CUDDY & FEDER LLP

445 Hamilton Avenue, 14th Floor
White Plains, New York 10601
Tel 914.761.1300 Fax 914.761.5372
www.cuddyfeder.com

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LAND USE AND SUSTAINABLE DEVELOPMENT LAW INSTITUTE

Planning and Permitting Mobile Broadband Communications Infrastructure: Is It Time To Amend Your Local Code?

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Charles J. Gottlieb and Anthony F. Morando

INTRODUCTION

This presentation focuses on mobile broadband communications infrastructure – a unique land use where the pace of technological and legal change are significant, the implementation of planning and zoning at times challenging for both municipalities and applicants and the outcomes of significant importance for communities.

This topic is highly relevant for municipal officials and staff members given the increased deployment of wireless communications infrastructure needed to address the explosion in data use and demand for mobile broadband. 4G LTE and new applications like the connected car, machine to machine (M2M) and a hockey stick demand curve that are driving the need for added wireless infrastructure. As demand grows, the need for in-building systems, small cells, towers and facilities will continue to result in wireless facility deployment.

To harness these advancements and growth in technology, municipalities should review recent developments in Federal law to ensure that their local codes are not only compliant with the most recent Federal policy, but properly balance their own administrative procedures with the nature of the infrastructure being deployed. Tools to aid in the deployment of wireless infrastructure includes designations of as-of-right sites, town wide planning, amendments of local laws including zoning regulations, as well as development of ongoing policies at the municipal level including use of municipal rights-of-way and properties.

These written materials are intended to summarize several current policies and laws that are a catalyst for mobile broadband and can be the basis for municipal planning for the next wave of wireless infrastructure deployments on a local level. Municipalities should review current codes that were developed principally in the 1990s and consider changes to facilitate appropriately mobile broadband projects that foster economic growth and the well being of local businesses and residents alike. For further background on the history of zoning and wireless siting in New York as a prelude, refer to *Wireless Services, Infrastructure & Zoning: A Time for Local Regulatory Change in New York?,* New York Zoning Law and Practice Report, 2011.

Why Are Communication Advancements Fostering Transition In Local Communities?

Over the past thirty years, wireless communications have revolutionized the way Americans live, work and play.[1] The ability to reliably connect with one another in a mobile environment has proven essential to the public's health, safety, welfare, as well as a rapidly evolving economy.
As of June 2012, there were an estimated 321.7 million wireless subscribers in the United States, a milestone equivalent of the U.S. population.[2] Wireless network data traffic was reported at 341.2 billion megabytes, which represents a 111% increase from the prior year.[3] Other statistics provide an important sociological understanding of how critical access to wireless services has become. In 2005, 8.4% of households in the United States had cut the cord and were wireless only.[4] By December 2012, that number grew exponentially to an astonishing 38.2% of all households and still growing.[5]

Wireless access has also provided individuals a newfound form of safety. Today, approximately 70% of *all* 9-1-1 calls made each year come from a wireless device.[6]

On May 15, 2014, wireless carriers began offering text-to-911 services nationwide in localities where municipal Public Safety Answering Points (PASPs) support text-to-911 technology. This program allows users to send text messages to emergency services as an alternative to placing a phone call. Licensed FCC wireless carriers will support Text-to-911.[7] Wireless Emergency Alerts ("WEA") now also play a role in ensuring public safety through the adoption of the Warning, Alert and Response Network (WARN) Act. "WEA is a public safety system that allows customers who own certain wireless phone models and other enabled mobile devices to receive geographically-targeted, text-like messages alerting them of imminent threats to safety in their area," minimizing the risk of emergency alerts being delayed in "highly congested areas."[8]

Parents and teens also rely on access to wireless services. In a 2010 study conducted by Pew Internet Research, 78% of teens responded that they felt safer when they had access to their cell phone.[9] In the same study, 98% of parents of children who owned cell phones stated that the main reason they have allowed their children access to a wireless device is for the safety and protection that these devices offer.[10]

Our health care and education[11] systems have also evolved as a result in mobile communication advancements and are relying more and more on robust mobile services. Advancements in mobile communication now enable medical professionals to send and receive patient information and vital-sign data transmissions in furtherance of reducing risks, improving patients' health status and reducing costs.[12] The Food and Drug Administration ("FDA") has recognized the benefits of wireless technologies in the healthcare industry, including:

> Providing the ability of physicians to remotely access and monitor patient data regardless of the location of the patient or physician (hospital, home, office, etc…).
>
> These benefits can greatly impact patient outcomes by allowing physicians access to real-time data on patients without the physician physically being in the hospital and allowing real-time adjustment of patient treatment. Remote monitoring can also help special populations such as our seniors, through home monitoring of chronic diseases so that changes can be detect earlier before more serious consequences occur.[13]

Advancements in communications technology have resulted in an annual multi-billion dollar boost to our economy, and significant cost savings to local businesses and communities.[14]

What does this mean for New Yorkers?

In 2014, the New York State Wireless Association ("NYSWA") commissioned an economic impact study of the wireless industry in New York.[15] The impact of the industry is immense. It's direct impact – jobs at wireless carriers, supplier firms, equipment, plus tax revenue, is large. The indirect impact – the impact of wireless access for business, education, innovation, and everyday life, is immeasurable. New York's wireless subscribers grew from 5.4 million in 2000, to roughly 21 million in 2012. That's nearly a four-fold increase. Total employment for the wireless sector

in New York State is estimated at a combined payroll of $5.1 billion, employing roughly 60,000 New Yorkers. Public and private investment in communications infrastructure in New York for the four-year period of 2008-2012 exceeded $2 billion.

In March 2015, Siena College issued a poll sponsored by AT&T on wireless device use in New York.[16] Cell phones are used by 90% of New Yorkers, with two-thirds using smartphones. 21% of households are wireless-only, no landline. 90% of smartphone users in NY are satisfied (44% completely) with their provider company, and 81% say it's important that their provider be innovative and a leader in technology. This study confirms that New Yorkers are becoming increasingly mobile and they will continue to demand a robust and advanced wireless network into the future.

What Recent Federal Wireless Policies
And Associated Legal Decisions Impact The Regulatory
Framework For Local Laws And Procedures Related To Wireless Infrastructure?

In 1996, the United States Congress adopted the Telecommunications Act (the "TCA") to "provide for a competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans."[17] With respect to wireless communications services, the TCA expressly preserved state and/or local land use authority over wireless facilities, placed several requirements and legal limitations on the exercise of such authority, and preempted state or local regulatory oversight in the area of emissions as more fully set forth in 47 U.S.C. § 332(c)(7). In essence, Congress struck a balance between legitimate areas of state and/or local regulatory control over wireless infrastructure and the public's interest in its timely deployment to meet the public need for wireless services.

Throughout the past nineteen years, the Federal Government and Courts have continually addressed the balance associated with the expeditious provision of wireless service to all Americans and a reservation of state and local permitting authority.[18]

The need for speed – the "Shot Clock"

The Federal regulatory framework over wireless communications establishes timeframes in which municipalities must complete their review of a communications provider's application to deploy wireless infrastructure. These timeframes have been adopted by Congress, upheld by the Courts and clarified by the Federal Communications Commission ("FCC").

The TCA requires zoning, land use and other state or local permitting decisions relating to wireless facilities siting requests to be rendered "within a reasonable period of time."[19] The FCC issued a Declaratory Ruling in 2009 defining a "reasonable period of time" as, presumptively, 90 days from the date an application is submitted to a reviewing agency to review and process collocation applications[20] and 150 days to review and process all other applications[21] (the "Shot Clock").[22]

The Shot Clock has the full force and effect of federal law and has been upheld by the United States Supreme Court.[23] Indeed, in City of Arlington v. FCC, the Supreme Court confirmed the FCC's authority to interpret the TCA, recognizing that: "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." Specifically, the Court affirmed the FCC's authority to issue its Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) of the Act, and establish timeframes and policies under the Shot Clock.

In October 2014 the FCC adopted further and formal clarifications of the Shot Clock, confirming exactly how it applies to municipalities and their review of wireless communication applications (the "Infrastructure Order").[24] The Order specifically confirmed the following procedures:

- The timeframe begins to run when an application is first submitted, not when it is deemed complete by the reviewing government;
- Completeness items are those listed in a code or formal procedure of general application, not consultant requests for additional information;
- A determination of incompleteness tolls the Shot Clock only if the State or local government provides notice to the applicant in writing within 30 days of the application's submission, specifically delineating all missing information, and specifying the code provision, ordinance, application instruction, or otherwise publically-stated procedures that require the information to be submitted;
- Following an applicant's submission in response to a determination of incompleteness, the State or local government may reach a subsequent determination of incompleteness based solely on the applicant's failure to supply the specific information that was requested within the first 30 days; and
- The Shot Clock begins running again when the applicant makes its supplemental submission; however, the Shot Clock may again be tolled if the State or local government notifies the applicant within 10 days that the supplemental submission did not provide the specific information identified in the original notice delineating missing information. [25]

In other words, once a communications application is filed with a municipality the 90 or 150 day period begins to run and will not be tolled unless the municipality responds in writing within the first 30 days and identifies exactly what, if any information is missing per the applicable local code requirements. While an applicant and the reviewing agency may agree to extend the applicable period, expiration of the Shot Clock without a determination by the local agency constitutes a "failure to act" under the TCA and allows the applicant to seek redress in federal court as provided for by Section 332(c)(7)(B)(v). Importantly, the burden of proof to defend an unreasonable delay claim based on a municipality's failure to comply lies with the municipality.

In 2014, the Second Circuit discussed the Shot Clock and the actions of a Westchester County municipality, along with other significant regulatory issues for siting communication facilities in Crown Castle NGE. Inc. v. Town of Greenburgh.[26] Crown Castle, an infrastructure provider that develops towers, distributed antenna systems ("DAS") and small cell systems for wireless carriers, applied to install DAS equipment on utility poles. The Town of Greenburgh has a local Antenna Review Board, which is charged with determining the completeness of an application for antenna installations. Although there was an extended debate between the Town and Crown

as to whether the application was subject to the Town's antenna regulations, the Second Circuit noted that the application was filed on November 13, 2009, and ultimately denied more than two and one-half years later in July 2012. The Second Circuit Court affirmed the District Court's ruling, which reiterated that: "The FCC recognized that applications may be incomplete, and therefore deemed the time it takes for the applicant to respond to request for additional information excludable from the 90 or 150 day time period, but 'only if [the municipality] notifies the applicant within the first 30 days that its application is incomplete.' "[27]

The Court ruled in favor of Crown, but noted that relief for a Shot Clock violation could not be granted because appropriate relief would be an injunction directing the Town to issue a decision in writing (which it had done by way of denial). The Court, however, considered the unreasonable time it took for the Town to issue a decision in deciding the remedy and directed the Town to issue the requested special permits, finding that remanding the matter to the Town would not be appropriate given the "lengthy delay in processing its applications that [Crown] has already suffered."[28] Issuing a denial 252 days after Crown submitted complete applications was well beyond presumptively-reasonable time period set by the Shot Clock. This period did not even include the time spent during the completeness review, "at least some of which should arguably count towards the application processing time given that the Shot Clock only excludes time that it takes the applicant to respond to requests for additional information."[29] *See* Case Update starting on page 9 below for further details.

"In-fill" Installations – Section 6409 of the Spectrum Act

Federal policy encourages the use of existing infrastructure to accommodate technological advancements and changes in communications services. Section 6409 of the Spectrum Act, a portion of the Federal Middle Class Tax Relief and Job Creation Act of 2012, was signed into law by the President on February 22, 2012 (hereafter referred to as "Section 6409").[30] While municipalities retain discretionary zoning review over the construction of new towers, under Section 6409 simple collocations and/or equipment upgrades to existing communications infrastructure must be approved by a municipality. The Federal law provides that:

> Notwithstanding Section 704 of the Telecommunications Act of 1996 or any other provision of law, a state or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.

Federal law defines an "eligible facilities request" as "(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment."[31] As with the Shot Clock, the 2014 FCC Infrastructure Order similarly adopted rules to clarify and implement the requirements of Section 6409. Of note, it:

- Confirmed that Section 6409 applies to support structures and to transmission equipment used in connection with any Commission-licensed or authorized wireless transmission;

- Defines "transmission equipment" to encompass antennas and other equipment associated with and necessary to their operation, including power supply cables and backup power equipment;
- Defines "tower" to include any structure built for the sole or primary purpose of supporting any Commission-licensed or authorized antennas and their associated facilities;
- Clarifies that the term "base station" includes structures other than towers that support or house an antenna, transceiver, or other associated equipment that constitutes part of a "base station" at the time the relevant application is filed with State or municipal authorities, even if the structure was not built for the sole or primary purpose of providing such support, but does not include structures that do not at that time support or house base station components;
- Clarifies that a modification "substantially changes" the physical dimensions of a tower or base station, as measured from the dimensions of the tower or base station inclusive of any modifications approved prior to the passage of [Section 6409], if it meets any of the following criteria:
    - for towers outside of public rights-of-way, it increases the height by more than 20 feet or 10%, whichever is greater; for those towers in the rights-of-way and for all base stations, it increases the height of the tower or base station by more than 10% or 10 feet, whichever is greater;
    - for towers outside of public rights-of-way, it protrudes from the edge of the tower more than twenty feet, or more than the width of the tower structure at the level of the appurtenance, whichever is greater; for those towers in the rights-of-way and for all base stations, it protrudes from the edge of the structure more than six feet;
    - it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets;
    - it entails any excavation or deployment outside the current site of the tower or base station;
    - it would defeat the existing concealment elements of the tower or base station; or
    - it does not comply with conditions associated with the prior approval of the tower or base station unless the non-compliance is due to an increase in height, increase in width, addition of cabinets, or new excavation that does not exceed the corresponding "substantial change" thresholds…[32]

The 2014 Infrastructure Order also outlined the process that municipalities are required to follow for reviewing an application under Section 6409, as follows:

- A State or local government may only require applicants to provide documentation that is reasonably related to determining whether the eligible facilities request meets the requirements of Section 6409(a);
- Within 60 days from the date of filing, accounting for tolling, a State or local government shall approve an application covered by Section 6409(a); and
- The running of the period may be tolled by mutual agreement or upon notice that an application is incomplete provided in accordance with the same deadlines and requirements applicable under Section 332(c)(7), as described below, but not by a moratorium;[33]

Significantly, if a local government fails to act within the above timeframes, namely the 60 day period to approve (contrasted with longer time periods under the Shot Clock), then the application filed under Section 6409(a) is deemed granted. [34] Unlike under the Shot Clock – "whereas a municipality may rebut a claim of failure to act under Section 332(c)(7) if it can demonstrate that a longer review period was reasonable, that is not the case under Section 6409(a)."[35] FCC regulations implementing the 2014 FCC Infrastructure Order are fully effective and law as of May 18, 2015.[36]

Case Update: Recent Cases Impacting Mobile Broadband Infrastructure Siting

Bell Atl. Mobile of Rochester L.P. v. Town of Irondequoit, 848 F.Supp.2d 391 (W.D.N.Y. 2012)

Bell Atlantic (d/b/a "Verizon") proposed a 120-foot cell tower to replace an existing 84-foot emergency communications tower located on a fire district site. In accordance with local procedures, Verizon submitted a special permit application for the proposal. Prior to this application it is important to note that Verizon studied several alternative options which were found to be inadequate for the provision of its service. The Planning Board issued a positive referral for the project to the Town Board, who had final approval authority.

Notwithstanding the above, the Town Board issued a Positive declaration pursuant to the New York State Environmental Quality Review Board, requiring a Environmental Impact Statement ("EIS") and suggested that an alternative site be utilized. As a result, Verizon filed suit claiming two violations of the TCA: (1) unreasonable delay (47 U.S.C. § 332(c)(7)(B)(ii)), and (2) unlawful prohibition of the provision of wireless services (47 U.S.C. § 332(c)(7)(B)(i)(II)).

The Court found that the unlawful issuance of the Positive Declaration constituted an unreasonable delay and a violation of the TCA and the Shot Clock. The Court found that the Positive declaration was issued without support in the record and was simply a dilatory tactic. The Court also found that there was no other alternative site to provide reliable wireless service. Lastly, from these findings, the Court concluded that the issuance of a Positive Declaration was merely the result of public controversy and not the finding of a potential adverse environmental impact, which public controversy cannot justify the issuance of a Positive Declaration.

The Court granted Verizon's requested injunction and stated:

> Defendants are well aware of their responsibilities and obligations under the TCA and New York State Law, yet they have willfully disregarded the law and wrongfully delayed action on Verizon's application. In this case, further review by Defendants would serve no useful purpose and would greatly prejudice Verizon by encouraging additional delay in its ability to provide service to the public in a non-covered area. A mandatory injunction is therefore an appropriate remedy.

Arlington v. FCC, 133 S.Ct. 1863 (2013)

As discussed above, in Arlington v. FCC, [37] the Court affirmed the FCC's authority to issue its *Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B),*[38] (i.e., the Shot Clock Ruling) where the FCC established guidelines for what constitutes a reasonable time for municipalities to review and act on wireless facility siting applications. The Shot Clock was issued in response to a petition seeking clarification of Section 704 of the TCA, which requires a municipality to "act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality . . . ."[39] The notion behind the Shot Clock was to curb the long delays experienced at municipal permitting stages which hindered Federal communication policies.

Ultimately, Arlington held that the Courts are required to defer to the FCC's interpretation of a statutory ambiguity in the TCA. The Court's opinion applied the test from Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,*[40]*which mandates that a court first look at whether the federal statute has addressed the questions presented – here, the meaning of a "reasonable time" within Section 704 of the TCA. However, if the statute is silent or ambiguous on a question or interpretation asked, the court must decide whether the agency's interpretation (i.e., the Shot Clock Ruling), is based on a permissible construction of the statute.[41]

In Arlington, the Supreme Court resolved that because Congress delegated general authority to the FCC to administer the TCA through administrative rulemaking, Congress permitted the FCC to issue the Shot Clock Ruling to address any ambiguity. Accordingly, the FCC properly discharged their statutory duties when clarifying what constitutes "reasonableness" and the FCC's interpretation is entitled to deference.

Crown castle NG East v. Town of Greenburgh, N.Y., 2013 WL 3357169 (S.D.N.Y 2013), affirmed 552 Fed.Appx 47 (2d Cir. 2014)

As stated above, Crown Castle, applied to install DAS equipment on utility poles in the Town of Greenburgh. Greenburgh has a local Antenna Review Board, which is charged with determining the completeness of an application for antenna installations. Although there was an extended debate between the Town and Crown as to whether the application was subject to the Town's antenna regulations, the Second Circuit noted that the application was filed on November 13, 2009, and ultimately denied more than two and one-half years later in July 2012.

The Second Circuit Court affirmed the District Court's ruling, which reiterated that: "The FCC recognized that applications may be incomplete, and therefore deemed the time it takes for the applicant to respond to request for additional information excludable from the 90 or 150 day time period, but 'only if [the municipality] notifies the applicant within the first 30 days that its application is incomplete.' "[42]

The Court ruled in favor of Crown, but noted that relief for a Shot Clock violation could not be granted here because the appropriate relief would be an injunction directing the Town to issue a decision in writing (which it had done). Noting unreasonable delay in the application process, the

Court granted an injunction mandating the Town issue all permits because remanding back to the municipality would have been futile and cause added delay.

Aside from the Shot Clock considerations and ruling in the Crown Castle case, the Court opined on a plethora of other allegations related to the TCA. While many matters were discussed at length in the District Court's decision, the Second Circuit made specific findings related to "necessity" and "aesthetic intrusion".

The Second Circuit noted "[t]he fact that Crown Castle had only a single client at the time [MetroPCS] that would benefit from the proposed facilities was not significant, as there still was a need for the proposed facility." The Second Circuit held that the Town's determination that there was no need for the proposed DAS system was premised on an error of law and therefore its determination was not supported by substantial evidence.

The Second Circuit also held that the Town's denial of the DAS system because of their aesthetic intrusion was not supported by substantial evidence. In its denial the Town objected to the proposed DAS (small cell) system because it was not "minimally intrusive". The District Court confirmed that the evidence in the record did not support such a finding. In fact, the Second Circuit agreed with the District Court and held that "the intrusion was *de minimis*—the antenna added less than eight feet to *existing* thirty-foot utility poles, and photographs in the record show that Crown castle's installations would be no more intrusive than existing installations of other carriers." Most importantly, the Second Circuit noted that the Town never explicitly found that the DAS boxes would constitute an aesthetic intrusion, the Town only "speculated" that the boxes could be smaller without any proof in the record. The Second Circuit compared the minimal nature of the proposed small cell system to that of a monopole that could be upwards of 100 feet in height. The District Court also pointed to a memorandum by the Town Engineer stating "utility poles throughout Greenburgh and Westchester County currently accommodate cables/wiring, transformers, and utility boxes of similar—or larger—sizes [and therefore] nodes do not appear to present a significant incremental visual impact to the area."

T-Mobile South, LLC v. City of Roswell, 135 S.Ct. 808 (2015)

T-Mobile sought to construct a new 108 foot "monopine" tower on 2.8 acres of vacant residential property in Georgia. The City Council held a public hearing on the matter, which T-Mobile arranged to have transcribed. At the public hearing, the City Council commented on the project as well as neighbors in the vicinity of the site. The Supreme Court's opinion outlines many of the City Council members' specific comments during the meeting at which it rendered its decision. After the Council's comments were expressed, it voted to deny the tower application.

Two days after the application was denied, the Planning and Zoning Division sent a letter to the applicant stating the following:

> Please be advised the City of Rosewell Mayor and City Council denied the request from T-Mobile for a 108' mono-pine alternative tower structure during their April 12, 2010 hearing. *The minutes from the aforementioned hearing* may be obtained

> from the city clerk. Please contact Sue Creel or Betsy Branch at [phone number]. (Emphasis added.)

Notwithstanding the notice provided to the applicant, the minutes of the public hearing where the decision was rendered was not approved and published by the City until 26 days after the denial. Further, a resolution outlining the reasons for denial was never prepared and/or forwarded to the applicant in the meantime.

The question presented was whether the City of Rosewell through this correspondence had violated the TCA (47 U.S.C. § 332(c)(7)(B)(iii)) which mandates that all municipal denials "shall be in writing and supported by substantial evidence."

The Supreme Court held that:

> Localities must provide or *make available their reasons*, but that those reasons need not appear in the written denial letter or notice provided by the locality. Instead, the localities reasons may appear in some other written record so long as the reasons are sufficiently clear and are provided or made accessible to the applicant *essentially contemporaneously* with the written denial letter. (Emphasis added).

The Supreme Court's Opinion placed importance on the text of the statute, including "in writing" and "supported by substantial evidence", in holding that if a "writing" was not required judicial review of whether such evidence is substantial would be strained. The Court held that the "in writing" requirement does not mean that a formal decision and/or resolution must be issued and further held that the form of the decision was not for the Court to determine. Accordingly, the minutes from the meeting at which the Council's decision was rendered provided the proper form to satisfy the "in writing" requirement.

However, the Court stated that "a locality cannot stymie or burden the judicial review contemplated by the statute by delaying the release of its reasons for a substantial time after it conveys its written denial" especially considering the 30 day statute of limitations to challenge such a denial under the Telecommunications Act. With this consideration in mind, the Supreme Court held that a municipality can fulfill its "in writing" obligation under the law "if it states its reasons with sufficient clarity in some other written record issued essentially contemporaneously with the denial." In this case, the City of Roswell Council did not issue its written reasons "essentially contemporaneously" with its written denial and therefore the case was remanded for further proceedings consistent with its holding.

Sprint Spectrum, L.P. v. Zoning Board of Adjustments of the Borough of Paramus, 2015 WL 1786306 (3rd Cir. 2015)

Although not a Second Circuit case (and not controlling within New York) the Third Circuit's decision in Sprint v. Paramus provides an interesting fact pattern for consideration and is congruous with Second Circuit holdings on what it means to "prohibit service". Here, Sprint challenged a denial issued by the Board of Adjustments ("ZBA") for a faux tree monopole

wireless telecommunications facility as being in violation of the TCA by prohibiting wireless services.[43] The Applicant was before the ZBA because monopoles were prohibited within the applicable zoning district and therefore required a variance.

The Court reiterated the prohibition of services analysis, requiring a showing that (1) the proposed facilities will fill a significant gap in service, and (2) the manner in which it proposes to fill the significant gap in service is the least intrusive. The Court noted that this requires a "showing that a good faith effort has been made to evaluate less intrusive alternatives". Furthermore, where the "record contains conflicting evidence, the fact-finder [Zoning Board of Adjustments] must adequately explain its reasons for rejecting or discrediting competent evidence." Indeed, the Court, upon review, is tasked with determining whether the decisions, as guided by local law, was supported by substantial evidence.

This case focused on whether a hypothetical series of DAS antennas (i.e., a small cell system) within Paramus was a feasible and a less intrusive alternative when compared to the proposed monopole. Note the Second Circuit decision in N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 106 (2d Cir. 2010), which held that a municipality is prohibited from setting forth a preference for "alternate technologies" noting that a zoning preference for alternate technologies like DAS interferes with federal regulation of "technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law." In Paramus several experts with credible backgrounds, including an independent expert hired by the municipality, testified at the ZBA meetings that DAS systems would not be feasible because it would "require the use of multiple structures and is more of a 'spot solution' for small coverage gaps, and would not be suitable for covering a large area like the one in Paramus." However, unhappy with the testimony from the several experts, the ZBA hired a "self described municipal wireless consultant" who was not a recognized Radio Frequency Engineer and had very limited knowledge of wireless systems or land use planning. Notwithstanding all other expert opinions, the municipal wireless consultant concluded that a DAS system could be installed. The ZBA denied the application claiming a detrimental visual effects and because the DAS system was the least intrusive method and was not properly investigated.

In affirming the District Court, the Third Circuit held that the denial of the variance by the ZBA was an "effective prohibition" under the TCA. The Court noted only the testimony of one expert, whose credentials were "questionable", believed that the DAS system was a feasible alternative, thus the Court found that "[t]he opinions of the experts who testified at the ZBA hearings and the bench trial below weighed heavily against the feasibility of a DAS system in the coverage area, particularly when considering that the experts who had actual experience with DAS systems harbored that view." The Appellee (wireless carrier) did not bear the burden of proving every potential alternative, no matter how speculative, but instead the proper question for a prohibition of service claim is whether a "good faith effort" was made to identify less intrusive alternatives. Accordingly, the Court held that a good faith effort was made through the several expert reports.

Similarly, the Court concluded that the denial was not supported by substantial evidence. As noted above, given the municipal consultants suspect report, adverse to all other opinions and his lack of credentials and expertise to evaluate the DAS feasibility did not amount to substantial evidence as a basis for the denial. The ZBA's reliance on the visual impact to deny the variance was also not supported by substantial evidence, considering there was "no clear aesthetic winner

between a DAS and the proposed monopole". Therefore, the Third Circuit affirmed the district Court's decisions in that the ZBA denial violated the TCA.

Orange County-Poughkeepsie Limited Partnership v. Town of East Fishkill, No. 13-CV-4791(KMK)(S.D.N.Y. Jan. 30, 2015)(appeal pending)

In Orange County-Poughkeepsie Limited Partnership d/b/a Version Wireless v. Town of East Fishkill, pursuant to the TCA the Plaintiffs (Verizon Wireless and Homeland Towns) challenged a denial issued by the Town of East Fishkill, New York, Planning Board for a proposed 150 foot monopole on a sixteen acre wooded site. It was established before the Zoning Board of Appeals and before the District Court that the proposed site would provide mobile data and voice services to an underserved community comprised of businesses, residences, and high traffic volume roads where approximately 35,000 people travel daily.

In a comprehensive 72 page Decision, the District Court rejected the several *post hoc* justifications produced by the Town related to the denial, which were also unsupported by the record. In declining to adopt the Town's arguments, the Court cited several cases that prohibit just *post hoc* justifications that also require the Board denial to be supported by a written decision or some other contemporaneous writing, relying on the United States' Supreme Court's recent ruling in T-Mobile South, LLC v. City of Roswell, Ga., 135 S. Ct. 808 (2015) and MetroPCS N.Y. LLC v. City of Mount Vernon, 739 F. Supp. 2d 409 (S.D.N.Y. 2010).

The East Fishkill decision also presents one of the first instances where a Federal Court applied the recent FCC Infrastructure Order issued in October 2014, which addressed Section 6409 of the Spectrum Act. As noted above, Section 6409 was signed into law by the President in 2012 to fast track and ensure approval of certain wireless applications to meet federal wireless coverage goals.[44] The Town argued that none of the additional carriers expected to collocate on the proposed facility would be able to locate their antennas below Verizon and that every carrier who came after the Verizon application could rely on Section 6409 to require the Town to approve indefinite extensions of the tower height. However, the Court rejected this argument, pointing out that under the 2014 FCC Order, potential future extensions are not unlimited and "[f]urther, speculation based on what may or may not happen in the future cannot provide substantial evidence for denying the application[.]"

The Court further held that "a requirement that an applicant demonstrate a proposed tower could support the frequency needs of other providers may turn on 'technical and operational matters, over which the FCC and the federal government have exclusive authority.'" (*quoting* N.Y. SMSA Ltd. P'ship v. Town of Clarkstown, 612 F.3d 97, 106 (2d Cir. 2010)).

Importantly, the East Fishkill Decision reaffirmed and discussed at length several precedents where the wireless industry prevailed by proving that a denial was unsupported by substantial evidence and had the effect of prohibiting wireless services. In short, the District Court held that in establishing an effective prohibition claim, "the size of the gap is by no means determinative" and that a gap is significant not only based on its size, but also based on the number of people adversely affected. In East Fishkill the size of the gap would affect people in the Town as well as travelers spanning approximately 2 miles along the Taconic and 1.6 miles along New York State

Route 82. The District Court recognized that a finding of its significance is in line with other recent federal cases where such distances were found to be significant.

The Court granted Verizon and Homeland's summary judgment motion and mandated that all permits and approvals be issued within 30 days of the decision. The Town has appealed the District Court's decision and such appeal is now pending before the Second Circuit.

CONCLUSION

The public's reliance on wireless service and growth in demand requires additional infrastructure. The information provided here is relevant to all applicants, planners, and municipal boards that are involved with wireless infrastructure applications. Over the past two decades Federal policy has created the framework for which applicants and municipalities must process and determine wireless applications, which is unique to other land use applications. As evidenced by the 2014 FCC Infrastructure Order, Federal policy is continuously evolving to ensure that the mobile broadband needs of today as well as tomorrow are met and future services are reliable.

Municipalities should examine their local codes and wireless laws to ensure compliance with the related Federal policy. Such revisions will also help municipalities avoid unnecessary litigation related to application processes that are clearly set forth in Federal law. Understanding that code revisions do not happen overnight and may require time and resources, municipalities can look to various industry organizations for guidance. For example, the NYSWA has prepared a model ordinance that municipalities may reference when revising their wireless laws. The NYSWA model ordinance is currently being updated and is available at NYSWA's website (http://nyswa.org). These materials will assist municipalities seeking to revise their Codes to conform to Federal policies while maintaining local jurisdiction over siting wireless facilities.

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[1] *See generally*, History of Wireless Communications, *available at:* http://www.ctia.org/media/industry_info/index.cfm/AID/10388 (2011)

[2] CTIA's Wireless Industry Indices: Semi-Annual Data Survey Results, A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry, Mid-Year 2012 Results (Semi-Annual Data Survey Results). See also, "CTIA-The Wireless Association Semi-Annual Survey Reveals Historical Wireless Trend" *available at* http://www.ctia.org/media/press/body.cfm/prid/2133.

[3] *Id.*

[4] CTIA Wireless Quick Facts, *available at* http://www.ctia.org/your-wireless-life/how-wireless-works/wireless-quick-facts *citing Early Release of Estimates from the National Health Interview Survey, December 2012, National Center for Health Statistics*, June 2013.

[5] CTIA Wireless Quick Facts

[6] Wireless 911 Services, FCC, *available at* http://www.fcc.gov/guides/wireless-911-services.

[7] *See Text-to-911: What you need to know (FAQ) available at* http://www.cnet.com/news/text-to-911-what-you-need-to-know-faq. It should be noted that while the carriers have committed to supporting 911 texting in their service areas, text-to-911 will not be available everywhere. Emergency call centers, called PSAPs (Public Safety Answering Points), are the bodies in charge of implementing text messaging in their areas. These PSAPs are under

the jurisdiction of their local states and counties, not the FCC, which governs the carriers. *See also*, *What You Need to Know About Text-to-911 available at* www.fcc.gov/text-to-911.

[8] Federal Communications Commission ("FCC"), Wireless Emergency Alerts, available at http://www.fcc.gov/guides/wireless-emergency-alerts-wea.

[9] Amanda Lenhart, *Attitudes Towards Cell Phones*, Pew Research, *available at* http://www.pewinternet.org/Reports/2010/Teens-and-Mobile-Phones/Chapter-3/Overall-assessment-of-the-role-of-cell-phones.aspx.

[10] *Id*.

[11] FCC Approves 2 Billion Boost for Wi-Fi in Schools, Bloomberg Businessweek, July 11, 2014 available at http://www.businessweek.com/news/2014-07-11/fcc-approves-2-billion-boost-for-wireless-internet-in-schools.

[12] LifeBot, available at http://www.emstelemedicine.com/; *see also*, LifeStar ACT Ambulatory Cardiac Telemetry, available at http://www.lifewatch.com/ACT.

[13] U.S. Food and Drug Administration, Wireless Medical Devices, available at http://www.fda.gov/MedicalDevices/ProductsandMedicalProcedures/ConnectedHealth/WirelessMedicalDevices/default.htm

[14] Survey Finds Mobile Technologies Saving U.S. Small Businesses More Than $65 Billion a Year, available at http://about.att.com/story/survey_finds_mobile_technologies_saving_us_small_businesses_more_than_65_billion_a_year.html (dated, May 14, 2014)(small businesses are saving approximately $67.5 billion a year in time and money due to new technologies, and relying heavily on the use of mobile devices to conduct their business operations).

[15] *See Wireless: Direct Contributor, Catalyst for New Markets*, CGR, Inc., www.nyswa.org.

[16] https://www.siena.edu/news-events/article/cell-phones-used-by-90-percent-of-new-yorkers.

[17] H.R. Rep. No. 104-458, at 206 (1996) (Conf. Rep.).

[18] *See* Wireless Infrastructure: A Time of Regulatory Change in New York, New York Zoning Law and Practice Report (July 2011) (Christopher B. Fisher, Anthony B. Gioffre III, Daniel M. Laub and Troy Lipp); *see also* What's Your Wireless Plan? Federal Law, Local Review and Wireless Facilities, NYSBA Municipal Lawyer, Spring 2012, Vol. 26, No. 2. (Anthony B. Gioffre III, Lucia Chiocchio and Daniel M. Laub).

[19] 47 U.S.C. § 332(c)(7)(B)(ii).

[20] "Collocation" is "[t]he mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast purposes." Nationwide Programmatic Agreement for the Collocation of Wireless Antennas, FCC 04-222 (2001), 47 C.F.R. Part I, Appx. B, at B-6; *see*, 47 U.S.C. § 1455(a) ("a State or local government may not deny, and shall approve, any . . . request for modification of an existing wireless tower or base station that involves . . . collocation of new transmission equipment . . . .")

[21] *E.g.*, new wireless tower facilities built on raw land.

[22] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, (Nov. 18, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-99A1.pdf.

[23] *See* City of Arlington, Tex. v. FCC, 133 S. Ct. 1863 (2013).

[24] *See In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, FCC 14-153 (adopted, October 17, 2014) (the "2014 FCC Infrastructure Order").

[25] *Id*. at ¶ 22.

[26] Crown Castle NGE. Inc. v. Town of Greenburgh, 2013 WL 3357169 (S.D.N.Y. 2013), *aff'd*, 2014 WL 185012 (2d Cir. 2014).

[27] *Id*. at 13; *see also*, Id. at FN 9.

[28] *Id*. at 21.

[29] *Id*. at 21; *see also*, Bell Atl. Mobile of Rochester L.P. v. Town of Irondequoit, N.Y., 848 F. Supp. 2d 391, 400 (W.D.N.Y. 2012)(wireless application deemed complete upon filing of supplemental papers required for original application triggering Shot Clock prior to 30 day completeness period).

[30] *See* February 2012 link located at http://www.whitehouse.gov/briefing-room/signed-legislation.

[31] "Collocation" is defined by the FCC as "[t]he mounting or installation of an Antenna on an existing Tower, building, or structure for the purpose of transmitting radio frequency signals for telecommunications or broadcast

purposes." See, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (2001), available at 47 C.F.R. Part I, Appendix B (FCC 04-222), Section II (Definitions), ¶ 4, p. B-6.
[32] 2014 FCC Infrastructure Order at ¶ 21.
[33] *Id*.
[34] *Id*.
[35] *Id*. at ¶ 216.
[36] 47 C.F.R. § 1.40001 (2015).
[37] Arlington v. FCC, 11-1545, slip op. at 5, 2013 WL 2149789 (May 20, 2013).
[38] *Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 F.C.C.R. 13994 (2009) ("*Declaratory Ruling*").
[39] 47 U.S.C. § 332(c)(7)(B)(ii).
[40] 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).
[41] Arlington, 11-1545, slip op. at 3-4 (citations omitted).
[42] *Id*. at 13; *see also*, Id. at FN 9.
[43] Sprint Spectrum, L.P. v. Zoning Board of Adjustments of the Borough of Paramus, 2015 WL 1786306 (3rd Cir. 2015).
[44] *See* February 2012 link located at http://www.whitehouse.gov/briefing-room/signed-legislation.