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# Federal and Local Law Govern Requests To Build Cell Towers

By Anthony S. Guardino

In late December, AT&T Mobility, a wireless service provider, sued the Long Island village of Oyster Bay Cove and the village's zoning board of appeals and planning board in the U.S. District Court for the Eastern District of New York. AT&T alleged that the defendants failed to timely approve its request to construct a cell tower that it asserted was needed to provide reliable wireless service in an area of the village suffering from a "service gap."

Lawsuits such as the one filed by AT&T involving proposed cell towers are not uncommon. This past September, a provider filed a similar lawsuit against another Long Island village and a host of other parties. *New Cingular Wireless PCS, LLC v. Village of Muttontown*, No. 22-cv-05524-JS-LGD (E.D.N.Y.). And about a year earlier, yet another similar suit was filed against Riverhead, a town in Long Island, and related defendants. *Crown Castle Towers 06-2 LLC v. Town of Riverhead*, No. 21-cv-789 (E.D.N.Y.).

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These cases implicate federal law—most notably, the Telecommunications Act of 1996 (TCA)—as well as local zoning and regulatory statutes. When steps are taken in compliance with these rules, providers typically can gain court approval for the construction of their cell towers over community objections. Local governments, community officials, and residents, however, often do challenge these efforts and, under certain circumstances, can succeed (at least in the short run).

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This column discusses the principal governing law, recent Federal Communications Commission (FCC) guidance, and notable court decisions in this area to provide a roadmap both for those seeking to install cell towers and those wanting to make sure that all rules are followed.

## The Law

Congress enacted the TCA in a stated effort to facilitate the deployment of telecommunications infrastructure. The conference report on the TCA indicates that Congress intended "to remove all barriers to entry in the provision of telecommunications services." S. Rep. No. 104-230, at 126 (1996). Toward that end, the TCA directed the FCC to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

Despite these federal goals, the TCA expressly preserves the land use and zoning authority of local governments. It imposes, however, several substantive and procedural limits upon that authority when exercised in relation to wireless service facilities. For instance, Section 253(a) provides that "[n]o state or local statute or regulation, or other state or local legal requirement, may prohibit

or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

In addition, Section 332(c)(7) of the TCA states that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."

Clause (B)(ii) of that section further provides that "[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 TCA recognizes certain local needs. Thus, Section 332(c)(7) generally preserves state and local authority over the "placement, construction, and modification of personal wireless service facilities" but with the important limitations described above. Section 332(c)(7) also sets forth a judicial remedy, stating that "[a]ny person adversely affected by any final action or failure to act by a state or local government" that is inconsistent with the requirements of Section 332(c)(7) "may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." The provision further directs the court to "decide such action on an expedited basis."

In various rulings, the FCC has interpreted Section 332 and the limits it imposes on state and local authority. In one case, interpreting Section 332(c)(7)(B)(i)(II), the FCC found that "a state or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)." Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) To Ensure Timely Siting Review, Declaratory Ruling, 24 FCC Rcd 13994, 14016, para. 56 (2009), *aff'd, City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

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In 2018, the FCC released its ruling titled, "In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment" (2018 Declaratory Ruling). The 2018 declaratory ruling provides helpful guidance under the TCA with respect to a number of particularly important topics.

First, the FCC declared that the "materially inhibit" standard is the appropriate standard for determining whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332 of the TCA.

According to the FCC, a state or local legal requirement amounts to an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." The FCC indicated that an effective prohibition includes materially inhibiting additional services or materially inhibiting improving existing services. The FCC added that a legal requirement can "materially inhibit" the provision of services even if it is not an insurmountable barrier.

The FCC next noted in its 2018 declaratory ruling that state and local fees and other charges associated with the deployment of wireless infrastructure can effectively prohibit the provision of service. It declared that fees are only permitted to the extent that they represent a reasonable approximation of the government's actual, objectively reasonable costs and are non-discriminatory.

The FCC also addressed other types of land use or zoning requirements that, it said, might have the effect of prohibiting service in violation of Sections 253 and 332. For example, it declared that "aesthetics," "local undergrounding," and "minimum spacing" requirements are not preempted if they are reasonable,

no more burdensome than those applied to other types of infrastructure deployments, objective, and published in advance.

The FCC's 2018 declaratory ruling similarly discussed what is often referred to as the "shot clock"—the colloquial term for the reasonable period of time beyond which state or local inaction on wireless infrastructure siting applications constitutes a "failure to act" within the meaning of Section 332. The FCC adopted 60 days for review of an application for "collocation" of small wireless facilities (i.e., facilities that are, among other things, mounted on structures 50 feet or less in height) and 90 days for review of an application for attachment of small wireless facilities using a new structure.

It also decided on a 150-day shot clock for new construction applications that are not for small wireless facilities, explained when shot clocks start, and described the impact of incomplete applications on shot clocks.

## Court Decisions

Recent court decisions illustrate how many of these rules are applied in practice.

Consider, for example, the decision by the Eastern District of New York in *Crown Castle Ng East LLC v. Oyster Bay*, 2020 WL 2393915 (E.D.N.Y. 2020). Here, the plaintiff alleged that the defendant town prohibited the provision of telecommunication services by issuing a moratorium that materially inhibited its deployment of wireless infrastructure.

The court pointed out that Congress committed the siting of wireless facilities to the discretion of state and local governments, subject only to the limitations set forth in Section 332 of the TCA. It then found that the defendants demonstrated that a building permit and/or special use permits were required, that the plaintiff had not applied for those permits, and, therefore, that there was not "any final action or failure" to act by the town denying the plaintiff the opportunity to place its equipment in the town right of way upon which the court's subject matter jurisdiction could be based.

In *Gondolfo v. Town of Carmel*, 76 Misc.3d 521 (Sup. Ct. Putnam Co. 2022), a lawsuit over the construction of a cell tower brought by town residents, the court ruled that a town board overstepped its authority in agreeing to allow a cell tower to be built without zoning board of appeals or planning board review or vote. According to the court, none of the planning and zoning laws that the residents sought to be undertaken were preempted by the TCA.

*Cellco Partnership d/b/a Verizon Wireless v. Town of Clifton Park*, 365 F.Supp.3d 248 (N.D.N.Y. 2019), reached the court after the defendant town denied the plaintiff's application for local zoning approvals to construct and operate a new wireless telecommunications facility on a parcel of land in an area of the town that the plaintiff asserted was experiencing a significant gap in service.

The court ruled that the town "unlawfully denied [the plaintiff]'s application without substantial evidence in the written record" in violation of the TCA, and that the town was "federally preempted" from denying the plaintiff's application on technical grounds.

One other recent decision is also worth noting. The plaintiffs in *Up State Tower Co., LLC v. Village of Lakewood*, 431 F.Supp.3d 157 (W.D.N.Y. 2020), argued that a zoning board of appeals' denial of their application to construct a cell tower was improper.

The court granted summary judgment in favor of the plaintiffs, ruling among other things that the defendants' finding of no significant gap in cell coverage, the defendants' conclusion that the plaintiffs' siting efforts were insufficient, and the defendants' finding of aesthetic harm all were not supported by substantial evidence. The court then ordered the defendants to grant the necessary permits and approvals.

## Conclusion

When a wireless service provider seeks to construct a cell tower to eliminate a coverage or service gap, local officials have every right to carefully examine the application and to make sure that the provider obtains all appropriate permits and approvals. They should, however, firmly keep in mind the TCA's goal of enhancing cell service, and they must act promptly to respond to any such application. Litigation likely can be avoided when all parties recognize the applicable rules and act within the parameters they establish.