

***Sticks in the Air, Stakes in the Sand -- Be Proactive
When it Comes to Wireless Telecommunication Towers***

Not since the advent of funding for the interstate highway system, has federal legislation had such a visual impact upon the landscape as has a very small section of the federal Telecommunications Act of 1996 §704(a) of Public Law 104-104, codified at 47 U.S.C. §332(c)(7). Unless a community's municipal officials, by rare circumstance, have not received a tower facility application from a personal wireless telecommunication service provider, they most likely have bumped up against this section of the 1996 Act that deals with personal wireless service facilities and their relation to local land use regulation -- i.e., the local regulation of wireless communication tower facilities, commonly referred to as cellular phone towers.

The silver-gray cylindrical monopoles of wireless telecom providers are popping up everywhere, almost overnight. The landscape, particularly along limited access highways and even in more rural areas, is beginning to look like a pin cushion, or as some have dubbed it, the "porcupine effect". In my more fanciful moments, I liken this phenomenon to some kind of tropical greenhouse effect because of the similarity these monopoles have, with their outspread antenna panels at the top, to palm trees swaying in the breeze! Palm tree or porcupine, seemingly nothing raises the ire of local citizens more than a tower facility application at or near a residential area, a high-end commercial district, or a quaint historic town square.

For municipal attorneys and officials, particularly those officials dealing with land use applications, it is imperative to know, with some degree of clarity and practical application, Section 704(a) of the 1996 Act and its effect upon traditional state and local zoning and land use regulation. It is also imperative that local governments update their local zoning and land use regulations to

accommodate the provisions of Section 704 if they hope to have much say in the siting of communication tower facilities. As one of the technical consultants I have worked with over the past year continually reminds me, once “an engineering stake is driven in the sand” for a tower (analogous to the proverbial “drawing of a line in the sand”), the wireless tower technology dictates that the options for the siting of surrounding towers is necessarily reduced. This article is, therefore, an attempt to heighten the awareness of municipal attorneys and local government officials as to the provisions of Section 704(a) of the 1996 Act, the issues that may arise from the interplay of the Act with state and local land use laws, the relatively sparse case law to date under the 1996 Act, and the author’s observations of how some communities are successfully dealing with the 1996 Act’s dictates.

Overview of Section 704(a) of the Act

Section 704(a) of the 1996 Act amends Section 332(c) of the Federal Communications Act to add a new paragraph (7) which, on the one hand, states that it retains local authority over the placement, construction, and modification of personal wireless service facilities by state and local governments, but on the other hand, sets forth three significant limitations as follows:

1. Local government may not take discriminatory or prohibitive action -- i.e., local government “shall not unreasonably discriminate among providers of functionally equivalent services”; and they “shall not prohibit or have the effect of prohibiting the provision of personal wireless services; [47 U.S.C. 332(c)(7)(B)(i)];

2. Section 704(a) sets procedures to deal with requests for local government authorization of such facilities, such as requiring that local government act upon such applications within a “reasonable period of time” after an application is duly filed and requiring that any decision

by local government to deny an application for such facilities be “in writing and supported by substantial evidence contained in a written record” [47 U.S.C. 332(c)(7)(B)(ii) and (iii)]; and

3. Local government may not regulate such facilities on the basis of the environmental effects of radio frequency emissions so long as the facilities comply with the Federal Communication Commissions (“FCC”) regulations concerning such emissions [47 U.S.C. 332(c)(7)(B)(iv)].

Also, the Act provides relief to “[a]ny person adversely affected by any final action or failure to act” by local government that is inconsistent with the provisions of the Act by providing that within thirty days after such final action such person may bring an action in any court of competent jurisdiction. The Act provides for a hearing and decision in any court action on an expedited basis.¹

Section 704(a) defines “personal wireless services” in a broad fashion to mean “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services”. 47 U.S.C. 332(c)(7)(C). Services falling under this definition include traditional cellular services, the newer personal communication services (PCS), specialized mobile radio (SMR) services, and a plethora of unlicensed devices providing short range, high speed wireless digital information transfer.

Analysis of the 1996 Act and Recent Case Law

While other portions of the 1996 Act are typified by lengthy subsections replete with technical jargon, Section 704(a) of the Act is relatively simple and direct. Simple maybe, but the old saying that “the devil is in the details” certainly applies to this piece of federal legislation. A review of the case law from around the country since the passage of the 1996 Act certainly reveals that the

¹Any person aggrieved by action of local government which is inconsistent with the provision on radio frequency emissions in the Act may petition the FCC for relief.

companies being directly affected by the details of Section 704(a) are those requiring the construction of tall towers upon which to place their communication antennas. From my experience in speaking on these matters to municipal officials across the State of Ohio, very few local governments have in place regulations to specifically deal with tower applications for such facilities. Without such regulations in place, the community is left to face requests for variances from local zoning and other land use regulations which may entail not only relatively easy height and setback variances, but also “use” variance requests from the “permitted use” classifications in various zoning districts.

As many municipal attorneys are aware, variance proceedings in front of local planning and zoning boards, which are usually comprised of lay persons, can be risky, particularly where well-funded telecommunication companies come into the public meetings with expert witnesses and lawyers. Such appearances before local administrative boards can, and have, led to court actions when applications for wireless telecommunication facilities are denied, usually on the basis of effectively prohibiting the provision of personal wireless services under the 1996 Act. *See e.g., BELLSOUTH Mobility, Inc. v. Gwinnett Cty., G.A.*, 944 F.Supp. 923 (N.D.G.A. 1996); *Westinghouse Electric Corp. v. Council of Township of Hampton*, 686 A.2d 905 (1996); *Westel-Milwaukee Co., Inc. v. Walworth Cty., WI*, 556 N.W.2d 107 (1996) (1996 Act applied retroactively); *Akron Cellular Telephone Co. v. City of Hudson Village*, 1996 Ohio App. Lexis 4426 (unreported) (1996 Act not applied retroactively). Also, an unprepared local board’s decisions could potentially lead to claims of discrimination among providers of “functionally equivalent services” if it grants a permit to one applicant and then denies a permit to a subsequent applicant for such a facility.

As they have done for several years, the telecommunications companies are often attempting to circumvent local zoning regulations by claiming “public utility” status in order to be exempt from local zoning laws under state and local exemption laws. This has been fertile ground for litigation over the years and the case law has gone both ways on the issue. *Compare*, e.g., *Akron Cellular Telephone Co. v. City of Hudson Village*, 1996 Ohio App. LEXIS 4426 (unreported) and *Crown Communications v. Zoning Hearing Bd. of the Borough of Glenfield*, 679 A.2d 271 (Pa. 1996), with *Cellular Telephone Company v. Rosenberg*, 624 N.E.2d 990 (N.Y. 1993). It is certainly suggested that municipalities, located in states without a state-wide law defining such personal wireless service companies as “public utilities”, review their own local definitions of “public utility”, if any, along with any exemption in their land use laws for public utilities in order to protect their flexibility in applying their land use laws to such companies.

The other area offering fertile ground for litigation under the 1996 Act has been the requirement that local government act upon applications for wireless service facilities “within a reasonable period of time”. 47 U.S.C. §332(c)(7)(B)(ii).² After passage of the Act in February 1996, municipalities were simultaneously faced with numerous tower applications from the new PCS companies and new federal requirements limiting the options for the municipality to respond. The intense pressure upon these new PCS companies and other providers to build out their systems in a short period of time, in light of the billions of dollars paid for the FCC licenses, spurred an onslaught of tower applications. Predictably, municipalities all over the country began imposing short-term moratorium ordinances to stop the issuance of construction permits for towers until

²The 1996 Act does, however, qualify this requirement by the phrase “taking in account the nature and scope of such request”. *Id.*

planning studies could be accomplished and new local regulations put in place to strike a delicate balance between the 1996 Act's provisions and traditional local zoning concerns related to health, safety, aesthetics and property values.

The first such litigation under the 1996 Act dealing with a moratorium ordinance was in the City of Medina, Washington, where the federal district court upheld the city's six-month moratorium on the issuance of new special use permits for wireless communications facilities. *Sprint Spectrum, L.P. v. City of Medina*, 924 F.Supp. 1036 W.D. Wash. 1996). Municipalities, however, should be cautious when imposing such moratoria where the state does not have enabling legislation providing for such moratoria. It should be used to expeditiously perform planning and technical studies in order to develop well thought out zoning and land use restrictions which do not effectively eliminate the provision of personal wireless services in the municipality and which do not discriminate between similar service providers. It follows of course, that as we move farther and farther away from the February 1996 passage of the Act, the less legal justification there may be for a moratorium. The rationale for a moratorium is to permit a municipality to pause for planning purposes in order to react to a new circumstance facing the community which may disrupt its comprehensive land use plan. Moratoria therefore are increasingly difficult to defend given that there has been plenty of time for performing such planning studies and developing legislation to regulate these facilities. *See, Sprint Spectrum, L.P. v. Town of West Seneca*, 1997 N.Y. Misc. LEXIS 43.

Finally, the 1996 Act's requirement that any decision by local government to deny a request for a wireless telecommunication facility "shall be in writing and supported by substantial evidence contained in a written record" is one with which local governments should feel quite comfortable. Local codes and state administrative procedure acts usually require local planning and zoning boards

to memorialize their decisions and reasoning on land use applications in writing. Standards of review of administrative agencies' decisions in the court systems often require affirmation of a board's decision so long as they are supported by substantial evidence in the record. *See, e.g.*, Ohio Revised Code Section 2506.04. Indeed, constitutional procedural due process protections require no less.

What's Happening in the Trenches

In assisting various communities over the past year on these issues, I have seen several trends develop. Some communities attempted to deal with the 1996 Act by using traditional zoning methods of confining tower facilities to certain zoning districts, such as industrial and commercial districts, and imposing very restrictive height, setback and aesthetic requirements, such as substantial landscaping, painting of facilities certain colors, or even camouflaging towers to make them appear to be trees in the neighborhood. Depending upon the size and characteristics of the municipality, these traditional zoning methods can either effectively eliminate the provision of wireless services in the community or, at the other end of the spectrum, be overly permissive causing proliferation of such facilities in the community.

A much more effective method of developing zoning and land use regulations has been to seek the assistance of both planning and wireless telecommunication experts to perform a comprehensive study of the community, its topography, its land uses and its proposed land uses in order to pinpoint specific land areas in the community that are more acceptable than others for tower facilities.

The next step is to create a hierarchy of those acceptable land areas that have been identified in the study. The concept of an overlay zoning district works well in this situation. The overlay

district retains the underlying zoning regulations, where not specifically superseded by the new regulations, and does not necessarily track existing zoning district lines. For example, certain large tracts of governmentally-owned land, large industrial sites, limited access highway locations, and high tension electric power line areas may be more acceptable for towers than certain general commercial areas or residentially-zoned areas. Designating some of those more acceptable areas as “permitted use” areas for tower facilities and designating the location or collocation of antennas on existing tall structures as “permitted uses” in local codes will often provide the wireless telecommunication companies sufficient adequate options for siting tower facilities without facing a long, drawn-out review by a local planning or zoning board.

Furthermore, designating certain large tracts of vacant land in residentially-zoned areas, other more sensitive commercial areas, or certain public facility use areas as areas for “conditionally-permitted uses” with stricter standards of review by a local planning or zoning board has proven effective. An effective condition to be placed on such a conditional use permit is to require the company to provide proof that it is unable to locate its tower facility within one of the “permitted use” areas in the local code.

This hierarchy of land use areas and levels of administrative review of permits has already worked effectively in some communities. For example, the new PCS companies which are actively building out their systems have greater flexibility in the siting of such facilities and have readily sought those areas where the use is “permitted” rather than “conditionally permitted”. Administrative review by a local building official for a “permitted use” application is much more appealing to the company than facing the uncertainty of a board of laypersons reviewing a conditional use permit application. One community I have worked with has already seen a

telecommunication company shift its site acquisition efforts from sensitive commercial and residential districts to high tension electric power line areas in which relatively tall towers already exist.

Providing incentives for collocation of additional antennas of other companies is also appropriate. This can be accomplished by requirements to structurally overbuild towers in order to handle the loading capacity of additional antennas, for the use of the company and for other companies to use as well, and permitting such collocation as an accessory use on an existing tower site.

Conclusion

It should be clear that municipal officials should move rapidly to put into place well-planned land use and zoning regulations governing wireless communication facilities, given the provisions of Section 704. With the multitude of personal wireless service providers entering the marketplace, municipal officials must direct the tower facility's engineering stake to be driven in a place in the sand which is most desirable to the community and its residents. Otherwise, the sticks in the air created by the proliferation of personal wireless services may turn the community into a tropical "paradise lost".

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