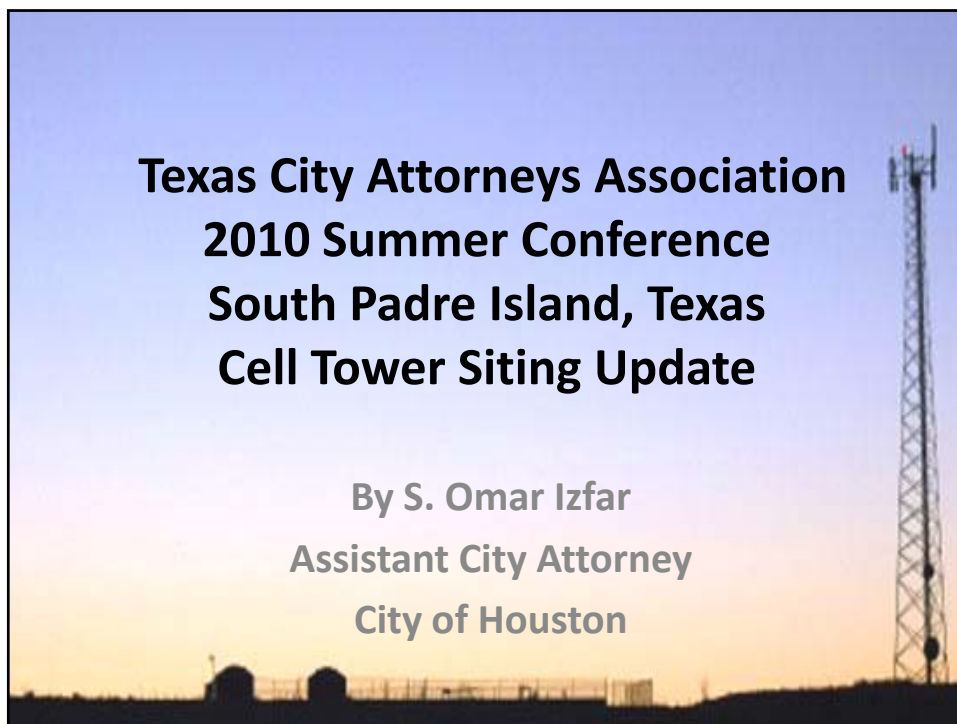


**Texas City Attorneys Association
2010 Summer Conference
South Padre Island, Texas
Cell Tower Siting Update**

By S. Omar Izfar
Assistant City Attorney
City of Houston



Single Antenna Lattice Tower



The Telecommunications Act

- Section 332(c)(7) - Preservation of Local Zoning Authority

(A) General authority

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

Wait, did you say zoning?

- TCA merely regulates the local process for siting towers.
- Local regulation typically means zoning.
- Houston regulation is police power similarly impacted by federal law.

Houston Ordinance

- No towers near sensitive uses (residential, scenic, historic)
- No towers within 1,000 feet of another tower (encourages collocation)
- Separate Tower Commission
- Discretionary waiver based on criteria
- Public protest based on criteria

FCC Declaratory Ruling

- The Wireless Association (CTIA) petition
- FCC ruling – November 18, 2009
- Clarify ambiguous provisions

Act Within a Reasonable Amount of Time

A State or local government...shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed

Pending applications

- (industry numbers)
- Huge delay in applications
3300 applications currently pending
- 760 pending more than a year
180 pending more than three years
- 350 collocations pending more than a year
135 collocations pending more than three years

Single Antenna Monopole Tower



Collocation of Antennas



FCC Interpretation of Reasonable Amount of Time

- 150 days for tower application / 90 days for collocation
- 30 days to process application for completion.
- does not toll while request outstanding
- Rebuttable presumption of failure to act
- Parties may mutually extend timeline
- Application Not automatically granted!

Pending through April?

- Pending less than 150 days on 11/18/09
- Presumption of failure to act in April
- 30 days to sue ended in May

TCA Discrimination Among Providers

- Regulation shall not unreasonably discriminate among providers of functionally equivalent services
 - unreasonable = not substantially more intrusive

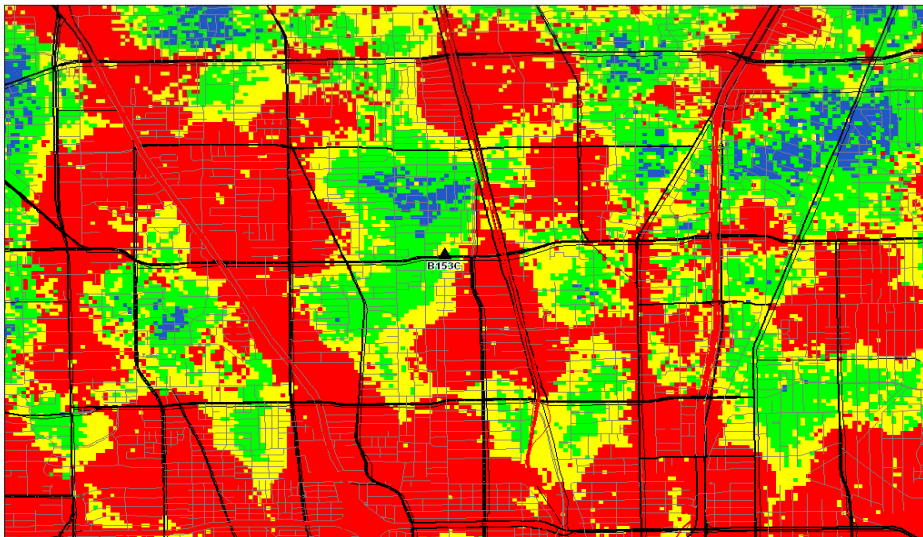
TCA Discrimination Among Providers cont.

- Regulation shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
 - Majority of circuits:
“significant gap” filled by “least intrusive means.”
 - Minority of circuits:
“one-provider rule” – patchwork quilt

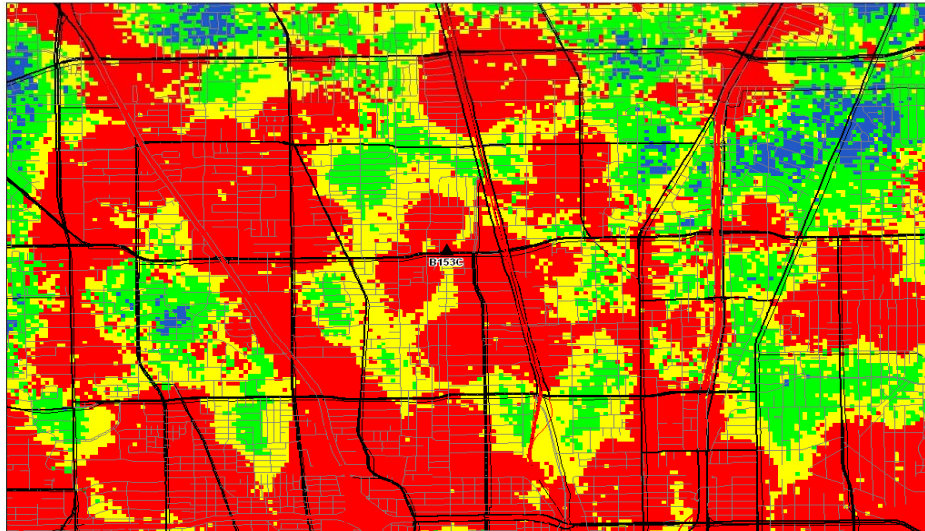
FCC Interpretation of Discrimination

- Sided with Majority.
- TCA is pro-competitive
- TCA contemplates providers of wireless services Plural
- Cannot deny solely because “one or more carriers serve a given geographic market”

Low Capacity



Increased Capacity



FCC Interpretation of Discrimination cont.

- Maintains “bona fide local zoning concerns”
 - proximity to sensitive uses
 - aesthetic character / stealth
 - preference for existing structures
 - preference for collocation

Antennas on existing structures



Antennas on existing structures



Stealth Towers



Stealth Towers



In writing supported by substantial evidence

- Any decision ... shall be in writing and supported by substantial evidence contained in a written record.
- - findings and conclusions in writing with reference to law and criteria
- - more than a mere scintilla
 - such relevant evidence as a reasonable mind might accept as adequate to support a conclusion

Ignore your health

- No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

Remedies

- (v) Any person adversely affected by any final action or failure to act by a State or local government ... may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.
- how do you know when you have a failure to act?
- Congress precluded Section 1983 remedies.

Requiring a Variance for each Tower

- FCC declined to declare this unlawful by 253(a) of the TCA

To Do List:

1. Revise ordinances to comply with timelines.
2. Planner has 30 days to deem application complete or request additional info.
3. Implement policy / draft forms for extending deadlines.
4. Review approval criteria for non-discrimination and general compliance.

