CAMPANELLI & ASSOCIATES, P.C.

FEDERAL LAW BASED ANALYSIS OF:

The Zoning Law of The Town of Woodstock, New York, Chapter 260,

December 19, 2020

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This Memorandum contains an analysis of the extent to which the Town Code empowers the Town of Woodstock, or fails to empower the Town, to exercise powers preserved to local governments, to the maximum extent intended by Congress under the Telecommunications Act of 1996, Section 47 U.S.C. §332(C)(7)(A). This Memorandum is not intended to provide legal advice pertaining to any specific matter or case.

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Introduction

This Memorandum is intended to provide a federal-law-based analysis of the applicability of the federal Telecommunications Act of 1996 (hereinafter "the TCA"), and its subdivisions, to the Zoning Ordinance of the Town of Woodstock, and its provisions pertaining to the regulation of the siting, construction, and modification of personal wireless service facilities.

More specifically, the purpose of this Memorandum and the analysis contained herein are to:

(A) Provide a review of the local zoning powers over the placement of personal wireless facilities, which the United States Congress explicitly preserved to local governments under the "General Authority" provision of the Telecommunications Act of 1996;[1]

(B) Dispel any misinformation regarding the current extent to which the Town of Woodstock may exercise such powers which Congress explicitly preserved to local governments under the TCA, notwithstanding any recent "interpretative" Order or Orders of the FCC;

(C) Provide specific recommendations pertaining to the Town Code, which may be incorporated into the Code to enable the Town of Woodstock to exercise its regulatory authority to control the placement of wireless facilities, to the maximum extent intended by Congress, without violating the constraints set forth within 42 U.S.C.A. §332 (c)(7) (B)(i)(I), (B)(i)(II), (B)(ii), (B)(iii) and (B)(iv) of the TCA;

(D) Provide recommendations regarding provisions that the Town should incorporate into its Code to: (i) guide its local regulatory boards to ensure that when rendering zoning decisions upon applications seeking approvals for personal wireless facilities, the Town's local boards do not violate the constraints of the TCA, and (ii) minimize the risk that an applicant whose application has been denied will possess a valid claim under the TCA which might serve as a basis for a viable federal lawsuit; and

(E) Provide recommendations regarding provisions which the Town should incorporate into its Code to: (i) enable its local regulatory boards to recognize what constitutes "substantial evidence" within the meaning of the TCA, and (ii) ensure that such boards will not be misled by false, misleading, or deceptive documentation submitted by an applicant seeking approval for a wireless facility.

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[1] See 42 U.S.C.A. §332 (c)(7)(A).

About the Author

Andrew J. Campanelli

General Experience

Since beginning his legal career as a litigator in 1992, Mr. Campanelli has handled well over 7,000 civil cases in both federal and state trial courts and litigated over 1,000 cases to their conclusion. He has investigated and/or handled federal cases in United States District Courts within as many as twenty-eight states. He has been admitted to nine of the thirteen United States Circuit Courts of Appeals and was admitted to The United States Supreme Court in 1998.

Mr. Campanelli has handled wireless facility cases from New York to California. His services have included: (a) litigating federal actions based upon the Telecommunications Act of 1996 (TCA), (b) providing representation, counsel, and guidance concerning TCA compliance within the context of processing applications for the installation of cell towers (macro cell sites), microcell sites and DAS systems before all forms of local zoning authorities and boards, and (c) assisting local governments in drafting and enacting local ordinances which vest such local governments with the maximum authority to regulate the installation of wireless facilities within their jurisdictions, and which afford their citizenry the maximum protections against both the irresponsible placement of wireless facilities and overexposure to illegal levels of radiation emanating from same.

Most Recent Presentations

Local Government Regulation of Wireless Facilities III
2020 Association of Towns of the State of New York Annual Meeting and Training School
Marriott Marquis, Times Square, New York, February 18, 2020

Local Government Regulation of Wireless Facilities II
Southern Tier Central Regional Planning and Development Board
Corning Community College, Corning NY, April 5, 2018

Local Government Regulation of Wireless Facilities II
Training Seminar – Wayne County, Department of Planning, June 5, 2017

Local Government Regulation of Wireless Facilities
New York State Conference of Mayors, July 24, 2013

Andrew J. Campanelli

General Court Admissions

United States Supreme Court

United States Court of Appeals for the First Circuit
United States Court of Appeals for the Second Circuit
United States Court of Appeals for the Fifth Circuit
United States Court of Appeals for the Sixth Circuit
United States Court of Appeals for the Seventh Circuit
United States Court of Appeals for the Eighth Circuit
United States Court of Appeals for the Ninth Circuit
United States Court of Appeals for the Eleventh Circuit
United States Court of Appeals for the Federal Circuit

United States District Court, Eastern District of Arkansas
United States District Court, Western District of Arkansas
United States District Court, Northern District of Illinois
United States District Court, Central District of Illinois
United States District Court, Southern District of Illinois
United States District Court, District of Nebraska
United States District Court, Northern District of New York
United States District Court, Southern District of New York
United States District Court, Eastern District of New York
United States District Court, Western District of New York
United States District Court, District of North Dakota
United States District Court, Eastern District of Wisconsin

State of New York
State of Connecticut *(Retired)*

Note: Current *Pro Hac* ***Vice*** **Admissions** *(current admissions in other federal and state courts)* are not listed.

I. Relevant History of the TCA and its Application

Any federal-law based analysis of a local zoning ordinance pertaining to personal wireless facilities must begin with: (a) a review of the TCA, specifically the powers which Congress explicitly preserved to local governments under the Act, and (b) the five (5) finite constraints that Congress placed upon those powers.

A. The Preservation of Powers to Local Governments and Their Exercise of Same

When Congress was considering the enactment of the Telecommunications Act, it considered vesting the FCC with the power to control the placement of wireless facilities, and draft legislation was considered concerning same.[2]

Instead of doing so, Congress decided to explicitly preserve to local governments the general authority to regulate the placement, construction, and modification of wireless facilities within their jurisdiction,[3] subject to five (5) finite constraints that were placed upon such powers.[4]

In the more than two decades that have transpired since the adoption of the Telecommunications Act in 1996, well-informed local governments have employed the powers preserved to them by Congress by adopting and enforcing "*smart planning* provisions." Through these provisions, local governments have controlled the placement of cell towers and other wireless facilities to protect their communities against the often substantial adverse impacts of wireless facilities' irresponsible placement.

Smart planning provisions are local zoning ordinances designed to achieve three (3) specific objectives simultaneously.

They are designed: to (a) enable *wireless carriers*[5] to saturate the local jurisdiction with personal wireless coverage while (b) minimizing the number of wireless facilities necessary to provide such coverage and (c) minimize, to the greatest extent possible, adverse impacts upon residential developments, individual homes, and communities in general.

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[2] See H.R. Rep. No. 104-204(I), §107 at 94 (1995).
[3] See 42 U.S.C.A. §332 (c)(7)(A) which is entitled "General Authority."
[4] See 42 U.S.C.A. §332 (c)(7)(B) which is entitled "Limitations."
[5] *Wireless carriers* are companies which provide personal wireless services, within the meaning of 42 U.S.C. §322(c)(7)(C)(i).

Working *against* the smart planning efforts of local governments are both *wireless carriers* and *site developers*, the latter of which are private for-profit companies that do not actually provide any personal wireless services but are engaged in the business of constructing wireless facilities, and thereafter leasing space or capacity upon such facilities to wireless carriers.

Site developers are driven by a desire to construct wireless facilities in the least expensive locations possible, irrespective of the potential adverse impacts their irresponsibly placed wireless facilities typically inflict on nearby properties, residential homes, and communities.

In furtherance of such desires, site developers often seek to mislead local governments to believe that they are possessed of little or no authority to regulate the placement of wireless facilities. Their representatives often seek to convince local zoning officials and their attorneys to interpret the finite statutory limitations upon the powers of local governments under the TCA in such a manner that the finite exceptions to a local government's power would, for all practical purposes, stamp out the "General Authority" which Congress preserved to them.

Of equal, if not greater import, the agents of applicants seeking to build wireless facilities are known to: (a) submit patently false or materially misleading information and documentation to local zoning boards in support of applications seeking approvals for desired wireless facilities,[6] (b) install wireless facilities without obtaining, or even seeking to obtain, any local zoning approvals before installing them, (c) complete stealth installations under cover of darkness, or at times when the owners of nearby properties would not be home or asleep,[7] and (d) lie to local property owners as to their intent and/or the placement and/or size of the facilities they intend to construct.[8]

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[6] The most common false documents proffered to local planning boards and zoning boards include things such as false or materially misleading propagation maps, patently false FCC compliance reports, false certifications of "need," and misleading and/or defective visual impact analyses, among others.

[7] In Huntington, New York, a wireless carrier filed a belated application to "legalize" a partially completed monopole that had been installed upon a poured concrete foundation in the Town, without the carrier having filed any applications seeking any zoning approvals from the Town, allegedly in violation of setback requirements and the necessity for a Special Permit. During a public hearing upon the belated application to legalize the installation, the Author questioned a neighbor who testified that the concrete foundation for the tower "*was poured at midnight on December 24th*" - the neighbor's assumption being that the choice of time was deliberately calculated to ensure that none of the neighbors would be around to object to the installation.

[8] In the Matter of DeMarco, the Author's clients, a New York family, arrived home to find workers installing something in the ground on their front lawn. When approached by the family, the workers allegedly explained to them that: (a) there was a public right-of-way across their front lawn, and (b) that the ground-wire they were installing was for a new streetlight that was going to be installed at the street in front of their home. Less than 48 hours later, the family came home to find a forty (40) foot cell tower on their front lawn. See http://abclocal.go.com/wabc/story?section=news/local/long_island&id=7937987 http://newyork.cbslocal.com/2011/02/03/cell-tower-on-front-lawn-surprises-long-island-couple/

As for the FCC, the FCC exercises no meaningful regulatory oversight over the location or operation of personal wireless facilities or the levels of radiation to which such facilities expose members of the general public.

Contrary to popular assumptions otherwise, with regard to the vast majority of cell towers, small cells, and DAS systems, the FCC has no idea where they are[9] or to what level of radiation any individual wireless facility is exposing members of the general public.[10]

This is because: (a) the FCC does not require wireless facilities that are less than 200 feet in height to be registered with it, and (b) unless they receive a complaint that a facility is emitting radiation levels which exceed the permitted limits, the FCC never tests the emissions emanating from wireless facilities.

This lack of meaningful regulatory oversight is exacerbated by the fact that the FCC has never updated its review of RF radiation levels it deems safe, which has precipitated a pending lawsuit seeking to force the FCC to review its antiquated RF radiation safety standards.

As such, local governments are their citizens first, *and only,* line of defense against exposure to illegally excessive levels of RF radiation from *non*-FCC-compliant facilities.

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http://northshoresun.timesreview.com/2011/02/5977/town-asking-wireless-company-to-take-down-tower-built-on-mount-sinai-familys-property/.

[9] The FCC's website addresses its lack of registration requirement, as follows:

"The ASR (Antenna Structure Registration) program requires owners of antenna structures to register with the FCC any antenna structure that requires notice of proposed construction to the Federal Aviation Administration (FAA) due to a physical obstruction. *In general, this includes structures that are **taller than 200 feet** above ground level or that may interfere with the flight path of a nearby airport."*

Excerpt from FCC's website at FCC.gov, May 27, 2020 [emphasis added]

Since the vast majority of cell towers, small cells and DAS nodes are less than 200 feet in height, they are not required to be registered with the FCC.

[10] The FCC's website addresses its lack of radiation testing, as follows:

"DOES THE FCC ROUTINELY MONITOR RADIOFREQUENCY RADIATION FROM ANTENNAS? *The FCC does not have the resources or the personnel to routinely monitor the exposure levels due at all of the thousands of transmitters that are subject to FCC jurisdiction. However, while there are large variations in exposure levels in the environment of fixed transmitting antennas, it is exceedingly rare for exposure levels to approach FCC public exposure limits in accessible locations. In addition, the FCC does not routinely perform RF exposure investigations unless there is a reasonable expectation that the FCC exposure limits may be exceeded."*

Excerpt from FCC's website at FCC.gov, May 27, 2020 [underline added]

Far too often, uninformed and uneducated local governments do not exercise the regulatory powers that were intentionally preserved to them by the United States Congress, simply because:

(a) they are unaware that they possess such powers, much less know how to exercise them,

(b) they fail to enact local zoning provisions that vest their respective boards with the power to render the proper factual determinations, which local governments have the power to make within the context of deciding zoning applications seeking approvals for the placement of wireless facilities, or

(c) they do not know how to evaluate "evidence" submitted by applicants seeking approvals for the installation of wireless facilities.

To exercise the regulatory powers which Congress intentionally preserved for local governments under the TCA to the greatest extent possible, local governments must adopt local zoning regulations which: (a) create permit requirements for all wireless facilities, (b) vest their local boards with the power to make factual determinations pertaining to permit applications for wireless facilities, and (c) codify guidelines to guide their local boards as to what factual determinations they are required to make, what evidence they should require or consider in making such determinations, and how to render decisions in a manner which does not violate any of the five (5) finite constraints which the TCA imposes upon them.

B. The Finite Constraints Upon Local Government Powers under the TCA

Subparagraph A of the TCA, which encompasses the general rule that local governments possess the "General Authority" to regulate the placement of wireless facilities within their jurisdiction, is followed by subparagraph B, which places five (5) finite constraints upon such authority.

More specifically, 47 U.S.C.A. §332 (c)(7) subparagraph (B) of the TCA is entitled "Limitations." It prescribes the following five limitations upon the general zoning authority and powers preserved to State and local governments under the TCA:

(i) Local governments cannot unreasonably discriminate among providers of functionally equivalent services §332(c)(7)(B)(i)(I),[11]

(ii) Local governments cannot prohibit or have the effect of prohibiting the provision of personal wireless services §332(c)(7)(B)(i)(II),[12]

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[11] As interpreted by the courts, this provision allows some discrimination among providers of equivalent services. Any discrimination need only be *reasonable*. Most courts have recognized that discrimination based on traditional bases of zoning regulation, such as preserving the character of the neighborhood and avoiding aesthetic blight are reasonable and thus permissible, and a mere increase in the number of wireless antennas in a given area over time can justify differential treatment of providers. See, e.g. MetroPCS Inc. v. The City and County of San Francisco, 400 F3d 715, 727 (2005); AT&T Wireless PCS v. City Counsel of The City of Virginia Beach, 155 F3d. 423 (4th Cir. 1998).

[12] Each of the United States Circuit Courts of Appeals have elaborated their own tests to establish whether or not a local government violated the effect of prohibiting language contained in §332 (c)(7)(B). United States District Courts situated in New York follow the United States Court of Appeals for the Second Circuit ruling in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999). Under Willoth, to establish that a denial of their cell tower application violated the "effective prohibition of the TCA, a wireless carrier or site developer must prove that it had established before the local zoning authority that its proposed installation was "the least intrusive means" of closing "a significant gap" in the applicant's personal wireless services, and the zoning authority still denied its application. Thus, applicants could only force a local government to permit them to install a non-zoning-code-compliant wireless facility if they could prove both that they suffered from "a significant gap" in their personal wireless services and that their proposed installation was "the least intrusive means" of remedying that gap. Note that this standard is slightly different than the First, Fourth, and Seventh Circuits. For the Ninth Circuit, See Sprint Telephony PCS LP v. City of San Diego, 543 F3d 571 (2008).
The FCC and the wireless industry are now working together to invoke the recent 2018 Orders of the FCC to argue that this standard no longer applies, and that a violation under this section occurs if a provider simply deems its new proposed installation is needed to either enhance existing wireless services, or to provide new ones.

(iii) Local governments must act upon any application to place, construct or modify a wireless facility within "a reasonable period of time" §332(B)(7)(B)(ii),[13]

(iv) Any decision to deny an application to place, construct or modify a wireless facility shall be *in writing* and be *supported by substantial evidence* contained in *a written record* §332(c)(7)(B)(iii), [italics added][14] and

(v) Local governments cannot regulate the placement, construction or modification of a wireless facility on the basis of environmental effects of radio frequency emissions,[15] *to the extent that such facilities comply with the FCC's regulations concerning such emissions* §332(c)(7)(B)(iv)[16] [italics added].

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[13] On November 18, 1999, the FCC adopted an interpretative ruling (FCC 09-99) which imposed the following time frames within which local governments must act upon siting requests for wireless towers or antenna sites: (1) ninety (90) days for the review of collocation applications, and (2) one hundred-fifty (150) days for the review of siting applications for new facilities.

[14] This provision mandates that when a local government renders a decision upon an application seeking approval for the installation of a wireless facility, the local government must: (a) reduce its decision to a separate writing (i.e., a "written record"), and (b) base its decision upon "substantial evidence."
The written record requirement specifies that: (a) local governments issue their decisions in a writing, separate and apart from any transcript or record of the proceeding, and (b) the written decision must contain a sufficient explanation of the reasons for the denial to allow a reviewing Court to evaluate the evidence in the record supporting those reasons. See e.g. MetroPCS v. City and County of San Francisco, 400 F.3d 715(2005).
The decision must also be based upon "substantial evidence" that was placed into the record. Substantial evidence means "less than a preponderance but more than a scintilla of evidence" Orange County-Poughkeepsie Ltd P'ship v. Town of Fishkill, 84 F.Supp.3d. 274 (2015), or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Cellular Tel. Co v. Town of Oyster Bay, 166 F3d 490 (2nd Cir. 1999). Review under this standard is essentially deferential, such that Courts may neither engage in their own fact finding nor supplant a local zoning board's reasonable determinations. See, e.g. American Towers, Inc. v. Wilson County, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV-1196].

[15] The FCC has defined Radiofrequency (RF) Radiation, for its purposes, as electromagnetic energy, that can be further defined as waves of electric and magnetic energy moving together through space, where such electromagnetic waves have frequencies that range from 3 kilohertz (kHz) to 300 gigahertz (Ghz) FCC OET Bulletin 65, Supplement B, (Edition 97-10) at page 8.

[16] The FCC has set maximum limits for human exposure to RF radiation based upon recommended exposure criteria issued by the NCRP and ANSI/IEEE, each of which identified the same threshold level "*at which harmful biological effects may occur.*" See FCC OET Bulletin 56, August 1999.
Based upon same, the FCC adopted Maximum Permissible Exposure (MPE) limits, which are expressed in terms of electric field strength, magnetic field strength and power density. *Id.* While federal law requires all wireless facilities to comply with such RF exposure limits (47 C.F.R. §1.1310), there is no agency that actually enforces such requirement. The FCC does not test wireless facilities for compliance with either set of exposure limits. The wireless industry maintains that 47 USCA §332(c)(7)(B)(iv), prohibits local governments from considering the potential adverse health impacts of the RF radiation which the proposed installation will emit, if that the respective applicant establishes that such emissions will not exceed the "*general population/uncontrolled limits*" or the "*occupational/controlled exposure limits*" which have been codified within the Code of Federal Regulations.

The exercise of local government powers to control the placement of wireless facilities, without violating the constraints of 47 U.S.C.A. §332 (c)(7) subparagraph (B), is relatively simple once a local government enacts zoning provisions to guide their local boards to avoid violating any of the limitations imposed under same.

This Memorandum will address (among other things) recommended changes to the Town Code to vest the Town's zoning authorities with the maximum power to control the placement of wireless facilities within the Town while not violating the constraints imposed under 47 U.S.C.A. §332 (c)(7) subparagraph (B).

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47 CFR§ 2.1 dictates that the *general population* limits apply as follows:

"*General population/uncontrolled exposure*. For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related."

47 CFR §2.1 dictates that the less stringent, *occupational limits* apply as follows:

"Occupational/controlled exposure. For FCC purposes, applies to human exposure to RF fields when persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over their exposure. Occupational/controlled exposure limits also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits, as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area by some other appropriate means."

C. The Potential Adverse Impacts of Irresponsibly Placed Wireless Facilities

Aside from preventing an unnecessary redundancy and proliferation of wireless facilities within the respective jurisdiction, local governments have enacted and enforced smart planning provisions to prevent, to the greatest extent practicable, any unnecessary adverse impacts from the irresponsible placement of wireless facilities.

The most common adverse impacts that irresponsibly placed facilities can, and do, inflict upon adjacent and nearby homes, properties, and communities, which can range in significance from minimal to severe, include the following:

i. Adverse Aesthetic Impacts

The irresponsible placement of wireless facilities, of all types, often inflicts significant adverse aesthetic impacts, the most severe of which are typically found when wireless facilities are sited in unnecessarily close proximity to residential homes. Federal courts have ruled that adverse aesthetic impacts are a valid legal ground upon which local zoning authorities can deny zoning applications seeking approvals to install wireless facilities.[17]

Within the context of the "5G rollout," the frequency and severity of adverse aesthetic impacts being inflicted upon residential homes across the nation have increased exponentially.

Since the transmissions from 5G facilities travel much shorter distances than previously installed wireless facilities, site developers have been installing them closer to residential homes, thus exacerbating their adverse aesthetic impact much more than before.

On an almost daily basis, the Author receives calls from homeowners advising that a wireless facility installation has been installed in extremely close proximity to their respective homes, either over their objection or without them having received any notice that such facility was to be so closely installed to their home, at any time before such installation occurred.

In the worst cases, wireless facilities have been installed as close as eight (8) feet from a young couple's kitchen table or ten (10) feet from a young child's bedroom window.

[17] See, e.g. Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2d Cir. 2005), T-Mobile Northeast LLC v. The Town of Islip, 893 F.Supp.2d 338 (2012).

ii. Reductions in Property Values

Across the entire United States, both real estate appraisers[18] and real estate brokers have rendered professional opinions that support what common sense dictates.

When cell towers or other wireless facilities are installed unnecessarily close to residential homes, such homes suffer material losses in value, typically ranging from 5% to 20%.[19] In the worst cases, they make homes situated within a newly installed tower's fall zone completely unsalable.

iii Lack of Sufficient Fall Zones

Due to the well-documented dangers irresponsibly placed cell towers present, local governments across the entire United States have enacted and enforced zoning provisions to ensure that the installation of such towers includes a fall zone or safe zone of sufficient size to preserve the health and safety of their residents.

The four principal dangers that irresponsibly placed cell towers present are structural failures, fires, icefall, and debris fall.

Due to the speed at which such cell towers are being constructed in the United States, and a desire on the part of *site developers* to build them as cheaply as possible, quality control over the manufacture, construction, and maintenance of monopole cell towers is nearly non-existent.

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[18] See, e.g. a February 22, 2012 article discussing a NJ appraiser's analysis wherein he concluded that the installation of a Cell Tower in close proximity to a home had reduced the value of the home by more than 10%, go to http://bridgewater.patch.com/articles/appraiser-t-mobile-cell-tower-will-affect-property-values.

[19] In a series of three professional studies conducted between 1984 and 2004, one set of experts determined that the installation of a Cell Tower in close proximity to a residential home reduced the value of the home by anywhere from 1% to 20%. These studies were as follows:

The Bond and Hue - *Proximate Impact Study* - The Bond and Hue study conducted in 2004 involved the analysis of 9,514 residential home sales in 10 suburbs. The study reflected that close proximity to a Cell Tower reduced price by 15% on average.

The Bond and Wang - *Transaction Based Market Study*

The Bond and Wang study involved the analysis of 4,283 residential home sales in 4 suburbs between 1984 and 2002. The study reflected that close proximity to a Cell Tower reduced the price between 20.7% and 21%.

The Bond and Beamish - *Opinion Survey Study*

The Bond and Beamish study involved surveying whether people who lived within 100' of a Cell Tower would have to reduce the sales price of their home. 38% said they would reduce the price by more than 20%, 38% said they would reduce the price by only 1%-9%, and 24% said they would reduce their sale price by 10%-19%.

Not surprisingly, cell tower structural failures and cell tower fires occur far more often than the public knows. Such failures and fires often result in a cell tower collapsing to the ground and presenting a risk of property damage, injury, or death.

The most common cause of a monopole cell tower's failure is baseplate failure, which typically causes the entire tower to collapse.[20] Monopole collapses, in whole or part, are also caused by the failure of such components as flanges, joints, and bolts, among others.

Another danger exists in cell tower fires, which occur far more frequently than known by the public. Such fires often cause the respective tower to "warp" from the heat of the fire, or in other cases, cause the respective tower to collapse in a flaming heap,[21] thereby creating the risk of igniting anything near the fallen flaming tower.

The third danger, that being ice fall, is prevalent in areas prone to freezing weather, where masses of ice can form on cell antennas and support structures atop cell towers. As temperatures rise and ice begins to melt, chunks of ice are known to dislodge and come hurtling to the ground.

According to a physicist's report, when a chunk of ice falls from a typical 150-foot cell tower, by the time it reaches the ground, the chunk of ice is traveling at a speed of approximately 67 miles per hour. This falling chunk of ice presents a genuine danger of inflicting severe physical injury or death to anyone standing within the tower's icefall zone or damaging any personal property or structures situated within such zone.

Finally, there is the danger of debris fall. Examples of debris fall are when a piece of the wireless structure falls off the structure, or a worker drops a tool or piece of equipment during the performance of routine maintenance upon the structure.

Given these dangers that cell towers and wireless facilities present, informed local governments typically enact and enforce setback or fall zone requirements for cell towers. The most common distances required for safe zones around cell towers are 110% of their height.

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[20] To see dramatic images of a 165-foot tower having collapsed at a firehouse, crushing the Fire Chief's vehicle, go to www.firehouse.com/news/10530195/oswego-new-york-cellular-tower-crushes-chiefs-vehicle, or go to Google and search for "Oswego cell tower collapse."

[21] To see videos of modern towers bursting into flames and/or burning to the ground, go to http://www.youtube.com/watch?v=0cT5cXuyiYY&NR=1 or http://www.youtube.com/watch?v=y__NKVWrazg, or simply go to *Google*, and search for "cell tower burns."

iv Exposure to Dangerous Levels of Radiation
From Non-FCC Compliant Facilities

Being well aware of the fact that, by its own admission, the FCC does not "have the resources" to test the radiation emissions from wireless facilities, wireless companies are free to cause their facilities to emit any levels of radiation they choose.

The potential danger posed to citizens due to the utter void of actual FCC oversight over radiation emission levels is exacerbated by the fact that applicants seeking zoning approvals often file false FCC compliance reports. These reports falsely claim that a proposed facility will be FCC compliant, when in reality, the facility may expose members of the general public to radiation levels that exceed the FCC's limits by several hundred percent or more.

By taking all of these well-documented dangers into consideration, local governments across the entire United States have enacted zoning provisions designed to protect their citizens, homeowners, and communities against same.

The Town of Woodstock should follow suit.

D. The Non-Risks of Litigation

All too often, representatives of wireless carriers and/or site developers seek to intimidate local zoning officials with either open or veiled threats of litigation.

These threats of litigation under the TCA are, for the most part, entirely hollow.

This is because, even if they file a federal action against the Town and win, the Telecommunications Act of 1996 does not enable them to recover compensatory damages or attorneys' fees, even when they get creative and try to characterize their cases as claims under 42 U.S.C. §1983.[22]

This means that if they sue the Town and win, the Town does not pay them a penny in damages or attorneys' fees under the TCA.

Typically the only expense incurred by the local government is its own attorneys' fees.

Since federal law mandates that TCA cases proceed on an "expedited" basis, such cases typically last only months rather than years.

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[22] See City of Rancho Palos Verdes v. Abrams, 125 S.Ct 1453 (2005), Network Towers LLC v. Town of Hagerstown, 2002 WL 1364156 (2002), Kay v. City of Rancho Palos Verdes, 504 F.3d 803 (9th Cir 2007), Nextel Partners Inc. v. Kingston Township, 286 F.3d 687 (3rd Cir 2002),

As a result of the brevity and relative simplicity of such cases, the attorneys' fees incurred by a local government are typically quite small, compared to virtually any other type of federal litigation—as long as the local government's counsel does not try to "maximize" its billing in the case.

II. *Hoodwinked* Wireless Laws

Aside from the FCC's lack of meaningful oversight and failure to enforce the General Population Exposure Limits through actual testing, the most significant current threat to local governments and their citizenry is the enactment of *hoodwinked* wireless provisions within State laws.[23] These *hoodwinked* provisions result from either:

(a) representatives of the wireless industry *hoodwinking* state legislators by essentially "tricking them" into authoring and/or securing the passage of State laws that strip local governments of local zoning authority over the placement of cell towers and wireless facilities *to an exponentially greater degree than the state legislators actually intended,* ***or***

(b) State legislators *hoodwinking* their electorate by authoring or securing the enactment of state laws in which they purport to impose only limited constraints upon local zoning powers over "***small cell***" facilities. In reality, such legislation strips local governments of virtually all control over ***cell towers***, small cells, and DAS systems, which invariably results in a plague of irresponsibly placed wireless facilities throughout the State.

Since the TCA was adopted in 1996, local governments across the entire United States have been creating and enforcing local zoning laws that protect their citizens and communities against the adverse impacts of the irresponsible placement of cell towers and other wireless facilities upon them.

As both logic and common sense dictate, local governments are best suited to regulate wireless facilities' placement within their respective jurisdictions and protect their citizenry through the same. They establish zoning districts and the permitted uses within same to ensure that differing uses and structures are compatible with their surroundings. They are also acutely aware of their jurisdictions' geography, topography, scenic resources, and the location and character of their communities, historic districts, and scenic districts.

Being uniquely possessed of such knowledge, they routinely protect their citizenry and communities by enacting and enforcing Smart Planning Provisions within their local zoning regulations.

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[23] *Hoodwinked* wireless laws are those containing provisions which have been drafted or enacted in a deceptive manner. They typically contain misleading language pertaining to the extent to which they apply to wireless facilities and/or the extent to which they limit local zoning authority over the regulation of cell towers and other wireless facilities. They are often created as the result of state or local legislators having been "tricked" into drafting, supporting or enacting such provisions.

Smart Planning Provisions enable local governments to achieve three (3) objectives simultaneously. First, they permit wireless carriers to saturate their respective jurisdiction with wireless coverage. Second, at the same time, they avoid unnecessary redundancy in wireless infrastructure, and third, they minimize, to the greatest extent possible, any unnecessary adverse impacts to communities due to the irresponsible placement of wireless facilities.

But apparently acting under the influence of the wireless industry, many State legislatures have enacted abhorrent laws that strip local governments of the power to use their local zoning laws, with which they have otherwise protected their communities and citizens for more than two decades.

As a direct result of such horrendous and wholly ill-advised State laws, on an almost daily basis, citizens awaken to find that some wireless structure has been installed in such close proximity to their respective homes and even outside their bedroom windows. These structures inflict substantial adverse aesthetic impacts upon their homes, substantially reduce the value of their homes, and in worst cases, present a serious physical danger by having placed their home within the fall zone of the particular installation.

Once such facilities are built, they are thereafter virtually unregulated. The FCC has no idea where they are and never tests them to ascertain whether such facilities expose the respective homeowners to illegally excessive radiation levels.

While the wireless industry has made and continues to make efforts to induce the New York State Legislature to enact *hoodwink* legislation, which would strip substantial zoning powers from local governments within the State, their efforts have thus far been defeated.

Inasmuch as such efforts are continuing, it would behoove the Town of Woodstock to remain vigilant in seeking out information about any such possible legislation being considered by the State Legislature and voice its opposition to the enactment of same.

III. Relevant Federal Caselaw Within The Second Circuit

This analysis of the Town's Code includes consideration of several relevant decisions of federal courts situated within the State of New York and the United States Court of Appeals for the Second Circuit.

For any local government in New York to possess any understanding of their ability to control the placements of wireless facilities within their jurisdiction, it is critical that they first know four things.

First, they must understand that the TCA does not, itself, provide any legal basis to deny an application for an approval of a wireless facility, but that the basis upon which such an application can be denied rests entirely upon state and local laws.[24]

This means that if a local government wishes to control wireless facilities' placement, it must enact zoning code provisions that (a) require a permit or approval to construct such facilities and (b) provide a basis upon which applications for such permits can be denied.

Second, it is not the TCA, but local zoning laws that exclusively govern what evidence a local zoning board can ask an applicant to provide and consider when deciding such applications.

Third, it is not the TCA, but the local zoning laws which exclusively govern *the weight* which a local zoning board may give to be given each item of evidence which is presented to it when it is deciding such applications.

Fourth, when applicants file federal lawsuits (under the TCA) to challenge a local government's denial of their zoning application pertaining to a wireless facility, federal courts situated within the State of New York are bound to apply a deferential standard to fact-finding determinations which have been made by a local zoning board when it has rendered the decision being challenged.[25]

As federal Courts in the Second Circuit have made crystal clear, "If [a federal court] finds that even one reason given for a denial is supported by substantial evidence, the decision of the local zoning body cannot be disturbed.[26]"

Unfortunately, far too many local governments in New York are entirely unaware of these facets of their regulatory powers, and for that reason, alone, they are powerless to exercise them.

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[24] See Sprint Spectrum v. Willoth, 176 F.3d 630 (2nd Cir 1999).
[25] See, e.g. Up State Tower Co. LLC v. Town of Southport, 412 F.Supp.3d 270 (2019) (a United States District Court's review of a local zoning determination is deferential, and federal courts may neither engage in their own fact-finding nor supplant a Town Board's reasonable determinations).
[26] See T-Mobile N.E. LLC v. Town of Islip, 893 F.Supp.2d 338, 355 (2012).

Thus, among the most common problems with many local zoning codes, including Woodstock's Code, is that they fail to provide guidance as to what evidence the Planning Board should require an applicant to produce, what weight should be given each item of evidence, and of greatest import, what fact-finding determinations the PB is required to make—if their decisions are to withstand a challenge under the TCA.

By way of example, if an applicant were to assert that the Town of Woodstock "*must*" grant their application to construct a new cell tower within the Town because they suffer from a gap in personal wireless services and that their proposed installation is the "least intrusive means" of remedying that gap, the Town's Code is wholly deficient as to what evidence the Town's Planning Board members[27] may request from the applicant to enable them to determine whether or not the applicant has proven either of those claims.

Unlike local governments, wireless carriers and site developers ***are*** aware of the law described hereinabove. Accordingly, applicants are now asserting that unless the local zoning Code explicitly authorizes a local board to require an applicant to produce a specific type of evidence, the Board cannot require the applicant to produce it.[28]

As representatives of the wireless industry also know, unless a zoning Board obtains specific evidence, which a Town's Code currently does not require, the TCA would actually prohibit the Board from denying a respective applicant's application because the Board would lack "substantial evidence" to support any such denial.

As such, it is imperative that the Town of Woodstock amend its code provisions if the Town's PB is going to possess the ability to regulate the placement of wireless facilities within the Town to any meaningful degree.

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[27] Under Chapter 260, §260-68 provides that it is the Town's Planning Board which is vested with the responsibility to determine applications for special use permits for telecommunications towers.

[28] See, e.g. Orange Court-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp3d 274 (2015)(The failure of the applicant to introduce evidence of poor coverage in the area could not serve as a basis to deny its application, because the local zoning code did not require *Verizon* to provide evidence of dropped calls or customer satisfaction); T-Mobile Central LLC. V. United Government of Wyandotte County, Kansas, 546 F3d.1299, 1310 (10th Cir 2008)("the Board erred in requiring T-Mobile to demonstrate that its proposal was the least intrusive means of filling a service gap because nothing in the local law permitted the Board to impose such a requirement); Verizon Wireless LLC v. Douglas County Bod of Cnty Comm'rs, 544 F.Supp2d 1218 (2008)(a denial is not supported by substantial evidence if it imposes a burden upon the applicant for which there is no requirement under local law).

IV. The Zoning Law of The Town of Woodstock

Without exception, the best model for a local zoning provision that enables local zoning authorities to regulate the placement of wireless facilities is a singular "all-inclusive" zoning provision, which creates a permit requirement for all wireless facility applications, irrespective of the location proposed by any respective applicant.[29]

Singular format provisions are simple to understand, use, and even defend when a denial of an application results in the affected applicant choosing to challenge that denial by filing a federal lawsuit under the TCA.

A review of the Zoning Law of the Town of Woodstock's provision pertaining to "Personal wireless service facilities" ("Chapter 260, Section §260-64")[30] reflects that it follows this best model format.

Moreover, viewed from the perspective of empowering its local boards to control the placement of wireless facilities within the Town, Woodstock's zoning law is far superior to most other local zoning ordinances which the author has reviewed, from across both the State of New York, and across the Country.

Particularly astute and valuable in vesting the Town with the maximum authority to control the placement of wireless facilities within the Town are the provisions set forth within subparagraphs §260-64(C),[31] §260-64(F)(4)(B),[32] §260-64(G) subparagraphs (1), (2) and (7),[33] and §260-64(H)(1), (H)(1)(a), (b) (c) and (d).

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[29] Many jurisdictions enact separate code requirements and provisions for installations within public rights of way verses installations upon private property, separate provisions for small cells and DAS (Distributed Antenna Systems) verses Cell Towers, and new installations verses replacements and/or modifications of existing facilities.

[30] See Town Code Chapter 260, §260-64.

[31] Which provides that no personal wireless facilities are exempt from the Special Use Permit Requirements set forth within Section §260-64

[32] Which empowers the Town's Planning Board to specify the types of visual analyses it can require applicants to provide in support of their applications.

[33] Which respectively prohibit the approvals of new wireless facilities based upon "speculation" (and concomitantly future capacity needs), require towers to minimize their visual impacts, and provide that new towers cannot exceed the "minimum height necessary" to provide "adequate coverage" (as opposed to seamless coverage).

Still, Section §260-64 of the Town's zoning law is deficient in several regards, and such deficiencies should be addressed through amendments to the Code which would:

(a) prepare the Town to deal with the flood of new wireless facility applications which the Town should expect to receive within the context of the current "5G rollout" by site development companies,

(b) enable the Town to better defend against any potential challenges to any denials of Special Permit applications seeking approvals for same, and (c) minimize, to the greatest extent possible, and

(c) minimize, to the greatest extent feasible, the likelihood that an applicant whose application has been denied will seek to challenge that denial by filing a federal lawsuit to assert alleged violations of the Telecommunications Act of 1996.

The analysis below addresses the changes that would be required to be made to the Town Law if the Town were desirous of: (a) vesting the PB with the maximum power available to the Town to control the placement of wireless facilities within the Town, and (b) providing guidelines that would enable the PB to exercise such power in a manner that did not violate the finite constraints set forth within the applicable provisions of the TCA—meaning that to the extent that zoning officials were to deny an application seeking approval for the installation of a wireless facility, the denial would likely not only withstand legal challenge but would make the actual filing of such a challenge unlikely.

V. Recommended Changes to The Town Code

A. Legislative Intent Section

Whether they are denominated a Zoning Code, Zoning Ordinance or Zoning Law, virtually all local zoning laws contain a *legislative intent* or *legislative purpose* provision.

These provisions codify the specific intent which was behind the respective local government's enactment of a zoning law, and they describe the types of potential adverse land impacts which the respective zoning law, and its provisions, are intended to prevent.

Consistent with same, the very beginning of most local zoning provisions pertaining to the installation of cell towers and other wireless facilities typically set forth *legislative intent* provisions that explicitly delineate the precise types of potential impacts that the respective municipality *seeks to prevent*, which serve as the reason why the local government initially enacted and continues to maintain a permit requirement for site developers and wireless carriers who seek to install a wireless facility within the local jurisdiction.

Among the reasons why these provisions *are essential* are they: (1) provide guidance to the local zoning authorities as to what they must consider when deciding whether to grant or deny a wireless facility application which is before them, (2) render the zoning authorities more capable of defending any decision wherein they decide to deny an application for a proposed wireless facility, and the applicant wants to challenge that denial by filing a federal lawsuit under the TCA and (3) they reduce the likelihood that such a lawsuit would be filed in the first place.

In furtherance of such objectives, a legislative intent section should be added to Section §260-64 which would describe the potential adverse impacts which the Town seeks to prevent, or at least minimize, which serve as the reason why the Town enacted a special use permit requirement for wireless facilities.

More specifically, the legislative intent provision should include descriptive words which indicate that the purpose and intent of Section §260-64 extend to:

(a) Serve as a "Smart Planning" provision intended to achieve the simultaneous objectives of enabling wireless carriers to provide personal wireless services within the Town while minimizing the number of facilities used to provide such coverage, avoid unnecessary redundant wireless infrastructure, and avoiding to the greatest extent possible, any unnecessary adverse impacts upon residential homes and residential communities, and

(b) Protect the interests of the public, property owners, communities and the Town, against significant adverse impacts caused by the irresponsible placement of wireless facilities, including, but not limited to, adverse aesthetic impacts, reductions in property values of properties situated adjacent to, across from, or in close proximity to, a site for a proposed wireless facility, the potential dangers associated within structural failures, fire, ice fall and debris fall from wireless facilities, adverse impacts upon historic resources and/or scenic views, and/or the use of properties which would be incompatible with nearby properties and thus be out-of-character with same.

While several of these issues are already addressed or raised within Section §260-64[34], the legislative intent provision at the beginning of Section §260-64 will be among the things a court will review and consider when an applicant argues that the basis of a denial was not supported by the legislative intent provision of the respective local zoning code.

Adding these issues into Section §260-64, the Code will essentially expand the variety of considerations that the PB can consider when deciding whether to grant or deny a special use permit for a proposed wireless facility.

[34]Town Code Chapter 260, §260-4 Authority and purposes.

B. Fact-Finding Requirements and Evidentiary Guidance

Within the context of the current "5G rollout," representatives of site developers and wireless carriers have become more aggressive than ever, not only demanding approvals of their applications but even "telling" local zoning officials what evidence they *can* and *cannot* consider when deciding their applications.

Where a local zoning code is silent as to what types of evidence local zoning officials can require an applicant to produce, site developers and wireless carriers now argue that if a local zoning code does not explicitly require an applicant to produce a specific type of evidence, the Board cannot require the applicant to produce it, or deny their application because they refused to do so. Federal courts, including United States District Courts sitting in New York, have begun ruling in favor of applicants based upon same.[35]

In addition, where a local zoning code is silent as to what fact-finding determinations local zoning authorities must make, a local zoning board will often render a denial based upon a valid determination, while failing to make a specific determination concerning a TCA issue, such as whether or not the applicant has established that it suffered from a significant gap in its personal wireless service.

In such cases, although the Board had a perfectly valid legal reason for denying the application, its failure to "*dot the i's and cross the t's*" rendered its decision fatally defective, and such decisions are routinely overturned in federal Court in proceedings that typically last less than 120 days.

If the Planning Board is to exercise the power to regulate the placement of wireless facilities within the Town, Section §260-64 must be amended to, among other things, codify: (i) what fact-finding determinations the Board is required to make, (ii) the types of evidence they can require an applicant to produce to enable the Board to in render those determinations, and (iii) how to recognize when an applicant submits evidence which is false or materially misleading.[36]

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[35] See, e.g. Orange County-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp3d 274 (2015)(The failure of the applicant to introduce evidence of poor coverage in the area could not serve as a basis to deny its application, because the local zoning code did not require *Verizon* to provide evidence of dropped calls or customer satisfaction); T-Mobile Central LLC. V. United Government of Wyandotte County, Kansas, 546 F3d.1299, 1310 (10th Cir 2008)("the Board erred in requiring T-Mobile to demonstrate that its proposal was the least intrusive means of filling a service gap because nothing in the local law permitted the Board to impose such a requirement); Verizon Wireless LLC v. Douglas County Bod of Cnty Comm'rs, 544 F.Supp2d 1218 (2008)(a denial is not supported by substantial evidence if it imposes a burden upon the applicant for which there is no requirement under local law).

[36] In more than 90% percent of the zoning cases handled by the Author, a site developer or other applicant submitted patently false or materially misleading evidence to the local zoning authority in support of their application.

Section §260-64 currently fails to describe the minimum factual determinations that the Planning Board is required make, under both the Zoning law, and the TCA, within the context of deciding wireless facility applications under Chapter 260.

Section §260-64 also fails to specify what types of *probative evidence* the Planning Board may require an applicant to produce when the Board is are deciding Special Use Permit applications pertaining to new wireless facilities.

Section §260-64 should be amended to describe the *minimum* specific factual determinations which the Board should make when entertaining an application for a special use permit (hereinafter a "SUP") for a wireless facility.

These must include both: (a) local zoning determinations and (b) TCA determinations.

(i) Local Zoning Determinations

The Code should provide that the Board shall make affirmative factual determinations, in a written decision wherein the Board describes: (i) whether or not the respective application met the requirements of Section §260-64, and (ii) whether granting the application would be consistent with the legislative intent section set forth within Section §260-64.

By way of example, the Code should be amended to explicitly state that the Board shall determine, in a written decision:

(a) Whether or not the proposed installation will, or will not, inflict a significant adverse aesthetic impact upon adjacent or nearby properties or surrounding neighborhood or community;

(b) Whether the proposed siting of the facility, both in terms of site location, and the specific area upon the site where the installation is proposed, would minimize the adverse visual impact of the facility, consistent with §260-64(G)(2);

(c) Whether the proposed height proposed for the facility, is the minimum height necessary to remedy any significant gap in personal wireless coverage for any identified wireless carrier, consistent with §260-64(G)(7) and §260-64(H)(1)(C);

(d) Whether or not the proposed installation will, or will not, inflict a significant adverse impact the property values of adjacent or nearby properties, consistent with §260-64(H)(1)(D);

(e) Whether or not the proposed installation will, or will not, inflict a significant adverse impact upon historic resources or scenic views, consistent with §260-64(H)(1)(D);

(f) Whether or not the proposed installation will, or will not, provide and maintain a sufficient fallzone and/or safezone around the facility, to protect the public from the potential dangers of structural failures, ice fall, debris fall and/or fire;

(g) Whether or not the proposed installation will, or will not, create an unnecessary redundancy in wireless infrastructure within the Town;

(h) Whether or not the granting of the Special Use Permit Application at issue, would be consistent with the legislative intent of Chapter 265,

(ii) TCA Determinations

Although Section §260-64(H)(2) attempts to conform with the TCA[37], the Code should be amended to more specifically provide that when rendering fact-finding determinations concerning any ***TCA based*** issues, the PB shall state each of its specific findings in a final written decision, and cite the evidence in the record, whether in the form of documentary evidence or oral testimony, based upon which the PB made each factual determination.

This will satisfy the TCA requirements that any decision denying an application for a wireless facility (a) be in writing,[38] and (b) be based upon substantial evidence.[39]

As long as the Board makes a fact-finding determination and has more than a scintilla of evidence to support its determination,[40] federal Courts grant substantial deference to such determinations and are loathe to set them aside.

To ensure that any determination made by the PB complies with the requirements of the TCA, the Code should state that the PB shall make fact-finding determinations as to whether or not the respective applicant has met its burden of proof, based upon the evidence presented to the Board, *for any of the following claims made by* ***the applicant***:

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[37] 47 U.S.C.A § 332(c)(7)(B)(ii) and (iii)
[38] As is required under 47 U.S.C.A. §332(c)(7)(B)(iii).
[39] Id.
[40] See e.g. Orange County-Poughkeepsie Ltd P'ship v. Town of Fishkill, 84 F.Supp.3d. 274 (2015), Cellular Tel. Co v. Town of Oyster Bay, 166 F3d 490 (2nd Cir. 1999), Cellular Tel. Co v. Town of Oyster Bay, 166 F3d 490 (2nd Cir. 1999), American Towers, Inc. v. Wilson County, Slip Copy 59 Communications Reg. P & F 878 (U.S.D.C. M.D. Tennessee January 2, 2014)[3:10-CV-1196].

(a) whether the applicant has proven, based upon the evidence presented to the Board that an *identified wireless carrier* suffers from a "significant gap" in its personal wireless service coverage;

(b) whether the applicant has proven, based upon the evidence presented to the Board that the proposed installation will remedy that significant gap or gaps in an identified wireless carriers personal wireless coverage;

(c) whether the proposed facility presents "a minimal intrusion on the community";

(d) whether the applicant has proven, based upon the evidence presented to the Board that its proposed installation is the least intrusive means of remedying any such gap;

(e) whether the applicant has proven, based upon the evidence presented to the Board that there are no potential alternative less intrusive locations than the site proposed, or

(f) whether the applicant has proven, based upon the evidence presented to the Board that the proposed height for a facility is the lowest height possible to remedy the gap.

Even if the Board determines that the respective application should be denied for some reason, which is entirely unrelated to any wireless coverage gap issues, the PB **must still** make these determinations because its failure to do so will likely subject their decision to successful attack under the TCA.

(iii) Evidentiary Standards

The Code should codify minimum evidentiary standards to assist the PB in rendering its determinations for TCA related determinations that should include, but not necessarily be limited to, the following:

(a) Significant Gap Claims

If the applicant asserts a claim that a proposed wireless facility is *necessary* to remedy a "*significant gap*" in an identified wireless carrier's wireless coverage, the Board must make several factual determinations, including whether or not the applicant has provided sufficient *probative evidence* to meet its burden of proving not merely that the applicant suffers from a "*gap*" but whether it has proven that it suffers from a "***significant*** *gap*" in personal wireless coverage.

While the TCA does not define what constitutes a "significant gap" in services, federal courts in the 2nd Circuit have determined both: (a) what constitutes a gap in service and (b) how a local zoning board can determine whether or not any such a gap is a "significant gap."

In the Second Circuit, federal courts have defined a coverage gap as follows:

> "A coverage gap exists when a remote user of those services is unable to either connect with the land-based national telephone network, or to maintain a connection capable of supporting a reasonably uninterrupted communication. When a coverage gap exists customers cannot receive and send signals, and when customers pass through a coverage gap their calls are disconnected."
>
> New York SMSA Limited Partnership v. Town of Oyster Bay Zoning Board of Appeals, 2010 WL 3937277, at page 5, citing Omnipoint Holdings, 2008 U.S. Dist. LEXIS 111741, at *3.

As further ruled by federal courts, a local zoning board can find that an existing service gap is "***substantial***" where, *inter alia*, the coverage needed by a carrier is not limited to a small number of houses in a rural area or merely the interior of buildings in a sparsely populated area. See, e.g., Nextel Partners, Inc. v. Town of Amherst, 251 F.Supp.2d 1187 (W.D.N.Y.2003). *cf Willoth*, 176 F.3d 630, 643--44 (2d Cir.1999) ("[w]here the holes in coverage are very limited in number or size (such as the interiors of buildings in a sparsely populated rural area, or confined to a limited number of houses or spots as the area covered by buildings increases) the lack of coverage likely will be de minimis .... ")."

The existence or absence of a "significant gap" in service is a factual determination by the respective zoning board, on a case-by-case basis, based upon whatever evidence is presented to it or the lack of evidence presented to it.

In addition, a carrier's claim that it needs the proposed tower for "future capacity" or to "improve coverage" cannot establish that it suffers from a significant gap in service, without any actual affirmative claim that its customers cannot connect to its network, or that when their customers pass through a specific gap, their calls are disconnected.

As such, the Town Code should be amended to authorize the PB to require the applicant to provide *probative evidence,* in the form of hard data recorded during an actual drive test,[41] to establish (a) the existence of a significant gap in a specific carrier's wireless coverage, (b) the location of the gap, and (c) the geographic boundaries of the gap.

If, and only if, the PB were to receive such data, would it then (a) be placed in a position to ascertain if the proposed installation would be consistent with the smart planning provisions of the Code, and contemporaneously (b) be placed in a position to defend any decision the Board renders, from a claim that a denial of the respective application violated the TCA by "effectively prohibiting" the applicant from providing personal wireless services within the Town.

Under the "effective prohibition" constraint of the TCA, the PB would legally be required to grant an application for the construction of a new cell tower if the applicant proved BOTH that: (a) it suffers from a significant gap in its personal wireless services, and (b) its proposed new cell tower, at the site it has chosen, and the height it desires, is the least intrusive means of remedying such gap.

But it is the PB, *not the applicant*, which possesses the authority to determine if the applicant has met its burden of proving both of those things to the PB.

In making such determinations, the PB can determine, by way of example, that an applicant *has not* proven that it meets both prongs of the test, based upon a host of factual determinations, which can include, among other things: (a) any holes in coverage are limited in size, or confined to a limited number of homes, or are situated in a rural sparsely populated area, (b) that any lack in coverage would be *de minimis*, (c) that there are potential, less intrusive, alternative locations for the placement of a wireless facility which would fill the gap, (d) that a facility of a lesser height, or multiple shorter facilities at less intrusive sites, would be sufficient to remedy any alleged gap or gaps.[42]

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[41] A drive test is a simple and inexpensive process through which applicants compile hard data that accurately depicts the existence or absence of a significant gap in a specific carrier's personal wireless services. To perform such a test, one simply attaches a recording device to a cell phone, which records wireless signal strength every few milliseconds. The tester then drives through an area within which a carrier is believed to suffer from a significant gap in its personal wireless services. In a two hour drive, the device can record a massive number of readings which collectively reveal: (a) if there is a meaningful gap in wireless service, (b) the location or locations of any such gaps, and (c) their geographic boundaries.

[42] See Orange County-Poughkeepsie Limited Partnership v. Town of East Fishkill, 84 F.Supp.3d 274 (2015).

Contemporaneously, bald conclusory claims by an applicant that a potentially less intrusive alternative site cannot be used because it "wouldn't meet" the applicant's "***coverage objectives***" should be uniformly rejected because such terminology is inherently meaningless.[43]

(b) Capacity Deficiency Claims

In a similar vein, where an applicant asserts a claim that a proposed wireless facility is *necessary* to remedy a *capacity deficiency*, the PB should require the applicant to provide *probative evidence*, that being hard data in the form of actual dropped call records[44] from the carrier which purportedly suffers from the capacity deficiency being alleged.

(c) FCC Compliance Reports

Applicants seeking to install new wireless facilities invariably assert that their proposed wireless facility will be FCC compliant, meaning that it will not expose the Town's residents, and the general public, to radiation levels that exceed the levels deemed safe by the FCC.[45]

In furtherance of same, they will invariably submit "FCC Compliance Reports."

Very often, these FCC compliance reports contain patently false information, which is submitted in a deliberate effort to mislead a local zoning board to falsely believe that a proposed facility will be FCC-compliant when in reality, it will expose members of the general public to radiation levels which exceed the levels deemed safe by the FCC.

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[43] Among the most important of "coverage objectives" desired by site developers is to place their facilities at the least expensive sites possible, irrespective of whatever adverse impacts they might inflict upon adjacent and nearby properties.

[44] Similar to drive test results, dropped call records are inexpensive to provide, and provide accurate hard evidence of the existence or absence of a capacity deficiency in a carrier's personal wireless services. Wireless carriers possess dropped call data and can provide simple printouts reflecting the number, and percentage of dropped calls they sustained in any geographic area for any period of time. This data shows what percentage of calls in a specific area failed, meaning that their customers were unable to initiate, maintain and conclude calls without loss of service. The TCA does not require local governments to grant applications for wireless facilities because an applicant wants to have *perfect* coverage, or *seamless* coverage, meaning a 100% call success rate, or absolutely no gaps in coverage. The TCA typically only requires approvals of applications for wireless facilities where the respective applicant establishes that it suffers from "*a significant gap*" in personal wireless services, and their proposed application is the least intrusive means of remedying such gap.

[45] Section §332(c)(7)(B)(iv) of the TCA provides that local governments cannot regulate wireless facilities based upon concerns over environmental impacts (which applicants assert means "health concerns") to the extent that a facility is FCC compliant.

The two most common deceits employed to mislead local zoning authorities into believing that a non-FCC compliant facility will be FCC-compliant are: (1) proffers of FCC compliance under the wrong standard[46] and (2) false radiation calculations based upon a false "minimum distance factor." [47]

The Code should mandate that any FCC compliance report submitted by any applicant disclose two (2) specific items of information on the cover page of any such report.

First, the cover page of the report must specify which set of FCC standards the applicant is claiming applies to its proposed facility, those being either the *General Population Exposure Limits or* the *Occupational Exposure Limits.*[48]

Second, the cover page of the report must specify the minimum distance factor, measured in feet, which the applicant used to calculate the radiation emission levels to which the proposed facility would expose members of the general public or others.

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[46] In the Author's experience, applicants often mislead local zoning authorities by claiming that the radiation levels to which a proposed facility will expose members of the general public will be "within the FCC's limits," while failing to disclose to that authority that the "limits" they are referring to are the much higher "Occupational Exposure Limits." In a case in Garden City, New York, an applicant's RF engineer testified that the radiation levels which a proposed facility would emit would be "*well below the FCC's limits*." Upon cross examination by the Author, the RF engineer conceded that the limits he was referring to were the *occupational exposure limits*, and that if the facility was to be installed, it would expose residents who would occupy an apartment underneath the installation to radiation levels that would exceed the general population exposure limits by 400 to 600 percent.

[47] The most common way that applicants deceive local governments into believing that a non-FCC compliant facility will be FCC compliant, is by preparing a false FCC compliance report based upon a false "*minimum distance factor*."

For an RF engineer to calculate the radiation levels to which a proposed new facility will expose members of the general public, they must start their calculation with the minimum distance factor, that being the closest distance to which a member of the general public will be able to get near the transmitting antenna(s).

In a case in the Village of Southampton, New York, where an applicant wanted to install cell antennas in the steeple of the oldest Presbyterian church in the United States, an applicant submitted an FCC compliance report, wherein it calculated the projected radiation level for the proposed antennas based upon a minimum distance factor of approximately fifty (50) feet, which was the distance from all the way up in the steeple, and all the way down to the sidewalk in front the church.

The Author was constrained to point out that, as was known to virtually everyone in the Village, the church steeple houses an antique clock, which has been manually "hand-wound" every eight (8) days for more than one hundred years, since it was installed back in the year 1871. Tourists regularly view the clock during regular historic tours within the church. When doing so, their heads would pass as closely as 3-4 feet from the transmitting antennas, instead of the fifty (50) feet minimum distance factor, which was used to falsely calculate the levels of radiation to which they would be exposed.

Finally, since the Board cannot surmise the potential harm to which a non-FCC compliant facility may expose the general public, the Board must require that any FCC Compliance report be verified under oath, and under penalties of perjury, by the person who prepared any such report. A sworn verification must be attached to the report.

(d) Propagation Maps

The Code should be amended to provide that to the extent that an applicant seeks to submit one or more propagation maps in support of its application, the applicant would be required to submit both: (a) the hard data that was employed to create such map or maps, as opposed to merely providing a description of computer modeling through which the map was created, and (b) a certification, under penalties of perjury, that the data is accurate.

(e) Visual Impact Analyses

Both the Town's Zoning Code and its 2018 Comprehensive Plan contain provisions which reflect that the Town recognizes when adding new wireless service, there remains an inherent import in the avoidance of adverse health risks and the creation of significant adverse visual impacts to the community.[49]

In accord with such objectives, the Code encompasses *limited* requirements intended to enable the PB to assess the potential adverse aesthetic impacts that a proposed cell tower or other wireless facility may inflict upon nearby properties.

Chapter 260, Section §260-64(F)(4) of the Town Code should be amended to require applicants seeking a special use permit to construct a new cell tower to provide a visual impact assessment of its proposed installation.

Section §260-64(F)(4) provides, that "the PB may provide other methods of visual analysis to assess the potential impacts on nearby viewsheds, ridge lines, scenic areas, historic sites and adjacent land uses, including but not limited to photographic simulation or photographic montage, with and without foliage."[50]

The glaring deficiency in Section §260-64(F)(4) is that it does not require applicants to submit any images, whatsoever, from any homes or properties which happen to be situated in closest proximity to the proposed site, and by virtue of which, are likely to sustain the most dramatic adverse impacts from the proposed installation.

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[49] See e.g. The 2018 Comprehensive Plan, Adopted November 20, 2018, Part IV, Infrastructure p.34.
[50] See Section §260-64(F)(4).

As logic would dictate, the whole purpose for which an applicant is required to submit a visual impact analysis to a local zoning board is to provide the Board with an accurate depiction of the actual adverse aesthetic impact that a proposed cell tower or other wireless installation will inflict upon nearby properties or the surrounding community.

To falsely portray that the proposed installation will have a dramatically less severe adverse impact than that which it will actually inflict, applicants routinely submit visual impact reports which contain photographic images, wherein they deliberately omit any images taken from the perspective of the closest properties which would suffer the most severe adverse impact from the installation.[51]

In Omnipoint Communications Inc. v. The City of White Plains, 430 F2d 529 (2nd Cir. 2005), the United States Court of Appeals for the Second Circuit explicitly ruled that where a proponent of a wireless facility presents visual impact depictions wherein they omit any images from the actual perspectives of the homes which are in closest proximity to the proposed installation, such presentations are inherently defective, and should be disregarded by the respective government entity that received it.

In a case where an applicant submitted a "visual impact study" to a local zoning authority in support of an application to build a cell tower on a golf course, which abutted several residential homes, the United States Court of Appeals for the Second Circuit explicitly pronounced:

> "the Board was free to discount Omnipoint's study because it was conducted in a defective manner. . . ***the observation points were limited to locations accessible to the public roads, and no observations were made from the residents' backyards much less from their second story windows.***" *Id.*
> Omnipoint Communications Inc. v. The City of White Plains,
> 430 F2d 529 (2nd Cir. 2005),

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[51] Where applicants seek to install a 100-175 foot cell tower directly adjacent to a residential home, and they submit a "visual impact analysis" to the local zoning board in support of their application, they virtually never include any photographic images taken from the perspective of the adjacent home.

In a case in Bedford, New York, local zoning officials affirmatively requested that a specific applicant provide the Board with photos taken from homes whose views would suffer the most dramatic aesthetic impacts. When reviewing the photos, which were then provided by the applicant, the local zoning board recognized that whoever took the photos from one particular home, had positioned the camera so that a tree was in the direct line of sight between the camera and the tower location, blocking the view of same. Other photos were taken out of focus, or darkened, which, as apparently intended, created the appearance that the adverse aesthetic impacts were far less severe than they actually were.

Even though the Omnipoint decision was handed down by the federal Court fifteen (15) years ago, applicants ***still*** submit visual impact analyses wherein they deliberately omit any images taken from the homes and/or other properties in close proximity to their proposed towers in a deliberate effort to mislead the respective local zoning authority to believe that their proposed new tower will have a far less significant adverse impact, than it actually will.

To ensure that its PB is provided with an accurate depiction of the potential adverse aesthetic and/or other impact that a proposed cell tower will inflict upon any nearby homes or other properties, Section §260-64 of the Code should be amended to provide that the Board can not only require a visual impact analysis and a balloon test, but to explicitly require applicants to include, within any visual impact analysis or balloon test, photos taken from the perspective of the properties situated in closest proximity to the proposed installation, unless the applicant can show proof that it attempted to secure such images, but that the owners of such properties refused to grant them access to obtain such images.

To the extent that an application pertains to a small cell facility, or a DAS System,[52] rather than a cell tower, the Code can provide that no balloon test be required. However, it should still require a visual impact analysis which contains images taken from the perspective of any residential homes adjacent, or in close proximity to, any such proposed installation.

This is because, within the context of the 5G rollout, many small cells and DAS nodes are being installed in extremely close proximity to residential homes. As a result, they have the potential to, and very often do, inflict significant adverse aesthetic impacts to nearby homes and cause reductions in property values thereof.

(e) Verification Requirements

Unfortunately, in ninety (90%) percent of the local zoning applications which have been reviewed by the Author, applicants, their representatives, and even their engineers have submitted patently false or materially misleading documents, evidence and representations to the respective local zoning authority.

In view of such practices by persons in the wireless industry, the Chapter 260 should include a requirement that all submissions proffered to the Town by an applicant be verified and should include a statement that the any person signing or submitting any document verifies, "under penalties of perjury," the truth of the representations made therein. This requirement should be mandatory for all "propagation maps" submitted by an applicant, because propagation maps are routinely manipulated to show falsely portray wireless coverage to be far less than what actually coverage exists.

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[52] DAS is a term commonly used to denote a Distributed Antenna System, which is a system that includes multiple transmission units which are individually referred to as Nodes.

B. Notice Provisions and Hearing Requirements

Well drafted wireless provisions invariably include notice provisions and public hearing requirements, which serve two critical functions.

First, notice provisions enable all property owners who may be affected by adverse impacts caused by the irresponsible placement of a wireless facility in close proximity to their home or other property to become aware of a proposed installation before it occurs, and it affords them an opportunity to voice any objections which they may possess.

Second, it affords the local Board the ability to receive evidence from such property owners that can serve as "substantial evidence" within the meaning of the TCA, based upon which the Board could deny an application (if they determine that a denial would be appropriate) without violating of the TCA.

Although Section §260-68[53] provides a provision concerning public notices and hearings with regard to SPU applications, it is recommended that Section §260-64 be amended to include its own public notice and hearing provision regarding wireless facilities applications. Specifically, it should require that an applicant provide the Town with the names and addresses of all property owners whose property is situated within 1,500 feet of the parcel's property line on which a proposed new cell tower is to be located. Additionally, applicants shall be required to provide all of such property owners with written notice of the public hearing, by certified mail, return receipt requested.

Such notice requirements can be varied based upon the size of the proposed facility. For example, an application to install a 150-foot cell tower might reasonably require an applicant to serve notice upon all property owners within 1,500 feet, by certified mail, return receipt requested. In contrast, a proposal to install a DAS node on a pre-existing utility pole might only require such notice to be provided to property owners whose properties are adjacent to, or within 300 feet of, the proposed site.

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[53] See Section §260-68(B).

VI. Optional Additions to the Town Code

A. ADA and FHAA Accommodations

Both the ADA and FHAA require local governments, their agencies, and public utilities[54] to make reasonable accommodations for persons who are disabled.

Electromagnetic Hypersensitivity Syndrome (EHS) has been recognized as a disability under the ADA for which disabled persons are entitled to request reasonable accommodations under the ADA[55] and the FHAA.

Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and public entities' services. It applies to all state and local governments, their departments, and agencies.

A provision should be added to the Town Code to establish a procedure to enable disabled persons suffering from EHS to submit requests for reasonable accommodations and file grievances for lack of accommodations, to be reviewed by the Town's ADA Coordinator.

B. Random Radiation Testing of Wireless Facilities

As described hereinabove, the FCC exercises no meaningful oversight over the levels of Radiofrequency (RF) radiation[56] to which wireless facilities expose members of the general public.

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[54] Site developers and wireless carriers uniformly assert that they are public utilities, and they are uniformly recognized as such by State Boards and commissions which are charged with the duty of regulating public utilities.

[55] See e.g. G v. The Fay School Inc., 282 F.Supp.3d 381 (2017)

[56] The FCC has defined Radiofrequency (RF) Radiation, for its purposes, as electromagnetic energy, that can be further defined as waves of electric and magnetic energy moving together through space, where such electromagnetic waves have frequencies that range from 3 kilohertz (kHz) to 300 gigahertz (Ghz) FCC OET Bulletin 65, Supplement B, (Edition 97-10) at page 8.

The FCC has set maximum limits for human exposure to RF radiation based upon recommended exposure criteria issued by the NCRP and ANSI/IEEE, each of which identified the same threshold level "*at which harmful biological effects may occur*." See FCC OET Bulletin 56, August 1999. Based upon same, the FCC adopted Maximum Permissible Exposure (MPE) limits, which are expressed in terms of electric field strength, magnetic field strength and power density *Id.* While federal law requires all wireless facilities to comply with such RF exposure limits (47 C.F.R. §1.1310), there is no agency that actually enforces such requirement. As a general rule, the FCC does not test wireless facilities for compliance with either set of exposure limits.

Recognizing same, local governments have begun enacting testing requirements, which provide for random testing of radiation levels emanating from wireless facilities within their jurisdiction to protect their citizens against exposure to illegal levels of radiation emanating from non-FCC-compliant facilities.

A facility is non-FCC-compliant when it exposes members of the general public to radiation levels that exceed the General Population Exposure Limits.[57]

The Town may choose to enact random testing requirements that provide for either: Town funding testing (Type 1), owner/operator testing (Type 2), or private citizen testing, under a *qui tam* type provision (Type 3).

Type 1 Testing

Under the Type 1 type of provision, Town governments enact a provision that provides that the respective local government will perform random testing of wireless facilities at the Town's own expense, wherein it pays an RF engineer to test the radiation levels emanating from wireless facilities within the jurisdiction.

If the Town's engineer finds that a facility is exposing members of the general public to radiation levels that exceed the General Population Exposure Limits, the Town places the owner of the facility on notice and affords them a hearing at which the Town requires them to show cause why the permit for their facility should not be revoked, and its installation removed.[58]

Type 2 Testing

Type 2 testing is the same as Type 1, except that the provision imposes the cost of the testing upon the owner of the facility being tested.

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[57] 47 CFR§ 2.1 dictates that the *general population* limits apply as follows:

"*General population/uncontrolled exposure*. For FCC purposes, applies to human exposure to RF fields when the general public is exposed or in which persons who are exposed as a consequence of their employment may not be made fully aware of the potential for exposure or cannot exercise control over their exposure. Therefore, members of the general public always fall under this category when exposure is not employment-related."

[58] While 47 U.S.C. §332(c)(7)(B)(iv) bars local governments from regulating wireless facilities based upon environmental effect, such ban only applies to the extent that such facilities are FCC-compliant, meaning that the radiation levels to which they are exposing members of the general public are within the General Population Exposure Limits.

Type 3 Testing

Type 3 testing is a *qui tam* type provision that deputizes all members of the Town. This type of provision provides that, at any time, any citizen can retain the services of an RF engineer and have any facility tested to ascertain if it is exposing members of the general public to radiation levels that exceed the General Population Exposure Limits.

If a facility is found exceeding such limits, the citizen can sue the facility owner to secure its removal. So long as the citizen establishes that the facility was exceeding the General Population Exposure limits, the facility owner must reimburse the citizen for their attorneys' fees.

C. Siting Hierarchy For the Placement of Wireless Facilities

Although Section §260-64(E)[59] requires applicants to provide written documentation of wireless facilities within a five mile radius of the proposed site, while additionally requiring the applicant to demonstrate the existing facilities inability to provide, or the lack of potential to provide, adequate coverage and/or capacity to the Town of Woodstock, the provision falls short of ensuring the applicants do not take advantage of the PB's "good faith" in using the "least intrusive means necessary." Historically, site developers have been known to submit patently false and materially misleading information and documentation to PBs in order to ensure their permit's approval.

In order to remedy the potential of your PB being misled, amending the current provision to include a siting hierarchy, which many local governments include within their respective zoning ordinances, ensures that to the greatest extent possible, wireless facilities are sited at locations that are most compatible with surrounding properties and/or uses.

These provisions include a ranking of potential locations for the placement of wireless facilities, from the most desirable to the least desirable, typically designating them from Tier 1 to Tier 5 type locations. After incorporating such a ranking system into their Code, local governments then include a provision that requires each applicant who seeks to install a wireless facility at a less desirable location to establish that no higher-ranking sites are available to satisfy whatever coverage needs the respective applicant is seeking to remedy.

[59] See Section §260-64(E).

VII. The FCC's "Interpretative Order" of September 16, 2018

Any analysis of the Town's power to control the placement of wireless facilities within the Town must include a review of the FCC's recent "interpretative order," pertaining to the "*effective prohibition*" language within section 47 U.S.C §332(c)(7)(B)(i)(II) of the TCA.

Under 47 U.S.C. §332(c)(7)(B)(i)(II) of the TCA, local governments cannot *prohibit* or *have the effect of prohibiting* the provision of personal wireless services.

For more than two decades, local governments have enacted and applied local zoning laws to control the placement of wireless facilities, without violating the "effective prohibition" language of that provision.

To the extent that an applicant filed a federal lawsuit claiming that a denial of their specific application *effectively prohibited* them from providing personal wireless services in violation of the TCA, federal courts from across the entire United States have interpreted that language within the TCA and specifically defined what constitutes an "effective prohibition" under the TCA.

Within the context of the current 5G rollout, site developers and wireless carriers now seek to install an unprecedented number of new wireless facilities, many of which will be placed closer to homes than any previous wireless facilities, and at elevations that could place them virtually "outside bedroom windows" of residential homes nationwide.

Being well aware that local governments would employ their local zoning laws to restrict site developers' access to residential areas for the installation of 5G wireless facilities in extremely close proximity to homes, it is believed that the wireless industry has made efforts to induce the FCC to limit further the powers of local governments in restricting the placement of such facilities.

They ultimately succeeded when, on September 26, 2018, the FCC issued an order wherein it *essentially attempted* to: (a) strip local governments of the ability to enforce their smart planning provisions, and/or to regulate the installation of wireless facilities within their respective jurisdictions, and (b) to wipe out 24-years-worth of local zoning regulations.

If it were to be read literally, the "interpretative order" essentially empowers site developers and wireless carriers to install new facilities, anytime, anywhere, and at any height, virtually free of any "interference" from local governments.

Among other things, the order purports to strip local governments of the authority to require applicants, who are seeking to install a cell tower or wireless facility, to prove both (a) that they suffer from a significant gap in their personal wireless services, and (b) that the proposed installation is the least intrusive means of remedying such gap and/or that there are no less intrusive alternative locations available at which they can install a facility to remedy their gap.

To do so, the FCC affirmatively stated that:

> *"an effective prohibition occurs where a state or local requirement materially inhibits a provider's ability to engage in any of a variety of activities related to the provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities . . . Thus, an effective prohibition includes materially inhibiting additional services or improving existing services."*
>
> FCC Order 18-133 Adopted September 26, 2018.

This new "interpretation" by the FCC conflicts with more than twenty years of federal courts' rulings from across the country. United States District Courts are presumably bound by their respective Circuit Court's interpretations,[60] as opposed to this *new interpretation* from the FCC.

Significantly, this is not the first time that the FCC has tried to "*interpret* the TCA" in a manner to say something that it does not. In Arcadia Towers v. Colerain Township Board of Zoning Appeals, 2011 WL 2490047, a plaintiff brought a federal action under the TCA based upon a new interpretation of the TCA, wherein the FCC interpreted the TCA to cover broadband services, even though the TCA does not say that it covers such services.

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[60] Where a local government has denied a zoning application for the installation of a new wireless facility, and the applicant sues the local government in federal court claiming that the denial has the effect of prohibiting the provision of personal wireless services in violation of Section 332(c)(7)(B)(i)(ii) of the TCA, the applicant has the burden of proving both (a) the existence of a significant gap in service coverage, and (b) that its proposed installation is the least intrusive means of remedying that gap and/or there are no less intrusive alternative sites available. See e.g. Crown Castle NG West LLC v. Town of Hillsborough, 2018 WL 3777492, T-Mobile USA Inc. v. City of Anacortes, 572 F3d.987 (9th Cir 2009). Where an applicant cannot meet that burden, any claimed violation of the effective prohibition provision of the TCA must fail. See, e.g. T-Mobile Northeast LLC v. Fairfax County Board of Supervisors, 672 F3d 259 (4th Cir. 2012).

In dismissing that case, the Court ruled:

> "It certainly makes sense as a policy objective for broadband services to have protections under the law equivalent to that provided by the TCA. However, as laudable as such goal may be, the Court finds this is a case where the law has not kept up with changes in technology. Under such a circumstance ***it is not up to the FCC to construe the TCA to say something it does not say,*** nor up to the Court to find broadband communication encompassed by the law. It is up to Congress to act."
>
> Arcadia Towers v. Colerain Township Board of Zoning Appeals, 2011 WL 2490047

Consistent with same, when an applicant tried to pursue a TCA claim in a federal court citing the recent FCC order, and *without* affirmatively asserting that it suffers from a "significant gap" in coverage, its case was dismissed by the federal Court. See Extenet Systems Inc. v. The City of Cambridge Massachusetts, U.S.D.C. District of Massachusetts, Case 19-cv-11836 (Decision dated 8/26/2020)[Decision not yet reported] See also Helcher v. Dearborn County, 500 F.Supp.2d 1100 (2007), Affirmed 595 F3d 710 (7th Cir. 2010).

As United States District Courts will likely recognize, as the District Court in Massachusetts did, they remain bound by the Circuit Courts' interpretation of "effect of prohibiting," and the FCC was without power to revoke powers which the United State Congress explicitly preserved to state and local governments, under 47 U.S.C.A. 332(c)(7)(A), under the guise of "interpreting" the "effect of prohibiting" language within Section §332(c)(7)(B)(i)(II).[61]

Moreover, as was also already held, in adopting its 2018 Order, the FCC acted in a manner that was arbitrary and capricious (and violated the National Environmental Policy Act).[62]

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[61] See e.g. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 91 (2002).[An agency may never exercise authority inconsistent with Congressional Intent, regardless of the issue the agency is seeking to address.], See also Am. Library Ass'n v. F.C.C., 406 F.3d 689, 708 (D.C. Cir. 2005) and La. Pub Serv. Comm'n. v. FCC, 476 U.S. 355, 90 (1986)[Courts have consistently held that agencies may only act within the authority given to them by Congress. The FCC, like other federal agencies, "literally has no power to act… unless and until Congress confers power upon it."], and See Cellular Tel. Co. v. Town of Oyster Bay, 166 F.3d. 490, 495 (2nd Cir. 1999)[under the powers preserved to local governments under the Telecommunications Act, aesthetics is an appropriate ground upon which a local government has the power to deny a zoning application for the installation of a wireless facility, so long as there is substantial evidence of negative aesthetic impact].

[62] Congress enacted the National Environmental Policy Act (hereinafter "NEPA") to "encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." United Keetoowah Band of Cherokee Indians in Oklahoma v. Fed. Commc'ns Comm'n, 933 F. 3d 728, 734 (D.C. Cir. 2019). The objective of the National Environmental Policy Act (hereinafter "NEPA") is to assure a safe and healthful environment. See 42 U.S.C. §§ 4321, 4331. NEPA review "does not dictate particular decisional outcomes, but merely prohibits uninformed-rather than unwise-agency action." Id. Under 42 U.S.C. §4332, NEPA requires federal agencies to prepared detailed statements on

As such, it would behoove local governments to enact local zoning ordinances to empower them to control the placement of the new wave of 5G installations, in the absence of which, their constituents will undoubtedly begin awakening to find such facilities installed in extremely close proximity to their homes.

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potential environmental impacts of a proposed action that is considered a "major federal action." See also 47 CFR §1.1305 A "major federal action" is considered to be any action that significantly affects the quality of the human environment. See 42 U.S.C. §4332. See *also* 47 CFR §1.1305, which is specific to the FCC and requires that any commission action which is deemed to have a significant effect on the quality of the human environment requires an Environmental Impact Statement. At the very least, an agency must prepare a preliminary Environmental Assessment to determine if there is any potential for a negative environmental effect and therefore an Environmental Impact Statement would be required. See 40 C.F.R. §1508.9. As explicitly set forth in 40 C.F.R. §1500.1(b), an agency must ensure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. According to the FCC's own website "responsibility for NEPA compliance rests with the FCC." The FCC's most recent order eliminated NEPA review for small cells. The FCC decision to eliminate NEPA review for certain small cells was "based on the Commission's conclusion that such review was not statutorily requested and would impede the advance of 5G networks, and that its costs outweighed any benefits." United Keetoowah Band of Cherokee Indians in Oklahoma, 933 F.3d at 737. However, the FCC failed to assess any harms that could come from the densification of the use of small cells for 5G. Id at 741. Further the Court in Keetoowah, noted that the FCC "does not reconcile its assertion that planned small cell densification does not warrant review because it will leave little to no environmental footprint" Id at 742. Ultimately, the Court determined that the FCC's order deregulating small cells was arbitrary and capricious. Id.

Conclusion and Disclaimer

It is the opinion of the Author that if, and to the extent that the Town were to amend its applicable Code provisions, it would significantly increase the Town's authority to regulate the placement of wireless facilities within the Town, to protect the Town and its residents against unnecessary adverse impacts resulting from the irresponsible placement of wireless facilities.

The struggle between the wireless industry and local governments attempting to control the placement of wireless facilities to protect their communities and citizens is ongoing and has intensified due to the 5G rollout. The ever-changing legal landscape of federal, state, and local laws and case decisions renders it impossible to guarantee that any local ordinance, rule, or regulation will not, at some point, be challenged in any federal or state court, based upon existing or future statutes or caselaw, or what the outcome of any such challenge may result.