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**Cellular Tower Zoning, Siting, Leasing and Franchising:
Federal Developments and Municipal Interests**

by

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prepared for

Lorman Seminar

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**Cellular Tower Zoning, Siting, Leasing and Franchising:
Federal Developments and Municipal Interests**

by
John W. Pestle¹

I. Introduction and Background

A. This paper summarizes from a municipal perspective (1)--Federal matters affecting municipalities on the zoning and siting of cellular towers and broadcast towers, (2)--leasing space on municipal property (buildings, water towers, parks) for cellular antennas, (3)--environmental and historic preservation concerns, and (4)--the need for franchises for the lines in the streets connecting cellular towers to the conventional phone network. This paper is updated frequently, for the most recent version contact us.

B. Personal Communications Service (PCS) is the next major advance in cellular telephone service. It is similar to conventional cellular service, except it is higher frequency, all digital.²

C. The FCC auctioned off licenses for PCS service around the country. Around \$40 billion raised to date.

D. Major cities will likely have five or six PCS type providers in addition to the two current conventional cellular operators.

E. PCS providers are attempting to build their systems quickly for competitive reasons and to meet the conditions of their FCC licenses.

F. Concurrently conventional cellular providers are upgrading their systems to better compete with PCS--converting to digital, installing more towers for better coverage.

¹Varnum, Riddering, Schmidt & Howlett LLP represents municipalities nationwide on cable and telephone matters, from small municipalities to large cities such as Fort Worth, Chicago and Detroit. John Pestle is Co-Chairman of the firm's Cable/Telecommunications Group and is a past chair of both the Municipal Lawyers Section of the State Bar of Michigan and the Legal Section of the American Public Power Association. He received the "Member of the Year" award from NATOA in 1996 for his work assisting municipalities on the Federal Telecommunications Act of 1996 and is a graduate of Harvard College, Yale Graduate School, and the University of Michigan Law School.

The firm has provided over 500 communities nationwide with model cellular zoning ordinances, leases and related materials, represented the National League of Cities and National Association of Counties in the Denver/Lake Cedar Zoning Preemption proceeding, the National League of Cities and NATOA in reply comments in the FCC's zoning moratorium preemption proceeding and represented many municipalities and municipal organizations in the FCC's cellular zoning moratoria, cellular RF radiation, broadcast tower and wireless preemption proceedings.

²In this paper "cellular" refers to both PCS and conventional cellular service. The terms "PCS" and "conventional cellular" are used only where there are items unique to that service.

G. PCS providers sometimes are partnerships with local utility companies (electric utilities such as Texas Utilities) due to the advantage of using the existing entities' towers, poles, lines and access to their customers.

H. Due to the technology used, PCS requires many more "cell sites" and towers than conventional cellular telephones (one tower per cell site).

1. PCS "cells" may be ½ to 2 miles in diameter vs. 3 to 15 miles for conventional cellular.

2. One major venture is proposing one tower every two square miles.

I. Failure or bankruptcy of some PCS providers is a real possibility.

1. Two major providers (Pocket Communications, Nextwave) have already filed for bankruptcy, plus some smaller providers.

2. Others may follow.

J. Tower Proliferation:

1. Towers may be 50' to 100' to 200' tall.

2. Partially due to increased number of providers

a. Six PCS-type providers may lead to approximately three separate towers per square mile.

b. Higher frequency of PCS as compared to older conventional cellular service also leads to more towers.

3. More towers are also needed to provide "in building" coverage for handheld phones which are much lower power than older car phones, requiring more antennas and towers as a result.

4. Result--many more antennas and towers--over five times the number of towers present in 1996.

a. 16,000 new cellular antennas built per year since 1995.

b. FCC estimated 125,000 new towers needed--BUT 120,000 towers in place in 2001.

c. This may be a problem in residential areas.

5. Consider means to require consolidation of towers/one joint tower in residential areas.

II. Summary of Section 704 of 1996 Act

A. Section 704 of the Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the 1996 Act is hereafter referred to as the "1996 Act", Section 704 is set forth at the end of this paper--it is only partially codified at 47 U.S.C.A. § 332 (c) (7)), generally preserves local zoning and land use authority for cellular towers. The principles it sets forth largely repeat standard provisions of zoning law. A recent U.S. Supreme Court case indicates that it may not be Constitutional, as did an opinion in an earlier lower court case--see Section V of this paper.

1. A complete copy of Section 704 is attached at the end of this paper.
2. Congress rejected cellular industry attempts to have the FCC preempt local zoning of cellular towers. This is important, given that the new personal communications services (PCS) will lead to 125,000 new cellular towers nationwide, with many communities having three to six different providers (with nine providers possible), each needing its own set of antennas.
 - a. In fact, in the 1996 Act Congress expressly directed the FCC to terminate proceedings the FCC had started to preempt local zoning of cellular towers.
3. The scope of state and local authority preserved by Section 704 is much more than just zoning of cellular towers.
 - a. It includes all State and local decisions regarding "the placement, construction, and modification" of personal wireless service facilities. Thus, local safety code, environmental and health laws relating to placement, construction, and modification are preserved.
 - b. The term "personal wireless service facilities" is broadly defined in Section 704 and includes (among other things) certain unlicensed services and fixed wireless services.
4. Municipalities cannot "unreasonably discriminate" among "providers of functionally equivalent services."
 - a. The Conference Committee Report accompanying Section 704 says this language gives municipalities "flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district." Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference, HR-104-458, 104th Cong., 2d Sess. at 208 ("Conference Committee Report")
 - b. Different standards may apply in different districts (commercial vs residential).

c. If Provider A needs a 30-foot tower and Provider B needs a 200-foot tower, the municipality may treat them differently.

5. Municipalities cannot "prohibit or have the effect of prohibiting" cellular service, so some appropriate place and conditions should be found for the antennas.

6. Municipalities must act in a reasonable time, which in general is the time frame that would typically occur under State and local law.

7. Municipalities must see that any denial of a request to "place, construct or modify" cellular devices is:

a. In writing, and

b. Supported by "substantial evidence contained in a written record," which is a common existing standard for evidence in zoning matters.

c. There is no Federal presumption of validity on cellular requests for zoning approval.

d. The written record requirement may create concerns for situations such as denial of a building permit for a cellular tower because such a tower is not a permitted use in the zone in question.

8. Municipalities cannot deny or regulate cellular antennas due to environmental concerns about their radio emissions if the antennas comply with FCC rules on radio emissions, which appear at 47 C.F.R. § 1.1310.³

a. A court challenge to such rules has been rejected. Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000), rehearing denied, 2000 U.S. App. LEXIS 12246 (2d Cir. 2000), cert. denied 531 U.S. 1070 (2001), 121 S. Ct. 758, 148 L.Ed 2d 661.

b. The FCC and its Local and State Government Advisory Committee ("LSGAC") on June 2, 2000 published the paper "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance" on radio emissions from cellular and other towers. Copies are available from our firm, the FCC/LSGAC (see LSGAC site at <http://www.fcc.gov/statelocal/>) and from the International Wireless Committee of the International Right of Way Association at <http://www.irwa.net/>.

c. At least one court has held that as part of the local zoning approval process a municipality's board of health could inquire about RF emissions and require the provider to explain its RF study for the site so as to ensure that the FCC's RF emission standards are met. Sprint Spectrum v. Township of Warren Planning Board 737 A. 2d 715 (N.J. Superior Ct. App. Div. 1999) ("Township of Warren").

³The FCC Wireless Facilities Siting web page, <http://www.fcc.gov/wtb/siting>, provides useful documents, links and information on a wide range of cellular issues, including RF radiation, some pending proceedings, environmental and compliance, tower siting information (getting a list of towers in a particular area) and interference issues.

B. Section 704(c) (attached at end of paper) also requires the Federal Government to make Federal lands and buildings available for cellular antennas.

1. A General Services Administration directive in the 1996 Federal Register encourages cellular antenna placement on Federal property. General Services Administration, "Government-Wide Procedures for Placing Commercial Antennas on Federal Properties." 61 Fed. Reg. No. 62, 14101 (March 29, 1996).

a. But requires compliance with local zoning rules and building codes.

b. Claims by cellular providers that their antennas on post offices are exempt from local zoning regulations are incorrect.

c. The Post Office and other Federal agencies have backed off claims that they need not comply with local zoning laws when cellular antennas are installed on Federal property e.g., Unisite litigation regarding antenna on post office in Schaumburg, IL. Village of Schaumburg v. United States Postal Service, et. al., (USDC, ND Ill Docket No. 96-CV-5992), filed September 18, 1996, (settled by Post Office obtaining local zoning approval); People v. Salzman, 43 N.Y.S. 2d 560, 126 Misc. 2d. 686 (1984), (criminal prosecution of individuals leasing Federal property for billboard for failure to obtain required New York City permits upheld, Federal preemption challenge rejected); See generally 83 Am. Jur. 2d. "Zoning and Planning" at § 416 and following; Annotation: "Applicability of Zoning Regulations to Government Projects or Activities" 53 ALR 5th (2000).

III. Potential Zoning Solutions⁴

A. By modifying the definitions in their zoning ordinances, municipalities can address cellular company claims that they are "utilities" or "essential services" entitled to preferential treatment (for example, placement of towers of right in all zoning districts) under zoning ordinances, which may impair municipal attempts to apply appropriate zoning controls to cellular towers.

B. A good means to encourage use of certain locations, such as industrial or commercial areas, is via a lessened or quicker approval process for such locations.

C. Encourage location on municipally owned properties or rights of way.

1. Minimizes intrusion.

2. Aids consolidation, collocation.

3. Revenue impact.

⁴The firm has available a 10-15 page model PCS/conventional cellular tower zoning ordinance for use by municipalities for \$225. It is available in hard copy and on disk. Contact John Pestle or Barb Allen at 616/336-6000 for details.

D. Consolidation/collocation approaches:

1. Multiple antennas on one tower where feasible.
2. Engineering considerations -- may not always be practical.
3. Some opposition by incumbent providers.
4. Aided where towers are special uses or require variances.
5. Towers with multiple antennas can be unsightly.
6. Tradeoff between having fewer, more obtrusive towers and more, less obtrusive (shorter) towers.

E. Graduated Zoning Approach

1. Increased scrutiny and approval needed as land use categories become more sensitive (industrial to commercial to residential).

F. Encourage "stealth" or concealed antennas, such as:

1. In church steeples, or buildings
2. As part of outdoor signs
3. As part of electric light poles
4. Disguised as trees.

G. Encourage use of cable-based "microcell PCS", also known as "Distributed Antenna Systems" or DAS, which uses a cable system and no towers to provide cellular service.

1. Used at 1996 Republican National Convention.
2. Used by Sprint Spectrum affiliate in San Diego area.
3. Viewed as potential revenue source for cable systems.
4. Require tower applicant to show why cannot use it in lieu of tower.
5. But opposed by industry. See Town of Clarkston-2 below, where a group of providers successfully challenged a New York community's zoning ordinance which expressed a preference under some circumstances for "alternate technologies" such as DAS, in lieu of traditional cell towers. The District Court, on grounds which can be questioned, found that this was preempted because this "interferes with the FCC's regulatory scheme".

- H. Spacing requirement -- antennas must be located a certain distance apart.
 - 1. Prevents concentration of antennas, does not reduce their number.
- I. Concerns about bankruptcy of tower owner.
- J. Provisions to obtain additional information from provider to allow examination of issues that may arise in zoning proceeding.
- K. Radio Emission Concerns:
 - 1. Some PCS (or conventional cellular) services cause interference with hearing aids -- major issue in some areas (e.g., San Diego). Some studies show interference with pacemakers.
 - a. Technological solutions in short term unclear.
 - 2. In some areas, there is significant public concern about the health effects of radio frequency emissions from cellular towers.
 - a. The 1996 Act states that municipalities cannot regulate the "placement, construction or operation" of PCS and conventional cellular facilities but only "to the extent such facilities comply with the FCC's regulations concerning such emissions."
 - b. FCC August, 1996 rules set standards for such emissions, but "categorically exclude" PCS and conventional cellular antennas below certain power levels and which are located more than 10 meters above ground level (or 10 meters above a rooftop) from having to demonstrate compliance with the FCC rules. See more detailed information in "Radio/RF Emissions" at Section V.K, below.
 - c. The FCC does not conduct measurements of RF radiation from PCS or conventional cellular antennas.
 - d. Actual measurements of RF radiation from antennas can provide a basis to address community concerns (if the antenna meets FCC requirements) and a basis for municipal action (if the antenna violates FCC requirements). At least one court has held that as part of the zoning process a municipality's board of health could inquire about RF emissions and require an explanation of the provider's RF study to ensure that the FCC's RF emission standards are followed. See Township of Warren, *supra*, 737 A. 2d 715. Measurements by City of San Francisco showed a large number of cellular antennas located on buildings exceeding FCC RF radiation limits. See Section IV.B.3.g (2), below. Municipalities where radiation concerns are an issue may wish to consider:
 - (1) Requiring cellular providers to provide information (especially on towers with collocation) on projected radiation, whether standards for "categorical exclusion" are met, and if so why. Updated information may be needed as other providers attach to a tower.

(2) Requiring the provider (or an independent party at provider's expense) to make periodic measurements for compliance with FCC rules.

(3) Predetermined potential actions by the municipality if the FCC radiation limits are exceeded (affect on zoning approvals, temporary cessation of service, notice to FCC, notice to nearby property owners and persons, provision of adequate insurance to cover claims).

e. Collocation with multiple antennas on one tower or building is more likely to not meet the FCC standards for "categorical exclusion" and are more likely to not meet the FCC radiation standards.

f. Interference from cellular antennas has disrupted police, fire and public safety communication. See Section IV.B.3.h below.

L. Typical Municipal Views

1. Municipalities and their residents want cellular service.

2. Municipalities are well aware of and frequently deal with the "not in my backyard" syndrome for items such as electric substations, garbage transfer stations and water towers.

3. Cellular towers are simply another area for the same type of tension between a need for service and desire for residents not to have the facilities to provide the service placed near them.

4. In general, municipalities want control over:

a. Zoning: Should the tower go at this location or another one nearby.

b. Site Plan Review: For design elements, to camouflage the tower and in general try to have it blend in; and

c. Control the fewer higher towers vs. more lower towers tradeoff.

d. Municipalities dislike provider attempts to "bulldoze" them.

M. Common provider errors with municipalities include the following:

1. "We have been approved by the FCC so you have to let us build the tower right here and nowhere else." This is simply not true.

2. "The tower has to be this high and no lower." Often towers end up being lower and engineering studies and radio tests show that it easily can be lower.

3. Providers not approaching the matter as one of local zoning or as a local real estate matter.

4. One provider's loss of credibility affects subsequent providers.

IV. FCC Proceedings

A. Zoning Moratoria Proceeding.

1. Some municipalities have adopted moratoria on new towers until they could amend their zoning ordinances to deal with them.

2. In December 1996, the cellular industry filed a petition at the FCC to have all cellular tower zoning moratoria nationwide declared illegal. Acting very rapidly, on December 18, 1996, the FCC sought public comment on the petition. See FCC Public Notice DA 96-2140.

3. Municipalities claimed in comments that the FCC lacked jurisdiction over the subject matter in question and if it had jurisdiction, had not followed the appropriate procedures (proceeding municipality by municipality, as provided by statute).

4. In July 1997, the FCC sought additional comments on its tentative conclusion that it should preempt all cellular tower zoning moratoria of unlimited duration. See FCC Public Notice FCC 97-264, WT 97-30. The FCC asked for comments on this conclusion and the following points:

a. What is the maximum time for a zoning moratorium which the FCC should allow (90 days, 6 months or other).

b. Whether the FCC's ruling precluding moratoria should apply prospectively or retroactively (to moratoria currently in effect).

c. Whether moratoria that affect new cellular providers while old ones construct or modify facilities should be preempted by the FCC.

d. Whether zoning moratoria that are otherwise acceptable should be ruled illegal if they are based upon concerns about radiation from cellular antennas.

5. Municipalities were concerned about this proceeding for the following reasons, among others:

a. Zoning moratoria are a permissible zoning tool and do not prevent cellular service. The FCC's proposal did not recognize this and impermissibly attempted to create a uniform maximum duration for such moratoria.

b. It violated the exclusive local zoning authority over cellular towers which Congress confirmed in the Telecommunications Act of 1996.

c. The FCC would likely use a ruling in this proceeding as a precedent to further limit local zoning authority over cellular towers, such as:

(1) Cellular companies' claims that the FCC should ban any delay in acting on a request for cellular tower zoning approvals, and

(2) Banning most zoning changes affecting cellular towers (because they affect new providers more than they affect incumbents with some towers already in place)

d. The FCC violated applicable statutory and constitutional provisions by failing to either proceed on a case-by-case basis (with notice to the affected municipalities) or use the rulemaking process.

(1) Use of this procedure may have substantial impact on many other FCC attempts to preempt local authority.

e. The FCC action violated principles of Federalism and States' Rights, where zoning is generally a matter of exclusive local concern. See discussion in Section V.B., below.

f. The FCC action violated the Freedom of Speech and other rights of residents to voice their concerns about radiation from cellular towers.

6. In August, 1998, the proceeding was resolved with an agreement between the FCC's Local and State Government Advisory Committee, the cellular industry and the FCC which provides generally as follows (see www.FCC.gov/statelocal/agreement.html):

a. It provides a set of suggested "best practices" by which the industry and local governments can work cooperatively on wireless tower siting.

b. It provides an informal dispute resolution process administered by the FCC for use by local governments and industry regarding moratoria or other disputes that may affect wireless tower siting. The process is voluntary and advisory.

c. The cellular industry agreed to withdraw its preemption petition with prejudice, meaning that it may not be refiled.

B. RF Radiation Proceeding.

1. The 1996 Act states it preserves local zoning of cellular towers with one exception: Municipalities cannot regulate cellular towers to the extent their radiation complies with FCC rules.

2. In August, 1997, the FCC issued a Notice of Proposed Rulemaking which would have this "exception swallow the rule" by allowing the FCC to review and reverse any local zoning decision that it concludes is "tainted" by concerns over RF radiation. See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Telecommunications Act of 1934, FCC 97-303, WT Docket No. 197-192, *Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 12 FCC Rcd 13494, 13540-60 (1997). The proposed rule would have the following elements, among others:

a. A cellular provider could appeal directly to the FCC any zoning decision (or failure to act) it claims is based on concerns over radio wave radiation from a cellular tower.

b. Appeals would not be from the final decision of a municipality (e.g.--board of zoning appeals) but instead would be from the initial decision (e.g.--of a zoning or planning commission).

c. FCC appeals would proceed in parallel with board of zoning appeal proceedings and any local court appeals.

d. The FCC could reverse zoning decisions if there is any evidence showing that concern over radiation was the basis (or partial basis) for the decision.

(1) The FCC stated it could reverse zoning decisions that are otherwise perfectly acceptable if radiation concerns were raised.

(2) The FCC apparently will "second-guess" the reasons given by a municipality for its decisions.

e. "Where the FCC does not have specific preemption authority" over cellular zoning decisions it would intervene in court appeals by industry providers to "provide the court with our expert opinion."

f. The FCC suggested these rules should also apply to private restrictions affecting cellular towers, such as land trusts, conservation easements, condominium rules, homeowner association rules, subdivision restrictions, and deed restrictions.

(1) In a related proceeding, the FCC is being asked to rule that it can prohibit all state court lawsuits affecting cellular towers, such that (among other things) all private land restrictions limiting the construction of cellular towers could not be enforced.

g. Municipalities could not require cellular telephone companies to measure the radiation from their antennas (to show it complies with FCC rules).

(1) The FCC rarely, if ever, conducts such measurements for certain classes of towers.

3. Municipal concerns as to this rulemaking include:

a. The FCC is proposing to use the "radiation exception" to overturn the 1996 Telecommunications Act's preservation of local zoning authority over cellular towers because in contested cases, usually some resident will mention RF radiation.

b. The proposal violates principles of Federalism and States' Rights, especially by allowing the FCC to "second-guess" the reasons for local decisions and reverse decisions that are otherwise acceptable. See discussion in Section V.B., below.

c. The proposed rule violates the 1996 Act's preservation of local authority over cellular tower radiation exceeding FCC limits.

d. It infringes on citizens' Freedom of Speech and right to petition government, particularly given that in many communities, by statute, charter or local practice, there is a public comment period where citizens may speak on agenda and non-agenda items and their comments cannot be restricted.

e. It is a "gag rule" because citizens who properly raise radiation concerns (e.g.-exceeding FCC limits) may increase the chances towers will be located near them!

f. The FCC is in a conflict of interest position because it has been directed by Congress to help balance the Federal budget by selling off airwaves for cellular service. It is giving first priority to this with health and safety of citizens getting little attention.

g. The FCC's rationale for not measuring radiation from towers typically assumes a single tower standing by itself. Increasingly, towers are mounted on the sides of buildings or with multiple antennas "collocated" one on top of each other, such that they may interact in unanticipated ways.

(1) If the radiation is within FCC limits, why is it opposed to measuring it?

(2) As the City and County of San Francisco set forth in its comments, most cellular antennas in that city are mounted on rooftops to which members of the public often have access. Out of approximately 100 cellular antenna applications monitored by the City's Public Health Bureau for compliance with the FCC's RF radiation standards, approximately 40 to 50 had the potential for human exposure in excess of FCC limits. The City required mitigation measures to be taken in many instances to bring RF radiation within FCC limits.

(3) And as the City and County of San Francisco pointed out, the FCC conducts no on-site monitoring of cellular antennas for compliance with RF radiation standards.

h. A related concern is that interference from cellular antennas has disrupted and blocked police, fire, and public safety radios. According to press reports, the problems sometimes have involved Nextel sites, perhaps because it operates in the 800 MHz band, close to public safety frequencies. The FCC is not staffed or well situated to investigate and resolve such problems, which are highly site-specific.

4. The rulemaking proceeding was concluded by Report and Order FCC 00-408 adopted November 13, 2000, released November 17, 2000. The Report and Order concluded that FCC "review of requests for relief from impermissible State and local regulation of personal wireless facilities based on . . . RF emissions . . . shall be treated as petitions for declaratory ruling." Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Telecommunications Act of 1934, WT Docket No. 197-192, *Report and Order*, __ FCC Rcd __, FCC 00-408 at ¶ 1 (2000). The Report and Order then specified certain procedural and timing requirements for such proceedings, which are those applicable to petitions for preemption of State or local authority under Section 253 of the 1996 Act, with a minor change in service requirements.

a. The Report and Order dealt exclusively with the preceding procedural provisions relating to petitions for declaratory rulings--it did not include the types of provisions set forth in the Notice of Proposed Rulemaking (described above) to which municipalities strongly objected.

b. The FCC appeared to have been strongly influenced by the very small number of disputes involving RF radiation issues, and the fact that court decisions have tended to uniformly uphold the FCC's exclusive jurisdiction on such matters. See the *Report and Order* at footnote 56.

c. The FCC was also favorably influenced by the promulgation of "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance" (see Section II.A.8.b above) which had been prepared and released by the FCC and its Local and State Government Advisory Committee since the issuance by the FCC of its Notice of Proposed Rulemaking in this proceeding.

C. Broadcast Tower Proceeding

1. In August, 1997 the FCC issued a proposed rule requiring (a) states and municipalities to act on (b) all zoning, building permit, environmental permits and any other approvals (c) necessary for the construction or modification of radio and TV station towers (d) within 21 days to 45 days irrespective of (e) the subject matter of the approval, its complexity, the time needed to obtain information, local requirements for notice to adjoining landowners, hearing requirements, appeal periods and the like. See FCC 97-296, MM Docket No. 97-182.⁵

a. Failure to act in these time frames results in the permit or approval automatically being granted!

b. The FCC claims this change is needed to aid the initial construction of new towers needed for High Definition Television (HDTV), also known as digital TV (DTV). It does not explain why the proposed change should apply to AM and FM stations and continue indefinitely.

c. Some of the new digital TV towers will be nearly one-half mile high -- taller than the Sears Tower or Empire State Building.

2. In addition, under the proposed rule:

a. Zoning approval, building permits, environmental permits and code approvals could only be denied for "clearly stated safety" reasons.

⁵Compare American Towers v. Williams, 146 F. Supp. 2d 27 (D.C.D.C. 2001) ("American Towers v. Williams") (Rejecting claim that Section 704 of 1996 Act applies to broadcast tower proposed primarily for HDTV, if cellular antenna will also be placed on tower).

b. Approvals could not be denied or conditioned due to aesthetics, impact on property values, designation as a historic site or the like.

c. Municipalities must prove that any zoning, environmental or code requirements are reasonable in light of the Federal interest in having radio/TV stations and "fair competition among electronic media."

d. All appeals of state and local decisions affecting radio and TV towers would go to the FCC in Washington, not to the local courts.

3. States and municipalities are concerned about this rulemaking for the following reasons, among others:

a. The proposed rule violates principles of Federalism which restrict Federal authority, promote States' Rights and recognize zoning and permitting as being a uniquely local concern. See discussion in Section V.B., below.

b. It would set a dangerous precedent for Federal agencies intruding in local affairs by mandating that state and local approvals are "automatically deemed granted" for private parties.

c. The time limits proposed by the FCC are unrealistic and bear no relation to the procedural requirements of state and local law, requirements of due process, or zoning law.

d. The proposed rule totally disregards property values, historic districts, aesthetics and the like. Even safety rules apparently can be overruled by non-safety "Federal interests."

e. Rather than change the artificial deadline it set for HDTV (which may not be met for other reasons) the rule puts zoning, property values, safety and Federalism at risk.

4. The FCC appears to have backed off some on this rulemaking.

a. Its experience in the top television markets (to convert to HDTV in 1998 and 1999) have not shown state and local permitting to be a problem.

b. On May 29, 1998, the FCC created a "DTV Tower Strikeforce" to target potential problems in the implementation of HDTV and to work with state and local governments to expedite its implementation. See FCC Report No. MM 98-6.

c. Efforts to reach an amicable resolution with broadcasters have not been successful.

5. To date nothing has resulted from the proposed rulemaking. In September 2006, the FCC issued a ruling in response to a request for a declaratory ruling that, "under the current policy of the FCC, local zoning rules which are predicated on land use preservation, including preservation of agriculturally-zoned land and scenic vistas, would not be preempted by the Commission" with respect to construction of "new broadcast towers in certain rural areas and height restrictions in other" areas. The Commission ruled that "It is true that, to date, the Commission has not adopted any rules or regulations that preempt local zoning rules affecting construction of broadcast towers." DA 06-1920, released September 26, 2006.

D. 1999-2000 Wireless Preemption Proceeding

1. Introduction: On July 16, 1999, the FCC

a. Proposed a rule

(1) Preempting state and local laws, ordinances, building codes and deed restrictions affecting telecommunications antennas, and

(2) Allowing multiple telephone companies to (1) place their wires in buildings and (2) place their antennas on buildings but (3) without the permission of the building owner,

b. Issued a Notice of Inquiry to consider preempting local management of rights of ways, compensation, permitting and fees regarding telephone companies, and

c. Also issued a Notice of Inquiry to consider preempting state and local taxation of telephone companies.

d. See generally FCC 99-141, WT Docket No. 99-217, CC Docket No. 96-98. Further information on the proposed rule (not the Notices of Inquiry) is as follows.

2. Proposed Rule: The FCC's proposed rule would have allowed any cable or phone company to extend their wires to any tenant of a building and to place their antennas on the building roof. The FCC's stated goal in the rulemaking was to increase competition in local telephone service by allowing any tenant of a building to be physically reached and served by any phone or cable company the tenant chooses. In part the proposed rule would have extended the FCC's 1996 rules prohibiting landlords from preventing tenants from installing small direct broadcast satellite dishes to other types of antennas.

a. A principal emphasis of the proposed rule was "fixed wireless" telephone service where a new phone company reaches a building via a microwave dish on the roof, not wires in the streets.

b. To encourage the desired competition to occur, the proposed rule would have allowed all phone and cable companies to place wires in buildings and antennas on their roofs necessary for this to occur. Building owners (including units of government) would not have been allowed to prohibit this from occurring.

3. Municipal Concerns: Municipal concerns on the proposed rule included the following:

a. The rule would have created major problems where municipalities are landlords, such as for housing projects. In some states eighty (80) to two hundred fifty (250) new telephone companies have been approved to provide service. Each tenant could have had a different wire, antenna and phone company. Serious safety and other problems could occur at prisons and municipal hospitals.

b. The rule would have preempted building codes, zoning codes, safety, and environmental laws that would impair placing multiple antennas of unlimited size on the roofs of buildings. Private restrictions (deeds, condominiums, by-laws, homeowner association restrictions) on these antennas would have been prohibited as well.

c. Such preemption would ignore the safety and other concerns which these items address. For example, allowing multiple antennas of unlimited size on buildings (without screening) invites structural problems and collapses, and encourages urban blight.

d. The FCC's proposed rule in part was based upon its broad interpretation of a statutory provision allowing cable and phone companies to use "rights of way" "owned or controlled by a utility." If the FCC broadly interprets this provision to include the roofs and interiors of buildings, it may well apply it next to streets and highways to achieve the FCC's apparent goal of preempting all local telephone franchising, permitting, and fees.

e. The FCC did not publish the proposed rule, making it much harder to provide detailed comments on it.

f. The proposed rule violated principles of Federalism and States' Rights where zoning and local safety concerns are exclusively reserved to municipalities and Congress is limited in the scope of its authority under the Commerce Clause and Tenth Amendment (see discussion in Section V.B below).

g. The proposed rule violated constitutional property rights by taking public and private property without compensation.

h. Congress had not given the FCC authority to take these actions.

i. There is some risk given FCC proceedings in this area that cellular providers may ask—and the FCC may agree—that any resulting rule must be extended to cellular antennas, such that if a municipality (or other landlord) allows a cellular antenna or tower on its property, that it has to allow many other cellular antennas or towers to be placed there (and perhaps on other property as well).

4. A rule was adopted by the FCC on October 12, 2000 which generally preempts local zoning and building codes only for fixed wireless dishes one (1) meter or less in diameter placed in areas (balconies, patios) within a user's exclusive use and control. See generally First Report and

Order and Further Notice of Proposed Rulemaking, FCC 00-366, WT Docket 99-217, CC Dockets 96-98, 88-57 (October 12, 2000) (“Wireless Order”); 47 CFR § 1.4000 (as thereby amended).

a. The new rule extends the then-current FCC "Over the Air Reception Device" ("OTARD") rule generally preempting zoning and building codes for small (1 meter) video satellite dishes to customers' fixed wireless dishes of the same size.⁶

b. The text accompanying the rule said it is primarily intended to benefit tenants (such as in office buildings) by allowing them to place wireless antennas on balconies but not on rooftops (or other "common areas" outside the tenant's exclusive use and control). Providers may claim that the rule extends to such locations as single family dwellings as well.

c. Because such dishes transmit signals, municipalities may require that they be installed by a professional installer. Wireless Order ¶ 119. "Interlocks" necessary to promote safety may be allowed as well. Id at fn. 256.

d. The FCC disagreed that in Section 704 Congress had expressly preserved local zoning authority over such antennas.

e. The FCC said that local regulations addressing asbestos and other safety concerns would continue to be valid, subject to certain restrictions in 47 CFR § 1.4000, particularly if they accomplish a clearly defined safety objective.

f. Historic preservation regulations are also exempted.

g. The rule does not apply to rooftops and other "common areas" not within a tenant's exclusive care and control.

h. The FCC, although in the past having stated strongly that aesthetics would require an environmental impact statement ("EIS"), stated that it believed the aesthetic impact of small dishes was minimal. It declined to prepare an EIS on this or other environmental grounds.

5. The constitutionality of the OTARD rule generally, and of this expansion of it, is suspect under Northern Cook County and other cases Constitutionally restricting the scope of Federal authority and promoting states' rights, particularly in matters relating to state and local authority over land and water use matters. See discussion in Section V.B., Constitutionality of Section 704, below. For related Constitutional takings claims issues, see Greater Boston Real Estate Board v. Massachusetts Department of Telecommunications & Energy, (Suffolk County, Mass, Superior Court Civil Action No. 00-4909A, July 27, 2001) rejecting on constitutional takings ground a state regulation requiring landlords to give telecommunications companies space in buildings for their wires, even if landlord objects. But see Building Owners and Managers Association v. FCC, 254 F.3d 89 (D.C. Cir 2001) upholding over similar constitutional objections earlier provisions of the OTARD rule as applied to landlords.

⁶For a general description of these rules see our paper on satellite dish rulemaking.

E. Denver/Lake Cedar Zoning Preemption Proceeding

1. Summary: In a potentially precedent-setting case in November, 1999 several Denver TV stations known as the "Lake Cedar Group" and the broadcast industry asked the FCC to preempt a local zoning decision denying approval for an 854 foot TV station tower. This case is important to municipalities and their residents because it is the first time that the FCC has been asked to step in and reverse a local zoning decision on broadcast towers. It appears to be intended by the broadcast industry to set a precedent that the FCC can preempt local zoning of radio and TV towers, with preemption then being expanded on a case-by-case basis. See FCC Public Notices DA 00-764 and DA 00-1090.

2. The Case: Several Denver TV stations proposed a new 854-foot TV tower on Lookout Mountain just west of Denver. After delays of approximately a year and a half they filed for rezoning of the land in question (which already contains some TV towers). The rezoning request was denied by the Jefferson County Board of Commissioners for, among other things, failure to comply with applicable land use plans, failure to meet set back requirements (three houses were within the "fall zone" equal to 110 percent of the height of the tower) and failure to show there were no reasonable alternative sites available. The broadcasters then filed at the FCC asking it to overturn the local zoning decision because failure to do so would conflict with the FCC's requirement that all Denver TV stations offer the new, high definition television ("HDTV") service by November 1999. The tower was for such services. The broadcasters claimed:

a. That Jefferson County officials "bowed to political pressure from a small cabal of intransigent activists,"

b. That the FCC needs to send a "strong and clear signal... to other localities who may be considering obstruction of HDTV broadcast towers, of needed zoning variances, or of other local approvals," and,

c. That there was no factual or legal basis for the county's action.

d. At the FCC the broadcasters filed a lengthy study on the lack of other sites which they had not presented at any point during the year-long local rezoning process.

e. The Denver broadcasters also filed an appeal in the Colorado courts challenging the rezoning denial. That case was ready for decision in the spring of 2000.

f. Jefferson County and area residents filed responsive documents at the FCC opposing the broadcaster's requests and in general stating that there was ample evidence in the record to support the denial; that the broadcasters had failed to demonstrate the lack of alternate sites; noting how the broadcasters had needlessly delayed seeking their rezoning request for a year and a half (such that any delay in meeting a November 1999 HDTV conversion was largely the broadcasters fault). These filings also opposed preemption of local zoning on statutory, Constitutional and policy grounds.

3. Municipal Concerns: Municipalities should be concerned about this case for the following reasons, among others.

a. Zoning and planning are best handled at the local level. Federal preemption of local zoning is unconstitutional (see discussion in Section V.B below), unworkable and a violation of Federalism.

b. The case appears to be intended by the broadcasters to set the precedent of making the FCC a "National Board of Zoning Appeals" which can preempt local zoning decisions on radio towers, TV towers and many other matters.

c. The broadcasters' request is contrary to 80 years of precedent where local zoning has worked well and the FCC has consistently deferred to municipalities on zoning of broadcast towers. "If it isn't broke, don't fix it."

d. There is no need for the FCC to act because there is a prompt, effective remedy in the Colorado courts where the broadcasters have already appealed.

e. Appeals on this and many zoning matters are solely on the record. It is extremely dangerous for the FCC to receive new evidence not submitted to the local municipality (it encourages applicants not to present municipalities with all the facts necessary for local zoning decisions).

f. Most fundamentally, if local zoning can be preempted here then FCC and Federal preemption of local zoning on a wide range of other topics is sure to follow.

4. Status: The FCC issued Public Notice DA 00-764 on April 10, 2000 requesting public comments on the broadcaster's petition. Comments were submitted by numerous parties on May 10, 2000 and replies on June 8, 2000. The National League of Cities, National Association of Counties and Texas Coalition of Cities For Utility Issues on May 26, 2000 filed a Petition for Environmental Impact Statement with the FCC due to the environmental impacts if the broadcaster's petition is granted.

V. Recent Court Cases on Section 704

A. Cases Covered: The following is a summary of the principal "for publication" Federal Courts of Appeals cases to date interpreting Section 704, plus some Federal District Court and state court cases.

1. The Courts of Appeals cases cover:

a. Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico (First Circuit).

b. New York, Vermont, and Connecticut (Second Circuit).

c. Pennsylvania, New Jersey, and Delaware (Third Circuit).

- d. Virginia, West Virginia, Maryland, North Carolina, and South Carolina (Fourth Circuit).
- e. Texas, Louisiana and Mississippi (Fifth Circuit).
- f. Michigan, Ohio, Kentucky, and Tennessee (Sixth Circuit).
- g. Illinois, Indiana, and Wisconsin (Seventh Circuit).
- h. North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri and Arkansas (Eighth Circuit).
- i. California, Hawaii, Alaska, Washington, Oregon, Montana, Nevada, Idaho and Arizona (Ninth Circuit).
- j. Colorado, Kansas, Wyoming, Oklahoma, New Mexico, and Utah (Tenth Circuit).
- k. Georgia, Florida, and Alabama (Eleventh Circuit).

B. Constitutionality of Section 704:

1. The constitutionality of Section 704 is questionable under the Commerce Clause, First Amendment and Tenth Amendment of the U.S. Constitution. Constitutional concerns regarding Federal intrusion in areas of state and local land use regulation have been upheld by the Supreme Court, discussed in one leading Court of Appeals case on Section 704, and raised extensively in the FCC proceedings described above.

2. Commerce Clause and 10th Amendment Issues

a. "The Congress shall have the power: . . . (3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;" U.S. Const. Art. I, Section 8.

b. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X.

c. Recent U.S. Supreme Court cases have interpreted the 10th Amendment--and the Commerce Clause--in favor of states, municipalities and our "dual system of governance" so as to strike down Federal statutes which improperly intrude on state and local rights and authority. See, e.g. Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, 531 U. S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 ("SWANCC") (as discussed below, construing Federal Clean Water Act so as not to preempt state and local authority because statute would likely be unconstitutional if so construed); Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991); New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992) ("New York") (invalidating Low-Level Radioactive Waste Policy Act); U.S. v. Lopez, 514 U.S. 549, 115 S. Ct. 1624,

131 L. Ed. 2d 626 (1995) (invalidating Federal Gun Free School Zones Act); Printz v. U.S., 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) ("Printz") (invalidating portions of Brady Handgun Violence Prevention Act).

d. "[T]he Federal Government may not compel the States to enact or administer a federal regulatory program," New York, 505 U.S. at 188, due to the blurring of lines of political accountability that result--

"[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." Id. at 168-169 (citations omitted).

e. In the Federalism context, and the proper spheres of local and Federal authority, the courts resist attempts by the Federal government to usurp the general police powers traditionally reserved to the states, and recognize zoning as a matter of particularly local concern, into which the Federal government is generally restricted from intruding.

(1) "As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" Printz, 117 S. Ct. at 2377.

f. Congress' authority to adopt Section 704 was based on the Commerce Clause. However, the Supreme Court in SWANCC affirmed that Congress' authority under the Commerce Clause is limited vis-a-vis traditional state and local land use. In SWANCC several municipalities proposed to build a landfill on property which included a wetland. Due to the presence of wetlands the Army Corps of Engineers refused to issue a permit needed under the Clean Water Act for landfills that effect the "waters of the United States." The U.S. Supreme Court upheld the municipalities' contention that the Corps was acting beyond the reach of Federal jurisdiction, stating that it feared that any other ruling would extend the Corps' jurisdiction far beyond "navigable waters" (a traditional test of Commerce Clause jurisdiction) to farmyard ponds and other isolated pools of water that were not adjacent to open water.

(1) While the Court technically ruled against the government on the basis of rules of statutory construction, it clearly intimated that, were it compelled to do so, it would have significant constitutional concerns about the Corps' efforts to "push the limit of Congressional authority." 531 U.S. at 173. Its concern, said the Court, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." Id., citing

United States v. Bass, 404 U.S. 336 at 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971) ("Unless Congress conveys its purposes clearly, it will not be deemed to significantly change the federal-state balance"). The Court concluded that there was "nothing approaching a clear sign from Congress" that it intended federal power to reach so invasively into the area of land use regulation. To rule in favor of the Corps, said the Court, "would result in a significant impingement of the states' traditional and primary control over land and water use." Id. at 174 (emphasis supplied).

(2) The decision is part of a trend to apply a much more restrictive construction to the Commerce Clause and thus restrict the powers of the Federal government. See, e.g. U.S. v. Lopez, supra (Federal Gun Free School Zones Act invalidated as exceeding Federal power under the Commerce Clause); Printz v. U.S., supra (invalidating portions of Brady Handgun Violence Prevention Act); U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) (portion of Federal Violence Against Women Act providing Federal civil remedy for certain gender-based assaults exceeded Federal authority under Commerce Clause and Fourteenth Amendment).

g. The leading case (decided before SWANCC) considering the constitutionality of Section 704 is Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000) ("Nottoway County") where each member of a divided court wrote a separate opinion which collectively reversed on other grounds a District Court decision which, among other things, had ruled that Section 704 was Constitutional. One judge of the three judge panel wrote at length why Section 704 was unconstitutional under the 10th Amendment and New York/political accountability line of cases, a second judge at length explained why the District Court was correct that Section 704 was Constitutional under a different reading of New York and other cases, and a third judge found the District Court decision defective on other grounds (and thus unnecessary to reach the Constitutional issue) such that the panel as a whole did not decide the Constitutionality of Section 704.

h. A Tenth Amendment challenge to Federal preemption of local regulation regarding radio frequency interference from cellular towers was rejected in Southwestern Bell Wireless v. Johnson County Board of Commissioners, 199 F.3d 1185, 1193-1194 (10th Cir. 1999) ("Johnson County").

3. 1st Amendment Issues

a. "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for a redress of grievances." U. S. Const. Amend I.

b. These principally relate to arguments by cellular companies that any mention of RF radiation invalidates local zoning proceedings, such as a citizen mentioning RF radiation in a public hearing, even if it is disregarded by the municipality.

c. Such a position, if adopted by the courts, would infringe on citizens' Freedom of Speech rights and right to petition government, particularly given that in many

communities, by statute, charter or local practice, there is a public comment period where citizens may speak on agenda and non-agenda items and their comments cannot be restricted.

d. See discussion and description of 1st Amendment type issues in Section IV on FCC rulemakings, above.

4. Generalized preemption deadline rejected by Ninth Circuit in San Francisco, below 400 F.3d at 735.

5. See 10th Amendment and other constitutional issues discussion in the Substantial Evidence-Standard of Review and Written Decision/Written Record sections of this paper, below.

C. Which Applies to Zoning Decisions, Section 253 or Section 704, and When?

1. Some carriers argue that Section 704 is inapplicable to most zoning decisions, and that Federal Communications Act Section 253, 47 U.S.C. Section 253, should apply instead. The leading case, where the Ninth Circuit initially agreed with the carriers and then reversed itself in an en banc decision, is Telephony PCS v County of San Diego, 490 F.3d 700 (9th Cir. 2007) (amended opinion, original opinion at 479 F.3d 1061 superseded) ("San Diego-1"), reversed en banc 543 F.3d 571 (2008), *cert. denied*, 77 USLW 3708 ("San Diego en banc"). A description of how this case evolved, the two major rulings by the Court of Appeals, their impact and the refusal of the U.S. Supreme Court to reverse the en banc decision is as follows.

2. Sprint filed suit initially with a facial challenge to San Diego County's entire cellular tower zoning ordinance. The case was notable because the challenge was filed not under Section 704 (47 U.S.C. Section 332(c)) which imposes certain Federal limits on local zoning of cellular towers. Instead, the challenge was filed under 47 U.S.C. Section 253(a).

a. Section 253 preempts, subject to certain exceptions, state and local regulations and legal requirements which "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. Section 253(a). It has been applied most frequently in the right of way context to franchising and permitting requirements.

b. Sprint argued, and in San Diego-1 the Ninth Circuit initially agreed, that the County's wireless zoning ordinance was preempted by Section 253(a). That decision was based in significant part upon a prior line Ninth Circuit decisions in the right of way context that Section 253 not only preempts regulations that *in fact* prohibit the provision of services but also preempt those that "may have" the effect of prohibiting service (City of Auburn v Qwest Corp 263 F.3d 1160, 1175 (9th Cir 2001)).

(1) Other Circuit Courts of Appeal generally have not followed Auburn in this regard, or have done so without discussion, and in fact have been critical of Auburn on this point. Level 3 Communications v St. Louis 477 F.3d 528, 532-533 (8th Cir. 2007), *cert. denied*, 77 USLW 3708 ("Level 3").

(2) In San Diego en banc the Ninth Circuit after careful analysis reversed Auburn as incorrect, and agreed with the majority of Circuits that "Under both [§§ 253(a) and 332(c)(7)(B)(i)(II) of the Communications Act of 1934] a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient." San Diego en banc at 579 (emphasis in original). The Court did not expressly reach the issue of whether in fact Section 253 applied here, because it ruled that on a facial challenge to an ordinance, such as was present here where Sprint had not applied for zoning approval, but simply wanted the cell tower zoning section of the zoning ordinance invalidated, the substantive standard was the same under both Sections 253 and 332(c)(7)(B)(i)(II).

(3) Based on this ruling the Court en banc then reversed San Diego-1. It had "no difficulty concluding" that the San Diego ordinance was neither an outright ban on nor an effective prohibition of wireless facilities. Id. The Court went on to "focus on the discretion reserved to the zoning board" and stated approvingly that "A certain level of discretion is involved in evaluating any application for a zoning permit" and that it is likely "that a zoning board would exercise its discretion only to balance the competing goals of an ordinance-the provision of wireless services and other valid public goals such as safety and aesthetics." Id.

(4) Sprint asked the U.S. Supreme Court to reverse the Ninth Circuit's en banc decision. 77 USLW 3366 (Dec 10, 2008). Each year the Supreme Court is asked to reverse thousands of decisions, but only accepts and rules on roughly one hundred cases. In this case, the Court asked the Solicitor General of the United States for her views on whether this was a case of sufficient importance for it to be one of the one hundred. In May, the Solicitor General said that it was not.

(5) In her May brief, in which she was joined by the General Counsel of the FCC, U.S. Solicitor General Elena Kagan said, among other things, that:

(a) The Ninth Circuit en banc decision, and the Level 3 (non-cell tower case) from the Eighth Circuit, were correctly decided: A plaintiff must show "practical effects" of the requirement at issue, not just that it "may" or "could" in the future be applied so as to prohibit service. In other words, municipalities are correct on how Section 253 is to be interpreted in this respect.

(b) It was an "unresolved threshold question" of whether Section 253 applies to cell tower zoning and similar issues, but noted that the FCC was now considering this issue in connection with the CTIA "Shot Clock" Petition for Declaratory Rulemaking discussed in Section U below.

(c) The FCC can resolve future differences regarding the interpretation of Section 253(a) under Section 253(d) and National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U. S. 967, 982-983 (2005) (holding that an agency's reasonable interpretation of an ambiguous statute is

authoritative and binding on the courts of appeals, even those that have previously interpreted the statute differently). This statement appears intended to put the FCC potentially into a prime role in future interpretations of Section 253.

c. Some of the background and history of the San Diego case is as follows. This may be useful, because providers continue to argue, albeit with diminished force after San Diego en banc and Level 3 cases, that Section 253 applies to and preempts some local zoning ordinances. See, e.g., USCOC of Greater Missouri v. Village of Marlborough, ___ F. Supp. 2d ___, 2009 WL 1176282 (E.D. Missouri 2009) (rejecting Section 253 challenges to zoning ordinance based on Level 3 and San Diego en banc); New York SMSA Limited Partnership v. Town of Clarkston, 603 F. Supp. 2d 715 (SDNY 2009) ("Town of Clarkston-2") (based upon San Diego en banc rejecting Section 253 and 332(c)(7)(B)(i)(II) facial challenges to zoning ordinance, and distinguishing prior Second Circuit case more in line with San Diego-1, but ultimately invalidating ordinance on other grounds and remanding same to Town for redrafting).

d. In its initial decision in San Diego-1 the Ninth Circuit had attempted to give effect to both Section 253(a) and Section 704 by indicating that Section 253 allowed facial challenges to "regulations" (ordinances) while Section 704 governs challenges to individual siting "decisions". San Diego-1 at 9-10 (page references are to slip opinion). It recognized that the use of Section 704 "to preempt an entire wireless facilities zoning ordinance is a new and different application" of that Section. Id. It justified its conclusion by the "high burden" for facial challenges (no set of circumstances exist under which the challenged item would be valid), stated that it is particularly difficult to challenge a zoning ordinance (because on their face they may not suggest discrimination between providers or prohibition of service) and said that "in most cases, only when a locality applies the regulation to a particular permit application . . . can a court determine whether [the Federal Communications Act] has been violated." Id. at 10. However, the Court then went on to preempt the county's wireless zoning ordinance.

e. The particular aspects of the County's zoning ordinance which caused the Court to initially rule in San Diego-1 that it "presents barriers to wireless telecommunications: and is preempted" were the following (in combination):

- (1) Adding additional requirements for wireless submittals for zoning approval "in addition to an already voluminous list" for ordinary zoning submittals. Id. at 14. The Court apparently is referring to requirements related to a visual impact analysis, descriptions of potential alternative placements, landscaping plan, statement about the applicant's willingness to co-locate, etc. See slip opinion at 5.
- (2) Discretion on the part of zoning authorities in making decisions.
- (3) Criminal penalties for violation of the zoning ordinance.
- (4) Allowing the County to decide whether a tower is "'camouflaged', 'consistent with community character' and designed to have minimum 'visual impact'." Id. at 14.
- (5) Subsequent cases referring issues for decision back and forth between the California Supreme Court and the Ninth Circuit provide additional information on the rationale for the Ninth Circuit's initial decision.

f. The Ninth Circuit in its initial decision in San Diego-1 appeared to be influenced by (1) prior cases which "recognized the 'preemptive language [of Section 253(a)] to be clear and 'virtually absolute' in restricting municipalities to a 'very limited and proscribed role in the regulation of telecommunications'." Id at 11, citations omitted; (2) the language of Section 253(a) which does not expressly exempt Section 704; and in particular (3) its Auburn line of cases finding typical municipal application requirements to be impermissibly onerous in that they "might" prohibit telecommunications service.

g. District Courts in the Ninth Circuit subsequently applied San Diego-1 to invalidate the application of zoning ordinances to cell towers. For example, in T-Mobile USA, Inc v. City of Anacortes (W.D. Wash, 2008) (Case No. C07-1644RAJ) the Court summarized and applied San Diego-1 and related cases as follows (all citations omitted):

(1) "Section 253(a)'s preemptive language is 'virtually absolute' in restricting municipalities to a 'very limited and proscribed role in the regulation of telecommunications'." Slip Opinion at 5.

(2) "[C]ourts have held that a combination of certain conditions imposed by local ordinances amounts to a prohibition for purposes of Section 253(a) . . . (1) an onerous permit application process, (2) a franchise requirement, (3) [criminal] penalties for failure to comply with ordinance requirements, (4) subjective aesthetic design requirements, and (5) regulations granting unfettered discretion to the zoning authority to deny permits". Id.

(3) "The county [wireless zoning] ordinance challenged in [San Diego-1] contains similar provisions to the [City wireless zoning] provisions challenged in this case. Both add voluminous submission requirements to a multi-layer permitting process, both contain criminal penalties for non-compliance, and both include subjective aesthetic and design requirements that vest significant discretion in the decision-making body." Id at 7.

(4) And to a similar effect see Newpath Networks LLC v. City of Irvine, (C.D. Cal. 2008) 2008 WL 2199689, and subsequent decision at 2008 WL 2199687 (enjoining enforcement of zoning ordinance against telecommunications applicants in Irvine).

D. Local Zoning Authority is Generally Preserved by Section 704

- a. Numerous cases recite that in general, Section 704 preserves local zoning authority, with most of its requirements (substantial evidence, short time period to appeal zoning decisions) being taken directly from local zoning law, with the additions being mainly the addition of some procedural requirements and a ban on considering RF radiation.
- b. See, among others, National Tower v. Plainville Zoning Board of Appeals 297 F3d 14, 19 (1st Cir 2002) ("The [act] attempts, subject to five limitations, to preserve state and local authority over the placement and construction of [wireless] facilities.") and the

lengthy discussion and extensive citations in Kay v. City of Ranchos Palos Verdes 504 F. 3d 803 (9th Cir. 2007).

E. Personal Wireless Facilities and Services—What Towers and Antennas Are Covered?

1. Section 704 does not apply to a tower built primarily for HDTV purposes even if a cellular antenna would then be placed on the tower. See discussion and holding in American Towers v. Williams, 146 F. Supp. 2d 27 at 34-36.

2. Section 704 imposes different requirements for personal wireless "facilities," "services" and "providers." These three terms are defined in Section 704(a)(7)(C). Municipalities should be attentive to these distinctions, for example:

a. Section 704(a)(B)(i)(I) prohibits discrimination between "providers of functionally equivalent services."

b. It also bans prohibitions/effectively prohibiting the "provision of personal wireless services." Id., (B)(i)(II).

c. The duty to act in a reasonable time relates to personal wireless "facilities." Id., (B)(ii).

3. In many instances, cellular providers do not own the towers on which their antennas are placed. The towers are owned by cell tower leasing companies who may or may not be covered by the provisions of Section 704 quoted above.

4. Note that personal wireless services are defined as including "unlicensed wireless service", which would include Wi-Fi and similar services. Id., (C) (iii).

5. Actual cell phones are not covered by Section 704. Murray v. Motorola, Inc., ___ F. 3d ___, ___ (D.C. Cir, 2009) (slip opinion at 14) ("Murray v. Motorola").

F. What Actions by Municipalities are Covered?

1. Section 704 applies in general to the "*regulation of the placement, construction, and modification of personal wireless service facilities*" by any State or local government or instrumentality. See, for example, Section 704(a)(B)(i).

2. Cell phone companies have contended in FCC proceedings that this language extends not just to the obvious category of zoning decisions, but to such local "regulation" as building codes, permits and environmental restrictions. See the discussion below on the "FCC Backup Power Ruling".

G. Who Can Sue?

1. Landowner who sold option to cellular company can sue based on denial of zoning approval, even when cellular company withdrew. U.S. Cellular v. City of Seminole, 180 Fed. Appx. 791.

H. Duty to Act in a Timely Manner:

1. Section 704 imposes a duty to act in a timely manner: "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." Section 704(7)(B)(ii).

2. One of the few cases applying this section is Tennessee ex rel. Wireless Income Properties v. City of Chattanooga, 403 F. 3d 392 (6th Cir. 2005) ("Chattanooga"). Wireless applied for permits for several cellular towers in Chattanooga following which the City imposed a moratorium on such permits and then amended its zoning ordinance. After the moratorium and amendments, Wireless' applications did not comply with the newly amended ordinances. City officials advised Wireless of the changes so that it could amend its applications to comply with the new ordinance, but did nothing to approve or deny the applications. Wireless never made the necessary corrections and filed suit under Section 704. The Sixth Circuit ruled that the City had informally denied the applications in violation of the Federal law requirement that any such decision be "in writing" and "supported by substantial evidence." The Sixth Circuit also ruled that the appropriate remedy was injunctive relief requiring the City to grant the cellular tower zoning permits as applied for.

3. But see Ho-Ho-Kus, 197 F. 3d at 76, discussed infra, ruling that two and one half years to reach a decision was not unreasonable.

I. Moratoria:

1. Municipalities sometimes enact moratoria on new approvals for cellular towers until they can modify their zoning or other ordinances so as to deal with the increased number of towers. Conventional cellular and PCS companies strongly oppose such moratoria.

2. The leading case upholding moratoria is Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036 (W.D. Wash. 1996) ("Medina") which upheld a six-month moratorium that was passed five days after the 1996 Act's effective date and only prohibited the local commission from issuing permits.

3. Some other courts have found that moratoria violate Section 704. See, e.g.-- Lucas v. Planning Board of the Town of LaGrange, 7 F. Supp. 2d 310 (S.D.N.Y. 1998); Sprint Spectrum, L.P. v. Jefferson County, 968 F. Supp. 1457 (N.D. Ala. 1997) ("Jefferson County"); Sprint Spectrum, L.P. v. Town of Farmington, 1997 U.S. Dist. LEXIS 15832, Civ. No. 3:97-863, 1997 WL 631104 (D. Conn. 1997); Sprint Spectrum, L.P. v. Town of West Seneca, 659 N.Y.S.2d 687 (N.Y. Sup. Ct. 1997) ("West Seneca");

4. The Fourth Circuit has vacated challenges to moratoria on mootness grounds with orders to the District Court to dismiss the case where the moratoria expired during the term of the litigation (and a zoning ordinance governing cellular towers was adopted). Cellco Partnership d/b/a/ Bell Atlantic Mobile v. Russell, 187 F. 3d 628 (4th Cir. 1999) (disposition only), unpublished opinion appears at 1999 U.S. App. LEXIS 17977, 1999 WL 556444 ("Bell Atlantic Mobile"). The

court held that the moratoria had to be in effect throughout the litigation and that Bell Atlantic Mobile had no reasonable expectation that the moratoria would be reinstated. See further discussion of this case under Effectively Prohibit Service, below.

5. Courts that have found moratoria problematic tend to do so because moratoria controvert the provisions of Section 704 that require the municipal authority to (a) respond to requests for permission to place facilities within a reasonable amount of time, (b) deny such requests only in a written decision supported by substantial evidence contained in a written record, and (c) not enact regulations that have the effect of prohibiting the provision of wireless services. See, e.g., Jefferson County, 968 F. Supp. at 1467; West Seneca, 659 N.Y.S.2d at 688.

J. Substantial Evidence–Standard of Review

1. In accordance with federal precedent concerning judicial review of state agency decisions and Section 704, the appropriate standard of review of a municipality's decision on conventional cellular or PCS zoning matters is whether "substantial evidence in the written record supports the authority's determination." AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment, 172 F.3d 307, 313-314 (4th Cir. 1999) ("Winston-Salem"); AT&T Wireless PCS v. City Council of Virginia Beach, 155 F.3d 423, 430 (4th Cir. 1998) ("Virginia Beach") A court cannot review such a decision *de novo*, and is not free to substitute its judgment for the municipal authority's judgment. Id.; Omnipoint Communications v. Easttown Township, 248 F. 3d 101, 106 (3d Cir. 2001) ("Easttown Township") Rather, a court must uphold the municipal authority's decision if there is substantial evidence to support it in the record as a whole, even if the court would have made a different decision. Id.; USCOC of Greater Iowa v. Zoning Board of Adjustment of City of Des Moines, 465 F.3d 817, 821-822 (8th Cir. 2006) ("Des Moines").

2. Standard U.S. Supreme Court definition of substantial evidence applies—less than a preponderance of the evidence but more than a mere scintilla, Cellular Telephone Company v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999) ("Oyster Bay"); Sprint Spectrum v. Willoth, 176 F.3d 630 (2d Cir. 1999) ("Willoth"); Virginia Beach, 155 F.3d at 430; Aegerter v. City of Delafield, 174 F.3d 886 (7th Cir. 1999) ("Aegerter"); Omnipoint v. Pine Grove Township, 181 F.3d 403, 408, n.5 (3d Cir. 1999) ("Pine Grove Township"); Telespectrum v. Public Service Commission of Kentucky, 227 F.3d 414, 423 (6th Cir. 2000) ("Telespectrum"); Easttown Township, 248 F.3d at 106; Des Moines, 465 F.3d at 821-822; Metro PCS v. San Francisco, 400 F.3d 715, 723 (9th Cir., 2005) ("San Francisco"); Huntsville (below) 296 F.3d 1218; United States Cellular v. Broken Arrow, 340 F.3d 1122; 1133 (10th Cir. 2003).

3. "Substantial evidence" also means "such relevant evidence as a reasonable mind might accept as adequate to support such a conclusion." Virginia Beach, (quoting Universal Camera v. NLRB, 340 U.S. 474, 488 (1951)); Cellular Telephone Company v. Zoning Board of Adjustment of Borough of Ho-Ho-Kus, 197 F.3d 64, 71 (3d Cir. 1999) ("Ho-Ho-Kus"); APT Pittsburgh v. Penn Township, 196 F.3d 469, 472 (3d Cir. 1999) ("Penn Township"); Telespectrum, *supra*; Easttown Township, 248 F. 3d at 106.

4. Virginia Beach is notable because

a. It held that "substantial evidence" under Section 704 should be interpreted as what would be considered important by a reasonable legislative body, not as to what would be important to a bureaucrat. Virginia Beach, 155 F.3d at 430.

(1) Virginia Beach makes sense because as explained further by the Fourth Circuit in Nottoway County and 360° Communications Company of Charlottesville v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000) ("Albemarle County") under Virginia law such zoning decisions are legislative decisions and are reviewed as such by the Virginia state courts, with (apparently) a different standard of review than applies to judicial or quasi-judicial decisions. Applying the substantial evidence test as to what would be considered important by a legislative body thus makes sense, and avoids the Constitutional/10th Amendment issues which would arise if Section 704 were interpreted to effectively change Virginia zoning decisions from legislative to being judicial or quasi-judicial in nature. There is no evidence that Congress in Section 704 intended such a change.

(2) Contra, see Pine Grove Township, 181 F.3d at 409 ("we apply the substantial evidence standard as we would to the decision of a federal administrative body"); Aegerter, 174 F.3d at 890.

(3) As in Virginia Beach and Albemarle County, some municipal zoning decisions are legislative decisions under state law. Municipalities contend that under the 10th Amendment/Federalism principles discussed above, and U.S. Constitution Article IV, Section 4 (guarantee of Republican form of government) a court constitutionally cannot impose what is essentially an administrative standard of review on a state's legislative decisions.

b. Accordingly, the Fourth Circuit held that it is "proper" and "expected" that the views of constituents should be considered by municipalities as "particularly compelling forms of evidence" in zoning and other legislative matters. "[Constituents'] views, if widely shared, will often trump those of bureaucrats or experts in the minds of reasonable legislators." Virginia Beach, 155 F.3d at 430.

c. The court relied on "the repeated and widespread opposition of a majority of citizens" to uphold the city's rejection of the cellular tower zoning requests, even though the cellular companies' evidence "may even amount to a preponderance of evidence in favor of the application." Id. at 431.

d. The court expressly rejected the cellular companies' claims that the "predictable barrage" by them of "exhibits, experts and evaluations . . . mandates that local governments approve [cellular tower] applications [and] effectively demand that we interpret the Act so as always to thwart average, nonexpert citizens; that is, to thwart democracy." Id. at 431. Accord, Broken Arrow, 340 F.3d at 1138.

e. But see Nottoway County, 205 F.3d at 692-696 and 709-710 for a discussion pro and con of the limits of Virginia Beach on such issues as substantial evidence viewed by

a legislative body (widespread, objectively reasonable concerns vs "communit[y] opposition compelling in the mind of the reasonable legislator)" and involving "predictions, value preferences, and policy judgments" of legislators.

5. Burden of proof is on provider to show that municipality's decision was not supported by substantial evidence. Des Moines, 465 F.3d at 821; United States Cellular v. City of Wichita Falls, 364 F.3d 250, 256 (5th Cir. 2004); Voicestream Minneapolis v. St. Croix County, 342 F.3d 818, 830 (7th Cir. 2004) ("St. Croix County"); American Tower v. City of Huntsville 295 F.3d 1203, 1207 (11th Cir. 2002). Unclear whether municipality bears burden of proof to show that its decision was supported by substantial evidence, but not necessary to decide issue, said court in Oyster Bay, 166 F. 3d at 496-7.

6. Substantial evidence standard does not apply to gaps in service, issue of effectively prohibiting service. Ho-Ho-Kus, 197 F.3d at 71, 76.

7. Substantial evidence standard only applies to adjudicative facts—the substantial evidence standard "is intended to provide procedural protections with respect to the determination of factual issues made by a state or local authority in the course of applying state and local zoning law . . ." It does not apply to other issues which reviewing courts must resolve, such as state constitutional challenges to zoning decisions. Such an issue "is a legal issue that is not subject to deferential judicial review. While such decisions may involve some consideration of legislative facts, the evidence to be considered is not limited to the facts of the particular applicant's case and is not necessarily limited to the record compiled by the local authority." Easttown Township, 248 F.3d at 106 (quoting Penn Township, citations omitted) and passim, (reversing lower court application of substantial evidence standard to state constitutional issue, and extensively discussing the preceding principles).

K. Substantial Evidence–Substantive Standard

1. The "substantial evidence" standard of Section 704 does not create a new substantive standard for local zoning decisions. Instead "[t]he substantial evidence requirement element in the statute . . . means substantial evidence to support the decision of the State or local government authority under local law." Nottoway County, 205 F.3d at 707. It was "Congress's intent [in Section 704] that local and state land use and zoning decisions be tested under *local standards*." Id. at 707 (emphasis in original). See extended discussion of this issue in Nottoway County. "We cannot agree with [the cellular company's] assertion that "Federal law has largely displaced traditional local zoning law where cellular towers are concerned." Des Moines 465 F.3d at 822.

2. As discussed in Nottoway County, the other Courts of Appeals who have considered the issue are in agreement-see Aegerter, 174 F.3d at 891-892; Town of Amherst v. Omnipoint Communications 173 F.3d 9, 13-14, 16 (1st Cir. 1999) ("Amherst"); Pine Grove Township, 181 F.3d at 403, 408; Penn Township, 196 F. 3d at 475; Easttown Township 248 F. 3d at 106.

3. The test is used to determine whether there is substantial evidence to support the requirements of state and local law: "[T]his Court must look to the requirements set forth in the local zoning code to determine the substantive criteria to be applied in determining whether substantial evidence existed to support the Board's decision." T-Mobile Central, LLC v Unified Government of Wyandotte County, 546 F. 3d 1299, 1307 (10th Cir. 2008) ("Wyandotte"). In

Wyandotte the Court rejected the denial of zoning approval as not based on "substantial evidence" largely because the criteria enunciated as the reason for denial were different from those set forth in the relevant zoning code. The Court concluded that there was no "substantial evidence" for the permissible criteria so as to support the denial. The Court cited the following as authority for this point: "In order [to] be supported by substantial evidence, the proffered reasons must comport with the objective criteria in existence (i.e. zoning regulations, permit application policies, etc.). Governing bodies cannot simply arbitrarily invent new criteria in order to reject an application." Virginia Metronet, Inc. v. Bd. of Supervisors of James City County, Va., 984 F. Supp. 966, 974 n. 14 (E.D. Va.1998); New Par v. City of Saginaw, 301 F.3d 390, 398 (6th Cir. 2002) ("Saginaw"); (concluding that the zoning board's decision was not supported by substantial evidence because, among other reasons, the applicant's failure to show lack of alternatives did not "go to any of the criteria set out in the Zoning Code"); Amherst, 173 F.3d 9, 14 (stating that the substantial evidence standard "surely refers to the need for substantial evidence under the criteria laid down by the zoning law itself") (emphasis omitted); AT & T Wireless Servs. of Cal., LLC v. City of Carlsbad, 308 F.Supp.2d 1148, 1163-64 (S.D.Cal. 2003); Although Section 704 "does not divest local officials of any authority they may have to consider the quality of existing services, neither does it create such authority. Efforts to assess existing quality ... must be authorized by and performed within the parameters of governing state and local law." Ho-Ho-Kus, 197 F.3d at 70.

4. The preceding restriction does not appear to apply to at least one of the substantive criteria of Section 704 itself. As the New Hampshire Supreme Court observed, "The [Town] was correct to characterize [Section 704] as an 'umbrella' under which a [Town] must evaluate an application to construct a telecommunications tower, as [Section 704] will preempt local law under certain circumstances. See 47 U.S.C.A. § 332(c)(7). As the First Circuit Court of Appeals has noted, although [Section 704] does not explicitly authorize a zoning board to consider whether a decision amounts to an effective prohibition of the provision of wireless service, '[s]ince board actions will be invalidated by a federal court if they violate the effective prohibition provision, many boards wisely do consider the point.' Second Generation Props. v. Town of Pelham, 313 F.3d 620, 630 (1st Cir. 2002)." Daniels v. Town of Londonderry, 953 A. 2d 406, 410-411 (N. H. Supreme Court, 2008).

L. Some of the Factors That May Be Considered

1. Factor must be a permissible ground for denial under state law. Sprint PCS v. City of La Canada Flintridge 448 F.3d 1067 (9th Cir. 2006) rejecting denial based on aesthetics as not an appropriate ground under California law for facilities in streets) ("La Canada Flintridge").

2. Aesthetics

a. Expressly allowed in Aegerter, 174 F.3d at 890, Amherst, 173 F.3d at 15, Pine Grove Township, 181 F.3d at 408, Winston-Salem, 172 F.3d at 315; Ho-Ho-Kus, 97 F.3d at 73, and Albemarle County, 211 F.3d at 84. See discussion in Willoth, 176 F.3d at 645-6. Discussed at length in Oyster Bay, 166 F. 3d at 495-6. Discussed in San Francisco, 400 F.3d at 727. Discussed at length in Wyandotte, 546 F. 3d 1299, 1312.

b. Aesthetics were discussed at length and upheld as the sole basis for denying zoning approval in Southwestern Bell Mobile Systems v. Todd, 244 F. 3d 51 at 60-62 (1st Cir. 2001) ("Southwestern Bell Mobile"). The Court also rejected provider arguments that

aesthetics alone cannot justify denial without a "quantifiable examination of the issue demonstrating, for example, the economic impact associated with the tower's appearance." Instead the court ruled that the city "was entitled to make an aesthetic judgment about whether that [visual] impact was minimal without . . . reference to an economic or other quantifiable impact." Id at 61. The Court also rejected the provider's argument that to support a denial on visual impact grounds the burden was on the municipality to show substantial "evidence of alternative sites that would have a lesser visual impact." Id at 63. See also Des Moines 465 F.3d. at 824-825. See related discussion under the Effectively Prohibit Service section of this paper, below.

c. Favorable discussion of aesthetics in Easttown Township, 248 F. 3d 101, passim, and approved as grounds for decision by Eighth Circuit in Eighth Circuit, among others, in Sprint Spectrum v. Platte County, ___ F. 3d ___ (8th Cir. 2009).

d. "A few generalized expressions of concern with 'aesthetics' cannot serve as substantial evidence" to support a denial. Oyster Bay, 166 F.3d at 496; Pine Grove Township, 181 F.3d at 408. Accord, Huntsville, 296 F.3d at 1219-20.

e. Committee Report accompanying Section 704 expressly states that aesthetics may be considered. Conference Committee Report at 208.

f. The Ninth Circuit initially held that under California law, aesthetics may not be considered for cell towers located in public rights of way. La Canada Flintridge, supra, and related decision at 250 P.U.R. 4th, 207, 182 Fed. Appx. 688, 2006 WL 145 7785 (9th Cir. 2006). But in Sprint PCS Assets v. City of Palos Verdes Estates, ___ F3d ___ (9th Cir. 2009) ("Sprint v. Palos Verdes") it held to the contrary, that under the California Constitution, a municipality may consider aesthetics in considering whether to approve cellular antennas located in the public rights of way, and upheld Palos Verdes' denials of two antennas on that basis, but that such denials could not "operate as a prohibition of wireless service in violation of" Section 704.

3. Property Values

a. Considered at length and expressly allowed in Ho-Ho-Kus, 97 F.3d at 72-73. Allowed as a factor in Aegerter, 174 F.3d at 890; in Pine Grove Township, 181 F.3d at 408; Des Moines 465 F.3d at 823.

b. "Difficult questions" of expert versus lay testimony described but not decided in Oyster Bay, 166 F. 3d at 496.

c. "[A] few generalized concerns about a potential decrease in property values, especially in light of [the plaintiff]'s contradictory expert testimony, does not seem adequate to [meet the substantial evidence test]." Oyster Bay, 166 F.3d at 496; Pine Grove Township, 181 F.3d at 409.

d. One lay witness's testimony on adverse impact on property values insufficient. Telespectrum, 227 F.3d at 424.

4. Quality of Service

a. Ho-Ho-Kus analyzed and squarely held that a municipality may consider the quality of the provider's existing service in determining whether to grant zoning approval. Arguments that this was preempted and wholly within the jurisdiction of the FCC were rejected. Ho-Ho-Kus, 197 F.3d at 66-67.

5. Citizen vs. Expert Testimony

a. Citizen testimony may be considered—see discussion strongly supporting citizen testimony in Virginia Beach, 155 F.3d at 430-431; Pine Grove Township, 181 F.3d at 409 (citizen testimony inadequate on facts of case).

b. Citizen tape recordings too insubstantial. Ho-Ho-Kus, 197 F.3d at 73.

c. See Nottoway County and the conflicting opinions therein discussing, distinguishing or applying Virginia Beach and Winston-Salem on such issues as the amount of citizen opposition necessary to support a denial (such as absolute numbers or instead proportional to the population of the municipality) and interpreting the Act so as "not to thwart average, nonexpert citizens." Nottoway County, 205 F.3d at 710 (quoting Virginia Beach, 155 F.3d at 431). And see discussion in Montgomery County, below, 343 F.3d at 272.

6. Number and Height of Towers

a. Recognized as expressly reserved for municipalities in Amherst, 173 F.3d at 14-15.

b. Favorable, detailed discussion of height restrictions in Easttown Township, 248 F. 3d at 107-108.

c. Comparing to other, recently approved towers inappropriate. USCOC of Virginia v. Montgomery County, 343 F.3d 262, 270 (4th Cir. 2003).

7. Towers in/near Historic Districts, Sites

a. Commented on favorably by Court in Amherst, 173 F.3d at 16.

b. Approved as a legitimate factor in Winston-Salem, 172 F.3d at 315-316.

c. Impact on historic district a significant factor in affirming zoning denial in Southeast Towers v. Pickens County, 2008 WL 2064649 (N.D. Ga. 2009), even though applicant had received approval under National Historic Preservation Act.

8. Safety-Related

a. Includes risks of tower collapse, risks to aviation, public climbing tower.

b. Allowed in principle as a factor in one opinion in Nottoway County, 205 F.3d at 695-696, but evidence in case did not support the factor. Another opinion in the case at 709-710 found the safety-related evidence sufficient to deny zoning approval.

c. Failure to meet setback/fall zone requirements (tower must be at least as far from other property lines as its height) allowed as basis for zoning denial in Albemarle County, 211 F.3d at 85.

d. Committee Report accompanying Section 704 expressly states that safety may be considered. Conference Committee Report at 208.

e. Falling ice from tower. Des Moines, 465 F.3d at 823.

9. Environmentally Related

a. Environmental factors such as constructing a tower on a natural ridgeline (thus affecting the visual character of an area), access roads being on steep, critical slopes, inconsistency with community environmental preservation goals, increased problems with soil erosion and water runoff in mountainous areas and the like were allowed as factors sufficient to support a zoning denial in Albemarle County, 211 F.3d at 85.

b. Ban in Section 704 on local regulation based on environmental effects only applies to radio frequency emissions, such that District of Columbia's concerns about falling ice and resulting safety risk was outside the ban. American Towers v. Williams, 46 F. Supp. 2d 27 at 36.

10. Impact of Commercial Operation on Residential Neighborhood

a. Maintaining the residential character of a neighborhood is an appropriate consideration, and municipalities may deny zoning approval based on the impact of a commercial operation on a residential neighborhood, or impose conditions, such as limits on times for maintenance work, number of vehicles present, noise levels, yard maintenance. Kay v. City of Ranchos Palos Verdes 504 F. 3d 803, 810-811 (9th Cir. 2007) (conversion of amateur radio antenna in residential area to commercial use).

11. Costs

a. The courts have generally not found that an increase in costs to as to comply with local zoning requirements is a violation of Section 704. Bell Atlantic Mobile, 1999 U.S. App. LEXIS 17977 at 9-10, 1999 WL 556444 at 4; Albemarle County, 211 F.3d at 81.

M. Written Decision/Written Record/Final Action

1. Section 704 provides that "any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

a. The courts have not settled on a uniform standard as to what this means. Penn Township, 196 F. 3d 469, 474 n.4; cases collected and discussed in Southwestern Bell Mobile, 244 F. 3d at 59.

b. Providers argue that a "decision . . . in writing" must include findings of fact and an explanation of the decision. Some (early) District Court decisions have so required. See, e.g.--cases cited in Southwestern Bell Mobile, 244 F. 3d at 59. However, the Court of Appeal cases have all rejected this claim. See e.g. Des Moines, 465 F.3d at 824 ("The [Act] requires only that the Board's final decision be in writing supported by substantial evidence in a written record, not that every necessary finding be in the written decision.")

2. The Fourth Circuit does not require the written decision to contain a statement of the municipal authority's findings or rationales. In Winston-Salem and Virginia Beach the court found that merely stamping "DENIED" in the appropriate blank on the cover page of a special use permit application was sufficient to constitute a "written decision" under Section 704. Winston-Salem, 172 F.3d at 313; Virginia Beach, 155 F.3d at 429. The courts refused to entertain the argument that the decision was insufficient because it failed to include the reasoning behind the decision and the evidence relied upon to reach the decision. Quoting Virginia Beach, the Winston-Salem court found that "[t]he simple requirement of a decision. . . in writing cannot reasonably be inflated into a requirement of a statement of findings and conclusions, and the reasons or basis thereof." Winston-Salem, 172 F.3d at 313 (quoting Virginia Beach, 155 F.3d at 430). However, the Third Circuit has not yet found it necessary to decide the issue. Penn Township, 196 F.3d at 472.

3. The most extensive discussion of the written record/written decision requirement to date is by the First Circuit in Southwestern Bell Mobile, 244 F. 3d at 59-60, which:

a. Rejected the requirement of formal findings of fact and conclusions of law as having "no basis in the language of the Act" and contrary to sound policy because local zoning boards "are primarily staffed by laypeople" from whom it is unrealistic "to expect highly detailed findings of fact and conclusions of law." Id at 59.

b. Required that under Section 704 the "written decision" must be separate from the "written record" of the proceeding. Id at 60.

c. Required that the written decision "must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." Id. Other courts have agreed with this standard. Saginaw, 301 F.3d 390, 395; San Francisco, 400 F.3d at 722.

d. But ruled that court review is not limited "to the facts specifically set forth in the written decision." Id. Instead the court may look at the whole record.

e. Followed by Eighth Circuit, among others, in Sprint Spectrum v. Platte County, ___ F. 3d ___ (8th Cir. 2009).

4. The one court which has considered the issue has rejected as "absurd" the argument that a municipality has to have a transcript of the proceeding prepared and made part of the record before it makes its decision -- "We see no irregularity in the City Council issuing a verbatim

transcript of its hearing after it made its decision and incorporating that transcript into the record. This is standard legislative practice, and the Act, unlike the [Federal Administrative Procedures Act], does not require a decision to be 'on the record,' 5 U.S.C. § 553 (c). It is absurd to suggest that a hearing that the legislators themselves attended and participated in cannot be part of the record simply because they did not either produce a real-time transcript or postpone their vote until after the transcript was prepared." Virginia Beach, 155 F. 3d at 430, fn. 5.

5. The "record" cited with approval in Virginia Beach "consists of appellees' application, the Planning Department's report, transcripts of hearings before the Planning Commission and the City Council, numerous petitions supporting the applications, and letters to members of the Council both for and against." Id. at 430 (footnote omitted). No transcript of proceedings is required, Ferguson on appeal, below.

6. Some District Court cases show confusion as to what is a "final action" under Section 704. Citing the requirement under Section 704 that court challenges against a municipality must be brought within 30 days of "final action" by the municipality, and combining it with the "in writing" requirement, some providers have argued and some District Courts have held that in combination they mean that a municipality must issue a "written decision" within thirty days of its oral denial of a wireless zoning application. See, e.g., USCOC of Greater Missouri v. City of Ferguson (E. D. Mo. 2008) 2008 WL 2065033 ("Ferguson") and cases collected therein. However, the 11th Circuit and 6th Circuit have both held "final action" under Section 704 does not occur until the municipality issues its written decision regarding the zoning request, and the Ferguson court reversed its prior ruling (that a written decision must be issued within 30 days or oral denial) to accord with these Circuits, and was upheld by the Eighth Circuit on this point on appeal. Ferguson, Id.; USCOC of Greater Missouri v. City of Ferguson, 583 F. 3d 1035, 1041-1042 (8th Cir. 2009) ("Ferguson on appeal"); Preferred Sites v. Troup County, 296 F.3d 1210, 1217 (11th Cir. 2002) ("Troup County"); Omnipoint Holdings, Inc. v. City of Southfield, 355 F.3d 601, 607 (6th Cir. 2004).

7. "Final action" by a municipality (for purposes of right to challenge in Federal Court) occurs is at "consummation of the [local unit of government's] decisionmaking process, even though the applicant had a limited right to challenge the decision in state court. Omnipoint Holdings v. City of Cranston, ___ F.3d ___, ___ (1st Cir. 2009) ("City of Cranston"). Claim was not ripe for appeal to Federal Court when provider still had recourse before local zoning board. Sprint Spectrum v. City of Carmel, 361 F.3d 998 (7th Cir. 2007), accord Nextel Communications of Mid-Atlantic v. City of Margate, 305 F.3d 188, 193-194 (3d Cir. 2002). To somewhat the same effect, see Ferguson on appeal.

8. Several cases have dealt with the "written decision" requirement in addressing whether and when resolutions and minutes are sufficiently separate from the "written record" requirement to satisfy cases such as Southwestern Bell Mobile, Saginaw and San Francisco. See, for example, the discussion of this point in Cellco Partnership v. Franklin County, ___ F. Supp. 2d ___ (E.D. Ky 2008) 2008 WL 1790135, slip opinion at 4-5. Adopting a separate written resolution at a meeting other than that at which a hearing is held (or oral decision announced) seems to provide the most assurance this requirement is met. Compare Village of Marlborough, supra, where at the conclusion of a cell tower zoning hearing the Village's Board of Adjustment adopted a seventeen page "Findings of Fact" denying the request, where the Findings of Fact were prepared before the

hearing, and were allegedly adopted without being read by the Board, all of which prevented the Village from getting a Section 1983/Constitutional Due Process violation claim dismissed.

9. Especially for legislative decisions there is a Constitutional/Federalism-10th Amendment issue on the Federal Government's ability to apply a "written decision" requirement (especially one involving specific standards and details) to the states. See, e.g., Ferguson, supra at 8.

N. Unreasonable Discrimination

1. "[A]ssuming that the City Council discriminated, it did not do so 'unreasonably,' under any possible interpretation of that word as used in the Act. We begin by emphasizing the obvious point that the Act explicitly contemplates that some discrimination 'among providers of functionally equivalent services' is allowed. Any discrimination need only be reasonable. . . . There is no evidence that the City Council had any intent to favor one company or form of service over another. In addition, the evidence shows that opposition to the application rested on traditional bases of zoning regulation: preserving the character of the neighborhood and avoiding aesthetic blight. If such behavior is unreasonable, then nearly every denial of an application such as this will violate [Section 704], an obviously absurd result." Virginia Beach, 155 F.3d at 427. Accord, San Francisco, 400 F.3d at 727.

2. Second Circuit reached same conclusion in Willoth, supra, and ruled that:

a. A more probing inquiry of one provider than another is OK.

b. The location of a tower may be taken into account to approve a tower for one provider, deny for another. Willoth, 176 F.3d at 639.

3. Cellular service was distinguished from paging service by the Court where the City approved towers for one service, but not the other. Aegerter, 174 F.3d at 892.

4. A number of cases question zoning ordinances which actually or effectively show a preference for cell towers being located on municipal property, and often raise a variety of state and Federal law issues. See, e.g., Village of Marlborough, ___ F. Supp. 2d ___; and Laurence Wolf Capital Management v. Ferndale, 2009 WL 416785 (Mich App 2009) and the several cases between the same parties described therein.

O. Effectively Prohibit Service/Ripeness/Facial Challenges

1. The Fourth Circuit in Bell Atlantic Mobile ruled that a facial challenge to a cellular tower zoning ordinance (where the applicant had made no attempt to comply with the ordinance) was not ripe for decision and must be dismissed. 1999 U.S. App. LEXIS 17977 at 10-11, 1999 WL 556444 at 1. Claims that the ordinance made towers so costly as to effectively prohibit service were inadequate to support a case. 1999 U.S. App. LEXIS 17977 at 9-10, 1999 WL 556444 at 4. The Court said there was no major hardship to Bell Atlantic Mobile in having to seek to obtain zoning approval and the defendant county would be harmed if the Court ruled on the merits of the ordinance before it was applied, because that would "deprive the county of the opportunity to

regulate the construction and placement of towers within its borders in a manner consistent with the [Telecommunications Act]." 1999 U.S. App. LEXIS 17977 at 15, 1999 WL 556444 at 5.

2. Fourth Circuit in Virginia Beach held that Section 704's requirement that municipalities not "prohibit or have the effect of prohibiting" conventional cellular/PCS service only applies to "'blanket prohibitions' and 'general bans or policies,' not to individual zoning decisions," 155 F.3d at 428. And see further Fourth Circuit discussion of this point in Albemarle County, 211 F.3d at 86.

3. First, Second and Ninth Circuits reached opposite result: Municipalities' claim that Section 704 only prohibits general bans (moratoria) on wireless facilities was rejected by the Courts of Appeal in Amherst and Willoth, 176 F.3d at 644 and San Francisco, 400 F.3d at 730. In rejecting this claim, the Court of Appeals in Amherst was concerned about the situation where a municipal zoning authority sets out criteria that could never be met. Amherst, 173 F.3d at 14. The court held as follows: "[i]f the criteria or their administration effectively preclude towers no matter what the carrier does, they may amount to a ban 'in effect' even though substantial evidence will almost certainly exist for denial." Id. at 14.

a. However, the Amherst court also held that the burden for the carrier in these situations-where a single denial is alleged to have the "effect" of prohibiting the provision of personal wireless services-is a "heavy one." Id. at 14. The carrier must show "from language or circumstances not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Id. at 14-15.

4. And the provider's claim that it must be allowed to build any and all towers it deems necessary to compete with other phone companies was rejected by the Court of Appeals in Willoth, 176 F.3d at 639 and the Third Circuit in Penn Township-Section 704 does not "trump all other important considerations." Penn Township, 196 F.3d at 478.

5. As discussed in Albemarle County, 211 F.3d at 87, and Sprint v. Palos Verdes, FCC regulations expressly allow gaps or "dead spots" in cellular coverage-for FCC purposes "cellular service is considered to be provided in all areas, including 'dead spots.'" 47 C.F.R. §§ 22.911 (b) and 22.99.

6. In addition, the Willoth court held that a municipality "may reject an application for [a tower]in an under-served area without thereby prohibiting wireless services" if

a. "The service gap can be filled by less intrusive means" such as

- (1) Less sensitive sites
- (2) Shorter towers
- (3) Tower on existing building
- (4) Camouflaged tower

(5) Use of fewer towers (if adequate for coverage). Willoth, 176 F.3d at 643. Applied in New York SMSA v. Town of Clarkston, 99 F. Supp. 2d 381 (S.D.N.Y. 2000) ("Town of Clarkston-1") to uphold municipality's approval of one tower for several providers to fill a gap in coverage as opposed to multiple towers.

b. "The holes in coverage are very limited in number or in size", i.e.-de minimis,

(1) Interiors of buildings in rural area, or

(2) Limited number of spots or houses. 176 F.3d at 643.

c. Note: Expressly contemplates municipal and court review of coverage maps and patterns.

7. The Third Circuit followed and refined Willoth in Ho-Ho-Kus, 197 F.3d at 70, Penn Township, 196 F.3d at 480; applied it in Omnipoint Communications Enterprises v. Newtown Township, 219 F.3d 240 (3d Cir. 2000) cert. denied 531 U. S. 985, 148 L. Ed. 2d 446, 121 S. Ct. 441 ("Newtown Township"); and summarized it in Easttown Township, 248 F.3d at 109, ruling that:

a. Municipalities have the effect of prohibiting service if their decisions lead to "significant gaps" in the availability of wireless services. Ho-Ho-Kus, 197 F.3d at 70; Newtown Township, 219 F.3d at 244.

b. There are significant gaps in wireless services if a user cannot connect with the national telephone network or cannot maintain a connection supporting reasonably uninterrupted communication. Factors to consider in determining whether there is a gap were described. Id.

c. However, the gap must not be just in the complaining provider's service-it must be an area unserved by any provider. "The provider's showing on this issue will thus have to include evidence that the area the new facility will serve is not already served by another provider." Penn Township, 196 F.3d at 480. Newtown Township, 219 F.3d at 244. Omnipoint v. Easttown Township, 331 F.3d 386, (3d Cir. 2003).

(1) The Third Circuit's apparent logic was that there was no effective denial of "wireless services" (plural in the statute) if some providers could serve the area in question. Alternatively, if some providers can serve the area with facilities that comply with local zoning and land use law and one cannot, it is that provider's defective system design and not municipal action that is effectively preventing service.

(2) "We . . . reiterate here that the doctrine prohibiting gaps is designed to protect the users, not the carriers." Newtown Township, 219 F.3d at 244.

(3) First and Ninth Circuits disagree with gap in "any provider's" service test, instead gap need only be in the same of "that provider." Southwestern Bell Mobile, 244 F.3d at 63; San Francisco, 400 F.3d at 732.

d. "The providers still bear the burden of proving that the proposed facility is the least intrusive means of filling those gaps with a reasonable level of service." Ho-Ho-Kus, 197 F.3d at 75 (emphasis supplied). Accord Penn Township, 196 F.3d at 474, San Francisco, 400 F.3d at 734. The Court clearly differentiated barring wireless service from barring wireless facilities in a municipality (service might be provided by a tower located in an adjacent municipality). Ho-Ho-Kus, 197 F.3d at 70.

(1) First and Second Circuits have rejected "least intrusive" test, and instead use test of "no alternative sites" which would solve the problem. Southwestern Bell Mobile, discussed below and cases cited there.

e. The preceding determinations are made by the Federal District Court-the substantial evidence standard for reviewing municipal decisions does not apply. Id. at 70.

f. But see Albemarle County where the Fourth Circuit rejected the preceding approach as reading too much into the Act-for example, a community could reject the least intrusive approach for a more intrusive approach to provide better service or promote commercial goals. Albemarle County, 211 F.3d at 87.

8. Ninth Circuit follows Second and Third Circuits on preceding analysis. See T-Mobile USA v. City of Anacortes, ___ F3d. ___ (9th Cir. 2009) and cases cited therein. Anacortes also contains a lengthy discussion of the shifting burden between the provider and municipality, and the various factors which can be considered.

9. District Court test for "prohibition of service" being met if the provider shows that it cannot provide a "high level of wireless service" from another site at a cost "within or close to the industry wide norm for establishing a new service" was rejected by the Fourth Circuit in Albemarle County, which reversed the District Court. Albemarle County, 211 F.3d at 81.

10. Amherst--"Subject to an outer limit, such choices [between fewer higher towers and more shorter towers] are just what Congress has reserved to [municipalities]." Amherst, 173 F.3d at 15.

a. Unless record shows municipality would reject all proposals.

b. Cannot require/reject successive applications without indicating what will lead to approval.

c. "[T]he burden for the carrier invoking the [prohibition of service] provision is a heavy one: to show from language or circumstances not just that this application has been rejected, but that further reasonable efforts are so likely to be fruitless that it is a waste of time even to try." Id. at 14. Cited with approval by Fourth Circuit in Albemarle County, 211 F.3d at 88.

11. In Southwestern Bell Mobile the court upheld denial of zoning approval due to the adverse visual impact of the tower, and then addressed the provider's claim regarding the lack of alternate sites with a lesser visual impact as follows:

a. "For a telecommunications provider to argue that a permit denial is impermissible because there are no alternative sites, it must develop a record demonstrating that it has made a full effort to evaluate the other available alternatives and that the alternatives are not feasible to serve its customers. Such a showing may be sufficient to support an allegation that the zoning board's permit denial effectively prohibits personal wireless services in the area." Southwestern Bell Mobile, 244 F. 3d at 63. Accord, Second Generation Properties, 313 F.3d at 635; St. Croix County, 342 F.3d at 834-835.

12. No prohibition of service where denied tower would improve quality of service and dropped call rate in a small area. Des Moines, 465 F.3d at 825. And provider must investigate "all feasible alternative sites." Id.

13. The First Circuit Court of Appeals has noted, that although [Section 704] does not explicitly authorize a zoning board to consider whether a decision amounts to an effective prohibition of the provision of wireless service, "[s]ince board actions will be invalidated by a federal court if they violate the effective prohibition provision, many boards wisely do consider the point." Second Generation Props. v. Town of Pelham, 313 F.3d 620, 630 (1st Cir. 2002).

14. For an extended discussion of "gap" analysis, legal standards, alternative remedies and what did/did not suffice to rebut the provider's case, see City of Cranston and Sprint v. Palos Verdes above.

P. Radio/RF Emissions

1. The FCC has adopted rules on radio emissions from cellular towers and other facilities. See 47 C.F.R. § 1.1310.

a. The rules were affirmed in Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000), rehearing denied 2000 U.S. App. LEXIS 12246 (2d. Cir. 2000), cert. denied 531U.S. 1070, 121 S. Ct. 758, 148 L.Ed 2d 661.

b. The FCC and its Local and State Government Advisory Committee ("LSGAC") on June 2, 2000 published the paper "A Local Government Official's Guide to Transmitting Antenna RF Emission Safety: Rules, Procedures, and Practical Guidance" on radio emissions from cellular and other towers. Copies are available from our firm, the FCC/LSGAC (see LSGAC site at <http://www.fcc.gov/statelocal/>) and from the International Wireless Committee of the International Right of Way Association at <http://www.irwa.net/>.

c. At least one court has held that as part of the zoning process a municipality's board of health could inquire about RF emissions and require an explanation of the provider's RF study to ensure that the FCC's RF emission standards are followed. Township of Warren, 737 A. 2d 715. In Town of Clarkston-2, 603 F. Supp. 2d 715, the court held that the Town could require the provision of detailed RF emission information, but could not use it as a basis for siting decisions.

2. Residents often have concerns about RF emissions from cell phones and cell towers, and newspaper accounts about such concerns occur frequently, including in such newspapers of

record (and not given to sensationalism) as the New York Times. See, e.g. "Experts Revive Debate Over Cellphones and Cancer", Tara Parker-Pape, New York Times, June 3, 2008, page D8.

3. "The Town acknowledges that health concerns expressed by residents cannot constitute substantial evidence" due to ban in Section 704 on considering these if facility complies with FCC rules. Oyster Bay, 166 F.3d at 494.

4. Virginia Beach court dismissed mention of health concerns by a few citizens as only "a small fraction of the overall opposition." Virginia Beach, 155 F.3d at 431, fn. 6.

5. Pine Grove Township court noted one citizen's comments on "alleged health affects, which the [Zoning] Board may not consider," comments did not affect court's disposition of case. Pine Grove Township, 181 F.3d at 181. Sixth Circuit noted that health risk concerns may not support a denial if facility emissions comply with FCC regulations. Telespectrum, 277 F.3d at 424. Ninth Circuit rejected RF emissions challenge. San Francisco, 400 F.3d at 737.

6. Ban in Section 704 on local regulation based on environmental effects only applies to radio frequency emissions, such that District of Columbia's concerns about falling ice and resulting safety risk was outside the ban. American Towers v. Williams, 146 F. Supp. 2d 27 at 36.

7. See Town of Clarkston-1, 99 F. Supp. 2d 381 where the Court upheld the municipality's selection of one tower (serving all providers) to close a gap in coverage over similar multiple provider towers proposed for other sites on the basis of "prudent avoidance" (minimizing radio frequency emissions reaching surrounding locations).

8. See the discussion of Brehmer v. Planning Board of Town of Wellfleet, 238 F. 3d 117 (1st Cir. 2001) ("Town of Wellfleet") in the next section on the remedies that are applicable when a municipality "impermissibly relied on the potential environmental effects of the telecommunications tower" to reject zoning approval, and the provider's agreement to conduct testing.

9. See also Johnson County, 199 F.3d 1185, preempting county regulation regarding radio frequency interference from cellular tower against Tenth Amendment challenge and holding that entire field of radio frequency interference regulation is preempted by federal legislation, Freeman v. Burlington Broadcasters, Inc., 204 F. 3d 311 (1st Cir 2000), cert. denied 531 U.S. 917, 121 S. Ct. 276, 148 L. Ed. 2d 201, holding to a similar effect regarding cellular providers and other FCC licensees, and also Town of Clarkston-2, 603 F. Supp. 2d 715 to the same effect. For a description of some of the types of problems which concerned Johnson County, see Section IV.B.3.h, above. As an example of a case where the court found that a zoning denial was based on impermissible RF emission grounds, see Sprintcom, Inc. v. Puerto Rico Regulation and Permits Administration, ___ F. Supp. 2d ___ (D. Puerto Rico, 2008), 2008 WL 2068743 ("the only substantial evidence on the written record is that of the site neighbors' concerns related to the effects of radio-frequency emissions").

10. Ban on considering RF emissions does not apply to leases by unit of government. Sprint Spectrum PCS v. Mills, 283 F.3d 404, 420 (2nd Cir. 2002).

11. For a discussion of and references to consumer class action litigation alleging cell phones causing cancer due to RF emissions, see Murray v. Motorola, supra, and cases cited therein.

Q. Remedy if Section 704 is Violated

1. Generally, courts either (1) remand to the local authority for reconsideration, or (2) issue mandatory injunctive relief, usually in the form of an order granting the improperly denied applications. Omnipoint Communications Enterprises, Inc. v. Town of Amherst, 74 F. Supp. 2d 109 (D.N.H. 1998), reversed on other grounds, 173 F.3d at 24 (1st Cir. 1999).

a. One of the major risks for a municipality is that a violation of Section 704 will lead to the zoning application being approved, not a remand to the municipality.

2. Courts ordering the tower approved (e.g.-issuing mandamus or injunction that local permission be given) do so due to Section 704's directive to courts to decide Section 704 cases "on an expedited basis" and perceived statutory goal of expediting relief, and/or because "remand would serve no useful purpose." See, e.g., Oyster Bay, 166 F.3d at 497; Pine Grove Township, 181 F.3d at 409 and cases cited therein. See generally, Chattanooga, 403 F.3d 392, approving six cellular towers as applied for due to lack of timely action by the City. See also Brehmer v. Planning Board, 328 F.3d 117 (1st Cir. 2001); Omnipoint v. Zoning Hearing Board 181 F.3d 403 (3d. Cir. 1999); Huntsville 296 F.3d at 1221; Troup County, at 1222; New Par v. Saginaw supra at 400.

3. Remedies are discussed at some length in Town of Wellfleet, 238 F.3d at 120-122. The court held that largely due to Section 704's directive to the courts to "hear and decide such [cases under Section 704] on an expedited basis that injunctive relief, rather than a remand for further proceedings, is preferable as a remedy. The Court held that this principle extended to a consent judgment granting zoning approval voluntarily entered into by a municipality which had "conceded its own error" in violating Section 704, Id., n.4 at 120, such that the District Court should simply enter an order ratifying the consent judgment, and that Section 704 superseded and preempted any state law requiring a new round of hearings at the local level on the approval thereby being granted. Id. 121-122.

4. Other courts decline to issue mandamus and remand the case to the municipality. Id. In Winston-Salem, the Fourth Circuit found that the district court erred in issuing a writ of mandamus because such an act was not authorized by the Telecommunications Act, the Federal Mandamus Statute (does not apply to state officials), the All Writs Act, and because all other avenues of relief had not been exhausted. Winston-Salem, 172 F.3d at 312 n.3; accord Nottoway County at 710, fn. 3 (concurring opinion of Judge Widener).

5. Two and one half years to reach a decision not unreasonable. Case remanded to municipality. Ho-Ho-Kus, 197 F.3d at 76.

6. See Town of Clarkston-2, 603 F. Supp. 2d, supra, where on a facial challenge to a comprehensive, detailed zoning ordinance by a group of carriers, the court invalidated the ordinance and gave the Town six months to rewrite it.

7. In Industrial Tower and Wireless v. Town of East Kingston, 2009 WL 799616 (D NH 2009) the court found that the Town had not complied with the "written decision" requirement,

distinguished such a procedural violation from a substantive violation of Section 704, and remanded the case with instructions for the Town to promptly provide a written decision.

R. Damages, Attorneys Fees and Section 1983 Claims

1. In Rancho Palos Verdes the U.S. Supreme Court resolved the long standing issue of whether damages and attorney's fees are available under Section 1983 for violations of Section 704. The Supreme Court adopted the position advocated by municipalities, ruling that Section 1983 was not available. City of Rancho Palos Verdes, Cal. v. Abrams, 125 S. Ct. 1453 (2005) ("Abrams"). In particular, the Court rejected the Ninth Circuit's conclusion that Section 332's remedial scheme was not sufficiently comprehensive to preclude Section 1983 relief. The Supreme Court also disagreed with the Ninth Circuit's conclusion that the savings clause in the 1996 Telecommunications Act (which added 332(c)) demonstrated Congress's affirmative intent to preserve Section 1983 remedies for violations of Section 332.

a. See also Primeco Personal Communications v. City of Mequon, 352 F.3d 1147 (7th Cir. 2003) (attorneys fees not available under Section 1983).

2. And in a lengthy, well-considered analysis, the Ninth Circuit has ruled that damages and attorneys fees are not available as a remedy under Section 704 either, noting among other things that "The specter of large damages claims, and the expensive litigation recognized by Abrams, could easily intimidate local authorities into effectively abdicating their zoning and permitting powers when confronted with an application from a wireless service provider." Kay v. City of Ranchos Palos Verdes 504 F. 3d 803, 813-814 (9th Cir. 2007).

3. The Ninth Circuit in San Diego ruled that attorneys fees were not available for the violation of Section 253 which it found. San Diego at 14-15. It and all the Circuit Courts of Appeal which have recently considered the issue have ruled that "there is no private damages action under Section 1983 for a violation of Section 253." NextG Networks v. City of New York, 513 F.3d 49, 52-54 (2nd Cir. 2008); Qwest v. City of Santa Fe, 380 F. 3d 1258, 1265-67 (10th Cir. 2004); Southwestern Bell Telephone v. City of Houston, ___ F.3d ___, ___, Case No. 07-20320 (5th Cir. 2008) (slip opinion at 5-7). *But see* BellSouth Telecommunications, Inc. v. Town of Palm Beach, 252 F.3d 1169, 1191 (11th Cir. 2001) and TCG Detroit v. City of Dearborn, 206 F.3d 618, 624 (6th Cir. 2000), although both decisions predate the Supreme Court's clarification in Gonzaga that a Section 1983 analysis requires courts to "first determine whether Congress intended to create a federal right". Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) ("Gonzaga") (emphasis in original). "For a statute to create such private rights, its text must be phrased in terms of the persons benefited." Id. at 284 (citation and internal quotation marks omitted). "Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action". Id. at 286. And see Abrams, supra, where the Supreme Court rejected a § 1983 claim, citing Gonzaga, 536 U.S. at 285).

S. State Law Claims

1. Municipalities should be careful to follow applicable state laws, which may be more restrictive in some respects than Section 704.

a. Cellular companies generally bring claims against municipalities under both state and Federal law.

2. In some states, the authority to enact moratoria may not be as clear or strong as in Medina.

3. In others, special provisions may eliminate or lessen local review of zoning applications by "utilities" and cellular companies may claim they are utilities.

T. FCC Backup Power Ruling

1. On October 4, 2007 the FCC in continuing response to Hurricane Katrina adopted an order requiring backup power (batteries or generators) at most telephone and cell tower locations nationwide. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-177A1.doc. The order was scheduled to take effect in the spring of 2008 but was stayed by the D.C. Circuit Court of Appeals, pending review by the Office of Management and Budget. OMB in December, 2008 rejected the order, because the FCC failed to get public comment before adopting the order and didn't show that the information required from wireless companies would actually be useful. It also said the FCC hadn't demonstrated that it had enough staff to analyze the hundreds of thousands of pages of documents that the wireless industry said its members would likely have to produce as part of the regulations. Following this the FCC told the Court of Appeals that it would start the rulemaking process over with a new Notice of Proposed Rulemaking. Specifics about the now abandoned rule are as follows:

2. The FCC 2007 order by its terms expressly did not preempt state or local laws or leases which prevent backup power installations. Statements by cell phone company representatives that an FCC order preempts state or local laws or leases in this regard are incorrect. But cell companies may claim that by other means Federal law preempts in any event, even as to lease terms that prohibit dangerous substances (e.g.--gasoline) from being introduced on the municipal land or building being leased for a cell antenna.

3. Municipalities may still see activity to put generators and battery backup systems at cell tower sites on private and public property, including those in the rights of way. This may cause problems for towers in sensitive municipal locations, such as those on the roofs of municipal or school buildings, or on water towers, because backup power systems typically involve gas, diesel or propane powered generators (with accompanying fuel tanks) or batteries with lots of sulfuric acid. Lease terms often prohibit such dangerous substances or require municipal approval of changes from the initial installation, and either type of system is heavy, which may cause building or structural concerns.

4. Cell companies may still seek lease amendments to allow them to install backup power systems (in fact in the now disavowed order, the FCC said they should seek such amendments, if their leases now preclude such systems). Cell companies may claim that lease provisions effectively preventing backup power systems violate Section 253 of the Federal Communications Act, which (in general, and subject to a number of requirements and exclusions) preempts state or local laws or other legal requirements which "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. Section 253(a). On the other hand, municipalities can have legitimate concerns

if they have good reasons for not wanting such systems installed on particular properties, yet the lease does not clearly preclude them.

5. In the 2007 FCC proceeding, the cell phone companies complained to the FCC that local zoning laws, building codes or environmental restrictions may prevent backup power installations.

6. Municipalities should be aware that if this is the case, they may face challenges to such laws and the like not under the FCC order but under the cell tower zoning provisions of Federal law discussed at length above. These provisions apply to state and local laws which regulate the "placement, construction or modification" of cell towers--and the cell phone companies may contend this includes building codes, permits and other local requirements, not just zoning. They may argue that local requirements regarding backup power which they can't comply with or are slow in coming "prohibit or effectively prohibit" the provision of cell phone service, in violation of the statute.

7. Carriers may thus argue that the "decision in writing", based on "a written record" and other procedural requirements set forth above apply. Local practices and procedures may not be well adapted to meet these requirements, and if necessary should be changed to comply. As noted above, failure to meet such procedural requirements is one of the reasons local zoning decisions are sometimes found to violate the cell tower zoning requirements of the Federal Communications Act.

U. FCC "Shot Clock" Zoning Preemption Rulemaking

1. On July 11, 2008 the Wireless Association, or CTIA, a trade group for the cellular industry, filed a Petition for Declaratory Ruling with the FCC regarding state and local zoning of cellular towers. The FCC opened a docket, WT 08-165, and received numerous comments, reply comments, and other filings. The industry asked the FCC to rush and act on the Petition prior the change in administrations on January 20, 2009. This did not occur.

2. In general, the Petition sought the following:

a. A fixed deadline of 75 days from filing for "final action" by municipalities on applications for zoning approval for new cellular towers and antennas.

i. If the 75-day deadline is not met, the zoning approval is automatically deemed granted.

b. A similar deadline of 45 days for applications for zoning approvals to add cellular antennas to existing towers.

i. Again, with zoning approval automatically deemed granted if the deadline is not met.

c. Preemption of zoning ordinances where variances are required for cell towers.

i. In other words, if a municipality requires a variance for a cell tower, the FCC would preempt and cell companies would likely argue that no local zoning approval is needed.

d. Preemption of municipalities' ability to consider whether other cell companies provide service in the area when determining whether there is a "gap" in coverage warranting a new tower, in conflict with the Third and Fourth Circuit decisions discussed in Section V.O.7, above.

3. Principal Claims

a. Providers

i. The providers largely based their Petition on *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) where in the cable franchising context the Sixth Circuit upheld an FCC rule setting time limits for municipalities to act on franchising applications by new providers.

ii. The providers also cited instances of excessive time for action on zoning requests and claimed that variances are rare and burdensome.

b. Municipalities

i. Municipalities pointed to the express language in Section 704 about time periods taking into account "the nature and scope" of a request, and extensive statements in the Committee Report on Section 704 that it is Congress's intent that the time frames for municipal action on cell tower zoning requests vary with the facts and circumstances, with no intent to give priority or a preference to the wireless industry. For example:

"Under subsection [332](c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." Conference Committee Report at 207-208 (emphasis supplied).

ii. Municipalities in their comments objected to FCC jurisdiction due to the statute's prohibition on the FCC taking any action to "limit or affect" local zoning authority, pointed out that most zoning applications are handled quickly, objected to the citing of anonymous examples of excessive time being taken, refuted the

specifics of the instances cited by the providers that were not anonymous, noted the time needed to comply with procedural requirements of state law and of Section 704 decisions requiring a "written decision" separate from the "written record" supported by "substantial evidence", and noted that the time for action varies greatly depending on the facts and zoning district - - A cell tower in an industrial zone may be "of right" and approved in one day, whereas one in a single family residential area may take substantial time to consider, given the competing considerations of aesthetics, affect on property values, questions as to the height of the tower needed, camouflaging options and the like.

iii. Municipalities also pointed out that variances are an exceedingly common form of zoning approval, and allow cell towers in places where they otherwise might not be allowed.

4. Timing

a. Providers pushed for a quick decision by the FCC, prior to the change in administrations in early 2009, municipalities opposed this, and it did not occur.

5. Decision

a. The FCC issued its Order on November 18, 2009, which is available on our web site at www.varnumlaw.com/celltower . It is a declaratory ruling, so no rule was issued, instead you have to read the 29-page text of the order.

i. Variances for Cell Towers -- FCC rejected the request to preempt variances rejected for lack of evidence.

ii. The FCC issued shot clocks and ruled on the gap issue, each of which is discussed in turn as follows.

b. Jurisdiction, Relief

i. FCC agreed with the industry on its authority to set time limits for zoning requests. It said the statute requires action in "reasonable time" and allows applicants to file suit within 30 days after final action or "failure to act" on zoning request.

ii. It said the Order clarifies the statute by setting "presumptively reasonable" time limits for "failure to act", allowing the applicant to file suit in Federal Court under 47 U.S.C. § 332(c)(7) if these times are exceeded.

iii. "The court will [then] determine whether the delay was in fact unreasonable under all the circumstances of the case" -- it did not order the application "deemed granted" as requested by industry.

iv. But the industry will presumably argue in court that applications exceeding applicable time frames should be approved, not remanded for further

action. See discussion on remedies in Section V.Q of this paper. As discussed there, the Courts often rule that the remedy for a violation of 47 U.S.C. § 332(c)(7) is mandamus or an injunction approving the zoning application as filed, not a remand to the municipality.

c. Collocations. The FCC said 90 days to act was "presumed reasonable".

i. Its reasoning was that these are easier to process than new towers - - no new construction; no hearings are required in some states; and many communities process same within 90 days.

ii. Collocation is defined in the Order at fn 146. Key points – not a collocation if: More than 10% increase in height; More than 4 equipment cabinets (or 1 shelter); New antenna extends more than 20' from the tower; or Excavation needed outside current tower site.

d. New Towers. The FCC said 150 days to act was presumed reasonable.

i. Its reasoning was that seven state statutes require action within 150 days (what about the other 43 states?) and most routine applications conclude within 150 days. This time frame applies to all requests that are not collocations.

e. Transition. For applications pending as of November 18, 2009, the FCC said the 90/150 day shot clocks apply, and start to run on November 18.

i. And it created an optional 60 day shot clock for applications pending for more than 90/150 days as of November 18 if the applicant notifies municipality it is exercising this 60-day option. The 60 days runs from date of notice.

f. Extensions. The FCC said the 90/150 day time periods can be tolled by mutual agreement.

g. Completeness/Additional Information.

i. The FCC said that "When applications are incomplete as filed" the 90/150 timeframes do not include time for the applicant to respond to "a request for additional information".

ii. Providers probably will argue the preceding applies "only if" municipality notifies applicant within 30 days that application is incomplete.

h. Gaps.

i. The FCC recognized that the statute is ambiguous, and that the Third and Fourth Circuits have ruled that a gap must not be just in the complaining provider's service, but instead must be an area unserved by any provider. The First and Ninth Circuits have ruled the opposite way.

ii. The Order says the First and Ninth Circuits are correct, and thus a municipality cannot deny an application solely because another provider serves the area.

iii. The FCC says its interpretation of the statute on this point trumps that of the courts, because the courts did not state that the statute was "unambiguous", thus leaving room for agency interpretation.

i. Procedural status. Appeals of and/or Petitions to the FCC for Reconsideration are highly likely, if not certain, to occur.

j. Practical issues.

i. Municipalities and providers will need to keep these time deadlines in mind, and plan accordingly for the entire zoning process, keeping in mind delays due to factors outside the municipality's or provider's control, such as delays in responses to requests for information, responses from outside entities, and objections or information from third parties.

ii. Also timing issues due to internal appeals (such as by neighbors or provider) to City Council from Zoning Commission, and those necessary to comply with "written decision" on "written record" rulings discussed above.

iii. Will likely lead to cell tower zoning application requirements becoming more detailed.

VI. Environmental/Historic Preservation Law Compliance:

A. Environmental Laws:

1. Many environmental laws require studies or analysis of any Federal action potentially affecting the environment, or prohibit actions affecting certain categories of items (such as endangered species, bald eagles, migratory birds).

2. There has been a striking lack of compliance by the FCC, PCS and conventional cellular companies with these laws, even though the FCC's PCS licensing program will lead to around 125,000 new towers, and each tower has to be individually licensed.

3. Among the applicable laws are

a. The National Environmental Policy Act of 1969 Pub. L. 91-190, 83 Stat. 852 (1969) ("NEPA"), which requires environmental impact statements for Federal actions potentially affecting the environment.

(1) Note that NEPA generally applies to Federal actions affecting sites listed or eligible for listing in the National Register of Historic Places.

- (2) The FCC Wireless Facilities Sitings Issues web page provides some links and information on NEPA compliance, see <http://www.fcc.gov/wtb/siting>.
- b. Endangered Species Act, Pub.L. 93-205, 87 Stat. 884 (1969).
 - c. Migratory Bird Treaty Act, 40 Stat. 755 (1918).
 - d. Bald Eagle Protection Act, 54 Stat. 250 (1940) and Golden Eagle Protection Act, Pub. L. 87-884, 76 Stat. 1246 (1962).
4. The FCC as a Federal agency, and the towers of PCS and conventional cellular companies (as Federal licensees), are subject to these statutes.
5. Items that generally trigger NEPA or the other acts are items such as
- a. Actions potentially having a significant effect on the environment, which includes impacts on historic properties listed in or eligible to be listed in the National Register of Historic Places.
 - b. Towers or other structures that may affect birds, their flyways and the like. There are well-documented instances of major bird kills from encounters with towers at night and in unusual weather conditions. Such a kill could have a major impact on an endangered or similar species.
 - c. Many Federal programs, including major grants to municipalities, require review under the Endangered Species Act.
6. In implementing NEPA in the 1970's the FCC expressly recognized the potential environmental impact of towers on
- a. Bird kills
 - b. Visual/scenic landscape blight
 - c. Plus construction related concerns.
7. The FCC has since retreated from compliance with the analyses and other requirements of these laws.
- a. One of the few exceptions was the FCC vetoing a proposed cellular tower which would overlook the Gettysburg battlefield. It did so only after citizens in the area brought the tower and noncompliance with NEPA to the FCC's attention.
 - b. In the spring of 2001, the Friends of the Earth and Forest Conservation Council filed petitions at the FCC in many pending cell tower cases to require the FCC to prepare an environmental impact statement and comply with NEPA, the Endangered Species Act and other environmental laws. See www.forestconservation.org/programs/greenspacesinitiative/greenspaces.htm#tower.

c. Among one of the cases relating to NEPA, specifically in the context of FCC rules for towers under NEPA and several of the bird related statutes cited above, challenging in part successfully FCC rules to protect migratory birds in the Gulf Coast region from the impact of new cellular, broadcast and similar towers. American Bird Conservancy v FCC, 516 F. 3d 1027 (D.C. Cir, 2008).

8. In an appropriate case municipalities may wish to require a PCS or conventional cellular provider (especially one proposing a tower for a sensitive area) to demonstrate compliance with the preceding laws, or seek court redress for noncompliance.

B. National Historic Preservation Act:

1. Section 106 of the National Historic Preservation Act, codified at 16 U.S.C. § 470f ("Section 106") requires all Federal agencies to take into account the effects of their actions on historic properties.

2. The Advisory Council on Historic Preservation has promulgated a detailed set of regulations regarding this process. *See* 36 CFR § 800.1 – 800.16 (2001).⁷ The regulations are summarized and available with their accompanying explanation on the website of the Advisory Council on Historic Preservation. *See* <http://www.achp.gov>.

3. The following is a brief general description of the historic preservation process which Federal agencies are supposed to follow:

a. The responsible federal agency must first determine whether it has an "undertaking" that could "effect" any "historic property."

(1) An "undertaking" is defined to include projects, activities, or programs that are funded, directly or indirectly, by federal agencies or those projects, activities or programs that require a federal permit, license, or approval. 36 CFR § 800.16(y). On cellular matters, due to there being an FCC license there is an undertaking and the FCC is the responsible agency.

(2) A "historic property" is "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places." 36 CFR § 800.16(l)(1).

(3) The criteria for inclusion in the National Register of Historic Places are fairly broad, including association with events, activities or broad patterns of history (e.g.--site of a major union dispute, collection of typical workers housing) and association with historical figures.

⁷The rules were originally adopted in 1999. They were challenged in court due to claimed constitutional defects in the manner of their adoption. In response, the Advisory Council on Historic Preservation suspended the 1999 rules, *see* 65 Federal Register 55,928, and went forward with a new rulemaking to correct the claimed constitutional defect. The rules were readopted on November 17, 2000 and became effective January 11, 2001. The cellular industry has sued to overturn the new rules.

(4) "Effect" means "alteration of the characteristics of a historic property" eligible for inclusion in the National Register. 36 CFR § 800.16(i).

(5) "Adverse effects" are discussed at length in 36 CFR § 800.5. Of importance to cellular antennas they include the "introduction of visual . . . elements which diminish the integrity of the property's significant historic features," and changes to the "character of the property's use or of physical features within the property's setting that contribute to its historic significance," such as affecting the views or viewsheds associated with historic properties.

b. A key point is that if the responsible federal agency determines that it has such an "undertaking," it must then identify and consult with the appropriate "consulting parties", normally the State Historic Preservation Officer ("SHPO") or (for Indian/Native Hawaiian lands) the Indian tribe/Tribal Historic Preservation Officer ("THPO"). 36 CFR § 800.2 (a) and (c). For a listing of all SHPO's by state, see the National Conference of State Historic Preservation Officers web site, www.sso.org.hcshpo/shpolist.htm.

(1) With respect to cellular antennas, this means that the appropriate SHPO has to be consulted on each new cellular antenna.

(2) For simplicity, the balance of this discussion focuses on SHPOs. Note that Indian tribes and lands are in certain respects unique. The regulations require the agency to deal with Indian tribes for matters which may affect tribal lands. Such tribes for Federal purposes are sovereign governments and may have concerns over impacts on archaeological resources or traditional cultural properties which are more spiritual than material in nature. Tribes are becoming increasingly knowledgeable and influential on Historic Preservation Act matters.

c. Most important for municipalities, the regulations specify that "A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party." 36 CFR § 800.2(c)(3) (emphasis supplied). In addition, the agency is required to "plan for involving the public in the process," including notifying the public, and "shall invite any local government" described in § 800.2(c)(3) to participate. 36 CFR § 800.3 (e) and (f).

d. If the undertaking could affect any historic property, the agency must proceed to identify those historic properties in the undertaking's "area of potential effects."

(1) The area of potential effects includes "the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 CFR § 800.16(d). As noted above, this may include views and viewsheds.

(2) At this point in the process, the agency reviews existing information, consults with the SHPO, seeks information from other knowledgeable parties, and conducts any studies, as needed.

e. Next, the agency assesses the potential adverse effects on identified historic properties. This assessment is based on the Advisory Council on Historic Preservation regulations described above. *See* 36 CFR § 800.5(a)(2). For matters involving cellular antennas, adverse effects include the "introduction of visual, atmospheric, or audible elements that diminish the integrity of the property's significant historical features." 36 CFR § 800.5(a)(2)(v).

f. If the agency and the SHPO agree that there are no adverse effects, the agency proceeds with the undertaking and any conditions agreed upon with the SHPO. In order to resolve a dispute about how to manage any adverse effects, the agency may consult with a number of parties, including the SHPO, local governments, and the public. The Advisory Council on Historic Preservation may become involved at this point. This consultation usually results in an agreement among the parties called a Memorandum of Agreement, which is a legally binding document that outlines the agreed-upon mitigation measures.

4. According to historic preservation officials, the FCC has been notable for its general lack of compliance with Section 106 on cellular matters, including delegating the Section 106 review process to the cellular providers to act on behalf of the FCC.

a. Such delegation is unusual, and was only approved by the Advisory Council on Historic Preservation by letter dated September 21, 2000, subject to the FCC remaining involved in the Section 106 process, such as if there is an adverse effect or there are objections from the public.

5. On December 26, 2000, the FCC requested public comment on an expedited basis on a "Draft Programmatic Agreement with Respect to Co-Locating Wireless Antennas on Existing Structures" between the FCC, Advisory Council on Historic Preservation and National Conference of State Historic Preservation Officers. See FCC DA 00-2907 (December 26, 2000). The FCC, Advisory Council on Historic Preservation and National Conference of State Historic Preservation Officers signed a modified version of the agreement on March 16, 2001. See FCC DA 01-691 (March 16, 2001). In general the agreement as signed is more favorable to the cellular industry than the draft. For copies see the FCC web site at <http://www.fcc.gov/wtb/siting>. The agreement states that it:

a. Exempts from the Section 106 process co-locating additional cellular antennas on most existing or new cellular/radio towers, with some exceptions, such as allowing the public or others to challenge such exemptions.

b. Exempts from the Section 106 process locating cellular antennas on buildings and structures other than towers, except for (1)--buildings that are more than 45 years old, (2)--buildings that are located in or within 250 feet of a historic district, (3)--buildings that have been designated as a landmark or are eligible for listing in the National Register of

Historic Places, or (4)--cases where the public or others have filed a written challenge (meeting certain requirements) to the exemption.

c. See CTIA v. FCC, 466 F.3d 105, (D.C. Cir, 2006) upholding the FCC's 2004 programmatic agreement regarding the application of the historic preservation process to cell towers against challenges that the construction of cell towers is not subject to the Historic Preservation Act and the agreements coverage of both properties listed in and eligible for listing in the National Register of Historic Places.

C. Effect on Local Zoning:

1. Zoning laws take into consideration and promote (among other things) many of the same values as environmental laws and historic preservation laws.

2. In the zoning process municipalities may wish to require cellular providers to state whether an environmental impact statement has been prepared, whether state approval under Section 106 of the National Historic Preservation Act has been obtained, and if not, why not. In an appropriate case, the municipality may wish to participate in these environmental and National Historic Preservation Act proceedings.

3. In an appropriate case, the municipality may wish to defer zoning approval until the FCC and/or state have acted on environmental and National Historic Preservation Act matters. There is little point in the municipality acting if State or Federal authorities are going to impose conditions upon the cellular tower zoning request that would effect local zoning (or deny approval for a cellular tower at the location for which zoning approval is sought).

VII. Leasing Municipal Property for Cellular Antennas, Towers

A. Municipal Property: Municipal buildings (especially water towers) and lands are very attractive to cellular providers to lease for their antennas.

1. Height avoids need for tower.

2. Appropriate zoning already in place.

3. Are attractive to municipalities as well:

a. Aids tower consolidation, avoids unnecessary intrusion on residential areas--if a tower has to be located in/near a residential area, better to put in the corner of a park or on a fire station than in the middle of a subdivision.

b. Provides revenues.

B. Not Required to Lease Municipal Property

1. Cellular providers sometimes argue that under § 704 (a) of the 1996 Act municipalities are required to lease any property they own for a cellular antenna or tower, or make comparable arguments under § 253 of the 1996 Act.

2. These arguments are not correct. Among other things:

a. § 704 (a) added § 332 (c) (7) to the Communications Act of 1934. Subsection (7) is titled "Preservation of Local Zoning Authority." Its text and the accompanying portion of the Conference Committee Report make clear that § 704 "preserves the authority of State and local governments over zoning and land use matters." Conference Committee Report at 208. It is not intended to provide a means for cellular providers to condemn municipal property.

b. § 704 (c) does require government property to be made available for cellular providers--but only Federal property. It is titled "Availability of Property" and requires the Federal government to adopt procedures making Federal property available to cellular providers. The General Services Administration did so in 1996. General Services Administration, "Government-Wide Procedures for Placing Commercial Antennas on Federal Properties." 61 Fed. Reg. No. 62, 14101 (March 29, 1996).

c. The last sentence of § 704(c) requires the FCC to "provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for" cellular providers. Such language would not have been necessary if cellular providers already had access/condemnation authority under § 704 (a).

d. The Second Circuit has found the preceding types of arguments rejecting the cellular companies' position persuasive (although it ultimately found it unnecessary to decide the issue). Omnipoint Communications v. Port Authority of New York and New Jersey, 99 Civ. 0060 (BJS), 1999 U. S. Dist. LEXIS 10534 at *44, fn. 21, 1999 WL 494120 (2d Cir. 1999).

C. Bankruptcy Related Issues

1. Very important due to failures (bankruptcy) to date of several large cellular providers (Pocket, Nextwave), one satellite provider (Iridium), a wireless modem provider (Metricom) and several other providers. There is a strong likelihood that other providers may fail, too because there are many competing providers and technologies proving telephone service and not all will survive. Specifically, in each area there typically are (or will be):

- a. Conventional phone company.
- b. New landline phone companies.
- c. Phone service from cable company.
- d. Two (2) current cellular companies.
- e. Five (5) to six (6) new PCS companies.
- f. One (1) to two (2) satellite phone companies.

2. There are not enough telephone revenues to support all these providers, even if each home has two phone lines and a cell phone.

3. The question is not whether some companies will fail, but

a. Which ones, and

b. When.

4. To protect municipalities, leases should have bonds, security deposits, sufficient to cover several months rent and provide for removal of the antenna or tower.

5. Most important, the lease should be drafted to fit within the "commercial lease" safe harbor provisions of the Federal bankruptcy laws. See Section 365 of the Bankruptcy Code, 11 U.S.C. §365(d) (3) and (4). This ensures that if the provider files for bankruptcy that as an "executory contract" it either accepts the lease, and fully complies with it, including paying rent, or rejects the lease, such that the municipality can remove the antenna/tower or lease the space to another provider.

a. If the lease does not fit within this provision there is a severe risk that so long as the provider is in bankruptcy (which can be years) that under the "automatic stay" provision of the Bankruptcy Code it can continue to use the property without paying rent. The chances of receiving unpaid rent at the end of the bankruptcy are low--getting 10¢ on the dollar owed is a good result in such bankruptcy situations!

b. And if the lease does not fall within this provision there is a risk that if the tower falls into disrepair or is unsafe the municipality cannot require the provider to fix it or have it removed.

6. If part of the business arrangement is that the municipality puts police/fire radio antennas, tornado sirens, microwave dishes or the like on the cellular tower (usually for free), this should be by separate sub-lease⁸ from the provider (as landlord) to the municipality (as tenant). Reason--in terms of upholding leases tenants fare better in bankruptcy court than landlords: A provider in bankruptcy who is a leasing space on a tower to tenants gets no enhanced right to terminate its tenants' leases (see Section 365(h) of the Bankruptcy Code, 11 U.S.C. §365(h)), but MAY (see above) obtain an enhanced right to terminate leases where the provider is the tenant.

7. All compensation provisions of the lease should receive a bankruptcy law review.

⁸The firm has a model form of sublease available, see next footnote.

D. Major Lease Terms: Significant issues for cellular antenna and tower leases include:⁹

1. Base Compensation.
 - a. Base amount per month
 - b. Escalator-including a high cap (if any) on inflationary increases and frequent recomputation (e.g.--annually, not every three to five years).
2. Compensation from Colocation
 - a. Clearly specify how much additional rent the municipality receives if an additional cellular provider places its antenna on the tower (colocates).
 - b. To avoid non-cash barter "swaps" the lease should specify a minimum additional rental for each additional tower, or have comparable provisions (rental set on arms length basis).
3. Term of lease
4. Encourage Colocation
 - a. Leases should have provisions encouraging other providers to place their antenna on the tower so as to minimize the number of towers.
 - b. For example, the tower should be designed to accommodate multiple providers
 - c. The lease terms and conditions should be such that later providers (who may compete with first provider) are encouraged to use the tower.
5. Leases for antennas should similarly encourage placing multiple antennas on one water tower or building. Avoids tower proliferation.
 - a. Such leases should be non-exclusive, so that other providers can place their antennas on the water tower or building as well.
 - b. Leases should allow the relocation of existing antennas (at the expense of the new provider) so as to accommodate additional antennas.

⁹The firm has model forms of leases available for the following situations where a municipality may lease land or space to a PCS provider: (1)--PCS antennas on an existing building/water tower; (2)--PCS antennas on undeveloped land; (3)-- PCS antennas on an existing municipal communications tower (such as a fire station radio tower); and, (4) a form of sublease for municipal antennas or the like placed on a PCS or cellular tower. The leases are drafted from a municipal perspective and address the issues set forth in this paper, among others. They are available in hard copy or on disk for \$275 for one, \$300 for two, \$325 for three and \$350 for the set for municipalities to use and tailor to their specific situations. Contact John Pestle or Barbara Allen at 616/336-6000 for details.

6. Broad insurance and indemnity provisions.
 - a. Municipality's general fund not placed at risk.
 - b. Indemnity for all permits, other costs created/contributed to by cellular provider, including newly broadened FCC registration, lighting and painting requirements for radio towers, supporting structures.
 - c. Provisions to update, increase insurance amounts over the likely long term of lease.

7. Transfer Provisions

- a. Lease should require municipal approval of any transfer or change in ultimate ownership of the lessee/cellular provider, at minimum a review of the financial qualifications of the transferee.
- b. This is especially the case where the cellular company wants the lease to state that it is automatically released from all liability and responsibility under the lease if it transfers the lease another entity.
- c. Otherwise, there is a major risk that the cellular company can avoid payment, and other liabilities and responsibilities under the lease, simply by assigning the lease to a shell company or other entity with no assets.

8. Parental guarantee--some providers structure their operations such that the antennas are owned by separate affiliates (such as partnerships or limited partnerships). It may be desirable to obtain a parental guarantee of the lease.

9. Early termination clause--if property is harmed or destroyed, or if the municipality needs the property for another use incompatible with the continued lease to the cellular provider.

E. Leasing to One Provider Requires Lease to All

1. There is a small risk given arguments of the type made in the FCC's 1999 wireless preemption proceeding (described earlier in this paper) that cellular providers may ask--and the FCC may in the future agree--that if a municipality (or other landlord) allows a cellular antenna or tower on its property, that it has to allow many other cellular antennas or towers to be placed there (and perhaps on other property as well).

1. The cellular and other FCC regulated industries have been very aggressive in making such types of arguments. The industries have repeatedly argued that the FCC's 1996 rules prohibiting landlords from preventing tenants from installing small direct broadcast satellite dishes have to be extended to other types of antennas as well, such as broadcast towers, fixed wireless dishes and the like.

2. At the staff level in particular, the FCC appears receptive to such arguments to further the single goal of "competition" without regard to other goals.
 3. A variant would be to allow other types of antennas.
 4. The industry proposals so far generally reject paying the landlord any additional compensation for additional antennas placed on a building.
- ii. Cellular leases should be drafted to protect against the preceding types of developments, such as by:
- a. Providing for the lease to terminate if such provisions become law, or
 - b. Providing for substantially increased compensation if one tower or antenna leads to multiple antennas be placing on municipal property.
 - (1) Two (2) antennas leads to twice the base rent.
 - (2) Three (3) antennas leads to three times base rent.

VIII. Franchise for Backhaul Network

A. For cellular to work there has to be a copper or fiber optic network (so-called "backhaul provider") connecting the various cell sites together and to the cellular control center (and from there into the conventional telephone network).

B. Some cellular providers propose to connect their cell sites using the fiber optic lines of their cable company owner, electric utility owner or other affiliates. They would like to do this without a franchise or franchise fee.

C. The cable company, electric company, affiliate, or other "backhaul provider" connecting the cell sites should obtain a telephone franchise and pay appropriate fees if they are providing a telecommunications service under applicable law.

D. If the backhaul provider does not obtain a franchise and pay appropriate fees, the municipality's existing telephone franchises and fees may be at risk under § 253 of the Communications Act of 1934 (added by the 1996 Act). This is because other telecommunications providers with lines in the rights of way may claim that requiring franchises and fees of them and not of the backhaul provider is "discriminatory" and not "competitively neutral" in violation of Section 253.

Section 704 of 1996 Act

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY. Section 332 (c) (47 U.S.C. 332 (c)) is amended by adding at the end the following new paragraph [now partially codified at 47 U.S.C. § 332 (c) (7)]:

(7) PRESERVATION OF LOCAL ZONING AUTHORITY.

(A) General Authority. Except as provided in this paragraph, nothing in this Act 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.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof:

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) 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.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) 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.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph 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. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) DEFINITIONS. For purposes of this paragraph;

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

§704 (b) and (c) of the Act, which have not been codified, state:

(b) Radio Frequency Emissions. Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) Availability of Property. Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

Note: Much of the language helpful to municipalities on the interpretation and application of Section 704 appears in the relevant portion of the Conference Committee Report dealing with Section 704. For copies of this portion of the Conference Committee Report, contact John Pestle at 616-336-6000.

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