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Cell Tower Zoning Cases and the Federal Telecommunications Act

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Introduction

Cell tower cases are not your every day zoning case. Failure to take that into account will leave your client in a difficult spot. Cell tower applicants have given rise to complex regulatory challenges for municipalities in recent years. Under federal law, municipalities must comply with specific processes when dealing with mobile service providers, particularly when there is a mobile service coverage issue in the area. Further, federal law places limitations on how municipalities can restrict the provision of mobile service through zoning and other land use regulations. If municipalities violate these federal mandates when dealing with a cell tower application, they are at risk of being challenged in federal court. Further, there are many unresolved tensions in how courts interpretate the relevant provisions of federal law. This means that lawsuits related to cell tower issues are unpredictable as well as time and resource intensive for cities. Thus, knowing the key issues on which federal suits are based and considered enables municipalities to avoid potential liability when designing zoning ordinances and when making decisions regarding mobile service applicants.

The Federal Telecommunications Act and How it Affects Municipalities

Generally, municipalities have wide discretion in the creation and enforcement of zoning regulations under Chapter 211 of the Texas Local Government Code. However, under the Federal Telecommunications Act (the "TCA"), municipalities must comply with certain requirements when dealing with zoning cases involving mobile service issues like cell towers. These requirements impose restrictions on how municipalities craft zoning ordinances applicable to mobile service providers as well as how municipalities make decisions regarding permitting applications for mobile service providers. Further, the TCA enables mobile service providers to bring suit against municipalities if they do not comply with the relevant requirements. Because of this, it is important to know the relevant requirements of the TCA, how courts evaluate the various claims that can arise from non-compliance, and how best to prevent possible civil liability when dealing with mobile service entities.

First adopted in 1996, the TCA was created to provide a regulatory framework for dealing with mobile services that balances the interest of providers, regulators, and the public good. The TCA aims to remove local regulatory hurdles which hinder the development of wireless infrastructure while maintain the legitimate interest that state and local governments have in regulating wireless facility sites.[1] The Federal Communications Commission (the "FCC") is the agency charged with effectuating the TCA through the enforcement of the TCA as well as the creation of rules and guidance for regulators. In recent years, the FCC has released orders and guidance which has unsettled the judicial standards used to evaluate TCA claims brought by cell tower applicants. Further, the ever-progressing nature of telecommunications services means the criteria used to evaluate TCA claims is somewhat of a moving target for judges. The result of all this has been a spike in litigation of cell tower application denials for municipalities across the country in federal court in the past few years while newly unsettled questions of TCA claims have not yet

[1] *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 407 (3d Cir. 1999).

been resolved by many if any higher courts. Given the current legal environment, knowing what legal challenges municipalities are vulnerable to when dealing with cell service providers ensures cities can confidently work to improve telecommunications services for their communities while minimizing the risk of being sued under the TCA.

Claim Types Under the TCA

There are three common claims brough by cell tower applicants in the current trend of TCA challenges: (1) failure to take action on an application in a reasonable period of time, (2) deficient denial of an application, and (3) zoning ordinances or individual denials constituting an "effective prohibition." With regard to the first challenge, the FCC has released guidance that established presumptively reasonable timeframes within which municipalities must act on mobile service providers' applications. These time frames, or "shot clocks", are important to know to ensure a municipality avoids the expense and burden of a lawsuit simply due to lack of action in an application.

The second challenge, deficient denials, can arise from three requirements a municipality must satisfy when denying a mobile service provider's application under the TCA. First, municipalities must notify the applicant of the decision in writing. This requirement, although seeming straightforward, has split the circuit courts regarding what must be included in the written notification with the Fifth Circuit declining to rule on the issue to date. As a result, municipalities have a range of options to choose from when deciding what to include in their written notifications of denial which expose them to varying risks of liability. Second, barring a failure to act, denied applicants can only bring a relevant TCA claim after the municipality has denied their application in a "final action". Once the municipality has taken final action, applicants only have thirty days to bring a claim in federal court. Thus, municipalities should know when they have taken final action to ensure they are able to raise challenges to TCA claims on the basis of pre-mature and late timing of suit. Third, cell tower zoning application denials must be supported by substantial evidence in a written record. This requirement is the most common basis for an effective denial claim so it is essential to understand what evidence supporting a municipalities decision must be developed in the written record to satisfy the "substantial evidence" standard as well as what criteria can and cannot form a satisfactory foundation for denial of a cell tower application.

The third, and perhaps both the most common and most unpredictable, challenge in cell tower zoning cases is an effective prohibition claim. This type of claim can be raised with respect to the denial of a specific application or with respect to a municipality's zoning ordinance more broadly. While the FCC has recently released guidance in tension with many circuits' precedents regarding this claim, four criteria are commonly used to evaluate this type of claim through fact-intensive inquiry. Thus, understanding how claims of these kinds proceed can enable municipalities to revise their zoning ordinances and conduct their application evaluation processes with the relevant criteria in mind to best mitigate the risk of suit under this challenge.

Shot clock

Municipalities looking to deny requests covered by the TCA must act swiftly to ensure full compliance with the Act. Under § 332(c)(7)(B)(ii), any action taken "on any request for authorization to place, construct, or modify personal wireless services facilities" must occur "within a reasonable period of time after the request is duly filed."[2] While there is no express definition of "reasonable period of time" in the TCA, the FCC has established presumptively reasonable time-frames or 'shot clocks' for the various types of authorization requests that fall under the TCA. If the request relates to a preexisting structure, action must be taken within 60 days.[3] If, instead, the application is for a new structure, action must be taken within 90 days.[4] When a municipality does not take action within the relevant timeframe, this inaction constitutes a "failure to act" under § 332 which enables the applicant to bring suit in federal court to compel a decision.[5] Given the clear presumptive rules established by the FCC and the cost of noncompliance, municipalities should be aware of the shot clocks for each type of applicant so they can reach timely decisions.

State of Wisconsin Ex. Rel. U.S. Cellular Operating Company, LLC v. Town of Fond Du Lac

A case brought under a Wisconsin statute codifying the shot clock rule illustrates how claims of this type can arise. In *Town of Fond Du Lac*, US Cellular sought a conditional use permit from the Town to construct a new mobile service tower.[6] The Town notified US Cellular that its application as considered complete on April 20th.[7] This notification triggered the ninety-day-deadline for the Town to notify US Cellular of its final decision regarding the application in writing.[8] The Town Board subsequently considered and voted to deny the application at its June 28th meeting, at which representatives of US Cellular were present.[9] The minutes for this meeting, however, were not submitted for approval until well after the ninety-day-deadline had passed.[10] Eight days after the deadline, US Cellular's attorney notified the Town's attorney that US Cellular had not received a written decision and thus, pursuant to Wisconsin law, the application had to be approved by default.[11] US Cellular filed a complaint in August, seeking approval of its application due to the Town's failure to comply with the ninety-day-deadline.[12] Because

[2] 47 U.S.C. § 332(c)(7)(B)(ii)
[3] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv*., 33 F.C.C. Rcd. 9088, 9142 (2018).
[4] *Id*.
[5] *See Id.* (stating that the Commission uses "shot clocks to define a presumptively 'reasonable period of time' beyond which . . . inaction . . . would constitute a 'failure to act' within the meaning of Section 332").
[6] *State ex rel. United States Cellular Operating Company LLC v. Town of Fond du Lac*, 415 Wis.2d 720, 729 (Wis. App., 2025).
[7] *Id*. at 730.
[8] *Id*.
[9] *Id*. at 732.
[10] *Id*. at 733.
[11] *Id*. at 734.
[12] *Id*. at 735-36.

the Town did not satisfy the written notification requirement within ninety days, the court held that US Cellular's application was deemed approved by operation of law.[13]

While *Town of Fond Du Loc* is a case where an extreme remedy was granted under state law for a shot clock violation, it illustrates how the lack of proactive effort to comply can create significant and avoidable legal issues for municipalities. Thus, even though the shot clock requirement's straightforward application can lead municipalities to undervalue compliance efforts, it is important to ensure cities comply with this FCC requirements to avoid lawsuits and potential extreme remedies for failing to follow straightforward guidance.

Written denials must be supported by substantial evidence

Decisions denying any qualifying request must also meet the requirements under the TCA. A municipality denying "a request to place, construct, or modify personal wireless service facilities" must (1) notify the applicant in writing (2) of the municipality's final action denying the request (3) based on substantial evidence in a written record.[14] A failure to satisfy these requirements opens the door for suit in federal court as a result of non-compliance. Written notice of denial is an essential step in the process which, if absent, can have significant consequences. Ensuring a final action has occurred and determining when the final action occurred also have important legal implications for timeliness of suit. Most commonly, applicants challenge the adequacy of the reasoning for the decision, claiming the evidence in the written record does not meet the "substantial evidence" standard. Thus, it is vital to understand what to include in the written record to ensure a denial's reasoning is sufficient.

A. Notify in writing

A municipality denying authorization for a provider must notify the provider of its decision in writing. Notably, the written notification does not need to satisfy the "substantial evidence" standard so long as there is a written record issued "essentially contemporaneously with the denial" that separately can satisfy the standard.[15] Courts have varying interpretations of what is required of the written decision.[16] Some courts have interpreted the language as simply requiring a final action analogous to a final judgment for purposes of appeal.[17] At the other end, some courts have held that a written denial must "(1) be separate from the written record; (2) describe the reasons for the denial; and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons."[18] Some courts, like the First Circuit, have chosen a middle ground that imposes requirements beyond the plain

[13] *Id*. at 755.
[14] 47 U.S.C. § 332(c)(7)(B)(iii).
[15] *T-Mobile S., LLC v. City of Roswell, Ga*., 574 U.S. 293, 294 (2015).
[16] *See Southwestern Bell Mobile Systems v. Todd,* 244 F.3d 51, 59 (1st Cir. 2001) (acknowledging the lack of uniformity amongst courts regarding the extent of writing required for a denial under the TCA).
[17] *See Sprint Spectrum L.P. v. Par. of Plaquemines*, No. CIV.A. 01-0520, 2003 WL 193456, at *9 (E.D. La. Jan. 28, 2003).
[18] *See New Par v. City of Saginaw*, 301 F.3d 390, 395-96 (6th Cir. 2002).

language while rejecting the incredibly high standard at the other extreme. While the Fifth Circuit has decline to rule on what is required to satisfy the written decision requirement of § 332(c)(7)(B)(iii),[19] the court has been wary to impose quasi-judicial requirements on local zoning authorities in other contexts.[20] Thus, to ensure compliance in Texas, municipalities should attempt to satisfy at least some middle ground requirements contemplated by courts like the First Circuit or, to best avoid potential suit, the extreme requirements of courts like the Sixth Circuit.

B. Final action

Under the TCA, relief is available to applicants "if state or local land use authorities have denied . . . permission through 'final action.'"[21] Complaining applicants must initiate their lawsuit within thirty days of the "final action" denying permission. Because of this limitation, what constitutes a "final action" has important implications for both the compliance of municipalities and the timeliness of applicant suits. The TCA, however, does not define what constitutes final action in this context. As a result, whether a denial-related action is a final action for purposes of a TCA claim is commonly disputed.[22] To aid in resolving such disputes, the court has looked to the meaning of "final action" in the Administrative Procedure Act (the "APA").[23] The APA considers agency action final when it "mark[s] the consummation of the agency's decision-making process," determining rights and obligations or triggering "legal consequences."[24] Thus, for purposes of the TCA, issuance of written notice of denial can serve as the relevant final action while a subsequent issuance of reasons explaining a denial does not.[25] A zoning board's decision denying permission can also serve as "final action" if the zoning board can take no further action after approving the denial.[26] If, however, decisions by a land use authority are subject to mandatory review by an appeals board, such decisions are not "final action" for purposes of the TCA.[27]

Heritage Broadband, LLC v. City of Bertram

The *City of Bertram* case illustrates the importance of understanding what constitutes a final denial under the TCA. Heritage submitted an application requesting use of a water tower in the City of Bertram (the "City") which already supported

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[19] *See U.S. Cellular Corp. v. City of Wichita Falls, Tex.*, 364 F.3d 250, 257 n.9 (5th Cir. 2004)(stating that the court did not need to resolve the scope of the "in writing" requirement because the provider declined to raise the issue on appeal).
[20] *Shelton v. City of Coll. Station*, 780 F.2d 475, 480 (5th Cir. 1986). *See, e.g.*, *BellSouth Mobility, Inc. v. Plaquemines Parish*, 40 F.Supp.2d 372, 378 (E.D. La. 1999).
[21] *Glob. Tower Assets, LLC v. Town of Rome*, 810 F.3d 77, 79 (1st Cir. 2016). *See* 47 U.S.C. § 332(c)(7)(B)(v) ("Any person adversely affected by any final action or failure to act by a State or local government . . . may, within 30 days . . . commence an action in any court of competent jurisdiction).
[22] *See Town of Rome,* 810 F.3d at 79
[23] *City of Roswell, Ga*., 574 U.S. at 305 n.4.
[24] *See Bennett v. Spear,* 520 U.S. 154, 177–78 (1997).
[25] *City of Roswell, Ga*, 574 U.S. at 305 n.4.
[26] *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 47 (1st. Cir. 2009).
[27] *Glob. Tower Assets, LLC v. Town of Rome*, 810 F.3d 77, 88 (1st Cir. 2016)

telecommunications equipment in May of 2021.[28] After lengthy contract negotiations, the City Council approved a motion to discuss the application at a city council meeting on April 12th, 2022.[29] The parties continued to negotiate, particularly around the payment of municipal employees needed to accompany Heritage when accessing the water tower.[30] The City and Heritage ultimately failed to come to a resolution on this issue.[31] In a July 12th meeting, the City Council took no action on the application itself.[32] The City's legal counsel informed Heritage's counsel that "[n]o motion was made so the item died with no action" in an email on July 14th.[33] On August 9th, however, the City Council formally rejected Heritage's application.[34] Heritage subsequently filed suit in August 11th.

The City filed a motion to dismiss, asserting that Heritage's claim was barred because it was not filed within 30 days of the application's denial.[35] The City argued that the April 12th meeting constituted final action denying the application and thus, Heritage's 30-day deadline had passed.[36] To support its contention, the City introduced meeting minutes from the April 12th meeting and emails between counsel in April.[37] The court dismissed the City's motion, finding that the exhibits did not support the City's position.[38] The minutes were found insufficient because they did not state that "the City Council denied [the application] or issued any type of final decisions."[39] The emails also were found insufficient and in fact contradicted the City's argument because they showed that "even after April 12th, [the City] still appeared to be on track to approve the application of the parties could find a solution to the employee guide issue."[40] The court further noted that the July 14th email could be construed as notification to Heritage of "a procedural denial" but did "not appear to be a final denial."[41] Further, if the City did treat the July email as final action on the denial, the court noted that suit would still be timely when Heritage filed.[42] Ultimately, however, the court denied the City's motion, finding the subsequent discussion of and denial of the application by the City on August 9th implied that the City did not issue a final denial until that date.[43]

The timing of final action by any local land use authority can open the municipality to suit in federal court under the TCA and can also foreclose suit when claims are not promptly raised. Thus, it is essential to understand how courts determine what actions are

[28] *Heritage Broadband, LLC v. City of Bertram,* No. 1:22-CV-818-RP, 2023 WL 3035396, at *1 (W.D. Tex. Mar. 13, 2023).
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id.* at *2.
[34] *Id.*
[35] *Id*. at *1.
[36] *Id.*
[37] *Id*. at *2.
[38] *Id.*
[39] *Id*.
[40] *Id.*
[41] *Id*.
[42] *Id*.
[43] *Id*.

considered "final" as well as how long applicants have to complain before a timeliness defense can be raised. Municipalities should ensure any denial meant to serve as final action on a mobile service application will be construed as such by a court and should subsequently ensure that all required components of a denial are included in such final action to best insulate the decision from challenges by an acrimonious applicant in federal court.

C. Substantial evidence in a written record

When a municipality denies a cell tower application under the TCA, it must provide sufficiently clear reasoning for its decision to enable judicial review. The "sufficient evidence" standard in the TCA is defined in light of the Administrative Procedure Act, much like the "final action" requirement.[44] Thus, "substantial evidence" means "such relevant evidence as a reasonable mind would consider as adequate to support a conclusion."[45] When assessing a substantial evidence challenge, the court must review the entire record, including contrary evidence unfavorably to the ultimate decision reached.[46] Thus, a local board must draw all those inferences that the evidence fairly demands, and cannot freely decide to reject or accept from the record.[47]

When reviewing a challenge to the evidentiary basis of a denial of authorization under the TCA, courts must ask "whether the zoning decision at issue is supported by substantial evidence in the context of *applicable state and local law*."[48] Thus, municipalities cannot base denials on arbitrarily invented criteria not in place at the time of the provider's application.[49] If the decision lacks the evidentiary support required under relevant state and local regulations, it is invalid regardless of whether or not the municipality complied with the TCA's other requirements.[50] Further, generalized fears alone do not satisfy the substantial evidence standard, particularly when such opinions are in opposition to expert testimony.[51] The purpose of the TCA would be completely frustrated if the voicing of negative opinions, without more, could serve as a basis for denial.[52] Notably, if the reasons for denial are provided in a written record separate from the written notification of denial, the written record must be issued "essentially contemporaneously with the denial."[53]

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[44] *See* H.R. Conf. Rep. 104-458, at 208 (noting that "substantial evidence" should be construed as "the traditional standard used for judicial review of agency action").
[45] *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).
[46] *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981).
[47] *California RSA No. 4 v. Madera Cnty*., 332 F. Supp. 2d 1291, 1303 (E.D. Cal. 2003).
[48] *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 723-24 (9th Cir. 2005) (emphasis added).
[49] *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, 308 F. Supp. 2d 1148, 1163 (S.D. Cal. 2003).
[50] *MetroPCS*, 400 F.3d at 724.
[51] *California RSA No. 4*, 332 F. Supp. 2d at 1309. *See, e.g.*, *T-Mobile N.E. LLC v. Town of Barnstable*, 2020 WL 3270878, at *6-7 (D. Mass. June 17, 2020) (holding that a town cannot ignore its own expert's opinion).
[52] *Iowa Wireless Servs., L.P. v. City of Moline*, 29 F. Supp. 2d 915, 922-23 (C.D. Ill. 1998).
[53] *City of Roswell, Ga*., 574 U.S. at 295.

Intermax Towers, LLC v. Ada County, Idaho

The *Intermax Towers* case from earlier this year presents an insightful overview of how courts currently review substantial evidence challenges in the context of the TCA. The court reviewed a variety of ultimately insufficient basis for the County's rejection of the provider's cell tower application, providing key insight into how municipalities should design zoning ordinances and develop records when reviewing cell tower applications to satisfy the TCA's requirements and avoid liability.

In *Intermax Towers*, the Board of Ada County Commissioners denied Intermax's application for a conditional use permit to build a 100-ft cell tower.[54] The Board's denial followed an initial recommendation for approval by the Planning and Zoning Commission as well as county staff.[55] However, after being remanded by the Board, the Commission recommended denial of the application.[56] This recommendation followed objections raised based on concerns regarding lack of proof of a coverage gap, the potential health impacts of RF emissions, other general harms of a cell tower, and the fact that people moved to the area to get away from cell towers.[57] The Board subsequently voted to uphold the Commission's denial, finding that Intermax had not demonstrated that the proposed cell tower resolved a significant gap in coverage of the area.[58] The Board also based its denial in part on the finding that Intermax failed to demonstrate why the proposed tower must be located at Intermax's proposed site as well as the finding that Intermax failed to demonstrate the existing tower was unable to accommodate the proposed facility.[59] After being denied its request for reconsideration by the Board, Intermax filed an action seeking declaratory and injunctive relief based on claims that the County's determination was not based on substantial evidence as well as an effective prohibition claim.[60] Both parties moved for summary judgment.[61]

The court found that the County had not met the substantial evidence standard with regard to each of these findings premising the basis of its decisions.[62] With respect to the significant gap argument, the court found that the County Code contains no requirement to prove the proposed tower resolves a significant coverage gap.[63] The court clarified that the substantial evidence test does not incorporate the TCA's substantive standards and thus, if not required in the relevant state or local code, the inability of an applicant to prove resolution of a significant gap in coverage does not constitute substantial evidence to support a denial.[64] As to the other above noted findings, the court found that "the written

[54] *Intermax Towers, LLC v. Ada Cnty., Idaho*, No. 1:23-CV-00127-AKB, 2025 WL 1104041, at *1 (D. Idaho Apr. 14, 2025)
[55] *Id*. at *5-8.
[56] *Id*. *7.
[57] *Id*.
[58] *Id*. at *10.
[59] *Id*. at *15.
[60] *Id*. at *8.
[61] *Id*.
[62] *Id*. at *15.
[63] *Id.* at *11.
[64] *Id.*

record contains uncontested evidence" supporting the opposite findings.[65] The written record contained "unrefuted evidence" that the proposed tower site was "the only viable site" to remedy the coverage gap "including drive tests and other standard industry analyses."[66] The County's contrary evidence – a statement by Intermax's attorney made at the first hearing before the P&Z Commission that "he didn't know if making the existing tower taller would work" – was insufficient because the attorney was not an RF engineer and reliance on the statement ignores later testimony by an RF expert unequivocally stating that the existing site "would not provide adequate coverage even with a taller tower."[67]

Ada County also unsuccessfully attempted to rely on aesthetic incompatibility as a basis for denial of the application. The County argued that the proposed tower would be architecturally and visually incompatible with the surrounding area, creating potential for adverse impacts on property value and business operations for the surrounding area.[68] Despite these objections being grounded in the County Code, the written record did not contain sufficient evidence to meet the substantial evidence standard for the County's findings. There was ample evidence supporting the contrary conclusion introduced by Intermax including:

> (1) expert testimony and technical reports showing the proposed facility met all of the Ada County Code's technical provisions and complied with other requirements, including those related to the Federal Aviation Administration, the Idaho Bureau of Aeronautics, and the Federal Communications Commission's standard for RF emissions, construction and setback requirements, and suitability requirements; (2) photographic simulations showing the proposed tower's anticipated appearance from various points of views and distances and in comparison to nearby utility poles; (3) property value studies showing the proposed tower would not have a negative impact on property values; and (4) information showing multiple carriers are interested in co-locating their facilities on the proposed tower, thereby limiting the number of future towers in the area and mitigating adverse impacts and any impediments to normal development in the area.[69]

The County, in contrast, relied primarily on "not-in my-backyard" objections based on "generalized and unsubstantiated concerns" which alone do not constitute substantial evidence, even when referring to aesthetic-related objections, if no factual data is presented to justify the claims.[70] The court did note that one opponent–the owner of an organic farm very near the site of the proposed tower– provided evidence supporting her objection in the form of a survey of customers showing they would consider an alternative farm if the proposed tower were built.[71] However, because the Board did nothing in the record to

[65] *Id.* at *15.
[66] *Id.* at *14.
[67] *Id*.
[68] *Id*. at *
[69] *Id*. at *14.
[70] *Id*. at *15-16 ("numerous courts . . . have held that generalized and unsubstantiated concerns, even concerns based on aesthetics, do not constitute substantial evidence").
[71] *Id*. at *16.

confirm the accuracy or ascertain the methodology of the survey, the court held that substantial evidence did not support the survey's findings.[72] The court further noted the TCA "prohibits local governments from basing their decision denying a permit . . . on '*direct or indirect*' concerns associated with the RF emissions' health effects."[73] Thus, concern over potential loss of customers based on RF emission-related fear alone does not satisfy the "substantial evidence" standard under the TCA.[74] Put together, the high quality and quantity of evidence put forward by Intermax could not be overcome by generalized and unsubstantiated concerns of a few citizens and the denial of the applicant could not, the court held, be supported by substantial evidence on this basis.[75]

The court's ruling that these bases did not constitute substantial evidence justifying denial of the application present important lessons for municipalities. First, municipalities should ensure any deficiencies in the application noted in the written record providing the basis for denial originate from cited zoning ordinances. Relatedly, if municipalities wish to have the ability to deny applicants because they do not meet TCA requirements, the relevant TCA requirements must be expressly incorporated into local regulations. Secondly, when applicants present RF expert opinions to support the assertions of their applications, municipalities should develop contrary evidence in the record to refute these assertions using independent RF experts. Relying on statements of non-experts to refute assertions of RF experts creates a high risk of liability upon judicial review due to a finding of insufficient evidence. Thus, it is important for municipalities to proactively update their zoning ordinances to preserve all criteria they wish to be able to consider when making decisions about cell tower applicants. Additionally, when considering denying such applicants, municipalities should rigorously develop a record that provides ample evidence of the criteria justifying the municipality's denial.

(1) Effective prohibition

Both § 253 and § 332 of the TCA limit municipal authority when creating and enforcing zoning ordinances, disallowing ordinances and decisions that effectively prohibit the provision of telecommunications services. Under § 253, "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[76] Section 332 similarly states that "the regulation of the placement, construction, and modifications of personal wireless service facilities by any State or local government . . . shall not prohibit or have the effect of prohibiting the provision of personalized wireless services."[77] Separate claims can arise from each of these sections. Claims brought under § 253 seek to entirely invalidate regulations that effectively

[72] *Id.* (collecting cases that stand for the proposition that reliance on a report or study without ascertaining the accuracy of the data used in the study or the methodology used to collect the data affords conclusions drawn on such reliance virtually no weight and such reliance falls short of the substantial evidence standard).
[73] *Id*. at *17 (quoting *City of Carlsbad*, 308 F. Supp. 2d at 1157).
[74] *Id*. (citing *City of Carlsbad*, 308 F. Supp. 2d at 1162).
[75] *Id*.
[76] 47 U.S.C. § 253(a).
[77] 47 U.S.C. § 332(c)(7)(B)(i).

prohibit carriers from providing services while claims brought under § 332 challenge individual zoning decisions.[78]

There is currently some disagreement amongst the circuits about how to review effective prohibition claims. The majority of circuits, including the Fifth Circuit, however, follow the 2018 guidance of the FCC in applying the "materially inhibit" test. Under this test, a regulation or decision impacting small wireless facilities is considered an effective prohibition if it "materially limits or inhibits the ability of any competitor or potential competitor to compete."[79] The FCC has offered guidance for the enactment of local regulation of wireless facilities suggesting that ordinances, especially when prescribing aesthetic requirements be: (1) reasonable, (2) only as burdensome as requirements for other forms of infrastructure deployments, (3) objective, and (4) published in advance.[80] The "materially inhibit" standard requires courts to consider the totality of the circumstances; "a legal requirement that imposes a reasonable cost on one tower in one jurisdiction may constitute an effective prohibition when aggregated across many towers . . . in many jurisdictions."[81]

Under the standard, zoning ordinances cannot give local council an unrestricted right to reject mobile service provider applications.[82] The imposition of extensive delays in the application process also materially inhibits the competitive rights of providers.[83] Local regulations which impose substantial increases in costs such as obtaining appraisals for proposed rights-of-way also operate as a material inhibition under the TCA.[84] When considering whether an effective prohibition has occurred, courts can consider insufficiency of coverage, network capacity, 5G services, and new technology.[85] Another potential considerations for courts evaluating an effective prohibition claim for an individualized decision is a lack of available alternatives.[86] However, despite the restrictions the TCA places on municipal authority through § 253 and § 332, "decisions about whether to grant variances or amendments to [zoning] restrictions are ultimately within the municipality's purview" so long as the outer limits imposed by the TCA are respected.[87]

TowerNorth Development, LLC v. City of Geneva

[78] *See TowerNorth Dev., LLC v. City of Geneva*, No. 22 C 4151, 2025 WL 975753, at *16 (N.D. Ill. Mar. 31, 2025) (explaining the distinction between effective prohibition claims brought under § 253 and § 332).
[79] *California Payphone Ass'n*, 12 FCC Rcd 14191, 14206, para. 31 (1997). *See also In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv*., 33 F.C.C. Rcd. at 9092-93; *Cellco P'ship v. White Deer Twp. Zoning Hearing Bd.*, 74 F.4th 96, 102 (3d Cir. 2023).
[80] 33 F.C.C. Rcd. at 9132.
[81] *Cellco P'ship*, 74 F.4th at 104.
[82] *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76–77 (2d Cir. 2002).
[83] *Id*.
[84] *Qwest Corporation v. City of Santa Fe*, 380 F.3d 1258, 1271 (10th Cir. 2004).
[85] *Cellco* P'ship, 74 F.4th at 106.
[86] *City of Geneva*, No. 22 C 4151, 2025 WL 975753, at *13.
[87] *Id*. at *15.

A March 31, 2025, case out of the Northern District of Illinois synthesizes the process of review of effective prohibition claims adopted by the majority of courts. In the case, TowerNorth – a company that develops and leases wireless communications facilities – applied for a special-use permit to build a cell tower in an area of the city of Geneva (the "City") where TowerNorth alleged a significant gap in service existed.[88] The application was for a 100-foot "monopine" – a metal tower disguised as a pine tree – on the corner of a seven and a half acre parcel of open land.[89] The parcel of land sat within a zoning district that prohibited special uses of any kind on most parcels within the district.[90] TowerNorth therefore has to submit an additional application which it presented to the City for review alongside the special use application at a public hearing on July 14th.[91] At the hearing, TowerNorth alleged a coverage gap and described the site as their primary option to best address the gap but provided few specific regarding the scope and severity of the gap as well as their process for selecting the site.[92] Multiple city residents objected to the monopine based on aesthetic concerns as well as skepticism as to whether the purported gap existed.[93]

The City did not take any action immediately after the hearing and TowerNorth subsequently brought suit on August 8th.[94] The same night, the City Council convened and denied the application "citing public concern over the project's 'adverse aesthetic and visual impacs,' its potential effects on 'local property values,' and 'TowerNorth's demonstrated failure to consider less intrusive alternatives.'"[95] TowerNorth subsequently amended its complaint to allege several additional counts under the TCA including effective prohibition claims based on § 332 and § 253.[96] The court subsequently conducted an evidentiary hearing on the effective prohibition claims before ruling on competing motions for summary judgment on the issues.[97]

In reviewing the effective prohibition claims, the court adopted the "materially inhibit" standard, identifying four criteria for evaluating claims of this nature: (1) insufficiency of coverage, (2) a lack of alternatives available, (3) unreasonable costs imposed on carriers, and (4) unreasonable delay in making the decision.[98] The court quickly addressed and set aside the fourth and first criteria.[99] With respect to unreasonable delay, the court had previously ruled on the issue, finding that the delay was brief and

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[88] *Id*. at *2.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*. (blaming "an alleged need to protect Verizon's 'competative advantage' in its 'proprietary data' that might be used by rival carriers).
[93] *Id*.
[94] *Id*. at *3.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*. at *13. Notably, the court found that it was still bound by the FCC's 2018 order after considering the effect of *Loper Bright v. Raimondo* on agency deference.
[99] *Id*.

TowerNorth offered no evidence it was harmed by the delay.[100] As to insufficiency of coverage, the court concluded there was "no meaningful dispute."[101] TowerNorth showed Verizon's network coverage was underperforming based on "four 'KPI' metrics" and the City did not contradict the evidence besides arguing that the metrics were of Verizon's own design and used its own standards.[102]

The court considered the second and third criteria together when evaluating alternative sites. [103] Some alternative sites were dismissed as not viable options in comparison to the proposed site because "the landlord was not willing to enter int the lease . . . because of the litigation risk" or a significantly higher rental rate for another site.[104] There was, however, one alternative site which the court found viable.[105] The viable alternative site had been investigated by TowerNorth, which concluded the site met its technical requirements and was available to lease at the same price as the proposed site.[106] TowerNorth's reason for not submitting a proposal for the alternative site was simply that the site acquisition consultant "predicted the City would be more likely to issue zoning approval for the proposed site."[107] Notably, TowerNorth did not allege that building its tower on the alternative site would be more expensive than on the proposed site, removing the third criteria, unreasonable cost, as a basis for arguing effective prohibition. The focus of TowerNorth's argument was "the City's 'setback' requirements, the City's requirements that concealed cell-towers "blend in" . . . , and the fact that the [alternative] property [fell] under the same" zoning ordinance as the proposed site barring construction of a cell tower.[108]

While acknowledging that the City's zoning requirements were significant, the court was "uncertain that a carrier's professed expectations about the enforcement of zoning restrictions may fairly be characterized as an 'effective prohibition'" given that decisions of this nature are in the municipality's purview.[109] Given that TowerNorth failed dot apply for an alternative site available at the same lease price as the proposed site, approved by Verizon from a technical standpoint, and subject to the same additional application as the proposed site given the zoning district both sites fell within, the court concluded that the City's denial of TowerNorth's application did not violate the "materially inhibit" test.[110]

Effective Prohibition claims require fact intensive inquiries by the court which imposes significant resource burdens on municipalities subject to suit on this basis. Given this burden, it is important to proactively evaluate the municipality's existing zoning

[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*. at *13-15.
[104] *Id*. at *15.
[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] *Id*.
[109] *Id*
[110] *Id*. at *15-16.

ordinances and application process for mobile service providers and remove any barriers to entry that satisfy the appliable "materially inhibit" criteria considered by courts. Further, when reviewing applications for cell towers, municipalities should ensure the record reflects consideration of alternative sites and the feasibility of their use by the applicant. Ensuring municipal regulations and decision-making processes to not act as prohibitive barriers protects cities against the high cost of litigating this type of fact-intensive challenge.

Conclusion

The current popularity of TCA claims creates a unique problem for municipalities dealing with telecommunications issues associated with the TCA. Given the uncertain legal landscape of these claims, it is more important than ever for municipalities to be aware of potential sources of liability so they can take steps to comply with the TCA and the FCC's guidance to the best of their abilities when dealing with mobile service providers. Cell tower applications in particular, require careful consideration as municipalities take steps to ensure federal requirements are satisfied both at the zoning level and when making individualized decisions.