

Implementing Section 6409 posed some difficulties because the statute failed to define “substantial change” and “transmission equipment,” which were the two fundamental terms of the law. The FCC and the wireless industry encouraged localities to define “substantial change” as it was defined in an earlier federal document identified as the “Collocation Programmatic Agreement” (“Programmatic Agreement”), an agreement between the FCC, the National Conference of State Historic Preservation Officers, and the Advisory Council on Historic Preservation. *Guidance on Interpretation of Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012*, DA 12-2047, FCC (01/25/13) (“*Guidance on Interpretation of Section 6409(a)*”).

The Programmatic Agreement states that it was intended to better manage the consultation process under Section 106 of the National Historic Preservation Act (which requires federal agencies to take into account the effects of their undertakings on historic properties and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment) and to streamline reviews for collocating antennas on historic properties. The two most controversial elements of the Programmatic Agreement’s definition were that modifications could result in towers and their equipment increasing in height or width by up to 20 feet without being deemed to be a substantial change.

35-420 Implementing Section 6409: the FCC’s Rules

On October 17, 2014, the FCC adopted new Rules contained in a Report and Order (FCC 14-153). The Report and Order was released on October 21, 2014, and the Rules were published in the Federal Register on January 8, 2015 (Federal Register, Vol. 80, No. 5, p. 1238, *et seq.* (“Federal Register”). The portions of the new Rules that apply to local zoning decisions became effective April 8, 2015. The Rules implement and address some of the shortcomings of Section 6409(a). The Rules were upheld by the Fourth Circuit Court of Appeals in *Montgomery County, Maryland v. Federal Communications Commission*, 811 F.3d 121 (4th Cir. 2015) (rejecting challenge based on the Tenth Amendment and other grounds).

The Rules provide that any modification of an existing tower or base station resulting from the collocation, replacement, or removal of *transmission equipment* that does not result in the *substantial change* in the physical dimensions of the structure *must be approved* by the locality within 60 days. If the locality fails to approve the modification within the 60-day period, the application is *deemed approved*.

The Rules define the *transmission equipment* that will be eligible for collocation and replacement. The definition expands the term to not only include equipment used for personal wireless service communications, but also transmission equipment used for all FCC-licensed or authorized wireless transmissions. The FCC concluded that the expansion of the term fulfilled Congress’ intent in Section 6409 *to advance the deployment of commercial and public safety broadband services*. *Federal Register*, ¶¶ 64-66.

The Rules also define *substantial change*. Whether a modification results in a substantial change to the physical dimensions of an existing tower or base station goes to the heart of the Rules. If an applicant demonstrates that a modification does not result in a substantial change, a locality must approve the application. If the application would result in a substantial change, the locality may process the application under its applicable procedures. Although the definition in the Rules incorporates many of the thresholds for a substantial change in the Programmatic Agreement, it also includes two new key elements – a change is also substantial if: (1) “it would defeat the existing *concealment elements* of the tower or base station” (italics added); or (2) if it “does not comply with conditions associated with the siting approval of the construction or modification” of the tower or base station equipment, provided that this element does not apply to a condition that applies to the height or width of the existing tower or base station.

The Rules do not define *concealment elements*, which is a task that has been left to the localities to reasonably define. *See, e.g., FCC Report and Order*, ¶ 3: “[T]he rules we adopt today will allow local jurisdictions to retain their ability to protect aesthetic and safety interests”; *Statement of Chairman Tom Wheeler, FCC Report and Order*, p. 147: the new Rules “preserve[] local governments’ authority to adopt and apply the zoning, safety, and *concealment requirements that are appropriate for their communities*” (italics added).