Chapter 32

The Telecommunications Act of 1996 and Wireless Telecommunications

32-100 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, 125 S. Ct. 1453, 1455 (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, 125 S. Ct. at 1463 (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 (the "FCC") 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 32-400.

32-200 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 (2d Cir. 1999), a locality retains its authority under Virginia zoning laws to:

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

- Allow or prohibit various uses, including wireless facilities, within certain zoning districts. *Virginia Code § 15.2-2280(1). Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County*, 238 Va. 15, 380 S.E.2d 879 (1989).

- 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)), including on the ground that 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)).

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 did not 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 regulating radio frequency interference 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) (unpublished)*, 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.

32-300 The Telecommunications Act of 1996: the requirements and limitations in 47 U.S.C. § 332(c)(7)

As noted in section 32-100, 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 FCC's regulations concerning emissions *(47 U.S.C. § 332(c)(7)(B)(iv)).*

These requirements and limitations are discussed below.

32-310 The decision must be in writing

The Telecommunications Act of 1996 requires, among other things, that decisions denying wireless facilities

must be in writing. *47 U.S.C. § 332(c)(7)(B)(iii).* The federal appellate courts had been split as to whether a locality denying a wireless facility must state the reasons for the denial. The Fourth Circuit Court of Appeals, whose jurisdiction includes Virginia, had held that it is sufficient for the locality to satisfy the written decision requirement by merely stating "Denied."

In *T-Mobile South v. City of Roswell, Georgia*, 574 U.S. 293, 135 S. Ct. 808 (2015), T-Mobile challenged the city council's denial of its application for a 108-foot tall wireless facility. The United States Supreme Court considered whether, and in what form, localities must provide reasons when they deny applications for wireless facilities. The Court resolved the split among the federal circuit courts.

The Court first considered whether a locality must provide reasons for its decision. The Court considered the other relevant provisions of the Telecommunications Act, including the requirements that a locality's decision be supported by substantial evidence, that the locality not discriminate among functionally equivalent service providers, and that localities not adopt regulations that prohibit or have the effect of prohibiting wireless services. The Court held that these requirements, as well as other concepts, "all point clearly toward the conclusion that localities must provide reasons when they deny" wireless facilities. The Court added, however, that "these reasons need not be elaborate or even sophisticated, but rather . . . simply clear enough to enable judicial review."

The Court then addressed the timing for providing those reasons. In *T-Mobile*, the written minutes which may have provided the reasons for city council's decision were not available until 26 days after the denial, just 4 days before the wireless provider had to seek judicial review. The Court held that the reasons must be provided "essentially contemporaneously" with the written decision, explaining that although the reasons can be stated separately from the decision, they must be provided "essentially contemporaneously" with the written denial. The Court held that the city council's 26-day delay between its decision and the availability of the written minutes did not satisfy the "essentially contemporaneously" requirement.

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*, 140 F. Supp. 3d 548 (E.D. Va. 2015).

32-320 The decision must be supported by substantial evidence

Whether a decision to deny a wireless application complies with the Act requires a two-step analysis: (1) whether the reasons for the decision are contemplated in the locality's zoning ordinance; and (2) whether substantial evidence supports the denial. *T-Mobile Northeast LLC v. City Council of the City of Newport News*, 674 F.3d 380, 388 (4th Cir. 2012), followed in *Crown Castle Fiber LLC v. City of Charleston*, 2021 WL 538148 (unpublished) (where the plaintiff challenged the process as to how its applications were denied, the court held that the court's review is limited to *why* the applications were denied, not *how* it was denied; in other words, the court "can only review whether the reasons for the denial are rotted in local law and supported by substantial evidence").

32-321 Substantial evidence described

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).

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*, 140 F. Supp. 3d 548 (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.*

In a non-wireless telecommunications case, the Virginia Supreme Court has said that "[r]esidents' concerns over the quality of life in their neighborhood [are] hardly the stuff of blind, irrational prejudice." *Loch Levan Land Limited Partnership v. Board of Supervisors of Henrico County*, 297 Va. 674, 692, 831 S.E.2d 690, 699 (2019) (decision pertaining to abandoning a dedicated right of way). "It is not only proper but even expected that a legislat[ive body] and its members will consider the views of their constituents to be particularly compelling forms of evidence, in zoning as in all other legislative matters . . . Indeed, we should wonder at a legislator who ignored such opposition." *Loch Levan, supra*, quoting *Virginia Beach*, *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 six persons spoke in favor of the application but only three 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. However, the courts have never held that a locality's decision to deny an application *must* be supported by some form of public opposition. *Crown Castle Fiber LLC v. City of Charleston*, 2021 WL 538148 at 7 (unpublished).

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 . . .").

32-322 The substantial evidence test applied

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) (unpublished) (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 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) (unpublished) (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, as explained in section 32-321.

32-330 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) there is an *effective absence of coverage* in the area surrounding the proposed facility; and (2) there is a lack of reasonable alternative sites to provide coverage or that further reasonable efforts to gain approval for alternative facilities would be fruitless. *T-Mobile*, 672 F.3d at 266.

In *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*, 748 F.3d 185 (4th Cir. 2014), 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. The effective absence of coverage does not mean a total absence; it may mean coverage containing significant gaps. However, 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, Cellco Partnership v. Board of Supervisors of Roanoke County*, 2004 U.S. Dist. LEXIS 27348, 2004 WL 3223288 (W.D. Va. 2004) (unpublished) (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) (unpublished) (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 applied 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.*

32-340 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).

32-350 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, considering the nature and scope of such request.

The Act does not define what a "reasonable period of time" is. However, the FCC in 47 C.F.R. § 1.6003 establishes review periods for individual applications that are "presumptively reasonable":

- Review of an application to collocate a small wireless facility using an existing structure: 60 days.
- Review of an application to collocate a facility other than a small wireless facility using an existing structure: 90 days.
- Review of an application to deploy a small wireless facility using a new structure: 90 days.
- Review of an application to deploy a facility other than a small wireless facility using a new structure: 150 days.

The reader is advised to review 47 C.F.R. § 1.6002 *et seq.* for definitions, including definitions of *collocate*, *deployment*, and *small wireless facility*, additional rules pertaining to the shot clock including when a single application requests approval of multiple deployments, and tolling periods. *See section 32-500 for a summary of Virginia's requirements for acting on small cell and micro-cell applications.*

32-360 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 (2d 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, before the county issues 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.

32-400 Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 requires a locality 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.*

32-410 Eligible facilities

Modifications to existing towers or base stations involving the following are within the scope of the Spectrum Act and its implementing regulations if they do not *substantially change* the physical dimensions of the tower or base station:

- Collocation of new transmission equipment.
- Removal of transmission equipment.
- Replacement of transmission equipment.

47 C.F.R. § 1.6100(b)(3) (definition of "eligible facilities request").

Collocation means "[t]he mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes." *47 C.F.R. § 1.6100(b)(2).*

32-420 The meaning of "substantial change"

The modifications described in section 32-410 must be approved if they do not substantially change the physical dimensions of the tower or base station. Both tower and base station are defined in the regulations. *47 C.F.R. § 1.6100(b)(1) and (9).*

A modification substantially changes the physical dimensions of an eligible support structure if it meets any of the following criteria:

- Increase in height; towers not in a public rights-of-way: "For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet, whichever is greater."
- Increase in height; eligible support structures other than towers not in a public rights-of-way: "[F]or other eligible support structures, it increases the height of the structure by more than 10% or more than ten feet, whichever is greater."
- Adding an appurtenance; towers not in a public rights-of-way: "For towers other than towers in the public rights-of-way, it involves adding an appurtenance to the body of the tower that would protrude from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater."
- Adding an appurtenance; eligible support structures other than towers not in a public rights-of-way: "[F]or other eligible support structures, it involves adding an appurtenance to the body of the structure that would protrude from the edge of the structure by more than six feet."
- Any eligible support structure: "For any eligible support structure, it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets; or,

for towers in the public rights-of-way and base stations, it involves installation of any new equipment cabinets on the ground if there are no pre-existing ground cabinets associated with the structure, or else involves installation of ground cabinets that are more than 10% larger in height or overall volume than any other ground cabinets associated with the structure.

- Excavation or deployment outside of the current site; exception: "It entails any excavation or deployment outside of the current site, except that, for towers other than towers in the public rights-of-way, it entails any excavation or deployment of transmission equipment outside of the current site by more than 30 feet in any direction. The site boundary from which the 30 feet is measured excludes any access or utility easements currently related to the site."

- Defeat concealment elements: "It would defeat the concealment elements of the eligible support structure."

- Noncompliance with conditions of approval: "It does not comply with conditions associated with the siting approval of the construction or modification of the eligible support structure or base station equipment, provided however that this limitation does not apply to any modification that is non-compliant only in a manner that would not exceed the thresholds identified in § 1.40001(b)(7)(i) through (iv)."

47 C.F.R. § 1.6100(b)(7).

As used in the definition of *substantial change*, an *eligible support structure* is "[a]ny tower or base station as defined in [47 C.F.R. § 1.6100], provided that it is existing at the time the relevant application is filed with the [state or locality]"; *transmission equipment* is "[e]quipment that facilitates transmission for any [FCC]-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul." *47 C.F.R. § 1.6100(b)(4) and (8).*

The regulations 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).

32-430 The requirement to timely act

A state or locality must act on an application on an eligible facilities request within 60 days after the application is filed. *47 C.F.R. § 1.6100(c)(2).* The 60-day period may be tolled either by mutual agreement between the applicant and the state or locality, or the state or locality determines that the application is incomplete. *47 C.F.R. § 1.6100(c)(3).* There are procedural requirements that apply when the review period is tolled because an application is incomplete. *47 C.F.R. § 1.6100(c)(3)(i)-(iii).*

If the state or locality fails to approve or deny the application within the 60-day period (accounting for any tolling), the application is deemed granted (approved). *47 C.F.R. § 1.6100(c)(4).* The applicant must give written notice to the state or locality that the application is deemed approved for the deemed approval to be effective. *47 C.F.R. § 1.6100(c)(4).*

32-440 The requirement to approve if the modification does not substantially change the physical dimensions of the structure

A state or locality may not deny and *must approve* any eligible facilities request for modification of an eligible support structure that does not substantially change the physical dimensions of the structure. *47 C.F.R. § 1.6100(c).*

32-500 State procedure for small cell facilities and micro-cell facilities

Virginia Code §§ 15.2-2316.3 and 15.2-2316.4 establish a uniform procedure and standards for localities to act on small cell facilities on existing structures and establish a procedure for wireless service providers to obtain approval of, and install, small cell facilities in public rights of way. *Small cell facilities* are wireless facilities where: (1) each antenna is located inside an enclosure of no more than six cubic feet; and (2) all other wireless equipment associated with the facility has a cumulative volume of no more than 28 cubic feet, or a higher limit established by the FCC. *Virginia Code § 15.2-2316.3*. An *existing structure* is any structure that is installed or approved for installation at the time a wireless services provider or wireless infrastructure provider provides notice to a locality or the Department of Transportation of an agreement with the owner of the structure to co-locate equipment on that structure. *Existing structure* includes any structure that is currently supporting, designed to support, or capable of supporting the attachment of wireless facilities, including towers, buildings, utility poles, light poles, flag poles, signs, and water towers. *Virginia Code § 15.2-2316.3*.

A locality must review and act on applications for small cell facilities within 60 days and may not require a special use permit, special exception, or variance. *Virginia Code § 15.2-2316.4(A)*. An application may be disapproved only for specific reasons. *Virginia Code § 15.2-2316.4(B)(4)*.

An applicant may seek approval of up to 35 small cell facilities in a single application. *Virginia Code § 15.2-2316.4(B)(1)*. Localities may not charge more than $100 each for up to five small cell facilities on an application, and $50 for each additional small cell facility on the application. *Virginia Code § 15.2-2316.4(B)(2)*.

The installation, placement, maintenance, or replacement of micro-wireless facilities that are suspended on cables or lines that are strung between existing utility poles in compliance with national safety codes are exempt from locality permitting requirements and fees. *Virginia Code § 15.2-2316.4(C)*. *Micro-cell facilities* are small cell facilities that are not larger in dimension than 24 inches in length, 15 inches in width, and 12 inches in height and that have an exterior antenna, if any, not longer than 11 inches. *Virginia Code § 15.2-2316.3*.

32-600 State procedure for administrative review-eligible projects

Virginia Code §§ 15.2-2316.4.1 through 15.2-2316.4.3 establish procedures and standards for localities to act on applications for administrative review-eligible projects. *Administrative review-eligible projects* are projects that provide for:

> 1. The installation or construction of a new structure that is not more than 50 feet above ground level, provided that the structure with attached wireless facilities is (i) not more than 10 feet above the tallest existing utility pole located within 500 feet of the new structure within the same public right-of-way or within the existing line of utility poles; (ii) not located within the boundaries of a local, state, or federal historic district; (iii) not located inside the jurisdictional boundaries of a locality having expended a total amount equal to or greater than 35 percent of its general fund operating revenue, as shown in the most recent comprehensive annual financial report, on undergrounding projects since 1980; and (iv) designed to support small cell facilities; or
>
> 2. The co-location on any existing structure of a wireless facility that is not a small cell facility.

Virginia Code § 15.2-2316.3.

Virginia Code § 15.2-2316.4:1(A) prohibits localities from requiring a special exception, special use permit, or variance in order to install an administrative review-eligible project. At most, localities may require an administrative review prior to issuing a zoning permit. *Virginia Code § 15.2-2316.4:1(A)*. Localities may charge a fee not to exceed $500. *Virginia Code § 15.2-2316.4:1(B)*. Virginia Code § 15.2-2316.4:1 also establishes the period by which localities must act on applications, the requirements if the locality disapproves an application, and an appeal procedure.

Virginia Code § 15.2-2316.4:2(A) prohibits localities from disapproving an application on specified grounds, prohibits localities from requiring an application to provide proprietary, confidential, or other business information

to justify the need for the project, and prohibits localities from imposing a number of specified requirements or limitations on an approval. However, Virginia Code § 15.2-2316.4:2(B) allows a locality to disapprove an application:

- "On the basis of the fact that the proposed height of any wireless support structure, wireless facility, or wireless support structure with attached wireless facilities exceeds 50 feet above ground level, provided that the locality follows a local ordinance or regulation that does not unreasonably discriminate between the applicant and other wireless services providers, wireless infrastructure providers, providers of telecommunications services, and other providers of functionally equivalent services; or"

- "That proposes to locate a new structure, or to co-locate a wireless facility, in an area where all cable and public utility facilities are required to be placed underground by a date certain or encouraged to be undergrounded as part of a transportation improvement project or rezoning proceeding as set forth in objectives contained in a comprehensive plan" provided additional requirements are met.

Virginia Code § 15.2-2316.4:2(B) also allows a locality to disapprove an application if the applicant has not given written notice to adjacent landowners at least 15 days before it applies to locate a new structure in the area.

Virginia Code § 15.2-2316.4:2(D) allows a locality to disapprove an application submitted under a standard process project on the basis of the availability of existing wireless support structures within a reasonable distance that could be used for co-location at reasonable terms and conditions without imposing technical limitations on the applicant.

Virginia Code § 15.2-2316.4:3(A) prohibits localities from requiring zoning approval for routine maintenance or the replacement of wireless facilities or wireless support structures within a six-foot perimeter with wireless facilities or wireless support structures that are substantially similar or the same size or smaller. However, Virginia Code § 15.2-2316.4:3(B) provides that nothing in the laws pertaining to small cell facilities and administrative review-eligible projects prohibits localities from limiting the number of new structures or the number of wireless facilities that can be installed in a specific location.