

# Cell Tower Zoning Cases and the Federal Telecommunications Act

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# DISCLAIMER

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Generally, municipalities have extensive flexibility when creating and enforcing zoning ordinances under TX Loc. Govt. Code § 211.

## HOWEVER

The TCA was passed to provide a regulatory framework to regulate mobile services that balances the interest of providers, regulators, and the general public.

To accomplish this goal, the Act and regulations promulgated by the FCC **restricts** the zoning power of municipalities when dealing with mobile services like cell towers

# Key TCA Issues for Cell Tower Zoning Issues

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- Shot Clock for a Final Decision
- Decision to Deny a Request  
Written Notice of  
Final Action Denying Request Supported by  
Substantial Evidence in a Written Record
- Effective prohibition claim

# Timing of Denial

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“A State or local government or instrumentality thereof **shall act** on any request for authorization to place, construct, or modify personal wireless service facilities **within a reasonable period of time** after the request is duly **filed** with such government or instrumentality, taking into account the nature and scope of such request”

What is a presumptively “reasonable period of time” to act on a request?

# The FCC's 2018 “shot clock” rule for cell tower application review

Permit applications related to  
a pre-existing structure

60 days

Municipality must  
take action within

Permit applications for a  
new structure

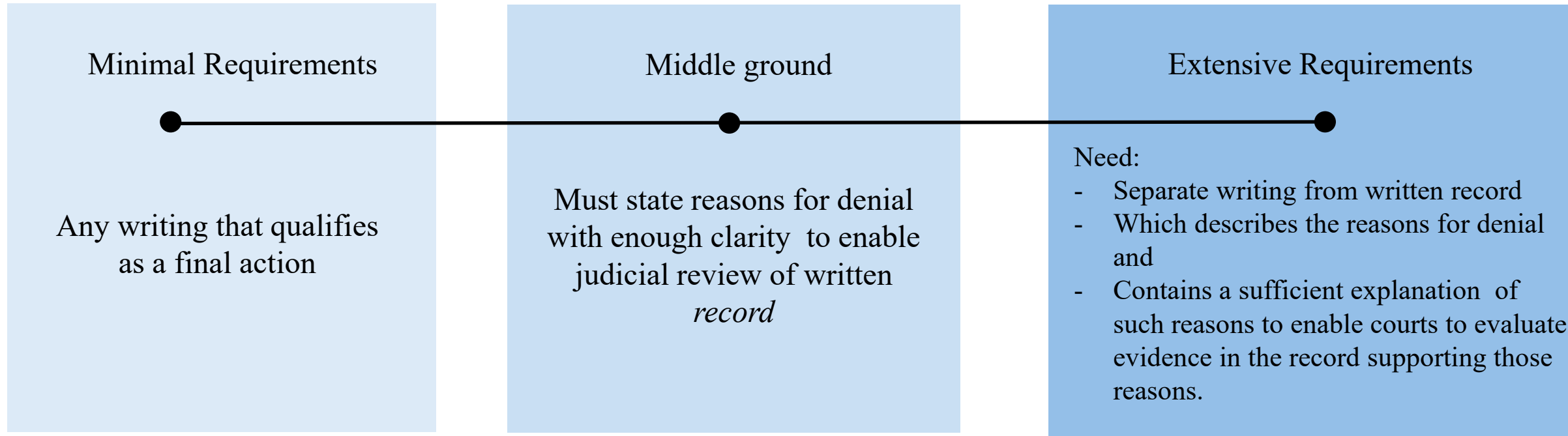
90 days

# Requirements for a Denial

- Notify Applicant in writing of
- Final decision denying application
- Supported by Substantial Evidence in  
a written record

# Written Notification of Denial: What is Required?

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Fifth Circuit → ?



# Final Action Requirement

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“Any person adversely affected by any *final action* . . . may, within *30 days* . . . commence an action in a court of competent jurisdiction”

**Final action:** action that marks the end of the decision-making process and triggers legal rights and consequences.

**IF** the denial is meant to be the municipality's last action on the issue

**THEN** it is a final action and the municipality must ensure the other requirements of a denial are met to avoid suit

# Substantial Evidence in a Written Record

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A denial of a cell tower application must be supported by *substantial evidence* in the context of applicable *state and local law*

Thus, the written record should included:

- Evidence which a reasonable mind would consider adequate to support  
Generalized fears are not enough to satisfy sufficient evidence when the applicant has put forward contrary expert opinions on an issue
- Reasons for denial based on
- Criteria found in applicable zoning law  
Municipalities cannot arbitrarily invent criteria for denial not in place at the time provider applied

# Effective Prohibition - § 253 & § 332

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A small wireless facility regulation that acts as an *effective prohibition* on the provision of telecommunication services violates § 253 and § 332 of the TCA.

## Standard of review in Fifth Circuit:

FCC's "materially inhibit" standard – municipal zoning regulations are an improper effective prohibition when they *materially limit or inhibit the ability of any competitor or potential competitor to compete*.

Applies when a regulation materially inhibits:

- new deployments,
- addressing coverage gaps,
- network densification,
- introducing new services, or
- improving service capabilities

Note: some courts have declined to follow the FCC's standard when determining if there is an effective prohibition and instead have followed their own precedents

## § 253 challenges

seek to entirely invalidate **regulations** that effectively prohibit carriers from providing services

vs

## § 332 challenges

seek to invalidate **individual application decisions** that effectively prohibit the applicant from providing service

# Evidence of an Effective Prohibition

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Four criteria commonly considered:

1. Is there a current **insufficiency of coverage**?
2. Are there **alternative sites** to meet the demonstrated gap in coverage?
3. Does local regulation impose **unreasonable costs or fees** on applicants?
4. Does the decision-making process include **unreasonable delay**?

# Key Steps to TCA Compliance

Upon determining that an application related to a cell tower should be denied, municipalities should issue:

- Prompt
- Written notification of
- Final action denying application based on
- Substantial evidence of appropriate bases for denial in written record
- That does not effectively prohibit mobile service providers from competing in the area

# Conclusion

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- If the cell tower zoning cases were simple, there would not be so much consternation and litigation regarding them.
- A review of applicable ordinances will help ensure compliance with the TCA
- In order to protect cities' basic prerogative to protect the health, safety, and welfare of the public utilizing Chapter 211 zoning be sure you have checked the boxes under the TCA.