AMERICAN PLANNING ASSOCIATION, MISSOURI CHAPTER

2013 STATE CONFERENCE

PLANNING REALITIES OF JEFF CITY POLITICS: A REVIEW OF THE 2013 LEGISLATIVE SESSION

SELECTED MATERIALS ON WIRELESS COMMUNICATIONS FACILITIES SITING

RYAN A. MOEHLMAN

CUNNINGHAM, VOGEL & ROST, P.C.
legal counselors to local government
333 S. Kirkwood Road, Suite 300
St. Louis, Mo 63122
314.446.0800
www.municipalfirm.com

BRANSON, MISSOURI
OCTOBER 17, 2013

I. <u>OVERVIEW OF TELECOMMUNICATIONS ACT OF 1996</u>. 47 U.S.C. § 332(c)(7) of federal Telecommunications Act of 1996 (the "TCA") provides limitations on the ability of local government to regulate placement, construction, and modification of "personal wireless service facilities," i.e.: cell towers, but "specifically preserved the authority of local zoning boards 'over decisions regarding the placement, construction, and modification of personal wireless service facilities,' *47 U.S.C. § 332(c)(7)(A)*." *USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 820 (8th Cir. 2006).

A. <u>Procedural Requirements of TCA</u> – Decisions on the placement, construction, and modification of personal wireless service facilities must satisfy the following:

1. *Decision "in writing" – § 332(c)(7)(B)(iii)*

a. *Sprint Spectrum, L.P. v. Platte County*, 578 F.3d 727, 731 (8th Cir. 2009). To satisfy the TCA's "in writing" requirement, decisions by local zoning boards must:

i. be <u>separate</u> from the written record;

ii. describe the reasons for the denial; and

iii. contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons.

b. *USCOC of Greater Missouri, LLC v. City of Ferguson*, 583 F.3d 1035, 1041-42 (8th Cir. 2009). Issuance of the local government's written decision, not the local government's vote to deny an application, is the "final action" that starts the 30-day limitations period for providers to sue under the TCA.

2. *Supported by "substantial evidence" in a written record* – § 332(c)(7)(B)(iii)

a. The TCA's "substantial evidence" requirement is directed at whether the local zoning authority's decision is consistent with the applicable local zoning requirements.

i. <u>*Compliance with Zoning Code*</u> – Failure to conform to local zoning regulations is, alone, held to be sufficient evidence to support a denial of a permit for a wireless service facility.

- *Florida RSA #8 LLC d/b/a U.S. Cellular v. City of Chesterfield*, 416 F.Supp.2d 725, 739 (E.D.Mo. 2006) (Denial of administrative permit supported by substantial evidence where administrative permit was not permissible under City's zoning ordinance);
- *USCOC of Va. RSA #3 v. Montgomery County*, 343 F.3d 262, 271 (4th Cir. 2003) ("[T]he proposed tower's inconsistency with local zoning requirements is sufficient to establish substantial evidence for the denial of the permit.");

ii. <u>*Aesthetics*</u> – Aesthetic concerns can be a valid basis on which to deny a wireless facility application.

- *Sprint Spectrum, L.P. v. Platte County*, 578 F.3d 727, 733 (8th Cir. 2009) Aesthetic judgment must be "grounded in the specifics of the case" and not based on "generalized aesthetic concerns…that are applicable to any tower, regardless of location."

3. *Decision within a "reasonable period of time"* – § 332(c)(7)(B)(ii)

a. Under TCA, decisions on the placement, construction, and modification of personal wireless service facilities must be done in a "reasonable period of time."

b. See discussion of FCC Shot Clock Rule below. *Provisions of Section 332(c)(7)(B)…, FCC 09-99, Declaratory Ruling (November 18, 2009)* (Order defining "reasonable period of time.")

B. Substantive Requirements of TCA – Local government regulation of personal wireless service facilities cannot:

1. *Unreasonably discriminate among providers of functionally equivalent services* – § 332(c)(7)(B)(i)(I)

a. *USCOC of Greater Missouri, LLC v. Village of Marlborough*, 618 F.Supp.2d 1055 (E.D.Mo. 2009). In order to succeed on a claim of unreasonable discrimination under the TCA, wireless providers "must show that [the local government] discriminated among providers of functionally equivalent services and that these providers were treated unequally."

i. "There is no unreasonable discrimination under the TCA where there is no evidence that a local zoning board treated another competitor differently." *Id.*, 618 F.Supp.2d at 1065. In *Village of Marlborough*, unreasonable discrimination claim was dismissed where "there [was] no allegation that the Village actually treated another telecommunications provider differently from [the plaintiff wireless provider]." *Id.* at 1064.

2. *Prohibit or have the effect of prohibiting provision of personal wireless services* – § 332(c)(7)(B)(i)(II)

a. A "Significant Gap" in wireless coverage must be shown. There is a circuit split on what constitutes a "Significant Gap"

i. 1st and 9th Circuit

- Gap only need be in one providers' available service. See e.g., *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 732-33 (9th Cir. 2005)

ii. 2nd and 3rd Circuit

- Gap must be in *all* available wireless service. *APT Pittsburgh Ltd. P'ship v. Penn Twp.*, 196 F.3d 469, 480 (3rd Cir. 1999)

b. "As Applied" Effective Prohibition claims – *See USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adjustment of the City of Des Moines*, 465 F.3d 817, 820 (8th Cir. 2006).

i. Claim of effective prohibition based on a specific decision of a zoning board requires a showing that a wireless provider:

- adequately investigated "all feasible alternative sites,"
- gave "serious consideration" to other locations,
- proposed site "was the only location for a cellular tower that would remedy [the provider's] coverage issue."
  - Complaint must contain allegations showing that the provider's proposed site is the "only viable location." (In *Village of Marlborough*, prohibition of service claim dismissed where complaint failed to allege proposed site was only viable location and alleged facts showing that sites other than proposed site would remedy provider's coverage needs.)

c. "Facial" challenges to regulations alleging Effective Prohibition – *USCOC of Greater Missouri, LLC v. Village of Marlborough*, 618 F.Supp.2d 1055, 1062 (E.D. Mo. 2009). Providers must show either:

i. The impossibility of obtaining a permit through the applicable local ordinances; or

ii. That no alternative site exists that the provider could use to fill a gap in service.

3. *Regulate "on the basis of the environmental effects of radio frequency emissions." – § 332(c)(7)(B)(iv)*

a. Federal RF Safety Standards totally preempt conflicting attempts to regulate RF emissions.

b. Prohibition against regulating RF emission does not apply where local government is seeking to control RF emissions as landlord, and not as regulator. *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2nd Cir. 2002).

C. Remedy for Violations of TCA

1. *Remand* – *See USCOC of Greater Missouri, LLC v. County of Franklin*, 575 F.Supp.2d 1096, 1102-03 (E.D. Mo. 2008) (Remand back to zoning board was appropriate remedy where zoning board failed to comply with "in writing" requirements of TCA).

2. *Injunction* – *But see Sprint Spectrum L.P. v. County of St. Charles*, 2005 WL 1661496, 2005 U.S. Dist. LEXIS 43590 (E.D.Mo. July 6, 2005); (Injunction granted to allow the wireless provider to construct its tower in the manner it applied for upon violations of TCA's "in writing" and "substantial evidence" requirements.)

II. FCC'S SHOT CLOCK RULE - *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)…*, FCC 09-99, Declaratory Ruling (November 18, 2009) –

Under TCA, 47 U.S.C. 322(c)(7)(B), decisions on the placement, construction, and

modification of personal wireless service facilities must be done in a "reasonable period of time."

A. <u>Effect on Procedure</u>

1. The FCC Shot Clock Rule states that a "reasonable period of time" for a local government is presumptively:
    a. **Ninety (90) days** to process personal wireless service facility siting applications requesting co-locations (**antennas on existing towers/structures**)
    b. **One-hundred fifty (150) days** to process all other applications (**new towers/structures**)
2. A failure to make a "final action" (a final *written* decision) within those timeframes constitutes a rebuttable presumption of a "failure to act" authorizing a challenge in federal court.
    a. However, failure to act on an application within the timeframes "would not, in and of itself, entitle the siting applicant to an injunction granting the application."
3. Applicants and the state or local authority **can agree to extend** the above timeframes.
4. The 90 day or 150-day time limits **do not start to run until the applicant files a complete application**.
    a. State and local governments **must inform an applicant that their application is incomplete within thirty (30) days** of receiving an incomplete application.
5. New restriction on permissible reasons for denials:
    a. "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….'" (emphasis added).

B. <u>*City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012)</u>

1. ***Rule upheld*** – Opinion upheld FCC Shot Clock Rule as an appropriate exercise of FCC's authority.
2. **Operation of presumption –** Opinion points out that Shot Clock Rule merely creates a <u>presumption</u> that a City that does not make a final action within the Shot Clock time-limits failed to act within reasonable amount of time.
    a. "If the party against whom the presumption operates produces evidence challenging the presumed fact, the presumption simply disappears from the case."
    b. "[T]he ultimate burden of persuasion remains with the wireless facilities provider to demonstrate that the government unreasonably delayed action on an application."

c. "[T]he wireless provider would likely be entitled to relief if it showed a state or local government's failure to comply with the time frames and the state or local government failed to introduce evidence demonstrating that its delay was reasonable despite its failure to comply."

d. "If the state or local government introduced evidence demonstrating that its delay was reasonable, a court would need to weigh that evidence against the length of the government's delay—as well as any other evidence of unreasonable delay that the wireless provider might submit—and determine whether the state or local government's actions were unreasonable under the circumstances."

3. ***Practical implications of presumption*** – If your City cannot render a "final action" within the FCC Shot Clock Rule's time limits, make sure the City's record contains documentation showing the reasons for delay and showing that the delay was reasonable in the circumstance.

C. Action Plan to Deal with FCC Shot Clock Rule

1. Review City's wireless facility siting ordinance and current practices to ensure that it is adequately protected against new challenges based on this FCC Shot Clock Rule.

a. Possibly incorporate new time limits expressly into existing codes and practices.

b. Implement procedures regarding what constitutes a "complete application," the timing of review, procedures for extensions, and clear standards for decisions that reduce the risk of legal action and increase the likelihood that local decisions regarding your community will be upheld.

i. See CVR's Model Wireless Communication Facilities Code, for provisions addressing FCC Shot Clock Rule. http://www.municipalfirm.com/documents/CVRModelWirelessCommunicationsFacilitiesCode2012.pdf.

2. Notify and educate officials and staff who are responsible for processing and/or making decisions on wireless facility applications of the TCA obligations, the FCC Shot Clock Rule, and court interpretations of the procedural requirements of the TCA.

III. NEW FEDERAL STATUTE PROHIBITING DENIAL OF CERTAIN COLLOCATION REQUESTS

– As part of the *Middle Class Tax Relief and Job Creation Act of 2012 (H.R. 3630)* a new federal statute was approved on Feb. 22, 2012 that impacts state and local governments' authority to deny certain applications related to siting of wireless communications facilities (cell towers).

A. ***The Statute*** – Section 6409(a) of the Act (47 U.S.C. 1455(a)(1)-(2)) provides:

§ 1455. Wireless facilities deployment

(a) Facility modifications.

(1) *In general*. Notwithstanding section 704 [47 U.S.C. § 332] of the Telecommunications Act of 1996 (Public Law 104-104) or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

(2) *Eligible facilities request*. For purposes of this subsection, the term "eligible facilities request" means any request for modification of an existing wireless tower or base station that involves--

(A) collocation of new transmission equipment;

(B) removal of transmission equipment; or

(C) replacement of transmission equipment.

B. <u>Undefined Terms</u>. – What do they mean?

1. *"Notwithstanding … any other provision of law"* –

a. Building/Safety Code?

b. Zoning Code?

Note: Nothing in § 1455 strips Cities of their right to review applications and issue the necessary zoning permits/approvals.

2. *"Substantially change the physical dimensions of such tower or base station"*

a. FCC Notice of Proposed Rulemaking -- *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238, FCC 13-122 (9/26/2013).

ii. Defines "*Substantial increase in the size of the tower*'':

(1) *Height* – Greater of **10% of existing height** *or* **height of additional array plus 20ft**; or

(2) *Equipment* - Installation of more than the **standard number** of new equipment cabinets for the technology involved, **not to exceed four**, or more than **one new equipment shelter**; or

(3) *Width* – Greater of **20ft protruding from edge of tower** *or* **width of tower** at attachment height; or

(4) *Site* - Excavation outside the current tower site (boundaries of the tower's lease or fee area plus related access or utility easements.

c. Until Rulemaking - Strategies for limiting what constitutes a substantially change the physical dimensions of such tower or base station.

i. Ordinance – define for itself "substantially change the physical dimensions…"

ii. Policy/Discretionary Decision-making

- If your City denies an applications that the wireless company could claim is protected by §1455, make sure the City's record and written decision

clearly lay out the reasons why the application falls outside the provisions of the Act.

IV. UNIFORM WIRELESS COMMUNICATIONS INFRASTRUCTURE DEPLOYMENT ACT – HB 331

1. *City of Liberty, et al. v. State of Missouri* - HB 331 and its companion bill of HB 345 are currently being challenged by the Cities of Liberty, Gladstone, Lee's Summit, Butler, Cameron, and Independence for violations of the procedural requirements of the Missouri Constitution.

   ***a*. Single Subject/Clear Title Rule – cannot combine multiple subjects in one bill and the single subject must be clearly expressed in the title of the bills**

   ***b*. Original Purpose Rule – Legislation cannot be amended during the legislative process to substantially depart from its original purpose**

2. **SUMMARY OF HB 331 AND HB 345 CHANGES TO EXISTING LAW AND POSSIBLE EFFECTS OF SUCH CHANGES -** Below is a brief summary of <u>just a few</u> of the significant provisions of HB331 and HB345 directly affecting municipalities. References to "city" also apply to counties and the State.

<u>HB331</u>

Loss of Control over Wireless Facilities/Structures:

- **<u>Collocations and Replacement Facilities Not Subject *Any* Zoning Requirements</u>**. Applications for collocations are subject to building codes but "shall not otherwise be subject to zoning or land use requirements, including design or placement requirements, or public hearing review." This means that collocated and replacement antennas and equipment on existing buildings or towers may claim exemption from setbacks, appearance, height, or other zoning restrictions! § 67.5100.1 RSMo.

- **<u>Collocation Requirements Banned</u>**. Cities cannot "evaluate an application based on the availability of other potential locations for the placement of wireless support structures or wireless facilities, including without limitation the option to collocate," encouraging proliferation of new single-antenna towers. § 67.5094(2) RSMo.

- **<u>Deprives City Control over Wireless Facilities on Private Utility Poles</u>**. Cities cannot "mandate, require, or regulate the placement, modification, or collocation of any new wireless facility on new, existing, or replacement poles owned or operated by a utility," creating potential scenario of utilities and wireless providers partnering to build "utility poles" in rights-of-way to which wireless facilities are attached of unlimited size and unregulated design. § 67.5100.4 RSMo. Can antennas on poles now be of unlimited height and size in the ROW?

- **<u>Denies General Control over Type of Towers and Common Regulations:</u>**
  - **No Control Over Type of Facilities -** Prohibits "dictat[ing] the type of wireless facilities, infrastructure or technology" used for wireless facilities. Does this now allow Lattice towers? Guy wire towers? Can Cities still require disguised

antennas? Prohibit regulation of appearance of towers because they are "infrastructure"? § 67.5094(8) RSMo. Language unclear and inconsistent with other provisions. See §(15)(banning unreasonable regulations on appearance)

- Bans "preference" for public property for location of new towers. § 67.5094(14) RSMo.
- Bans durations on approvals. § 67.5094(13) RSMo.
- Bans bonds/surety to remove abandoned towers. § 67.5094(11) RSMo.
- Caps application fees. § 67.5094(10) RSMo.
- Among other - See § 67.5094(1)–(18)

- **Short Time Limits on Local Reviews**. Imposes shorter time limitations on wireless applications that FCC has already rejected as too short for general application; procedures for incomplete application could give Cities as little as 15 days to process a complete collocation request. §§ 67.5096.4, 67.5098.2, 67.5100.2 RSMo.

- **Limits on Future Planning for Airports**. Prohibits regulations greater than FAA – eliminating protection of local airport plans; potentially "land locks" airports as they currently exist. § 67.5094(8) RSMo.

- **Limits on Information**. Limits city inquiry into nature of the wireless services or coverage – information required to determine "need" for the tower and tax applicability. § 67.5094(1) RSMo.

- **Expanded Limits on Control of Radio Interference**. Cities may to be unable to directly prevent radio interference with police or public safety communications antennas. § 67.5094(5)-(7) RSMo.

Rights of Way/Public Land Impacts:

- **ROW Franchises, Agreements and Permits Banned for pre-2001 Utilities**. Cities cannot require "any public utility" lawfully in "right-of-way prior to August 28, 2001 to enter into an agreement or obtain a permit for general access to or the right to remain in the right-of-way…. " § 67.1842.1(6) RSMo. Does this now cause unlawful discrimination if anyone is required to have a franchise or agreement? Language is unclear.

- **City Utility Poles now considered Right-of-Way**. Removes exclusion of "poles" from definition of right-of-way; Cities may now be required to grant consent to use city-owned poles. § 67.1830(7) RSMo.

- **ROW Permit Fee Cannot be Used for Legal Review**. Cannot include in application fees the cost of legal or attorney review in compliance with all of the new ROW laws. § 67.1830(5) RSMo.

- **Required Public Land Lease Terms.** § 67.5102(3) & (4) RSMo. (also in HB345)

Deregulation of Telephone Industry

- Allows Telecom companies to opt out of certain PSC Tariff Regulations. § 392.611 RSMo.

Railroad Crossing Regulations

- Imposes new regulations on Railroads relating to Railroad crossings for all utilities. §§ 389.585-.591 RSMo.

HB345 (Affects Rent/Use of Public Land and Utility Poles)

- **Required Lease Terms and No Control Over Lease Rates**. If City leases land/space to wireless companies, lease cannot be "less than fifteen years" and forces rent to be determined by third-parties appraisers. § 67.5102(3) & (4) RSMo. (Same as HB331 above).
- **Pole Access Cannot be Conditioned on Compliance with Local Regulations**. Cities cannot condition pole attachment fees, terms, and conditions, including those related to access, on compliance with "franchising" or "governmental permitting" authority. § 67.5104.2 RSMo.
- **Pole Disputes Subject to Binding Arbitration**. In the event of a dispute, fees, terms, and conditions relating to pole attachments are subject to binding arbitration. § 67.5104.3 RSMo. City does not know the terms of use of its own public property as final deal terms determined by private arbitrator.
- **Pole Rates Limited to Cost Recovery.** Cities are limited to recover the cost of hosting pole attachers on their utility poles; utilizing federal "cable service rate formula," (generally reported to be in the $7.00 per pole range) i.e., Cities can't make money from leasing poles. § 67.5104.3 RSMo.

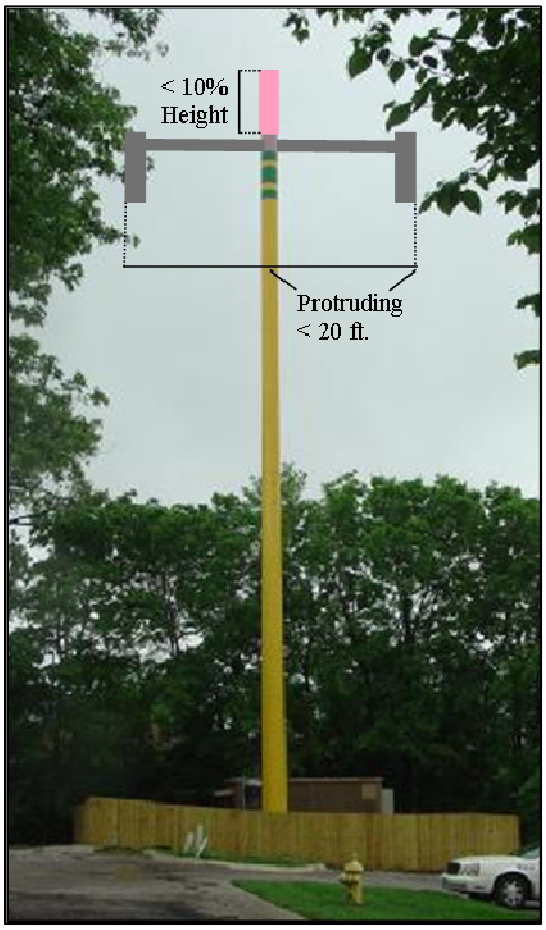
Ryan A. Moehlman
Cunningham, Vogel & Rost, P.C.
legal counselors to local government
333 S. Kirkwood Road, Suite 300
St. Louis, MO 63122
314.446.0800
314.446.0801 (fax)
www.municipalfirm.com
ryan@municipalfirm.com

NOTICE & DISCLAIMER

These seminar materials and the related presentation are intended for discussion purposes and to provide those attending the seminar with useful ideas and guidance on the topics and issues covered. The materials and the comments of the presenters do not constitute, and should not be treated as, legal advice regarding the use of any particular technique, device or suggestion, or its legal advantages or disadvantages. Although we have made every effort to ensure the accuracy of these materials and the presentation, neither the attorney presenting this seminar nor Cunningham, Vogel & Rost, P.C. assumes any responsibility for any individual's reliance on the written or oral information presented.

Exhibit A

BEFORE



AFTER

Exhibit B

BEFORE

AFTER

Credit: Best, Best, and Krieger & Bob Honeycutt

Exhibit C

BEFORE

AFTER

Credit: Best, Best, and Krieger & Bob Honeycutt

Exhibit D

BEFORE

AFTER

Credit: Best, Best, and Krieger & Bob Honeycutt