

## Chapter 25

# Personal Wireless Service Facilities\*

### Research References

#### *Westlaw Databases*

Delaney, Abrams & Schnidman, *Handling the Land Use Case* (3d ed.) (LANDUSELAW), Ch. 41

Salkin, *New York Zoning Law & Practice* (4th ed.) (NYZONING), Ch. 12

Ziegler, Rathkopf's *The Law of Zoning and Planning* (5th ed.) (RLZPN), Ch. 79

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

### § 25:1 Wireless facility zoning—Generally

In the Telecommunications Act of 1996 (“TCA”), Congress established two sets of priorities that affected local zoning authorities. First, Congress sought to create a “pro-competitive, deregulatory national policy framework designed to rapidly accelerate private sector deployment of advanced telecommunication and information technologies and services to all Americans by opening all telecommunications markets to competition.”<sup>1</sup> At the same time, Congress sought to preserve local zoning authority over personal wireless service facilities.<sup>2</sup> To serve these two goals, Congress enacted a provision, codified at 47 U.S.C.A. § 332(c)(7), that preserves local zoning authority subject to five

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\*This chapter was prepared by James Hobson and Matthew Schettenhelm, lawyers at Miller & Van Eaton, P.L.L.C., Washington, D.C., [www.millervaneaton.com](http://www.millervaneaton.com).

#### [Section 25:1]

<sup>1</sup>H.R. Conf. R. 104-458 at 113 (1996).

<sup>2</sup>H.R. Conf. R. 104-458 at 207 (1996).

§ 25:1

limitations.<sup>3</sup> It provides:

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The 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.

(ii) 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.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) 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.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.<sup>4</sup>

Congress's choice, described as a "refreshing experiment in federalism," does not offer a "cookie cutter solution for diverse lo-

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<sup>3</sup>H.R. Conf. R. 104-458 at 207 (1996).

<sup>4</sup>47 U.S.C.A. § 332(c)(7).

cal situations” and “imposes an unusual burden on the courts.”<sup>5</sup> The following sections trace the considerable body of case law that has resulted.

While most local zoning actions typically would be appealed to state courts under state law, the existence of federal due process safeguards in Section 332(c)(7)(B) has led most complainants “adversely affected by any final act or failure to act” into U.S. District Court.<sup>6</sup> The few state court decisions applying the federal statute fit readily within the bounds of the federal decisions, which are the principal focus below.<sup>7</sup>

### § 25:2 Wireless facility zoning—Discrimination among providers of functionally equivalent services

The TCA’s first limitation on local zoning authority is that a state or local government may not “unreasonably discriminate” in its siting decisions with respect to providers of functionally equivalent services.<sup>1</sup> The TCA does not prohibit all discrimination against providers, but only “unreasonable” discrimination.<sup>2</sup> According to the legislative history, Congress intended to provide local governments with flexibility to apply general zoning requirements while treating facilities that “create different visual, aesthetic, or safety concerns differently.”<sup>3</sup> Accordingly, most courts have concluded that discrimination based on “traditional bases of zoning regulation” such as “preserving the character of the neighborhood and avoiding aesthetic blight” are reasonable.<sup>4</sup> However, a zoning authority may not favor one similarly situated

<sup>5</sup>Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 17 (1st Cir. 1999).

<sup>6</sup>47 U.S.C.A. § 332(c)(7)(B)(v).

<sup>7</sup>The results of a Westlaw search of March 2009 are appended to this chapter. We found only 42 state cases since 1996 that cite “47 U.S.C. § 332,” and many of these are unreported and from lower state tribunals.

#### [Section 25:2]

<sup>1</sup>47 U.S.C.A. § 332(c)(7)(B)(i)(I).

<sup>2</sup>Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Tp., 331 F.3d 386, 395, 33 Env’tl. L. Rep. 20218 (3d Cir. 2003); Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 762 (11th Cir. 2005).

<sup>3</sup>H.R. Conf. R. 104-458 at 208 (1996). See Helcher v. Dearborn County, 500 F. Supp. 2d 1100, 1118 (S.D. Ind. 2007).

<sup>4</sup>MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 727 (9th Cir. 2005).

§ 25:2

competitor over another.<sup>5</sup> Courts have looked to whether the facilities in question are “similarly situated in terms of their ‘structure, placement, or cumulative impact’.”<sup>6</sup> Generally, plaintiffs “cannot demonstrate discrimination in the abstract without providing any comparative factual references respecting their purported competitors in the . . . area or any preferential treatment allowed another provider.”<sup>7</sup> Where plaintiffs have not shown any “relevant similarity” between the locations in question, their claims of unreasonable discrimination have failed.<sup>8</sup>

Cases finding “unreasonable discrimination” are relatively rare. Where local authorities have allowed identical (or larger) facilities to be placed in similar locations, courts have more readily found a violation of the statute. For example, a court found that a local government violated the anti-discrimination clause by denying a request to place a tower after it had allowed a tower that was “both larger in diameter and significantly taller.”<sup>9</sup> Local governments have also violated the statute by failing to allow providers to “co-locate” similar equipment on already-existing poles.<sup>10</sup> One court could find no “substantial evidence in the record of any significant visual or aesthetic difference between Plaintiff’s proposed antenna array and those of other, similar situated providers already located” on the tower.<sup>11</sup>

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<sup>5</sup>H.R. Conf. R. 104-458 at 208 (1996); *Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, 267 (3d Cir. 2002) (“Discrimination may be impermissible where a municipality favors one provider by permitting it to locate in a particular area at the exclusion of others, thereby creating unfair competitive advantage.”).

<sup>6</sup>*MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 727 (9th Cir. 2005); *Airtouch Cellular v. City of El Cajon*, 83 F. Supp. 2d 1158 (S.D. Ca. 2000); *APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 480 (3d Cir. 1999) (rejected by, *Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409 (D. Vt. 2003)).

<sup>7</sup>*Helcher v. Dearborn County*, 500 F. Supp. 2d 1100 (S.D. Ind. 2007).

<sup>8</sup>*Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F. Supp. 2d 1251, 1263 (D. Or. 2004); see also *Nextel Commc’ns v. City of Cambridge*, 246 F. Supp. 2d 118 (D. Mass. 2003) (no discrimination where “Nextel’s antennas would have been much closer to the ground than Cellular One’s, and they would have jutted out of the blank wall rather than being attached to the hotel’s rooftop sign, as Cellular One’s antennas are.”).

<sup>9</sup>*Ogden Fire Co. No. 1 v. Upper Chichester Twp.*, 504 F.3d 370, 394 (7th Cir. 2007).

<sup>10</sup>*Nextel Partners, Inc. v. Town of Amherst*, 251 F. Supp. 2d 1187, 1195 (W.D.N.Y. 2003); *Nextel West v. Town of Edgewood*, 479 F. Supp. 2d 1219, 1232 (D.N.M. 2006).

<sup>11</sup>*Nextel West v. Town of Edgewood*, 479 F. Supp. 2d 1219, 1232 (D.N.M. 2006).

### § 25:3 Wireless facility zoning—Prohibitions on the provision of personal wireless services

The TCA also provides that a state or local government “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.”<sup>1</sup>

Courts have used different tests to apply this provision. The Fourth Circuit is least likely to find a “prohibition” or an “effective prohibition”: the court generally would only do so if there were a jurisdiction-wide ban on wireless services.<sup>2</sup> Most other circuit courts are willing find a violation based on specific zoning decisions alone. These circuits hold that a local zoning authority runs afoul of the statute if its enforcement of local requirements creates “significant gaps” in service coverage. However, the courts differ on what it means to create a “significant gap.” Some courts—including the Second and Third Circuits—conclude there is no significant gap if *any* entity provides service in the area in question.<sup>3</sup> This is sometimes called the “one-provider” rule, because under this test, there is no statutory violation if any single provider offers coverage in a given area. Other courts, including the First and Ninth Circuits, find a significant gap if the *particular provider* has a gap in *its own* service network, even if other companies provide service in that area.<sup>4</sup> One district court has ruled that “a significant gap does not exist simply

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#### [Section 25:3]

<sup>1</sup>47 U.S.C.A. § 332(c)(7)(B)(i)(II). By “personal wireless services” the statute means commercial, common carrier, and unlicensed mobile services, including cellular telephone. See 47 U.S.C.A. § 332(c)(7)(C).

<sup>2</sup>AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach, 155 F.3d 423, 428–429 (4th Cir. 1998) (rejected by, PrimeCo Personal Communications, L.P. v. Village of Fox Lake, 26 F. Supp. 2d 1052 (N.D. Ill. 1998)). Since this decision, the Fourth Circuit has qualified itself somewhat. USCOC of Virginia RSA #3 v. Montgomery County Bd. of Sup’rs, 343 F.3d 262, 268 (4th Cir. 2003).

<sup>3</sup>Sprint Spectrum L.P. v. Willoth, 176 F.3d 630, 642–643 (2d Cir. 1999); Nextel West Corp. v. Unity Township, 282 F.3d 257, 265 (3d Cir. 2002) (rejected by, Independent Wireless One Corp. v. Town of Charlotte, 242 F. Supp. 2d 409 (D. Vt. 2003)); Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Tp., 331 F.3d 386, 398, 33 Env’tl. L. Rep. 20218 (3d Cir. 2003). To judge by Willoth, Second Circuit is not as convinced of one-provider rule as Third Circuit, for opinion says merely that presence of first provider in area that is gap for others means that zoning authority’s right to deny applications of those others “becomes broader” — by inference, not absolute.

<sup>4</sup>MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 732 (9th Cir. 2005); Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620, 631–33 (1st Cir. 2002).

§ 25:3

because on area with coverage also has ‘dead spots.’”<sup>5</sup> However, courts have ruled that in-building” coverage may be a consideration in the “significant gap” analysis.<sup>6</sup> Courts have stated that providers bear a “heavy” burden in making a “prohibition” claim.<sup>7</sup>

If a court finds that a local restriction creates a “significant gap,” a provider is not free to fill that gap as it pleases. A provider instead must make some showing as to the intrusiveness or necessity of its proposed means of closing the gap.<sup>8</sup> Here, too, the courts have taken different approaches. The Second, Third, and Ninth Circuits require a provider to show that the manner in which it proposes to fill the significant gap is the least intrusive on the values that the zoning rules seek to serve.<sup>9</sup> As the Third Circuit has explained, a provider must demonstrate that a “good faith effort has been made to identify and evaluate less intrusive alternatives, e.g., that the provider has considered less sensitive sites, alternative system designs, alternative tower designs, placement of antennae on existing structures, etc.”<sup>10</sup> In contrast, the First and Seventh Circuits require a provider to show that there are “no alternative sites which would solve the problem.”<sup>11</sup> For example, the Seventh Circuit requires a provider to “investigate[ ] thoroughly the possibility of other viable alternatives.” When a provider offered “no maps, diagrams, or any time of as-

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<sup>5</sup>*Voice Stream PCS I, LLC v. City of Hillsboro*, 301 F. Supp. 2d 1251, 1261 (D. Or. 2004) (citing *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 631 (1st Cir. 2002)).

<sup>6</sup>*T-Mobile Central, LLC v. Unified Government of Wyandotte County/Kansas City, Kan.*, 528 F. Supp. 2d 1128, 1169 (D. Kan. 2007), *aff’d in part*, 546 F.3d 1299 (10th Cir. 2008). This follows enhancements in technology and enlarged consumer expectations of indoor wireless connectivity.

<sup>7</sup>*Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9, 14 (1st Cir. 1999); *Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 629 (1st Cir. 2002).

<sup>8</sup>*MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 734 (9th Cir. 2005).

<sup>9</sup>*APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 480 (3d Cir. 1999) (rejected by, *Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409 (D. Vt. 2003)); *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Bd. of Easttown Tp.*, 331 F.3d 386, 398, 33 *Env’tl. L. Rep.* 20218 (3d Cir. 2003); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 735 (9th Cir. 2005).

<sup>10</sup>*APT Pittsburgh Ltd. Partnership v. Penn Tp. Butler County of Pennsylvania*, 196 F.3d 469, 480 (3d Cir. 1999) (rejected by, *Independent Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409 (D. Vt. 2003)).

<sup>11</sup>*Second Generation Properties, L.P. v. Town of Pelham*, 313 F.3d 620, 635 (1st Cir. 2002); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 834–835 (7th Cir. 2003).

assessment” but only “conclusory statements” about one potential alternative site, the court ruled that the provider had failed to state a claim.<sup>12</sup> Similarly, the Eighth Circuit rejected a claim where a provider rejected certain proposed sites “without ever giving them serious consideration.”<sup>13</sup>

Section 253. Another similarly-phrased statute in the TCA, 47 U.S.C. § 253(a), has also played a role in this area. Like Section 332, Section 253(a) states that a local government may not “prohibit or have the effect of prohibiting” the ability of any entity to provide telecommunications service. Although Section 253 litigation historically has focused on right-of-way management of wireline providers, around 2005 wireless service providers sought to exploit a series of Section 253 decisions that preempted not only local requirements that “prohibit” but also those that “*may* prohibit” the ability to provide service.<sup>14</sup> The providers enjoyed some success.<sup>15</sup> However, a 2008 *en banc* decision by the Ninth Circuit may stem that tide. The court ruled that the readings of Section 253 and Section 332 should be harmonized, and that both statutes require a provider to show “actual or effective prohibition,” not the mere possibility of a bar to service.<sup>16</sup>

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<sup>12</sup>*VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 836 (7th Cir. 2003). See also *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Brookline, Mass.*, 520 F. Supp. 2d 238, 253 (D. Mass. 2007) (finding feasible alternative provider had not adequately investigated); *Helcher v. Dearborn County*, 500 F. Supp. 2d 1100, 1119 (S.D. Ind. 2007) (finding plaintiffs “offered no proof that the Losekamp Road site was the only feasible location for the proposed facility nor that the location on another neighboring hilltop in a non-residential area would be impossible or impractical”); *Cellco Partnership v. Town of Grafton, Massachusetts*, 336 F. Supp. 2d 71, 83 (D. Mass. 2004) (“Cellco has not eliminated the possibility that there may be other single or multiple site solutions that will provide adequate coverage to the gap.”).

<sup>13</sup>*USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines*, 465 F.3d 817, 825 (8th Cir. 2006).

<sup>14</sup>See, e.g., *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (overruled by, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008)).

<sup>15</sup>See *Verizon Wireless (VAW) LLC v. City of Rio Rancho, NM*, 476 F. Supp. 2d 1325 (D.N.M. 2007); but see *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700 (9th Cir. 2007), reh’g en banc granted, 527 F.3d 791 (9th Cir. 2008) and on reh’g en banc, 543 F.3d 571 (9th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3366 (U.S. Dec. 10, 2008).

<sup>16</sup>*Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3366 (U.S. Dec. 10, 2008).

§ 25:4

§ 25:4 **Wireless facility zoning—Action within a reasonable period of time**

Section 332(c)(7)(B)(ii) provides that a state or local government “shall act on any request for authorization . . . within a reasonable period of time after the request is duly filed . . . , taking into account the nature and scope of such request.” The legislative history of this section indicates that Congress did not intend to give preferential treatment to the wireless industry, or to subject their requests to any but the generally applicable time frames for zoning decisions.<sup>1</sup> No rigid timetables were intended.<sup>2</sup>

Courts have held that local authorities failed to act within a reasonable period of time when they have unnecessarily kept wireless providers “tied up in the hearing process through invocation of state procedures, moratoria, or gimmicks.”<sup>3</sup> Local authorities should not transform the application process into a “self-perpetuating, endless odyssey.”<sup>4</sup> However, courts have allowed for delays in the process, such as those arising from a locality’s attempt to comply with state environmental laws.<sup>5</sup> In addition, courts have allowed local moratoria for the purpose of updating ordinances if they are proportionate in time to the task at hand and allow the continued processing of siting applications.<sup>6</sup> Some courts have looked to standards in state law to determine whether a delay is reasonable.<sup>7</sup>

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[Section 25:4]

<sup>1</sup>H.R. Conf. R. 104-458 at 208 (1996). See also *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996).

<sup>2</sup>*Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996).

<sup>3</sup>*Masterpage Communications, Inc. v. Town of Olive, NN*, 418 F. Supp. 2d 66, 77 (N.D. N.Y. 2005) (citing *Lucas v. Planning Bd. of Town of LaGrange*, 7 F. Supp. 2d 310, 322 (S.D. N.Y. 1998)).

<sup>4</sup>*USCOC of Greater Missouri, LLC v. City of Ferguson, Mo.*, 2007 WL 4218978 (E.D. Mo. 2007) (citing *Nextel Partners of Upstate New York, Inc. v. Town of Canaan*, 62 F. Supp. 2d 691, 694 (N.D. N.Y. 1999)).

<sup>5</sup>*New York SMSA Ltd. Partnership v. Town of Riverhead*, 45 Fed. Appx. 24 (2d Cir. 2002).

<sup>6</sup>*Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996).

<sup>7</sup>*Sprint Spectrum L.P. v. Zoning Hearing Bd. of Willistown Tp.*, 43 F. Supp. 2d 534, 537–38 (E.D. Pa. 1999).

**§ 25:5 Wireless facility zoning—Decision to deny siting request “in writing” and “supported by substantial evidence”**

Section 332(c)(7)(B)(iii) specifies that a state or local government’s decision to deny a request must be “in writing and supported by substantial evidence, contained in a written record.” Courts have addressed both the “substantial evidence” and the “in writing” requirements.

Most court decisions under Section 332(c)(7) focus on the application of the “substantial evidence” test. The legislative history indicates that Congress intended the test to be the traditional standard used for judicial review of agency actions.<sup>1</sup> Some courts have characterized it as a “clearly erroneous” standard.<sup>2</sup> Whatever it is called, the test is “highly deferential” to the determinations of zoning authorities.<sup>3</sup> The standard generally allows “less than a preponderance,” but insists on “more than a scintilla of evidence” supporting the zoning authority’s decision—<sup>4</sup>that is, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>5</sup> The plaintiff carries the burden of proving that no substantial evidence supports the zoning authority’s decision.<sup>6</sup> The court reviews the record in its entirety, including evidence that is unfavorable to the zoning authority.<sup>7</sup>

The “substantial evidence” test is not itself a substantive

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**[Section 25:5]**

<sup>1</sup>H.R. Conf. R. 104-458 at 208 (1996).

<sup>2</sup>PrimeCo Personal Communications, Ltd. Partnership v. City of Mequon, 352 F.3d 1147, 1149 (7th Cir. 2003).

<sup>3</sup>VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 830 (7th Cir. 2003) (quoting Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620, 627 (1st Cir. 2002)); U.S. Cellular Corp. v. City of Wichita Falls, Tex., 364 F.3d 250, 256 (5th Cir. 2004).

<sup>4</sup>USCOC of Virginia RSA #3 v. Montgomery County Bd. of Sup’rs, 343 F.3d 262, 272 (4th Cir. 2003).

<sup>5</sup>MetroPCS, Inc. v. City and County of San Francisco, 400 F.3d 715, 725 (9th Cir. 2005).

<sup>6</sup>VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 830–31, (7th Cir. 2003); American Tower LP v. City of Huntsville, 295 F.3d 1203, 1207 (11th Cir. 2002); Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 63, 31 Env’tl. L. Rep. 20578 (1st Cir. 2001).

<sup>7</sup>Preferred Sites, LLC v. Troup County, 296 F.3d 1210, 1218 (11th Cir. 2002).

§ 25:5

standard.<sup>8</sup> Instead, courts evaluate the presence or absence of substantial evidence not against any federal standard, but against substantive standards set by state law or local zoning ordinances.<sup>9</sup> As the Ninth Circuit has explained, “[W]e must take applicable state and local regulations as we find them and evaluate the City decision’s evidentiary support (or lack thereof) relative to those regulations.”<sup>10</sup> Localities are entitled to deference in interpreting their own regulations.<sup>11</sup> However, if local law is preempted by state law, the local law is not controlling, notwithstanding the TCA.<sup>12</sup>

Courts have applied the “substantial evidence” test to a number of local requirements including: “necessity” requirements,<sup>13</sup> health and safety issues,<sup>14</sup> “special exception” and variance requirements,<sup>15</sup> and visual impact or aesthetic considerations.<sup>16</sup> A zoning authority’s consideration of the aesthetic impact of a

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<sup>8</sup>*VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 830 (7th Cir. 2003).

<sup>9</sup>*U.S. Cellular Telephone of Greater Tulsa L.L.C. v. City of Broken Arrow, Oklahoma*, 340 F.3d 1122, 1133 (10th Cir. 2003); *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 58, 31 *Envtl. L. Rep.* 20578 (1st Cir. 2001); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 724 (9th Cir. 2005).

<sup>10</sup>*MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 726 (9th Cir. 2005).

<sup>11</sup>*Nextel Communications of the Mid-Atlantic, Inc. v. Town of Brookline, Mass.*, 520 F. Supp. 2d 238, 250 (D. Mass. 2007); *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 115–16 (D. Mass. 2000).

<sup>12</sup>*Sprint PCS Assets, L.L.C. v. City of La Canada Flintridge*, 448 F.3d 1067, 1071 (9th Cir. 2006), for additional opinion, see, 182 *Fed. Appx.* 688, 250 *Pub. Util. Rep.* 4th (PUR) 420 (9th Cir. 2006).

<sup>13</sup>*MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 725 (9th Cir. 2005); *Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d 529, 536 (2d Cir. 2005).

<sup>14</sup>*USCOC of New Hampshire RSA #2, Inc. v. City of Franklin, N.H.*, 413 F. Supp. 2d 21, 31, 2006 *DNH* 13 (D.N.H. 2006).

<sup>15</sup>*Ogden Fire Co. No. 1 v. Upper Chichester TP.*, 504 F.3d 370, 382–92 (3d Cir. 2007); *USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines*, 465 F.3d 817, 822 (8th Cir. 2006); *U.S. Cellular Corp. v. Board of Adjustment of City of Seminole, Okla.*, 180 *Fed. Appx.* 791, 797 (10th Cir. 2006); *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Brookline, Mass.*, 520 F. Supp. 2d 238, 249 (D. Mass. 2007).

<sup>16</sup>*Nextel Communications of Mid-Atlantic, Inc. v. City of Cambridge*, 246 F. Supp. 2d 118, 123 (D. Mass. 2003); *Sprint Spectrum L.P. v. Board of Zoning Appeals of Town of Brookhaven*, 244 F. Supp. 2d 108, 114 (E.D. N.Y. 2003); *AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1161 (S.D. Cal. 2003); *Cellco Partnership v. Town of Grafton, Massachusetts*,

proposed tower has received special attention from the courts. Courts have ruled that generalized concerns of citizens are, standing alone, not substantial evidence.<sup>17</sup> In a case where the only evidence bearing on aesthetic considerations was the testimony of three or four residents that they did not like antenna support structures in general, a court explained: “If blanket opposition to poles could count as sufficient evidence for denying an application to build an antenna, the substantial-evidence provision of the Telecommunications Act would be set at naught.”<sup>18</sup> To avoid this, courts have looked for evidence rooted in the “specifics of the case,” such as objections raised by community members who know how local sightlines (or property values) would be specifically affected by a proposed tower.<sup>19</sup> Courts generally have not required zoning authorities to obtain expert testimony or written studies.<sup>20</sup>

With respect to the “in writing” requirement, the courts have adopted differing approaches. Some courts have required local governments to explain the reasons for their decision, and to link

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336 F. Supp. 2d 71, 81 (D. Mass. 2004); USCOC of New Hampshire RSA #2, Inc. v. City of Franklin, N.H., 413 F. Supp. 2d 21, 31–32, 2006 DNH 13 (D.N.H. 2006); Helcher v. Dearborn County, 500 F. Supp. 2d 1100, 1114 (S.D. Ind. 2007); USCOC of NH RSA No. 2, Inc. v. Town of Bow, 493 F. Supp. 2d 199, 211 (D.N.H. 2007); Southeast Towers, LLC v. Pickens County, 2008 WL 2064649 (N.D. Ga. 2008).

<sup>17</sup>Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Tp., 181 F.3d 403, 409 (3d Cir. 1999); Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490, 496 (2d Cir. 1999); New Par v. City of Saginaw, 301 F.3d 390, 398, 2002 FED App. 0276P (6th Cir. 2002); VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 831 (7th Cir. 2003); U.S. Cellular Corp. v. City of Wichita Falls, Tex., 364 F.3d 250, 256 (5th Cir. 2004); T-Mobile South, LLC v. Coweta County, Georgia, 2009 WL 596012 (N.D. Ga. 2009).

<sup>18</sup>PrimeCo Personal Communications, Ltd. Partnership v. City of Mequon, 352 F.3d 1147, 1150 (7th Cir. 2003); see also Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 761 (11th Cir. 2005).

<sup>19</sup>Southwestern Bell Mobile Systems, Inc. v. Todd, 244 F.3d 51, 61, 31 Env'tl. L. Rep. 20578 (1st Cir. 2001); Petersburg Cellular Partnership v. Board of Sup'rs of Nottoway County, 205 F.3d 688, 695 (4th Cir. 2000); VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 831 (7th Cir. 2003); Voice Stream PCS I, LLC v. City of Hillsboro, 301 F. Supp. 2d 1251, 1258 (D. Or. 2004); Michael Linet, Inc. v. Village of Wellington, Fla., 408 F.3d 757, 761 (11th Cir. 2005).

<sup>20</sup>U.S. Cellular Corp. v. Board of Adjustment of City of Seminole, Okla., 180 Fed. Appx. 791, 804 (10th Cir. 2006); Omnipoint Communications, Inc. v. City of White Plains, 430 F.3d 529, 533–34 (2d Cir. 2005) (quoting Harlen Associates v. Incorporated Village of Mineola, 273 F.3d 494, 501 n.3 (2d Cir. 2001)); USCOC of Greater Iowa, Inc. v. Zoning Board of Adjustment of the City of Des Moines, 465 F.3d 817, 823 (8th Cir. 2006)

§ 25:5

their conclusions to specific evidence in the written record.<sup>21</sup> These courts have found that anything short of this “places the burden on [the] Court to wade through the record below in order to determine the decision’s reasoning and assess its evidentiary support.’ ”<sup>22</sup> At the other extreme, the Fourth Circuit has held that merely placing the word “DENIED” on a zoning permit application is sufficient to satisfy the plain language of the “in writing” requirement.<sup>23</sup> The First, Sixth, and Ninth Circuits have settled on a middle ground, requiring local governments to “issue a written denial separate from the written record” which “contain[s] a sufficient explanation of the reasons for the . . . denial to allow a reviewing court to evaluate the evidence in the record supporting these reasons.”<sup>24</sup> As the Ninth Circuit has put it:

While the bare language of the Act may not require more than the briefest written disposition, it also does not compel a strictly minimalist construction, and the purposes of the “in writing” requirement would be ill-served by allowing local zoning authorities to issue . . . opaque, unelaborated ruling[s].<sup>25</sup>

Local governments that have used less formal procedures have run afoul of this requirement.<sup>26</sup>

Courts have reached different conclusions regarding whether a denial may appear within the minutes of a meeting and still

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<sup>21</sup>*Omnipoint Communications, Inc. v. Planning & Zoning Com’n of Town of Wallingford*, 83 F. Supp. 2d 306, 309 (D. Conn. 2000).

<sup>22</sup>*Omnipoint Communications, Inc. v. Planning & Zoning Com’n of Town of Wallingford*, 83 F. Supp. 2d 306, 309 (D. Conn. 2000).

<sup>23</sup>*AT & T Wireless PCS, Inc. v. City Council of City of Virginia Beach*, 155 F.3d 423, 429 (4th Cir. 1998) (rejected by *PrimeCo Personal Communications, L.P. v. Village of Fox Lake*, 26 F. Supp. 2d 1052 (N.D. Ill. 1998)). See also *USCOC of Greater Missouri, LLC v. County of Franklin, Mo.*, 2008 WL 2079110 at \*5 (E.D. Mo. 2008); *Sprint Spectrum L.P. v. County of Platte, Mo.*, 2007 WL 2994362 (W.D. Mo. 2007).

<sup>24</sup>*Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51, 60, 31 *Env’tl. L. Rep.* 20578 (1st Cir. 2001); *New Par v. City of Saginaw*, 301 F.3d 390, 395, 2002 FED App. 0276P (6th Cir. 2002); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 722 (9th Cir. 2005). See also *Cincinnati Bell Wireless LLC v. City of Middletown*, 2008 WL 1732967 (S.D. Ohio 2008).

<sup>25</sup>*MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 722 (9th Cir. 2005).

<sup>26</sup>See, e.g., *Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga*, 403 F.3d 392, 398–99, 2005 FED App. 0164A (6th Cir. 2005).

satisfy the “in writing” requirement.<sup>27</sup> One court has concluded that a formal resolution is a sufficient “separate writing” even if it is included within the minutes.<sup>28</sup> In a recent decision, a district court found that

the bare-bones form that was filled out by checkmarks entered by the Board provides so little insight into the Board’s final decision that no one reviewing it, including the Court, is able to glean an understanding of the Board’s reasoning in response to the evidence submitted.<sup>29</sup>

**§ 25:6 Wireless facility zoning—Regulation on the basis of environmental effects of radio frequency emissions**

Section 332(c)(7)(B)(iv) stipulates that no state or local government may regulate cell tower placement based on “the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission’s regulations concerning such emissions.” This provision bars local zoning authorities from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of radio frequency (RF) radiation where the facilities would operate within levels determined by the FCC to be safe.<sup>1</sup> A zoning authority’s consideration of such evidence, including potential effects on property values due to potential radio frequency emissions, may not serve as “substantial evidence.”<sup>2</sup> However, one court has found that in deciding between alternative sites, a local government may “maximize the distance between the monopole and other municipal uses” (such as homes and schools), based, in part, on a policy of “prudent avoidance,” at least when no other

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<sup>27</sup>*Helcher v. Dearborn County*, 500 F. Supp. 2d 1100, 1113 (S.D. Ind. 2007); *USOC of Greater Iowa, Inc. v. City of Bellevue, Nebraska*, 279 F. Supp. 2d 1080, 1085 (D. Neb. 2003).

<sup>28</sup>*Omnipoint Holdings, Inc. v. City of Southfield*, 355 F.3d 601, 606 (6th Cir. 2004).

<sup>29</sup>*Sprint Spectrum, LP v. City of Jeffersonville Bd. of Zoning Appeals*, 2008 WL 833494 (S.D. Ind. 2008).

**[Section 25:6]**

<sup>1</sup>*Cellular Phone Taskforce v. F.C.C.*, 205 F.3d 82, 88, 30 *Envtl. L. Rep.* 20402 (2d Cir. 2000).

<sup>2</sup>*AT&T Wireless Services of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1159 (S.D. Cal. 2003); *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715, 736 (9th Cir. 2005).

## § 25:6

factor differentiated two finalists.<sup>3</sup> Another court has recognized that to the extent a local government acts not as a zoning authority or regulator, but as a property owner for its own sites, the local government may request and obtain different emissions conditions.<sup>4</sup>

Paralleling the preemptive effect of the FCC's regulations on protection from non-ionizing radiofrequency ("RF") radiation is the option at Section 332(c)(7)(B)(v) for an aggrieved person to take his case to the Commission rather than to the courts. This has not occurred often because the issues in a zoning application's denial typically are multiple, and those not involving RF radiation would require the attention of a court in any event.

## § 25:7 Wireless facility zoning—Remedies and other issues

Most courts have ruled that the proper remedy for a zoning authority's violation of the limitations in Section 332(c)(7) is an order compelling the local authority to issue the requested permit.<sup>1</sup> The Supreme Court has squarely rejected the claim that a provider wrongly denied a license should also be entitled to damages and attorney fees under 42 U.S.C.A. § 1983.<sup>2</sup> The Ninth Circuit has also ruled that compensatory damages are generally not appropriate for violations of this provision of the TCA.<sup>3</sup>

While opinions may vary between wireless service providers and zoning authorities on the outcomes discussed above, the authors' present view is that the courts have discharged fairly and capably the "unusual burden"<sup>4</sup> imposed on them by Congress in Section 332(c)(7) of the Communications Act.

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<sup>3</sup>New York SMSA Ltd. Partnership v. Town of Clarkstown, 99 F. Supp. 2d 381, 392 (S.D. N.Y. 2000).

<sup>4</sup>Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 421 (2d Cir. 2002).

### [Section 25:7]

<sup>1</sup>Tennessee ex rel. Wireless Income Properties, LLC v. City of Chattanooga, 403 F.3d 392, 399, 2005 FED App. 0164A (6th Cir. 2005) (citing cases).

<sup>2</sup>City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 125 S. Ct. 1453, 161 L. Ed. 2d 316 (2005).

<sup>3</sup>Kay v. City of Rancho Palos Verdes, 504 F.3d 803, 815 (9th Cir. 2007).

<sup>4</sup>Town of Amherst, N.H. v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9, 17 (1st Cir. 1999).